12.9. It is stated that without prejudice to the above, it needs to be noted that Clause 11 of the Wheeling Agreement dated 29.04.2016 provides for dispute resolution. However, till date the Petitioner has not raised any dispute with the Respondent. Hence, the present Petition is premature.

12.10. It is further stated that accordingly, in view of above, the Commission needs to decide the maintainability of the present matter. At para 3 of its Reply dated 07.01.2020, the Petitioner has contended that the Respondent herein has not objected the admission of the Petition. The Respondent categorically denies the contention and submits that during hearing on 22.10.2019, the Respondent has raised the issue of admissibility of the Petition filed without following due procedure as indicated herein above.

12.11. It is submitted that the Petitioner may approach the Commission after following the due remedial measures for resolution of any dispute available to it under the Agreement.

(F). REJOINDER BY THE PETITIONER TO REPLY FILED BY THE RESPONDENT TORRENT POWER LTD.

13. It is stated by the Petitioner that the Respondent 2, Torrent Power Ltd. has indulged into irrelevant references and narrations and thereby avoiding replies to the real issues raised under the Petition and subsequent amendment and denied all the contentions and averments made by the Respondent - 2 seeking leave to rely on the Petition including amendment and written submissions filed by the Petitioner.

13.1. Moreover, it is stated that no specific reply is required to para 1 to 5. In so far as para 6 is concerned, it is stated that proviso to Section 9 (1) of the Electricity Act, 2003 defines a Captive Power Plant as a Generating Company and that the Respondent also accepted that the matter is subject to Regulatory framework.

13.2. With regard to para 7, the contention of Respondent is wrong and denied. The issue raised by the Respondent has already been addressed by the Respondent No. 6 GEDA during the hearing held on 22.10.2019 and the same has been recorded by the Commission in Daily Order dated 20.01.2020. The Respondent was well aware

of the fact that installed Captive Solar Plant was of 4 MW as distinctly mentioned in wheeling agreement between the Petitioner and the Respondent Torrent. Hence, the Respondent is now estopped from raising this issue.

13.3. The contention of Respondent at para 8 is wrong and denied. The Solar Plant of the Petitioner was registered on 20.05.2015, that is well before the promulgation of Policy-2015 and as such the dispute needs to be adjudicated by this Commission.

13.4. Denying the contentions of the Respondent at para 9, it is stated that the dispute is regarding applicability of policy on already registered project which is essentially a Captive Power Plant irrespective of fuel used for generation of electricity. The Petitioner has also approached the Respondent for a resolution of the matter vide various letters exchanged between the Petitioner and the Respondent between June-2015 to December-2015. However, the issue did not get resolved. Hence, this Petition is preferred

13.5. In respect of para 10 & 11, while denying the contentions of the Respondent it is stated that the Petitioner had already approached the Respondent as stated above and reiterates the prayer for admission.

(G). REPLY FILED BY THE RESPONDENTS GUVNL AND DGVCL ON THE AMENDMENT SOUGHT BY THE PETITIONER.

14. The Respondents GUVNL and DGVCL have filed their submissions on the issue of amendment sought by the Petitioner vide affidavits dated 07.09.2021, which are more or less similar and stated in brief as under:

14.1. It is stated that the Petitioner had initially filed the Petition for consideration of adjustment of 100% of captive solar energy injected instead of the 50% being considered wherein the 50% has been considered in pursuance to the Government of Gujarat Policy, 2015 as well as the agreements executed by the Petitioner itself accepting such conditions. The Respondents No. 1 & 4 further submitted that Petitioner in effect is seeking to contravene the provisions of the Policy as well as the Agreements which are not permissible.

14.2. It is also stated that the Petitioner has sought the amendment in the Petition, but the Petitioner has not filed an appropriate application nor provided any reasons or justification for seeking amendment, the Petitioner has only referred to the addition of para and also added the prayers without specifying the specific para being added. The Petitioner has not followed the procedure for seeking amendments and no relief of amendment can be considered without a proper application.

14.3. It is stated that the Petitioner has filed its submissions on the issue of jurisdiction while requesting that the Commission may first decide the issue of jurisdiction since the Commission vide Daily Order dated 20.12.2019 had held as under:

> *"6.6. Considering the above, it is necessary to decide as to whether the issue involved is a billing dispute where the generation, injection, wheeling and adjustment of the energy in the bill is done by the Respondents who are distribution licensees and whether it falls within the jurisdiction of this Commission or the Consumer Grievance Redressal Forum and Electricity Ombudsman?"*

14.4. It is stated that the Petitioner has executed a wheeling agreement dated 30.03.2016 for 50% of the contract demand and in terms of the Solar Policy 2015. The said agreement inter alia reads as under:

> *"* *AND WHEREAS*
>
> *DISCOM is agreeable for wheeling of power on behalf of the Company in accordance with the Government of Gujarat's Solar Policy-2015 (Solar Policy), Gujarat Electricity Regulatory Commission (GERC)'s Order No. 3 of 2015 "In the matter of Determination of Tariff for Procurement of power by Distribution Licensees and Others from Solar Energy Projects for the State of Gujarat", GERC Open Access Regulations, 2011 and amendments thereto, Intra State ABT Order and amendment thereto and other applicable GERC Regulations and as per the terms and conditions contained in the Application Form filled by the Company with GEDA and as per the terms and conditions of this Agreement.*
>
> *……..*
>
> *3.0 Maximum allowable capacity of solar*
> *As per policy, the maximum allowable capacity of solar power for wheeling is 50% of the Contract Demand/Sanctioned load for Wheeling is 50% of the Contract*

Demand/Sanctioned Load. Hence the consumer shall ensure that at all the time, Contract Demand/Sanctioned Load shall be double of the capacity of SPG"

14.5. It is stated that in the letter dated 31.03.2016, it was clearly mentioned that the solar capacity allocated to recipient unit was 1.21 MW. The Petitioner through said amendment is seeking to in effect modify the said Agreement and further seek relief for the past period when it has not even obtained open access for such capacity.

14.6. The Petitioner has filed the present Petition on 20.06.2019 and the amendment in the Petition is filed on 28.02.2020 vide affidavit dated 25.02.2020 and therefore any claim for setting aside the specific terms of the Contract being the wheeling agreement dated 30.03.2016 cannot be entertained as being time barred. The time period for setting aside any terms of the agreement is only three years.

14.7. It is stated that by way of the application for amendment, the Petitioner is in effect seeking to change the scope of the Petition. The Petitioner is now seeking an amendment for consideration of the splitting of the power plant into capacity covered under the Solar Policy 2015 and capacity not considered as solar power, which is not feasible.

14.8. It is well settled principle that the amendment cannot be allowed when it changes the scope of the Petition and when it defeats the law of limitation. The Respondents No. 1 & 4 have referred the following judgements which are as under:

(A) *Raikumar Gurawara v. S.K. Sarwagi and Co. (P) Ltd. [(2008) 14 SCC 364]:*

"18. Further, it is relevant to point out that in the original suit, the plaintiff prayed for declaration of his exclusive right to do mining operations and to use and sell the suit schedule property and in the petition forced during the course of the arguments, he prayed for recovery of possession and damages from the second defendant. It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment,;

(ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (ini) when allowing amendment application defeats the law of limitation. The plaintiff not only failed to satisfy the conditions prescribed in proviso to Order 6 Rule 17 but even on merits his claim is liable to be rejected. All these relevant aspects have been duly considered by the High Court and rightly set aside the order dated 10-3-2004 of the Additional District Judge.

(B) *Muni Lal V. Oriental Fire & General Insurance Co. Ltd. [(1996) 1 SCC 90]:*

"5. Admittedly, by the date of the application for amendment filed, the relief stood barred by limitation. The question, therefore, is whether the Court would be justified in granting amendment of the pleadings in such manner so as to defeat valuable right of defence of bar of limitation given to the defendant, ...

In other words, this Court laid emphasis that with a view to mould the relief a new fact can always be taken into account not merely by the trial court but even by the appellate court. Where the appeal is delayed even by necessary implication, the relief of amendment in that event cannot be given, In other words, to render substantial justice without causing injustice to the other party or violating fairplay, Court would be entitled to grant proper relief even at the stage of appellate forum. It is seen that the ratio of Jagdish Singh v. Natthu Singh ((1992) 1 SCC 647 : AIR 1992 SC 1604] is also inapplicable to the facts of this case. That case relates to a suit instituted for specific performance but without abandoning the relief of specific performance alternate relief for damages was also sought for. This Court relying upon the proviso to sub-section (5) of Section 21 of the Specific Relief Act which expressly gives power to the Court to grant amendment of the pleadings at any stage of the proceeding, permitted amendment of the plant seeking alternate relief, The ratio therein is clearly distinguishable and does not apply to the facts of this case.

6. On a consideration of this case in its proper perspective, we are of the view that granting of amendment of plaint seeking to introduce alternative relief of mandatory injunction for payment of specified amount is bad in law. The alternative relief was available to be asked for when the suit was filed but not made. He cannot be permitted to amend the plaint after the suit was barred by limitation during the pendency of the proceeding in the appellate court or the second appellate court. Considered from this perspective, we are of the opinion that the District Court and the High Court were right in refusing the prayer of amendment of the suit and the courts below had not committed any error of law warranting interference."

14.9. That the amendment sought by the Petitioner is completely contrary to the Agreement specifically entered by the Petitioner and the Solar Power Policy 2015 which had been specifically accepted by the Petitioner. Further the Petitioner has been granted open access for 1.21 MW. The Petitioner cannot now by way of the amendment, seek to set aside the terms of the agreement.

14.10. That the Petitioner did not raise any such alternate contention at the time of entering into the wheeling agreement or prior to injection of power. The present contention is an afterthought and cannot be entertained.

14.11. That the Petitioner has already exercised its option under the Solar Power Policy 2015 and has entered into the wheeling Agreement. The Petitioner by way of the Amendment is seeking to go back on its election which cannot be permitted. The Petitioner had elected to accept the Solar Power Policy of 2015 which means that all terms of the said Policy would apply to the Petitioner. Once the Petitioner has elected all the terms of the Solar Power Policy 2015 the Petitioner cannot go back on its election. In this regard the said Respondents have referred following cases which are as under:

(i) State of Rajasthan Vs. Union of India, [(2018) 12 SCC 83]

The relevant para of the above judgment is reproduced herein under:

"3. After hearing the arguments of the learned counsel for the parties, we find substance in the aforesaid submission of the defendants. Even if we presume that the suit was maintainable, at the same time the plaintiff also had remedy of filing the statutory appeals, etc. by agitating the matter under the Finance Act. It chose to avail the remedy under the Finance Act. The doctrine of election would, therefore, become applicable in a case like this. After choosing one particular remedy the plaintiff cannot avail the other remedy as well, in respect of the same relief founded on same cause of action."

(ii) Joint Action Committee of Air Line Pilots' Assn. of India v. DG of Civil Aviation [(2011) 5 SCC 435].

The relevant para of the above judgment is reproduced herein under:

"11. In R.N. Gosain V. Yashpal Dhir [(1992) 4 SCC 683 : AIR 1993 SC 352] this Court observed as under: (SCC pp. 687-88, para 10)

10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the void for the purpose of securing some other advantage.'

12. The doctrine of election is based on the rule of estoppel - the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. Taking inconsistent pleas by a party makes its conduct far from satisfactory.

Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily. (Vide Babu Ram v. Indra Pal Singh [(1998) 6 SCC 358}, P.R. Deshpande v. Maruti Balaram Haibatti ((1998) 6 SCC 507] and Mumbai International Airport (P) Ltd. v. Golden Chariot Airport ((2010) 10 SCC 422 : (2010) 4 SCC (Civ) 195).

14.12. It is stated that even assuming but not admitting that there can be any consideration of the amendment, it can only be prospectively and after the Petitioner has applied for and granted open access for the balance capacity. At present the Petitioner was granted open access for wheeling of 50% of the contract demand which is 1.21 MW only. The Petitioner cannot now claim that it should be deemed to be granted open access for the balance capacity and that too retrospectively.

14.13. The Petitioner could not and should not have injected more than the said capacity of 1.21 MW for which the open access is granted. The Petitioner has without open access and being aware that the agreement had been executed only for adjustment of 50% of the contract demand, on its own risk and cost injected power into the grid. Merely because the Petitioner has injected the power into the grid cannot be the reason for claiming any adjustment, if such adjustment is allowed, it would give a premium to the Petitioner for its wrongful act.

14.14. Apart from the above preliminary reply, in para-wise reply it is stated that any amendment to the Petition has to be prayed for by way of an Application and the Petitioner cannot on its own file the amendment to the original Petition without seeking the leave of the court and such leave being granted. The Petitioner has sought to amend the Petition by adding para 3.4 without any explanation or reason for seeking amendment. It is further submitted that the initiation of the solar power plant prior to Solar Power Policy, 2015 does not mean that the Petitioner is eligible for 100% adjustment. The eligibility under Solar Policy is by way of commissioning within the control period of the said Solar Power Policy of 2009. Since the project is commissioned within the control period of Solar Power Policy 2015, the Project is governed as per the terms of Solar Power Policy, 2015 and therefore it is clear that the Petitioner did not envisage its project under the said Policy of 2009.

14.15. It is further stated that with regard to the consideration as captive power plant under Section 9, the Petitioner has not applied for nor obtained open access as non-renewable power for the entire capacity. The Petitioner has applied for open access as solar power plant and the wheeling agreement has been executed for 1.21 MW and in terms of the Solar Power Policy. There is no open access granted for the balance capacity. The contentions of the Petitioner on the alleged right under Section 9 of the Electricity Act, 2003 are therefore not relevant at the present stage when there is no such open access obtained by the Petitioner. The said Respondents have further submitted with reserving their Rights to file a reply on the issue of whether such consideration can be done for solar projects in case the amendment is allowed by the Commission.

14.16. The Petitioner cannot seek any amendment to the Petition which is time barred or otherwise changes the scope of the Petition. It is submitted that the Petitioner has sought Additional relief being that the unadjusted 50% be adjusted without any policy benefit, without prejudice to the contention that such splitting of capacity cannot be done and that the Petitioner cannot seek contrary to the Solar Power Policy, 2015. The Petitioner has obtained open access only for 1.21 MW and the wheeling agreement has been executed for only such capacity. There is no wheeling agreement executed for the balance capacity, without such grant of open access and wheeling agreement, there cannot be any conveyance of power and no adjustment can be given for any electricity injected by the Petitioner without an open access.

(H). REPLY FILED BY THE RESPONDENT TORRENT POWER LTD. ON AMENDMENT SOUGHT BY THE PETITIONER.

15. The Respondent No. 2 - Torrent Power Limited (TPL) has filed its reply vide affidavit dated 09.09.2021 to the amendment sought by the Petitioner as follows:

15.1. The Respondent No. 2 has filed preliminary reply on 06.02.2020 which may be treated as part of the present submissions and has denied the contentions in the Petition as well as amendment dated 25.02.2020.

15.2. It is stated that vide its amendment the Petitioner has prayed to consider the Solar generating plant as Captive Power Plant under Section 9 of the Electricity Act, 2003 and allow credit for 100% of generation and in turn, the Petitioner has offered to

relinquish whatever additional benefits that might accrue under the Solar Policy, 2015 of Government of Gujarat for balance 50% generation. The Petitioner has asserted to have their own captive generating plant for own consumption as enshrined in the Electricity Act, 2003 and cardinal principle of jurisprudence that any policy is subservient to the Act and not vice versa.

15.3. It is submitted that the Petitioner has relied on Section 9 of the Electricity Act, 2003 to contend that they are eligible for credit of 100% generation. However, the proviso to Section 9 (1) of the Electricity Act, 2003 provides as follows:

"Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company"

15.4. Since the present the matter pertains to the wheeling of solar power generated from captive power plant through the grid, hence the same is subject to regulatory framework, in this case the provisions of the Solar Power Policy, 2015.

15.5. It is stated that the Petitioner has installed a Solar Photovoltaic Plant of 4 MW capacity and has prayed to the Commission to consider adjustment and credit of 100% solar energy injected in the grid. However, the Petitioner's prayer is contradictory to the Solar Power Policy, 2015 which restricts installation of Solar capacity only up to 50% of contract demand.

15.6. The project of the Petitioner was registered before the issuance of Solar Power Policy, 2015. However, as per the said policy, any project commissioned after the date of policy shall fall within its purview irrespective of the date of registration. Further, as per the provisions of the erstwhile Solar Power Policy, 2009 which got expired on 31.03.2014, the minimum capacity cap of Solar Power Generator, in case of Solar Photovoltaic was of 5 MW. Accordingly, the Petitioner's project was not eligible even under the Solar Power Policy, 2009.

15.7. The contention of the Petitioner agreeing to relinquish whatever additional benefits that might accrue under the Government of Gujarat's Solar Policy, 2015 for balance 50% generation is erroneous since as per the provisions of the Government of

Gujarat Solar Policy, 2015, the Petitioner, in any case, is not eligible to get any benefit for solar capacity installed beyond 50%.

15.8. Further, the Petitioner was aware of the provisions of the Solar Power Policy, 2015 while signing the Wheeling Agreement for 50% of the capacity, setting up Solar project of capacity more than 50% of its Contract Demand was the decision of the Petitioner for its own commercial considerations. Therefore, the Petitioner is responsible for its own decision and cannot seek any compensation for the period of Commercial Operation Date till date, for its own commercial decisions. The Respondent further submitted that they have been providing adjustment of Solar Generation strictly in line with the arrangement unequivocally agreed between the Petitioner and the Respondent under the wheeling agreement dated 29.04.2016.

15.9. Accordingly, the Commission is requested to reject the amendment, as filed by the Petitioner, and decide the preliminary issue as noted in its Daily Order dated 20.12.019. The Respondent No. 2 has further submitted that if the Commission decides the matter of maintainable than an opportunity be granted to him to submit their detailed reply on the merits.

(I). REJOINDER BY THE PETITIONER TO REPLY FILED IN MAIN PETITION BY THE RESPONDENT NO. 1 DGVCL AND RESPONDENT NO. 4 - GUVNL

16. The Petitioner vide separate affidavits both dated 14.09.2021 has filed individual rejoinder-in-reply(ies) which are identical in response to the reply(ies) filed by the Respondent No. 1 (DGVCL) and Respondent No. 4 (GUVNL) in main Petition as under:

16.1. It is stated that the Respondents have indulged into irrelevant references and narrations and thereby avoiding replies to the real issues raised under the Petition and subsequent amendment sought to said Petition and all the contentions and averments made by the Respondents are wrong and are denied with liberty to rely on the Petition and Written Submissions filed before the Commission.

16.2. The para wise reply to preliminary submissions at para 1 to 23 of the reply filed by Respondents DGVCL & GUVNL are as under:

16.2.1. With regard to para 1 & 2 it is stated that the contention of Respondent is wrong and denied being arbitrary and factually incorrect is not acceptable. As such the Petition is for the adjustment of solar energy from the balance 50% captive capacity already injected into the system and gainfully utilized by the utilities and the plea of the Petitioner is to consider the same for adjustment under the policy for the reasons stated in the Petition. The right of the Petitioner for adjustment of the same as Captive Power Energy cannot be denied considering the provision of the Electricity Act, 2003 for setting up any Captive Power Plant of any capacity using any fuel be it Fossil Fuel or Nuclear or Wind or Solar or any other type capable of generating electricity and taking such power to its place of use through grid or otherwise.

16.2.2. It is stated that even the Respondent DGVCL has recorded that it was already a matter open for decision at later date and referred para 5 of DGVCL's letter dated 31.03.2016 forwarding copy of wheeling agreement which reads as follows:

"……..
M/s Rallis India Ltd has made a representation to the Department of Energy and Petrochemicals seeking exemption from the applicability of the capacity of 50% of Contract Demand of the consumer as stipulated in the Gujarat Solar Power Policy 2015. Pending final disposal of the representation, this agreement is entered for 50% of the Contract demand of 2.5 MVA of the Consumer Unit in the event of final disposal of the said representation DGVCL hereby accepts to amend this agreement in accordance with directive of Govt. of Gujarat.
……."

16.2.3. It is stated that there is no submission by the Respondent to the right of the Petitioner to wheel its captive power from its place of generation to its place of consumption and get the adjustment of such captive power under the provisions of Section 9 of the Electricity Act, 2003 irrespective of any policy, with or without any additional benefit under the policy. As such any policy can give additional benefit to encourage, but cannot contravene the prevailing Act/Law until the relevant Act/Law is duly amended and actions of the Respondents are not in consonance and congruous to the provisions of the Electricity Act, 2003 and the National Power Policy in so far as encouraging the Renewable energy is concerned.

16.2.4. Denying the contention of Respondent at para 3 to 6 as wrong and incorrect in terms of law as the matter / claim has been raised and taken up since commissioning of the Captive Solar Plant as can be seen from the correspondence and chronological events as indicated in the Petition and already explained therein that the Captive Solar Power Project was conceived, taken up for execution with bona fide intention of adding renewable generation even without any special benefit and planned for commissioning earlier but because of Force Majeure conditions faced during execution, got delayed and in the meantime the GoG Solar Power Policy 2015 was issued. It needs to be noted that for permitted 50% capacity, the policy is applicable but for balance 50% Solar Energy injected, wheeling of Captive power to consumption site without considering specific benefit under the Solar Policy-2015, as per the provisions of the Electricity Act, 2003 and Open Access Regulation cannot be denied. Any Policy is subservient and must be in consonance to Act, the Electricity Act, 2003 in this case and it cannot deny rights conferred by the Act. The Act does not deny wheeling of Captive Power, irrespective of fuel be it Fossil Fuel or Nuclear or Wind or Solar or any other type capable of generating Electricity. As already stated under the Petition only meagre additional benefit under the Solar Power Policy-2015 is made available as against what is deprived off in the name of so called encouraging the renewable energy.

16.2.5. It is stated that exemption from Electricity Duty for all renewable power is already available under the Electricity Duty Act of the Govt. of Gujarat, irrespective of any policy and the same is not additional benefit under this Solar Power Policy - 2015

16.2.6. In response to para 7 of the reply filed by DGVCL, while denying contention it is stated that the Petitioner was not aware and could not have imagined about the Solar Power Policy - 2015 to come later on when project was conceived and registered as a Captive Solar Plant which was in an advance stage of commissioning while signing the agreement and has no other option available except signing the agreement. It is stated that the real issue is no credit adjustment towards Solar energy injected from balance 50% capacity as a Captive Power is not provided holding up only policy specific benefits when as per the Electricity Act, 2003 all consumers have unfettered right to generate and wheel through grid any amount of Captive power. The Policy can encourage Solar energy by additional benefits with

related conditions but cannot do away with rights under the Electricity Act, 2003. Moreover, the Petitioner has already covered/flagged the issue of wheeling of balance 50% Captive Solar generation while signing the Agreement.

16.2.7. With regard to para 8 to 11 it is stated that the Government has not amended the policy to consider balance 50% also under the Policy. Moreover, pursuant to the reply from Government in this regard, the Petitioner has also filed an Appeal dated 15.05.2019 explaining the issues in detail with facts, figures and documents requesting as under:

"..... With the above, we pray to your good self to consider our appeal and permit wheeling of 100 % captive solar generation in the interest of justice....."

16.2.8. It is stated that although no written reply is received yet but during meeting with the authority of the Department, the Petitioner has been advised to approach this Commission for needful in the matter and hence this Petition for the balance 50% capacity to be treated as captive generation/energy injected in accordance with provisions under Open Access Regulations and other relevant orders/policies as applicable.

16.2.9. It is also stated that the contention of Respondent at para 12 to 15 is wrong and denied since the reference is irrelevant as there is no issue of extending the control period of the Policy by the Commission but the issue of honouring the provisions of the Electricity Act, 2003 and the GERC Regulations for Captive generation and its wheeling to the consumer end. The Petitioner was not aware and could not have imagined about the Solar Power Policy -2015 to come later on when project was conceived and registered as a captive plant which was in an advance stage of commissioning while signing the agreement and has no other option available except signing the agreement.

16.2.10. With regard to the contention of Respondent at para 16 it is stated that fundamentally any policy of the State Government has to be necessarily within the ambit of existing laws and cannot do away or derogate the provisions under the law and more particularly it is for so called additional benefit or encouragement but *de facto* results in discouragement of the noble purpose of adding renewable

generation. The Respondent has stated that there will always have to be a date for the commencement of any Policy or Order or Notification but in general there are also provisions like "Savings, Repeals, Removal of Difficulties etc. to deal with such problems and the Petitioner has come before this Commission for resolution of a specific issue and justice in accordance with law in letter and spirit.

16.2.11. In response to para 17 & 18 it is stated that all judgements cited in general refers to benefits to be given under the policy outside the policy periods. However, in this specific case the issue is different where, 50% capacity Solar injection limitation has come up under the policy which is applied as per the policy and hence for this 50% capacity there is no issue. However, the real issue is not considering injection from the balance 50% capacity of Solar plant for crediting as a captive power as per the provisions of the Electricity Act as being done for any other captive power plant but without any benefit as made available under the Policy- 2015.

16.2.12. In response to para 19 it is stated that the facts must be appreciated in proper perspective viz. (i) Captive Solar Power plant was registered with declared capacity by GEDA as a Captive Solar Power Plant prior to the Policy-2015 and (ii) Solar Power cannot be stored and has to be consumed on real time basis (iii) As per the Electricity Act, 2003, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines and that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company and that every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use. Accordingly, the utilities are duty bound to wheel the Captive power irrespective of with or without any additional benefit under the Policy. Secondly, the Petitioners had put in all efforts to get 100% Captive Solar generation wheeled to its destination for use but the utilities, enjoying monopoly status, did not allowed the same. As such the additional energy could have been wheeled holding up only additional benefits under the policy.

16.2.13. It is stated that the contention of Respondent at para 20 is wrong and denied as there is no issue as far as 50% capacity is permitted and for which agreement is

signed. However, for balance 50% capacity, created prior to the Policy - 2015, the matter has been taken up to accommodate the same considering the provisions of the Electricity Act, 2003 and also the Policy of Government of Gujarat for encouraging renewable generation in spirit. Moreover, the basic right under the Electricity Act, 2003 for Captive power generation and wheeling, cannot be denied and the balance generation beyond 50% capacity must be adjusted without specific benefits under the Policy-2015.

16.2.14. With regard to para 21 it is stated that all judgements cited under the reply are not relevant in this particular case and are generally out of context. The Electricity Act, 2003 and the Policy - 2015, both mandate for encouraging the renewable energy but per contra a condition inserted clearly results in discouraging addition of renewable generation which was unimaginable while conceiving the project and hence the issue is raised and pursued for resolution based on natural justice in this specific case without challenging the Policy.

16.2.15. In response to para 22 it is stated that by said limitation, any consumer cannot have more than 10% Solar energy consumption considering 20% Plant Load factor of Solar plants even if it wants to use more Solar power which a clear discouraging/disincentivizing going against the letter and spirit of the Electricity Act, 2003 and also the Renewable energy policy. Limitation is for the benefit of the utilities beyond doubt and in no way this fact can be denied. Moreover, if the same consumer creates any captive capacity say even beyond 100%, it will surely get adjustment for whatever quantum of such energy with other conventional fuel in terms of Electricity Act, 2003 as also the Captive Power policy and will lose only Policy benefits but full energy will be admitted for adjustment. This is clear disincentive / discouragement and in no way justified either in terms of the Electricity Act, 2003 or even in terms of Renewable energy policy of any Government.

16.2.16. With regard to para 23.1 it is stated that instead of appreciating Suo motu efforts of the Petitioner to add renewable generation with a bona fide intention/cause to help reduce carbon footprint which is mandated under the Electricity Act, 2003 and the National Tarif Policy, the Petitioner is abused by calling this as a wrong full act as if the project was conceived and executed even after knowing about the limitation in

installed capacity which was not existing even for fossil fuel as far as Captive generation is concerned and the utilities do not respect the laws/policies in spirit and look at their revenues only. It is also wrong to label this generation as infirm power because the utilities forcefully disallowed wheeling solar generation from the balance capacity beyond 50% of the Contract Demand for the legitimately put up the Captive Solar plant

16.2.17. Responding to para 23.2 & 23.3, it is stated that the Petitioner has in no way challenged the Solar Power Policy 2015 of Government of Gujarat under this Petition but (1) appealed for resolution of the genuine issue based on natural justice and Renewable Policy in letter and spirit as the issue is caused due to reasons beyond control consequent to sudden declaration and implementation of the Policy - 2015 and (ii) permitting unfettered right of the Petitioner to generate and wheel its Captive generation in terms of the Electricity Act, 2003. In case the policy was not declared then 100% Captive Solar Generation would have been wheeled and adjusted by the utility as per the prevailing Electricity Act, 2003 and the Open Access Regulation without demur. The benefits under the Policy - 2015 are so meagre that it seems to be an indirect act to limit the Captive Solar generation for the benefit of the utilities rather than to incentivise/encourage solar generation. It is also an established principle that what cannot be done directly, can also not be done indirectly. The capacity limitation part/condition is absolutely against the spirit of Electricity Act, 2003 and the National Electricity/Power Policy mandating increase in Renewable energy but this Petition is to resolve the genuine issue caused due to sudden declaration and implementation of Solar Power Policy-2015 without any consideration to the projects already in the pipe line having achieved Financial Closure and irreversible.

16.2.18. It is further stated that the contention is far from the facts on record considering the fact that when any Captive generation with any fossil fuels mandated for discouragement to reduce the carbon footprint is permissible without any limitation then how only Renewable energy captive generation is singled out for limitation under the guise of interest of general body of consumer when balancing the interests of general body of consumers is to be taken care by this Commission as one of their function of tariff setting.

16.2.19. Regarding the Time Barred matter it is stated that same is incorrect in terms of law as the matter/claim has been raised and taken up since commissioning of the Captive Solar Plant. Accordingly, the Utilities are duty bound to wheel the Captive power irrespective of with or without any additional benefit under the Policy.

16.2.20. It is stated that contents of para 23.5 to 23.9 are wrong and denied while reiterating above submissions and complete correspondence including letter dated 15/16.05.2019 in accordance with the provision under the Policy - 2015 to Government of Gujarat is submitted wherein reply is still awaited. In the given scenario, there was no other logical and viable option made available. This is a specific case and not a general one hence in the given scenario, credit towards Captive Solar Power injected is requested in terms of provisions of the Electricity Act, 2003 and Open Access Regulation with or even without policy specific benefits

16.2.21. With regard to para 24 it is stated that merit of the matter has been explained in detail with supporting documents and references with a request to consider the same in the interest of justice.

(J). REJOINDER BY THE PETITIONER TO REPLY FILED BY THE RESPONDENT NO. 1 DGVCL AND RESPONDENT NO. 4 - GUVNL ON AMENDMENT SOUGHT

17. The Petitioner M/s Rallis India Ltd. vide separate affidavits both dated 14.09.2021 has filed individual rejoinder-in-reply(ies) which are identical in response to the reply(ies) filed by the Respondent No. 1 (DGVCL) and Respondent No. 4 (GUVNL) on aspect of amendment sought in main Petition as under:

17.1. It is stated that the Respondents have indulged into irrelevant references and narrations and thereby avoiding replies to the real issues raised under the Petition and subsequent amendment sought to said Petition and all the contentions and averments made by the Respondents are wrong and are denied with liberty to rely on the Petition and Written Submissions filed before the Commission.

17.2. The para wise reply to submissions in the reply filed by Respondents DGVCL & GUVNL are as under:

17.2.1. With regard to para 1 & 2, while denying the contentions of the Respondents as wrong it is stated that the Petitioner after having invested heavily in Solar Power Generation which is need of the hour for the country and even the Electricity Act, 2003 recommends promotion of same was compelled to sign the Agreement as evident from the representation by the Petitioner to various authorities. Even Respondent DGVCL has recorded at para 5 it in its letter dated 31.03.2016 whereby copy of wheeling agreement was forwarded as follows

"……..

M/s Rallis India Ltd has made a representation to the Department of Energy and Petrochemicals seeking exemption from the applicability of the capacity of 50% of Contract Demand of the consumer as stipulated in the Gujarat Solar Power Policy 2015. Pending final disposal of the representation, this agreement is entered for 50% of the Contract demand of 2.5 MVA of the Consumer Unit. In the event of final disposal of the said representation DGVCL hereby accepts to amend this agreement in accordance with directive of Govt. of Gujarat.

……"

17.2.2. With regard to para 3 while it is stated that the contention of Respondent(s) is wrong and denied, para 4 & 5 need no specific reply and has reiterated its reply in response to para 6 & 7. In response to para 11 to 13 it is stated that in the interest of justice, the Petitioner can seek all remedies legally available under the statute.

17.2.3. Denying the contentions of Respondents at para 14 to 16 as wrong, it is stated that the Petitioner after having obtained all requisite statutory approvals including GEDA, CEI, wheeling agreement with GETCO etc. had no option like election or selection but it was compulsion to sign the Agreement. The Petitioner was still in the process of discussing with appropriate authorities as COD was after promulgation of 2015 Policy. The Respondents are well aware that additional power was fed into the grid and was sold by the Respondent and the principle of equity demands that the same should be paid for. While noting the contents of para 17 the Petitioner with regard to para 18 of the reply filed by the Respondents has stated that considering reply by the Petitioner, the Commission is requested to admit the amendment in the interest of Justice.

17.2.4. It is further reiterated by the Petitioner that all necessary approvals were obtained before promulgation of 2015 Policy and necessary plant and equipment were available for commissioning before Policy 2015. However, the commissioning was delayed due to ROW issues where even police and collectorate authorities were to be involved. It was beyond the control of Petitioner and a clear case of capable of generating electricity and as such an absolute and unfettered right to get adjustment of power generated by Captive Power Plant when status and designation of Petitioner's plant is 'Captive Power Plant' as per GEDA Registration letter No. GEDA/SOL/2015/11/OW/5814 dated 30.11.2015.

(K). REJOINDER BY THE PETITIONER TO REPLY OF RESPONDENT TORRENT POWER LTD. ON ASPECT OF AMENDMENT.

18. The Petitioner has also filed its rejoinder-in-reply to the contentions raised by the Respondent No. 2. TPL in its reply on aspect of amendment.

18.1. The para wise reply to submissions by the Respondent TPL are as under:

18.1.1. It is stated that contents of para 1 to 3 need no specific reply whereas contention at para 4 are denied with regard to inability in attending hearing due to prevailing pandemic then and that copy of amended Petition was duly served upon the Respondent TPL. It is also stated in response to para 5 that the Petitioner has already filed rejoinder to reply dated 06.02.2020 vide affidavit dated 06.03.2020. Denying the contentions under para 6 to 8, the Petitioner has reiterated its unfettered right under Section 9 of the Electricity Act, 2003, to own and operate a Captive Generating Plant for 100% own consumption and also submitted that any policy is subservient to the Act and not vice versa. It is stated that reference to proviso to Section 9 (1) of the Electricity Act. 2003 is misplaced since it refers to transmission/supply of electricity by generator and does not differentiate and is irrespective of source/fuel of power generation. It is further stated that the contention of the Respondent TPL would amount to permission for 100% transmission of fossil fuel based generation but restrict transmission of clean solar generation which is required to be promoted as per the Electricity Act, 2003, which is not the intention of the legislators. Moreover, the Petitioner is seeking its right

under Section 9 of the Act which is above any policy - for transmission of 100% Generation for its own captive consumption, irrespective of source of Generation.

18.1.2. With regard to para 9 it is stated that the Petitioner has already responded to issue of the installed capacity of minimum 5 MW required under the Solar Power Policy of 2009 vide rejoinder dated 06.03.2020 and the same is also addressed by GEDA during the hearing held on 22.10.2019 which is recorded by the Commission in its Daily Order dated 20.12.2019. The Respondent was well aware of the fact that the installed Captive Solar Plant was of 4 MW as mentioned in the wheeling agreement between the Petitioner and the Respondent No. 2 TPL. Hence the Respondent TPL is estopped from raising said issue. In response to para 10, it is stated that unfettered right of utilization of 100% captive generation irrespective of source/fuel of Captive Generation under Section 9 of the Electricity Act, 2003 are reiterated.

18.1.3. Responding to para 11, it is stated that all the registrations/ approvals for setting up of 4 MW Captive generation plant were in place before promulgation of Solar Power policy, 2015 but due to the unforeseen issues of ROW forced COD after promulgation of Solar Power Policy, 2015 and it is clear case of Force Majeure for which the Petitioner had approached relevant competent authorities at that time. Also, DGVCL with whom the Petitioner has signed similar wheeling agreement for power from the same Captive Generating Plant has recorded the efforts of Petitioner in letter dated 31.03.2016 as under:

> *"……M/s Rallis India Ltd has made a representation to the Department of Energy and Petrochemicals seeking exemption from the applicability of the capacity of 50% of Contract Demand of the consumer as stipulated in the Gujarat Solar Power Policy 2015. Pending final disposal of the representation, this agreement is entered for 50% of the Contract demand of 2.5 MVA of the Consumer Unit. In the event of final disposal of the said representation DGVCL hereby accepts to amend this agreement in accordance with directive of Govt. of Gujarat……."*

18.1.4. With regard to para 12, it is stated that the Commission has jurisdiction to adjudicate the dispute between the Petitioner and the Respondents and prayed for admitting both main Petition and subsequent amendment in the interest of justice.

19. Thereafter, the matter was heard on 16.09.2021. When the matter was called out, nobody was present on behalf of the Respondents No. 3, 5 and 6.

20. Ld. Adv. Mr. R. N. Purohit, on behalf of the Petitioner referring to Daily Order dated 04.09.2021 argued that although the Commission had directed the Respondents to file their reply on the amendment, the Petitioner has received reply only from the Respondents DGVCL and GUVNL; whereas other Respondents have not filed any reply and rejoinder-in-reply on reply filed the Respondents DGVCL and GUVNL are being filed by the Petitioner.

20.1. Mr. Hetal Patel appearing on behalf of GUVNL submitted that reply objecting the amendment is already filed. It is argued that the Petitioner by way of amendment is in effect seeking modification of the Agreement as that too for past period for which no open access is sought. Therefore, the amendment sought by the Petitioner is not permissible. Further, referring to Daily Order dated 20.12.2019 passed by the Commission it is argued that it is necessary to first decide the issue of jurisdiction as mentioned therein.

20.2. Mr. Jignesh Langalia appearing on behalf of the Respondent TPL, submitted that despite clear direction of the Commission vide Daily Order dated 04.09.2021 to the Petitioner to serve copy of affidavit dated 25.02.2020 seeking amendment in the Petition, TPL has not received the same from the Petitioner till date and therefore, in order to comply filing of reply within time period stipulated by the Commission, the Respondent TPL has already filed its reply vide affidavit dated 09.09.2021 with a copy to the Petitioner after seeking copy of amendment in Petition from GUVNL. It is argued that the amendment sought by the Petitioner needs to be rejected.

20.3. In response, Ld. Advocate for the Petitioner submitted that although reply from the Respondent TPL has not been received by the Petitioner but the copy of same will be collected from Respondent TPL.

20.4. Having heard the Ld. counsel appearing for the Petitioner and representatives of the Respondents on issue of amendment in the Petition and despite being argued that issue of jurisdiction needs to be decided first, it was decided by the Commission to reserve the matter for order on the issue of amendment in the

present Petition with consideration that amendment being procedural aspect it is deemed appropriate to first decide the same.

21. We have considered the submissions made by the parties on limited issue of amendment. We note that while the Petitioner has submitted and argued that the amendment needs to be allowed, the Respondents have opposed the amendment sought by the Petitioner in the Petition and accordingly, we proceed to decide whether the amendment sought in the present Petition to be permitted or not.

21.1. We have carefully perused and considered the Amendment Application filed by the Petitioner vide affidavit dated 25.02.2020, the pleadings and all the written submissions and replies made thereon including the arguments oral and written made by the parties. We note that through the said Amendment the Petitioner seeks to insert para 3.4 in originally filed Petition as well as amend the prayer clause therein. It is pertinent to note that the Applicant/Petitioner has not submitted any reasons/grounds in support of seeking the said amendment although it is argued that same needs to be allowed.

21.2. We note that the Petitioner has sought aforesaid amendment after the original Petition was heard by previous bench of this Commission on 22.10.2019 for which Daily Order dated 20.12.2019 was passed wherein after hearing the parties the Commission in para 6.6 of the said Daily Order recorded that it is necessary to decide as to whether the issue involved is a billing dispute where the generation, injection, wheeling and adjustment of the energy in the bill is done by the Respondents who are distribution licensees and whether it falls within the jurisdiction of this Commission or the Consumer Grievance Redressal Forum and Electricity Ombudsman and directing the parties to file their submissions on the jurisdiction issue.

21.3. The Petitioner through aforesaid amendment affidavit is seeking to insert para 3.4 after para 3.3.0 and before 4.0 of the original Petition, which reads as under:

"……

3.4 The Petitioner has initiated and received all statutory approvals for his 4 MW Solar Plant before promulgation of GOG Solar Policy dated 13th August 2015 and as

such, this Petitioner is eligible for 100% adjustment of power generated. Without prejudice to our stand that we are eligible for adjustment of total solar generation. In any event if the same is not being granted, this Petitioner prays for considering this Solar Generating Plant as a Captive Power Plant under Sec. 9 of the Electricity Act, 2003 and under the provision of the same, allow this Petitioner credit for 100% generation of this Captive Power Plant as provided under Sec. 9 of the Electricity Act, 2003 for own consumption is irrespective of the type of fuel - be it Fossil Fuel or Nuclear or Wind or Solar or any other type capable of generating Electricity -and as such it is the Petitioner's unfettered right to get adjustment of power generated by this Captive Power Plant. Status and designation of our plant is CAPTIVE POWER PLANT as per GEDA Registration letter Ref. GEDA/SOL/2015/11/OW/5814 dated 20% May, 2015. The Petitioner is agreeable to relinquish whatever additional benefits that might accrue under GOG Solar Policy, 2015 for balance 50% generation (other 50% qualify for benefits as per said policy) but our right to have our own Captive Power Plant for our own consumption is unambiguous as enshrined in the Electricity Act, 2003 and it is a cardinal principle of jurisprudence that any policy is subservient to the Act and not vice versa.

……."

21.4. Moreover, through aforesaid amendment the Applicant/Petitioner is seeking additional two prayers as under:

"…

(d) Direct and hold and declare that adjustment of Remaining unadjusted 50% Captive Solar Energy Injection be adjusted without policy specific benefit available under SSP – 2015; if at all remaining 50% captive solar energy injection is not considered feasible in terms of the SPP – 2015 as prayed for

(e) Direct and hold and declare that credit adjustment of 100% of energy injection be given

……."

21.5. We also note that there is no dispute with regard to signing/execution of two separate wheeling agreements by the Petitioner (i) Dated 31.03.2016 with the Respondent No. 1 DGVCL for wheeling of solar power to recipient unit of the Petitioner at GIDC, Ankleshwar and (ii) Dated 29.04.2016 with Respondent No. 2

TPL for wheeling of solar power to recipient unit of the Petitioner at Dahej SEZ-II, district Bharuch.

21.6. We note that Order VI, Rule 17 of the Code of Civil Procedure, 1908 provides regarding 'Amendment of Pleadings' which reads as under:

> ***"17. Amendment of Pleadings:-*** *the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:*
>
> *Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."*
>
> As per above rule, the court may allow either party to alter or amend his pleadings at any stage of the proceedings, in such manner and on such terms as may be just. The Rule further states that such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. As per the proviso thereunder, once the trial has commenced, no application for amendment shall be allowed unless the court comes to the conclusion that despite due diligence, the party could not have raised the matter before the commencement of trial.

21.7. The Hon'ble Supreme Court in *Rajesh Kumar Aggarwal and Others v. K. K. Modi and Others, reported in [(2006) 4 SCC 385]* has gone into the approach to be taken by the Court in considering whether to permit an amendment. The relevant portion reads as under:

> *"We have carefully gone through the relevant pleadings, annexures and the judgment rendered by the learned single Judge and of the learned Judges of the Division Bench of the High Court.*
>
> *Order 6 Rule 17 of CPC reads thus:*
>
> *……*

This rule declares that the Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such a manner and on such terms as may be just. It also states that such amendments should be necessary for the purpose of determining the real question in controversy between the parties. The proviso enacts that no application for amendment should be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter for which amendment is sought before the commencement of the trial.

The object of the rule is that Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

Order VI Rule 17 consist of two parts whereas the first part is discretionary (may) and leaves it to the Court to order amendment of pleading. The second part is imperative (shall) and enjoins the Court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.

As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary has expressed certain opinion and entered into a discussion on merits of the amendment. In cases like this, the Court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard rights of both parties and to sub-serve the ends of justice. It is settled by catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good

conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court.

While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment.

……..

The Court always gives leave to amend the pleadings of a party unless it is satisfied that the party applying was acting malafide. There are a plethora of precedents pertaining to the grant or refusal of permission for amendment of pleadings. The various decisions rendered by this Court and the proposition laid down therein are widely known. This Court has consistently held that the amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice.

……..".

As per above decision, Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. Also, the basic structure of the suit should not change and the real controversy test is the basic or cardinal test. It is the primary duty of the Court to decide whether an amendment is necessary to decide the real dispute between the parties and grant leave unless the court is satisfied that the party applying for amendment was acting mala fide.

21.8. In *Lakha Ram Sharma v. Balar Marketing Private Limited [(2008) 17 SCC 671],* it has been held by the Hon'ble Apex Court that while considering whether the amendment is to be granted or not the Court is not to go into the merits of the matter and decide whether or not the claim made therein is *bona fide* or not being a question which can only be decided at the stage of trial of the suit.

21.9. We also note that the Hon'ble Supreme Court in *Rameshkumar Agarwal v. Rajmala Exports (P) Ltd., [(2012) 5 SCC 337]* has held that:

"……..

11) It is clear that while deciding the application for amendment ordinarily the Court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide and dishonest amendments. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

……."

21.10. Also, the Hon'ble Supreme Court in *Modi Spinning & Weaving Mills Co. Ltd. v. Ladha Ram & Co., [(1976) 4 SCC 320]* held that:

"……..

The trial court rejected the application of the defendants for amendment. One of the reasons given by the trial court is that the defendants wanted to resile from admissions made in paragraph 25 of the written statement. The trial court said that "the repudiation of the clear admission is motivated to deprive the plaintiff of the valuable right accrued to him and it is against law."

The trial court held the application for amendment to be not bonafide. The High Court on revision affirmed the judgment of the trial court and said that by means of amendment the defend- ants wanted to introduce an entirely different case and if such amendments were permitted it would prejudice the other side.

The decision of the trial court is correct. The defend- ants cannot be allowed to change completely the case made in paragraphs 25 and 26 of the written statement and substitute an entirely different and new case.

It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative

pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial court.

……"

21.11. We note that Hon'ble Supreme Court in *Revajeetu Builders and Developers v. Narayanaswamy and others [(2009) 10 SCC 84]* has laid down some basic principles which ought to be taken into consideration by the court while allowing or rejecting the application for amendment. The relevant portion reads as under:

"Whether amendment is necessary to decide real controversy

58. The first condition which must be satisfied before the amendment can be allowed by the court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the courts' discretion in grant or refusal of the amendment.

No prejudice or injustice to other party

59. The other important condition which should govern the discretion of the court is the potentiality of prejudice or injustice which is likely to be caused to the other side. Ordinarily, if the other side is compensated by costs, then there is no injustice but in practice hardly any court grants actual costs to the opposite side. The courts have very wide discretion in the matter of amendment of pleadings but court's powers must be exercised judiciously and with great care.

60. In Ganga Bai case [(1974) 2 SCC 393] this Court has rightly observed: (SCC p. 399, para 22)

"22. … The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the

discretion, greater ought to be the care and circumspection on the part of the court."

.....

63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

64. The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments.

65. When we apply these parameters to the present case, then the application for amendment deserves to be dismissed with costs of Rs 1,00,000 (Rupees one lakh) because the respondents were compelled to oppose the amendment

application before different courts. This appeal being devoid of any merit is accordingly dismissed with costs."

21.12. Thus, as per the general principles laid down by the Courts, an amendment may generally be allowed without going into the merits but an amendment sought for should not be allowed as a matter of routine without any other considerations because the Courts have also made specific exceptions, where the amendment sought for is refused rather than simpliciter allowing the same.

21.13. Therefore, it also appears from above cited cases, that it is a settled law that court has discretionary power to allow or disallow amendment application and the discretion should be exercised judiciously and such judicial discretion should be exercised liberally for the purpose of complete justice and to prevent further litigation. The main object of the rule for amendment is that the courts should get at and try merits of the case and should consequently allow all amendments that may be necessary for determining the real question in controversy between the parties without causing injustice to other side. An amendment which does not constitute addition of new cause of action or raise a different issue but amounts merely to a different or additional approach to the same facts can be allowed. However, by allowing amendment, a party should not be allowed to set up a new case or new cause of action and to completely change the case made out in the original pleadings. The provisions of pleadings for amendments are intended for promoting the ends of justice and not defeating them. It is also true that law regarding amendment is to be liberally construed and so far a party does not alter the basic cause of action and takes the other party by surprise and prejudice, the amendment relating to subsequent events may normally be permitted. It is also true that the court is not supposed to go into merits and demerits of the amendment and express its opinion as that could be the subject matter of scrutiny after the amendment is allowed or is not allowed. From the aforesaid judgements it is clear that the court should not allow the amendment, if it changes the nature of the suit and if prejudice is caused to the defendant. Moreover, any amendment should be before commencement of trial of the case and as per the settled principle, trial is said to be commenced when the court frames the issues i.e. applies it judicial mind after completion of pleadings. Here, in the present case before this Commission,

pleadings were completed and oral arguments were also made during the hearing on 22.10.2019 by the Ld. counsels for the Petitioner as well as the Respondents which is evident from Daily Order dated 20.12.2019. Undeniably, the Petitioner has preferred an amendment subsequently vide affidavit dated 25.02.2020.

21.14. It can also be culled out from above judgments as well as the settled Principle of law that liberal construction of law does not mean that as a matter of course each and every application should be allowed. When the amendment enlarges the scope of the matter and scope of defense is narrowed or right accrued in favour of defendant is destroyed or when it is at a very belated stage tending to cause prejudice or injustice to the defendants, the court should reject such application.

21.15. Accordingly, in order to decide the issue at hand regarding amendment sought by the Petitioner while keeping in mind the settled principles of law pertaining to permitting amendment during pendency of main matter, it is necessary to refer to the pleadings, even at the cost of repetition as, ultimately whether the amendment sought is required to be allowed or not would depend upon the facts and circumstances of the matter.

21.16. We note that it is contended by the Respondents that the Petitioner has sought the amendment in the Petition, but the Petitioner has not filed an appropriate application nor provided any reasons or justification for seeking amendment since the Petitioner has only referred to the addition of para and also added the prayers. Thus, the Petitioner has not followed the procedure for seeking amendment and no relief of amendment can be considered without a proper application. It is also contended that the Petitioner had filed its submissions on the issue of jurisdiction while requesting that the Commission may first decide the issue of jurisdiction.

21.17. Even, if the manner & form in which an amendment is sought by the Petitioner is overlooked for the time being, following is noteworthy as already stated in foregoing paras of this Order:

(a). Petition was originally filed by the Petitioner on 20.06.2019 and heard on 22.10.2019

(b). Respondent No. 4 GUVNL filed reply to original Petition on 16.11.2019

(c). Respondent No. 1 DGVCL filed reply to original Petition vide affidavit dated 26.11.2019

(d). Daily Order dated 20.12.2019 passed for above hearing duly noting the submissions / arguments advanced by the parties during the hearing and directing all the parties to file submissions on the issue of jurisdiction

(e). The Petitioner filed its submissions on the issue of jurisdiction vide affidavit dated 07.01.2020

(f). The Respondent No. 2 TPL filed its submissions on the issue of jurisdiction vide affidavit dated 06.02.2020

(g). The Petitioner sought amendment on 25.02.2020 in the original Petition

21.18. Thus, from the above it is clear that undoubtedly the aforesaid amendment sought by the Petitioner vide affidavit dated 25.02.2020 is after completion of pleadings / oral arguments on the main Petition.

21.19. We note that the Respondents have contended that by way of the application for amendment, the Petitioner is in effect seeking to change the scope of the Petition and is now seeking an amendment for consideration of the splitting of the power plant into capacity covered under the Solar Policy 2015 and capacity not considered as solar power, which is not feasible.

21.20. The Respondents No. 1 & 4 have also contended that it is well settled principle that the amendment cannot be allowed when it changes the scope of the Petition and when it defeats the law of limitation and referred the following judgements:

(A) *Raikumar Gurawara v. S.K. Sarwagi and Co. (P) Ltd. [(2008) 14 SCC 364]:*

"18. Further, it is relevant to point out that in the original suit, the plaintiff prayed for declaration of his exclusive right to do mining operations and to use and sell the suit schedule property and in the petition forced during the course of the arguments, he prayed for recovery of possession and damages from the second defendant. It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment,;

(ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application

defeats the law of limitation. The plaintiff not only failed to satisfy the conditions prescribed in proviso to Order 6 Rule 17 but even on merits his claim is liable to be rejected. All these relevant aspects have been duly considered by the High Court and rightly set aside the order dated 10-3-2004 of the Additional District Judge.

(B) *Muni Lal V. Oriental Fire & General Insurance Co. Ltd. [(1996) 1 SCC 90]:*

"5. Admittedly, by the date of the application for amendment filed, the relief stood barred by limitation. The question, therefore, is whether the Court would be justified in granting amendment of the pleadings in such manner so as to defeat valuable right of defence of bar of limitation given to the defendant, ...

In other words, this Court laid emphasis that with a view to mould the relief a new fact can always be taken into account not merely by the trial court but even by the appellate court. Where the appeal is delayed even by necessary implication, the relief of amendment in that event cannot be given. In other words, to render substantial justice without causing injustice to the other party or violating fairplay, Court would be entitled to grant proper relief even at the stage of appellate forum. It is seen that the ratio of Jagdish Singh v. Natthu Singh ((1992) 1 SCC 647 : AIR 1992 SC 1604] is also inapplicable to the facts of this case. That case relates to a suit instituted for specific performance but without abandoning the relief of specific performance alternate relief for damages was also sought for. This Court relying upon the proviso to sub-section (5) of Section 21 of the Specific Relief Act which expressly gives power to the Court to grant amendment of the pleadings at any stage of the proceeding, permitted amendment of the plant seeking alternate relief, The ratio therein is clearly distinguishable and does not apply to the facts of this case.

6. On a consideration of this case in its proper perspective, we are of the view that granting of amendment of plaint seeking to introduce alternative relief of mandatory injunction for payment of specified amount is bad in law. The alternative relief was available to be asked for when the suit was filed but not made. He cannot be permitted to amend the plaint after the suit was barred by limitation during the pendency of the proceeding in the appellate court or the second appellate court. Considered from this perspective, we are of the opinion that the District Court and the

High Court were right in refusing the prayer of amendment of the suit and the courts below had not committed any error of law warranting interference."

21.21. It is also contended by the Respondent DGVCL that the Petitioner has executed a wheeling agreement dated 30/31.03.2016 for 50% of the contract demand and in terms of the Solar Policy 2015. The said agreement inter alia reads as under:

" AND WHEREAS

DISCOM is agreeable for wheeling of power on behalf of the Company in accordance with the Government of Gujarat's Solar Policy-2015 (Solar Policy), Gujarat Electricity Regulatory Commission (GERC)'s Order No. 3 of 2015 "In the matter of Determination of Tariff for Procurement of power by Distribution Licensees and Others from Solar Energy Projects for the State of Gujarat", GERC Open Access Regulations, 2011 and amendments thereto, Intra State ABT Order and amendment thereto and other applicable GERC Regulations and as per the terms and conditions contained in the Application Form filled by the Company with GEDA and as per the terms and conditions of this Agreement.

……..

3.0 Maximum allowable capacity of solar
As per policy, the maximum allowable capacity of solar power for wheeling is 50% of the Contract Demand/Sanctioned load for Wheeling is 50% of the Contract Demand/Sanctioned Load. Hence the consumer shall ensure that at all the time, Contract Demand/Sanctioned Load shall be double of the capacity of SPG"

21.22. It is further contended by the Respondent DGVCL that in its letter dated 31.03.2016 to the Petitioner, it was clearly mentioned that the solar capacity allocated to recipient unit of the Petitioner was 1.21 MW and the Petitioner through an amendment is now seeking to in effect modify the aforesaid Agreement and is further seeking relief for the past period when it has not even obtained open access for such capacity. The present amendment sough is an afterthought and cannot be entertained.

21.23. We note that the Petitioner had initially filed the Petition for consideration of adjustment of 100% of captive solar energy injected instead of the 50% being considered and incorporated in accordance to the provisions under the Government of Gujarat Policy, 2015. Further, the Petitioner has itself executed two separate contracts being (i) one being a wheeling agreement with the Respondent

No. 1 DGVCL for wheeling of power to its recipient unit at Plot No. 3301, GIDC Ankleshwar, Dist. Bharuch with 2500 KVA Contract Demand with the distribution licensee DGVCL - Ankleshwar (Ind.) Division and (ii) second one being a wheeling agreement with the Respondent No. 2 TPL for wheeling of power to its recipient unit at Plot No. Z/110, Dahej SEZ II, Dahej, Ta. Vagra, Dist. Bharuch, having Contract Demand of 2000 KVA (11 kV) with the distribution licensee TPL - Dahej, duly accepting & incorporating aforesaid condition. Moreover, no further cause of action has arisen thereafter or even otherwise pursuant to filing of the original Petition in June-2019 necessitating any amendment. However, as noted above through the said amendment, the Applicant/Petitioner is seeking modification / amendment not only in main body of the Petition through additional para 3.4 sought to be allowed as part of main Petition but even in the relief clause originally prayed for. Thus, *prima facie* it appears that the basic structure of the suit/Petition is likely to get changed. It seems to be a belated attempt on the part of the Petitioner to alter the terms and conditions of the contract, namely the Wheeling Agreements already entered into.

21.24. As already noted above it is well settled that a party cannot challenge the terms of a contract/agreement which was voluntarily agreed upon under the guise of the amendment application. Further, an amendment that defeats the valuable rights of the other party and causes prejudice need not be allowed. Further, it is necessary for the court to assess potentiality of prejudice that will be caused to other party. It appears in the present case that the amendment sought by the Petitioner is an attempt to do so and there is potentiality of prejudice that may be caused to the Respondent No. 1 & 2 and defeat their rights under the contract, if the amendment is allowed, which is not permissible.

21.25. In view of above, we are not inclined to allow the amendment sought by the Petitioner vide its affidavit dated 25.02.2020 and accordingly, we decide not to allow the said amendment.

21.26. Before parting we note that the Respondents DGVCL & GUVNL have also contended that any claim for setting aside the specific terms of the Contract being the wheeling agreement dated 30.03.2016 cannot be entertained as being time barred. The time period for setting aside any terms of the agreement is only three years. It is also

contended that the amendment sought by the Petitioner is completely contrary to the Agreement specifically entered by the Petitioner and the Solar Power Policy 2015 which had been specifically accepted by the Petitioner. Further the Petitioner has been granted open access for 1.21 MW and that the Petitioner did not raise any such contention at the time of entering into the wheeling agreement or prior to injection of power. That the Petitioner has already exercised its option under the Solar Power Policy 2015 and has entered into the wheeling Agreement and now by way of the Amendment the Petitioner is seeking to go back on its election which cannot be permitted. The Petitioner had elected to accept the Solar Power Policy of 2015 which means that all terms of the said Policy would apply to the Petitioner. Once the Petitioner has elected all the terms of the Solar Power Policy 2015 the Petitioner cannot go back on its election. In this regard the said Respondents have referred following cases which are as under:

(i) *State of Rajasthan Vs. Union of India, [(2018) 12 SCC 83]*
(ii) *Joint Action Committee of Air Line Pilots' Assn. of India v. DG of Civil Aviation [(2011) 5 SCC 435].*

21.27. Since, through this Order we are only deciding the issue of amendment sought by the Petitioner without going into merits of the matter, we are not expressing any view or deciding upon the various other contentions raised by the Respondents including on law of limitation, relief claimed by the Petitioner is time barred, Doctrine of Election, estoppel, principle that one cannot approbate and reprobate etc., which are kept open.

22. Accordingly, the main original Petition to be now listed for hearing since the issue regarding seeking amendment vide affidavit dated 25.02.2020 filed by the Petitioner is not allowed hereinabove.

23. We order accordingly.

Sd/-
[S. R. Pandey]
Member

Sd/-
[Mehul M. Gandhi]
Member

Place: Gandhinagar.
Date: 19/10/2022.