

BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION

AT GANDHINAGAR

PETITION NO ____ of 2021

Petition under Sections 86 (1)(b) and 86(1)(f) of the Electricity Act, 2003 for approval of amendments to the PPA between Gujarat Urja Vikas Nigam Ltd. and Essar Power Gujarat Ltd. by way of Supplemental PPA dated 12.08.2021 pursuant to the Order dated 27.04.2020 of the Hon'ble Commission and Government of Gujarat GR and Letter dated 12.06.2020 and Government of Gujarat GR dated 05.06.2021.

IN THE MATTER OF:

Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhawan,
Race Course, Vadodara 390007
Gujarat

- Petitioner

Versus

1. M/s Essar Power Gujarat Ltd.
44 KM Milestone
Jamnagar - Okha Highway
P.O. Box No. 07
Khambhalia P.O.
Dist. Devbhumi Dwarka - 361 305
Gujarat

- Respondent No 1

2. Energy Watchdog
B 5/51, Paschim Vihar, New Delhi

- Respondent No 2

3. Prayas (Energy Group)
Unit III A&B, Devgiri,
Joshi Railway Museum lane,
Kothurd Industrial Area,
Kothurd, Pune - 411 038

- Respondent No 3



PETITION FOR APPROVAL OF REVISED SUPPLEMENTAL POWER PURCHASE AGREEMENT DATED 12.08.2021 SIGNED IN PURSUANCE WITH HON'BLE COMMISSION'S ORDER DATED 27.04.2020

MOST RESPECTFULLY SHOWETH

1. That the present Petition is being filed to place on record the revised Supplemental Power Purchase Agreement dated 12.08.2021 {hereinafter the SPPA} signed between the Petitioner Gujarat Urja Vikas Nigam Limited

and the Respondent No 1 M/s Essar Power Gujarat Limited, in pursuance to the Order dated 27.04.2020 passed by this Hon'ble Commission and the Government of Gujarat Resolution and Letter both dated 12.06.2020 and Government of Gujarat GR dated 05.06.2021.

2. That the Petitioner herein had filed the Petition No. 1807 of 2019 before Hon'ble Commission for approval of the Supplemental Power Purchase Agreement dated 01.03.2019 entered into with M/s Essar Power Gujarat Ltd for amendment in PPA dated 26.02.2007. The proposed Amendments were pursuant to the Government of Gujarat Policy Directive vide Government Resolution (GR) No. CGP-12-2018-166-K dated 01.12.2018. A copy of Supplemental PPA dated 1.03.2019 is attached hereto and marked as Annexure - A.
3. That the Hon'ble Commission vide order dated 27.04.2020 had after public hearing and receiving representation from Consumer organisations in the Petition, granted approval to the Supplemental Agreement with certain modifications as discussed in the Order and summarized in Para 23 and 24. The Hon'ble Commission in Para 25 held as under:

"In view of above observations, we decide that the present petition succeeds. We decide that the supplemental PPA signed between the parties dated 01.03.2019 be modified as per aforesaid decision of the Commission with regard to review of the coal price, ceiling price of coal, SHR, Auxiliary Consumption, incentive in excess of 90% etc. for determination of energy charge and other conditions as decided and directed by the Commission in earlier part of this Order. The Petitioner and the Respondent No.1 are directed to modify the supplemental PPA 01.03.2019 as per the aforesaid decision of the Commission and submit the modified supplemental PPA to the Commission."



A copy of Order dated 27.04.2020 passed by the Hon'ble Commission in Petition No. 1807 of 2019 is attached hereto and marked as Annexure - B.

4. That the Hon'ble Commission vide the said order dated 27.04.2020 had directed the parties to incorporate the following modifications in the SPPA dated 01.03.2021:
 - a. **Clause 3.1 (II) -Effective date** - The effective date of the SPPA is 15.10.2018. However, the revised energy charges as per SPPA payable

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from 20.08.2019 or from the date the coal is directly procured by EPGL from Indonesia, whichever is later. For the period prior to 20.08.2019, rates of energy charges shall be as per the PPA dated 22.04.2007 and change in law payment as approved by GERC. (Paras 23.6,23.52 and23.60 of Order dated 27.04.2020)

- b. **Clause 3.2.3 & 3.5.3** -Station Heat Rate has been reduced to 2262 kcal / kWh from 2333 kcal / kwh (Paras 23.9,23.64)
- c. **Clause 3.2.3** -Deletion of the provision related to the operation Parameters of Adani Power Limited (viz. Auxiliary Consumption and Gross Heat Rate) considered for computation of Energy Charge Rate to be aligned as per approval by Central Commission in Petition No. 374/MP/2018 (Para 23.64)
- d. **Clause 3.2.4 (I)** -Withdrawal of tolerance of 10% above HBA derived price while working out FOB cost of coal (Paras 23.18,23.66)
- e. **Clause 3.2.4 (I)** - Removal of Transit Loss (upto 0.2%) and Other Charges (upto 3% of CIF) - (Para 23.25,24)
- f. **Clause 3.2.4 (II)(a)** - HBA Index Ceiling Price reduced to USD 90 / MT from USD 110 / MT. Review of ceiling only with approval of Hon'ble Commission- (Para 23.29,23.67,24.1)
- g. **Clause 3.2.4 (II)** - Adhering to International Competitive Bidding Process for coal tie up at best available rates and adoption of best / lower of Indices for the country of origin of coal for working out energy charge and approval of the Commission for the price discovered (Para 23.12)
- h. **Clause 3.2.5** - Incentive for plant availability above 90% instead of 85% (Para 23.8, 24.3)
- i. **Clause 3.5** - Extension of the terms of PPA shall be with approval of the Hon'ble Commission(Para 24.5)



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In addition to above Hon'ble Commission had also approved the following clauses filed by Petitioner by way of addendum to the SPPA dated 01.03.2019

- a. **Clause - 3.8 & 3.9** - Absorption of past period losses by Project Developers (Paras 24.10,24.12)
 - b. **Clause 3.9** -Withdrawal of all pending claims and litigations by the Respondent No. 1 towards past period. (Para 24.10,24.12)
5. Further the Hon'ble Commission had also directed the parties to incorporate following in the modified SPPA (Para 25.1)

“Any change in the ownership of the Respondent's Power plant shall only be done with the prior intimation of any such move and approval of the Government of Gujarat and this Commission.”

6. It is submitted that aggrieved by the decision dated 27.04.2020, the Respondent No. 1 had filed an Appeal being Appeal No 108 of 2020 before the Hon'ble Appellate Tribunal for Electricity. However the said Appeal has been subsequently withdrawn by the Respondent No. 1 as detailed herein below.
7. It is submitted that subsequent to the above Order dated 27.04.2020, the Energy and Petrochemical Dept., Government of Gujarat vide letter dated 12.06.2020 has conveyed that the issue related to uniform implementation of Supplemental PPAs with imported coal based power projects located in Gujarat has been examined and Government of Gujarat vide G.R. CGP-12-2018-166-K dated 12.06.2020 has decided that the earlier G.R. dated 01.12.2018 stands revoked for all intents and purposes since the objective and purpose for which the G.R. dated 1.12.2018 was resolved is not being achieved. Further, Government of Gujarat in its letter dated 12.06.2020 had given detailed guidelines regarding further course of action regarding signing of SPPA with Respondent No. 1. The relevant part of the letter dated 12.06.2020 is as under :

“.....

2. In this regard, after careful consideration, State Government has decided, as follows:

- (i) *To revoke the GR dated 1.12.2018 for all intent and purposes.*



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(ii) The matter of signing of supplemental PPA(s) with EPGL and CGPL shall be decided on case to case basis by the Government and as per terms & conditions decided hereafter:

- a. Supplemental PPA with EPGL shall be signed with modified terms and conditions as per the GERC order dated 27.04.2020 and as per terms & conditions decided hereunder at para 2 (iii) of this letter.
- b. GUVNL shall submit the draft Supplemental PPA with CGPL separately for approval of state Government. All the modifications made in Supplemental PPA with M/s. EPGL shall be appropriately incorporated in the Supplemental PPA with M/s. CGPL and shall be submitted to the Government for approval before signing. However, in no case, supply of power to state of Gujarat by CGPL shall be at higher tariff than the tariff charged to other procurer states. Moreover, the supplemental PPA shall be effective from the date of order of CERC approving supplemental PPA. CGPL shall share 100% of mining profit towards coal utilization at power project. However, in case the coal from stipulated mines is not transferred or less transferred to the power plant and is sold outside, the profit is to be shared equivalent to energy supplied under PPA considering coal supplied to power plant as well as coal sold outside. In any case, the mining profit will be minimum 15 paise / unit. Further, fixed cost shall be reduced by 20 paise / unit to extent of normative availability of 80% towards lenders contribution as recommended in HPC report.

(iii) For the payment of actual fuel cost in energy charges, the FOB price of coal to be considered as lower of (i) Actual (ii) HBA Index derived price as per formula given by Indonesian Government for Quality of coal consumed (iii) Index published by Argus / Coalindo as applicable for quality of coal consumed (iv) Index published by S&P Global plats as applicable for quality of coal consumed (v) Lowest Index of the country of origin as application for quality of coal consumed.



The ceiling of HBA Index of 110 USD per Metric ton as recommended in HPC report is reduced to 90 USD per Metric ton.

Further, project developers shall procure coal through competitive bidding to ensure fair price discovery in line with market trend and also make available the invoices for the actual cost at which the imported coal is purchased from mining Company from the country of origin of coal.

For the payment of actual fuel cost in energy charges, other charges shall be allowed as under:

a.

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b. Whereas in case of EPGL these charges shall be lower of actual or per Annexure -I

(iv) The above decision shall be effective notwithstanding any pending proceedings before Hon'ble CERC or GERC.

.....
3. Accordingly, GUVNL is hereby directed to draft the supplemental PPAs with EPGL & CGPL consistent with the above decision and same shall be sent to State government for approval on cases basis.
.....”

Copies of the Government of Gujarat G.R. dated 12.06.2020 and the letter dated 12.06.2020 are attached hereto and marked as Annexure C (Colly).

8. That the modifications as per the decision of the Hon'ble Commission dated 27.04.2020 and further the Guidelines by Government of Gujarat dated 12.06.2020 was incorporated in the revised draft SPPA. The Petitioner vide letter dated 11.11.2020 forwarded modified draft of SPPA and requested Respondent No. 1 to convey its consent to the draft SPPA so that the Petitioner may proceed further for seeking approvals.

9. That Respondent No. 1 vide letter dated 25.01.2021 has conveyed willingness to execute the modified SPPA with following two suggested modifications:

1. Effective date of SPPA being the date on which the Hon'ble Commission approves the SPPA.
2. Untied power offered to Procurer (GUVNL) to be increased from 100 MW to 122 MW.

Copy of Respondent No. 1 letter dated 15.01.2021 is attached hereto and marked as Annexure D.

10. That the SPPA was submitted to the Government of Gujarat. Government of Gujarat vide G.R. dated 05.06.2021 accorded approval to the signing of modified SPPA between Petitioner and Respondent No. 1 in accordance with the Order dated 27.04.2020 passed by this Hon'ble Commission and Government Guidelines dated 12.06.2020 with the following modifications:



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1. Effective Date of Supplemental PPA (SPPA) with EPGL shall be from the date of approval of revised SPPA by Hon'ble Commission and the revised SPPA shall be signed incorporating the terms and conditions mentioned in Order dated 27.04.2020 passed by the Hon'ble Commission and Government of Gujarat Guidelines dated 12.06.2020.
2. In order to limit the impact of coal price on tariff in the interest of consumers, it was decided that HBA Index Ceiling Price under SPPA of USD 90 / MT (HBA Indonesia Index) shall not be subject to further revision without prior approval of State Government and Hon'ble Commission.
3. The 122 MW untied capacity from Respondent No 1's project shall be tied up under SPPA by GUVNL.

A copy of Government of Gujarat G.R. dated 05.06.2021 is attached hereto and marked as **Annexure E**.

11. It is submitted that Respondent No. 1 vide its letter dated 14.07.2021 has informed that Hon'ble Appellate Tribunal vide order dated 25.06.2021 has disposed the Appeal No. 108 of 2020 filed by Respondent No. 1 against the Order dated 27.04.2020 as withdrawn. Copy of Order dated 25.06.2021 passed by the Hon'ble Appellate Tribunal and the Letter dated 14.07.2021 by the Respondent No.1 are attached hereto and marked as **Annexure F (Colly)**.

12. Accordingly, in view of modifications directed by the Hon'ble Commission vide Order dated 27.04.2020, Government of Gujarat Guidelines and GR dated 12.06.2020 and Government of Gujarat G.R. dated 05.06.2021, the Petitioner and the Respondent No. 1 have mutually agreed and signed amended and modified Supplemental PPA in substitution of the earlier signed Supplemental PPA dated 01.03.2019. The salient features of the modified Supplemental PPA are as follows:

- i. **Clause 3.1 (II) - Effective Date:** The Amendment Effective Date shall be from the dated of approval revised SPPA by Hon'ble Commission.

(As per Government GR dated 05.06.2021)



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- ii. **Clause 3.2.3 & 3.5.3** - Gross Station Heat Rate: Lower of actual or Gross station heat rate of 2262 in kCal per kWh as approved by Hon'ble Commission in Petition no. 1296/2013

(As per Order dated 27.04.2020 - Paras 23.9 & 23.64)

- iii. **Deleted from clause 3.2.4 (I)** -The Petitioner and Respondent No 1 have agreed to modify the provision related to FoB cost of coal and withdraw the maximum tolerance allowed @ 10% above HBA price.

(As per Order dated 27.04.2020 -Paras 23.18 and 23.66)

- iv. **Clause 3.2.4 (I)** - For determination of equivalent Coal Price for working out Landed Cost of imported coal for the Month, the lowest of following for the month shall be considered:

- a) Actual FOB price of consignment
- b) HBA price worked as per formula stated in Annexure-A for billed GCV
- c) Index notified by Argus / Coalindo applicable for the quality of coal consumed
- d) Index notified by S&P Global Platts applicable for the quality of coal consumed
- e) Lowest Index of the country of origin applicable for the quality of coal consumed

(As per Government Letter dated. 12.06.2020)

For the coal procured having the GCV as published by above indices, the notified index price will be directly considered.

The coal index for the coal consumed other than for the coal in the pre-determined GCV range as notified by above indices shall be arrived as follows:



- (i) For the coal consumed having GCV within range of ± 200 Kcal / Kg from GCV of above notified index, the rate shall be worked out on proportionate basis considering the nearest notified monthly index and
- (ii) For the coal consumed other than above category, the rate shall be worked out considering weighted average

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price of the notified monthly index within which the GCV of consumed coal is falling to arrive at the equivalent coal price for the GCV of consumed coal.

(Methodology for calculation)

- v. **Deleted from Clause 3.2.4 (I)** - Provision related to Transit Loss @ 0.02% and Other Charges @ 3% of CIF have been deleted.

(As per Order dated 27.04.2020 - Paras 23.25 & 24)

- vi. **Clause 3.2.4 (III)(iii) & 3.2.4 (II)(d)**- The Respondent No. 1 shall make available the invoices for the actual cost of coal purchased from mining company from country of origin.

(As per Government GR dated 12.06.2020)

- vii. **Clause 3.2.4 (II)(a)** - Ceiling of HBA Index is reduced from 110 USD / MT to 90 USD / MT for 6322 Kcal / Kg GCV coal. The ceiling shall not be subject to further revision without prior approval of State Government and Hon'ble GERC.

(As per Order dated 27.04.2021- Paras 23.29 & 23.67 and Government GR dated 05.06.2021)

- viii. **Clause 3.2.4 (II)(c)**- The Respondent No. 1 shall seek approval of Petitioner for Tender document and price discovered under competitive bidding process shall also be approved by Petitioner and Hon'ble Commission. In absence of above, the procurement of coal shall not qualify for payment of energy charges under Supplemental PPA.

(As per Order dated 27.04.2020 - Para 23.12)

- ix. **Clause 3.2.5** - Incentive for availability declaration above Normative Availability of 85% as per PPA dated 26.02.2007 has been modified and shall be applicable for declaration above 90% availability.

(As per Order dated 27.04.2020 - Paras 23.8 & 24.3)

- x. **Clause 3.5.1** - Extension in term of the PPA shall be with approval of Appropriate Commission

(As per Order dated 27.04.2020 - Para 24.5)

- xi. **Clause 3.8** - The Respondent No. 1 shall bear the losses for prior period i.e. before implementation of this Supplemental Agreement.



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Further, the Respondent shall not raise any claim / dispute with regard to past period items before any Forum / Court in the future.

(As per Order dated 27.04.2020 - Para 24.10)

- xii. **Clause 3.9** - The Respondent No. 1 shall unconditionally withdraw all pending cases / litigations / waive claims against the Petitioner (other than Change in Law in India) before various Forums in lieu of the relief granted vide Government of Gujarat G.R. dated 1.12.2018 towards pass through of actual fuel cost read with Order dated 27.04.2020 passed by this Hon'ble commission. Only the cases / litigations filed by the Petitioner which are under adjudication shall be considered upon decision by appropriate forum / Court to extent of Petitioner's prayer in the matter.

(As per Order dated 27.04.2020 - Para 24.12)

- xiii. **Clause 3.4** - Tie up of Additional Capacity being 122 MW untied capacity of Respondent No. 1.

(As per Government GR dated 05.06.2021 - Earlier 100 MW approved by Order dated 27.04.2020)

- xiv. **Clause 3.10** - Any change in the ownership of the Respondent No. 1 shall only be done with the prior intimation of any such move and after approval of the Government of Gujarat and Hon'ble Commission.

(As per Order dated 27.04.2020 - Para 25.1)



Copy of the modified Supplemental PPA dated 12.08.2021 signed by both the parties are attached herewith and marked as **Annexure G**.

12. In view of the facts and circumstances of the present case, the Petitioner most respectfully prays that this Hon'ble Commission may be pleased to:

- a) Allow the present Petition and take on record the Government of Gujarat GR and Letter dated 12.06.2020 and Government of Gujarat G.R. dated 05.06.2021;
- b) Approve the modified Supplemental PPA dated 12.08.2021 to amendment in the PPA dated 26.02.2007 duly executed between the Petitioner and the Respondent No. 1; and

- c) Pass any such further orders as deemed fit in the facts and circumstances of the case.


PETITIONER

Place: Vadodara

Dated: 23.08.2021



**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION AT
GANDHINAGAR**

PETITION NO 1807 of 2019

IN THE MATTER OF:

Petition under Sections 86 (1)(b) and 86(1)(f) of the Electricity Act, 2003 for approval of amendments to the PPA between Gujarat Urja Vikas Nigam Ltd. and Essar Power Gujarat Ltd. by way of Supplemental PPA dated 12.08.2021 pursuant to the Order dated 27.04.2020 and Government of Gujarat GR and Letter dated 12.06.2020 and Government of Gujarat GR dated 05.06.2021.

AND

IN THE MATTER OF:

Gujarat Urja Vikas Nigam Limited

- **Petitioner**

Versus

M/s Essar Power Gujarat Ltd.

- **Respondent & Others**

Sr. No. 18696
Date: 23/08/2021
AFFIDAVIT

I, Vipul L Lathiya son of Sh. Lallubhai G Lathiya aged about 32 years resident of Vadodara hereby solemnly affirm and state as under:

1. I am the Deputy Engineer of the Petitioner and I am fully conversant with the facts of the case and able to depose to the present affidavit.

I have gone through the contents of the accompanying petition and I say that the facts stated therein are based on the records of the Petitioner Company and believed by the deponent to be true.

3. The Annexures to the petition are true copies of their originals.



Vipul L Lathiya
DEPONENT

VERIFICATION:

I, the deponent above named do hereby verify that the contents of my above affidavit are true to my knowledge, no part of it is false and nothing material has been concealed there from.

Verified at Vadodara on this 23rd day of August 2021.

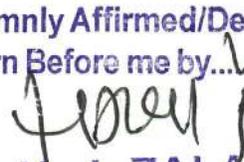

DEPONENT



My Commission Expires
on 04/07/2023



Solemnly Affirmed/Declared
Sworn Before me by.....


H. J. ZALA
NOTARY (Govt. of India)

V L Kathiyas

'Seller' or "EPGL" which expression shall unless repugnant to the context or meaning thereof include its successors and assigns) as Party of the first part;

AND

M/s Gujarat Urja Vikas Nigam Limited, (GUVNL) a Government of Gujarat Undertaking and a Company incorporated under the Companies Act, 1956 having its registered office at Sardar Patel Vidyut Bhavan, Vadodara (hereinafter referred to as 'Procurer' which expression shall unless repugnant to the context or meaning thereof include its successors and assigns) as Party of the second part

Each of the "Procurer" and "the "Seller" are individually referred to as "Party" and collectively as the "Parties"

Whereas:

- A. The Seller and the Procurer had executed a Power Purchase Agreement dated 26.2.2007, as amended by Assignment Agreement dated 25.11.2008 and Supplemental Power Purchase Agreement dated 16.10.2009 (hereinafter referred to as the "PPA"), for the sale and purchase of electricity in accordance with the terms and conditions contained therein;
- B. The promulgation of Indonesian regulations relating to the pricing mechanism of coal and resultant financial implication of the same on cost of generation of power by the power projects based on imported Indonesian coal, led to the inability of the power generators, including the Seller herein, to continue to operate their power generation projects on a sustainable basis. As a consequence of the inability of the Seller to generate and supply power on a sustainable basis, the Procurer State, faced power shortage and was required to procure power from alternate sources at higher cost/rates. Thus, due to the prevailing conditions the consumers of the State are put to pay much higher cost of power. In this background and consequent to the diverse background facts and events, as more particularly described in the Government of Gujarat Resolution No. CGP-12-2018-166-K dated 03-07-2018 (hereinafter referred to as "the GR"), the imported Indonesian coal based power generation projects encountered financial stress and losses and were unable to sustain power generation from the projects;
- C. In order to resolve these issues, the Government of Gujarat, vide Government Resolution No. CGP-12-2018-166-K dated 3.07.2018 constituted a High Power



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Committee to, inter alia, suggest sustainable solutions for reviving the power generation projects based in the state of Gujarat and based on imported Indonesian coal as fuel;

- D. The High Power Committee submitted its Report on 3.10.2018 making certain recommendations for resolving the said issues;
- E. The Government of the State of Gujarat accepted the recommendations of the High Power Committee with certain modifications and decided to implement the same, and consequently, issued its policy directions contained in Resolution No. CGP-12-2018-166-K dated 1.12.2018 (Hereinafter referred to as "the Implementation Policy");
- F. The implementation of the said policy directions contained in the Implementation Policy require, inter alia, carrying out certain amendments to the PPA, and obtaining necessary approvals for these amendments, from the Appropriate Commission;
- G. Article 18.1 of the PPA enables the Parties to amend the provisions of the PPA by written agreement and subject to the approval of the Appropriate Commission.

NOW THEREFORE, in consideration of the premises, mutual agreements, covenants and conditions set forth in this Supplemental Agreement, it is hereby agreed by and between the Parties as follows:

1. All capitalized terms, unless specifically defined in this Supplemental Agreement, shall have the meanings ascribed to them in the PPA.
2. With the execution of this Supplemental Agreement, all relevant Articles of the Power Purchase Agreement in respect of the matters covered in this Supplemental Agreement, shall stand amended, modified and/or replaced to the extent provided in this Supplemental Agreement and in the event of any conflict in the interpretation between the clauses of the PPA and this Supplemental Agreement, or in the application of any provision of the PPA or this Supplemental Agreement, then the provisions of this Supplemental Agreement shall prevail. Except as amended, modified and/or replaced



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hereunder, all other terms and conditions of the PPA shall continue to apply and shall remain unchanged.

3. The Parties agree as follows:

3.1 The following definitions shall be added:

(i) Article 1.1 of the PPA shall be amended as follows:

"Affiliate" with respect to any specified person shall mean any other person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified person and, in relation to a natural person, includes any "Relative" (as such expression is defined in the Companies Act, 2013) of such natural person. The expression "control" shall have the meaning ascribed to the term in the Companies Act, 2013 and the terms "controlling" and "controlled" shall be construed accordingly.

(ii) **"Amendment Effective Date"** shall be October 15, 2018, i.e. the date with effect from which, this Supplemental Agreement shall become effective and binding upon the Parties.

(iii) **"Tariff Regulations"** shall mean the regulations of the Gujarat Electricity Regulatory Commission specifying the terms and conditions for determination of tariff, as applicable at the time of COD of the Project.

3.2 All provisions in the PPA relating to determination of Capacity Charge & Energy Charge, shall be replaced and substituted with the following provisions.

3.2.1 Notwithstanding anything to the contrary contained in the PPA, the Seller shall, with effect from the Amendment Effective Date, be entitled to receive, and the Procurer shall be liable to pay, Revised Tariff determined in accordance with the provisions hereinafter contained, with respect to the sale and supply of electricity under and in terms of the PPA.

"Revised Tariff" shall mean the sum total of Energy Charge and Capacity Charge.

"Capacity Charge" shall mean the Capacity Charge determined in accordance with Clause 3.2.2 of this Supplemental Agreement



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“Energy Charge” shall mean the energy charge determined in accordance with clause 3.2.3 of this Supplemental Agreement.

“Exchange Rate” shall mean the simple average of State Bank of India TT Selling rate for last 15 days prior to 1st day of the Month of power supply.

3.2.2 Capacity Charge for each Month shall be the Quoted Capacity Charge (Sum of Quoted Non Escalable Capacity Charge and Quoted Escalable Capacity Charge) mentioned at Schedule 10 of PPA dated 26.02.2007 less 20 paise/kwh applicable upto Normative Availability of 80%. The Monthly Capacity Charge payment shall be made in accordance with Schedule 6 of PPA dated 26.02.2007. This Capacity Charge shall be subject to reduction towards penalty for declaration of Availability lower than 90% as per Clause No. 3.2.5 of this Supplemental Agreement in addition to the Contract Year Penalty for Availability below 75%. as per PPA dated 26.02.2007.

3.2.3 Energy Charge shall be determined for each Month, as under:

(Energy charge rate in Rs./kWh) x {Scheduled energy (ex-bus) for the Month in kWh.}

Energy charge rate (ECR) in Rupees per kWh on ex-power plant basis shall be determined to four decimal places in accordance with the following formulae:

$$ECR = \{GHR \times LPPF / CVPF\} \times 100 / (100 - AUX)$$

Where:

AUX = Lower of actual or normative auxiliary energy consumption as specified in the Tariff Regulations as defined herein.i.e. 6.50%

CVPF (as received basis) = Weighted Average Gross calorific value of coal in Kcal / Kg on as billed basis minus lower of (i) actual difference between GCV at loading port and unloading port or (ii) 72 Kcal / Kg towards loss of heat during transportation as per ISO 1928 (dated 01.06.2009)

ECR = Energy charge rate, in Rupees per kWh sent out.



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GHR = Lower of actual or Gross station heat rate of 2333 in kCal per kWh as specified in the Tariff Regulations as defined herein.

LPPF = Weighted average landed price at the plant site of coal as primary fuel (which for the avoidance of doubt shall include all taxes on the sale, transportation & import of coal and inland transportation costs for transporting and delivering coal to the plant site), in Rupees per kg, during the relevant Month. LPPF shall be worked out as per table in Clause 3.2.4 of this Supplemental Agreement.

The operational parameters viz. "AUX" & "GHR" considered for computation of Energy Charge Rate shall be aligned as per CERC approval in Petition No. 374/MP/2018.

3.2.4 The Energy Charge determined as above, shall be subject to the following conditions:

(I) General Principles for determination of LPPF:

<p>FOB cost of Coal</p>	<p><u>FOB Price for Imported Coal:</u></p> <p>Shall be the lower of actual price or the HBA Price (as defined hereinafter) determined in Indian Rupees at Exchange Rate. In case of change in pricing framework in Indonesia or change in source of coal to other country, HBA Price will be replaced with relevant coal indices as mutually agreed.</p> <p>"HBA Index" shall mean the FOB Price of Indonesian imported coal having 6322 kcal/kg Gross Calorific Value in USD / MT notified by Govt of Indonesia on monthly basis</p> <p>"HBA Price" shall mean the HBA Index FOB price of Indonesian imported coal published by Govt of Indonesia from time to time for coal quality of 6322 Kcal/Kg, as adjusted for GCV (as billed) of coal consignment consumed in the Project as per the formula as stated in Annexure-A. Further, tolerance of maximum 10% over HBA price</p>
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derived for a quality of coal shall be allowed. HBA price + maximum 10% tolerance shall not be higher than HBA coal price worked out on proportionate basis with reference to HBA Index. This tolerance of 10% of HBA price shall not be allowed for coal procured from mines owned by Seller / its Affiliates.

The actual FOB price of coal shall always be subject to an upper ceiling limit of HBA Index of USD 110/MT for 6322 Kcal / Kg ascertained on a monthly basis, adjusted for quality of coal (GCV as billed) in the Project and as revised from time to time in accordance with this Supplemental Agreement (the "Ceiling Price"). This has been explained in greater detail in sub para (II) Specific Conditions herein below.

Illustration: For determination of equivalent Coal Price for working out Landed Cost of imported coal for the Month:

The lower of following for the month shall be considered:

- (a) Actual FOB price of consignment
- (b) HBA price worked as per formula for billed GCV plus maximum 10% tolerance on HBA price (10% tolerance not allowed for coal procured from mines owned by Seller / its Affiliate)
- (c) HBA price worked out on proportionate basis with reference to HBA Index for 6322 GCV coal

Note: HBA price for billed GCV shall be worked out (on proportionate basis and as per formula) considering ceiling of HBA Index of USD 110 / MT or as revised as per sub para (II) Specific Conditions of this Supplemental Agreement



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Transportation and other costs	<p>Ocean Freight & Insurance</p> <p>The ocean freight and insurance shall be lower of actual or as stated in Annexure – B and calculated in Indian Rupees, at Exchange Rate. (Column (c) & (d) in Table I & II respectively of Annexure-B)</p> <p>Port / Fuel Handling Charges:</p> <p>The Port / Fuel Handling charges shall be lower of actual or as stated in Annexure – B (Column (e) & (f) in Table I)</p> <p>Transit Losses:</p> <p>Actual or 0.2%, whichever is lower</p> <p>Other Charges (Sampling, Inspection, Customs clearance and Forwarding Agency charge):</p> <p>Actual or 3% of CIF, whichever is lower – Seller to tie up services (Sampling, Inspection, Customs clearance and Forwarding Agency charge) through competitive bidding with approval of tender documents from Procurer & seek approval of discovered rate from Procurer</p>
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(II) Specific Conditions

- (a) The Ceiling Price for HBA Index will be fixed for 5 years at a time, with the first 5 year period commencing from the Amendment Effective Date and the last such 5 year period ending on the Expiry Date even if the last period is less than 5 years. The Ceiling Price will be reset and recalibrated for the next five year period, as per the following methodology:
- (i) If the HBA Price at any time during the relevant 5 year period, exceeds the Ceiling Price specified for the said relevant 5 year period, then the Ceiling Price for the subsequent 5 year period will be increased by a percentage factor equivalent to the percentage increase in domestic CIL coal price (FOR) for linkage coal (Average price of G – 7 to G – 14 grade of coal used for power generation), during the corresponding 5 year period. The principle is that the imported coal Ceiling Price should move in tandem with domestic coal price increase.



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- (ii) If the HBA Price does not at any time during the relevant 5 year period, exceed the Ceiling Price specified for the said relevant 5 year period, however, if the average HBA Price during the relevant five year period is higher than the average HBA Price during the immediately preceding five year period, the Ceiling Price for the relevant 5 year period shall be increased by a percentage factor equivalent to the lower of:
- (x) the percentage increase in domestic CIL coal price (FOR) for linkage coal (Average price of G – 7 to G – 14 grade of coal used for power generation), during the 5 year period corresponding with the relevant 5 year period; or
 - (y) escalation in the HBA Index over the relevant 5 year period

For the avoidance of doubt, for the first 5 year period commencing from the Amendment Effective Date, the aforesaid comparison of average HBA Price shall be done for the immediately preceding five year period prior to the Amendment Effective Date.

If during the relevant 5 year period, none of the conditions specified in paragraphs (i) or (ii) above are attracted, then the Ceiling Price for the subsequent 5 year period shall remain unchanged

- (b) Seller agrees that in case HBA Index of Indonesian coal exceeds 110 USD/MT or Revised Ceiling Price as determined every 5 years, Seller shall bear the differential cost and continue to supply power under the PPA & Supplemental Agreement
- (c) Seller shall procure imported coal only through competitive bidding process after seeking approval of Procurer for Tender document and shall also seek approval of rate discovered from Procurer.

(III) Methodology for Merit Order Scheduling & Billing

- (i) The Seller will, on the last working day of each Month, submit to the Procurer the anticipated Energy Charges for the subsequent Month. The anticipated Energy Charge will be based on the estimated cost of Indonesian imported coal procurement for subsequent Month.

- (ii) Deleted



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- (iii) At the end of each Month, the Bills by the Seller will be based on the Capacity Charge and Energy Charge respectively determined as per paragraphs 3.2.2 and 3.2.3 above.

The Seller has to provide the following documents along with the monthly bill:

1. Auditors certificate for each shipment in terms of value and quantity for coal received, consumed for the previous month,
 2. Invoices of fuel supplier, ocean freight and insurance, port / fuel handling charges and other charges.
 3. Copy of Bill of Entry and bank challans regarding payment of cess, taxes and duties.
 4. GCV certificate of loading and unloading port
 5. Certificate for actual parameters GHR & Auxiliary consumption for the month
- (iv) The payment of the Monthly Bill and Supplementary Bill shall be as per the Tariff specified under PPA dated 26.02.2007 until the approval of the Supplemental Agreement by Appropriate Commission. Differential amount towards Revised Tariff shall be payable after approval of Appropriate Commission without any interest / carrying cost / delay payment surcharge.
- (v) For the Monthly Bills, no rebate shall be available on Energy Charge component while rebate shall be available to Procurer for Capacity Charge component as per the existing provisions of the PPA. It is to clarify that this clause shall be effective for the Monthly Bills submitted after the approval of Appropriate Commission. Further, the Delay Payment Surcharge shall continue to apply as per provisions of PPA dated 26.02.2007.
- (vi) Further, the Seller shall not be entitled to any payment towards approved Change in Law for the Energy Charge from the date of approval of Supplemental Agreement by Appropriate Commission. Any payment received by the Seller towards approved Change in Law for the Energy Charge component for the period between Amendment Effective Date and the date of approval by the Appropriate Commission shall be adjusted in the differential amount stated at Para (iv) above.



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3.2.5 Availability: The Parties agree that the payment of Capacity Charges linked to Availability shall be modified, as specified below, in order to provide the Procurer the benefit of higher Availability upto 90%, beyond the Normative Availability of 80% as specified in the PPA, without Procurer having to pay Capacity Charge for such higher Availability. The Parties agree that the Seller shall maximize the utilization of the generation capacity from the Project, in the manner specified below:

- (a) The Seller shall declare availability up to 90% in a Contract Year. However, the Capacity Charge shall continue to be paid corresponding to Normative Availability of 80%, as specified in the PPA on achievement of cumulative Availability of 80% in a Contract Year. Further, in the event the cumulative Availability in any Contract Year is less than 80%, then the provisions of the PPA shall apply in respect of determination of the Capacity Charge payable to the Seller in addition to the reduction specified in sub clause (b) below.
- (b) In the event the cumulative Availability in any Contract Year is less than 90%, the Capacity Charge payable to the Seller, shall be reduced by 10% of Capacity Charges otherwise payable to the Seller. This is explained by way of illustration below:

Illustration for computing additional penalty below 90% Availability declaration

	Actual DC 82%	Actual DC 76%
PPA Capacity	1,000 MW	1,000 MW
Normative Availability	80%	80%
Capacity Charges	1.00 Rs/kWh	1.00 Rs/kWh
Normative Units	7008 Mus	7008 Mus
Actual Availability	82%	76%
Actual Units	7183 Mus	6658 Mus
Shortfall in availability compared to revised 90%	8% (701 MUs)	14% (1226 MUs)
Penalty for shortfall in 90% (10% of Capacity Charges)	Rs 0.10 / kWh (1 Rs x 10%)	Rs 0.10 / kWh (1 Rs x 10%)
Penalty Amount	Rs 7.01 crore	Rs 12.26 crore
Yearly Capacity Charges	Rs 700.8crore (7008 MUs x 1 Rs)	Rs 665.8 crore (6658 MUs x 1 Rs)
Less: Penalty	Rs. 7.01 Crore	Rs. 12.26 Crore
Net of Penalty Payment	Rs. 693.79 Crore	Rs. 653.54 Crore



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For avoidance of doubt, it is clarified that for all other purposes, the Normative Availability shall continue to be 80%, as specified in the PPA. It is further clarified that for the purposes of determining the Incentives under the PPA on account of Schedule being higher than Normative Availability, the Normative Availability shall continue to be reckoned at 80% as per existing PPA. It is further clarified that the Incentives for availability in excess of 85% and provisions relating to penalty for declaration of Availability below 75% during Contract Year shall also continue to apply in accordance with the provisions of existing PPA

3.3 Deleted:

3.4 **Untied Capacity offered to Procurer**

3.4.1 The Seller is having 100 MW untied capacity (hereinafter referred to as "Additional Contracted Capacity") from Units 1–2 (each of 600 MW) and Seller is willing to supply the same to the Procurer and the Procurer agrees to purchase the same for the period from the date of approval of this Supplemental Agreement by the Appropriate Commission to the 25th Anniversary of the Commercial Operation Date of Unit No. 2 and the Contracted Capacity under the PPA shall stand increased by such Additional Contracted Capacity.

3.4.2 The tariff applicable for the Additional Contracted Capacity shall be worked out as under:

"Tariff for Additional Contracted Capacity" shall mean the sum total of Energy Charge for Additional Contracted Capacity and Capacity Charge for Additional Contracted Capacity.

"Energy Charge for Additional Contracted Capacity" shall mean the energy charge determined in accordance with Clause 3.5.3 of this Supplemental Agreement.

"Capacity Charge for Additional Contracted Capacity" shall be Rs. 0.9017 / Kwh being the levelised Capacity Charge for the balance Term of PPA dated 26.02.2007.



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For the avoidance of doubt, the Capacity Charge for Additional Contracted Capacity shall not be subject to discount of Rs 0.20/Kwh as specified in Clause 3.3 of this Agreement.

- 3.4.3 Seller shall be required to declare single Availability for the Project (Unit 1-2) complying with Article 8 & 9 of the PPA dated 26.02.2007. SLDC, Gujarat shall allocate such Availability on proportionate basis between the Contracted Capacity of 1000 MW, Additional Contracted Capacity of 100 MW & 22 MW merchant capacity. SLDC Gujarat shall schedule Energy from the Project from above respective Capacity by adhering to Merit Order Protocol. SLDC, Gujarat shall separately certify the Availability as well as Scheduled Energy from the above Capacity. Seller shall have to ensure establishment of Proportionate Availability as per Article 9.4 of PPA dated 26.02.2007 and in case of failure, shall be subject to penalty as per Article 9.4.
- 3.4.4 Procurer shall make payment to the Seller for the Additional Contracted Capacity as per the provision of PPA dated 26.02.2007 read together with this Supplemental Agreement.
- 3.4.5 For the Additional Contracted Capacity, all other terms & conditions shall be applicable as per PPA dated 26.02.2007.

3.5 **Extension of Term of the PPA**

- 3.5.1 The Procurer shall have the right, but not the obligation, to extend the Term of the PPA by ten (10) years for the Contracted Capacity ("Extension Period"), such extension to be effected by issue of a notice by the Procurer to the Seller, stating its decision to extend the PPA for the Contracted Capacity for such period of ten years, and such notice shall be issued not later than five (5) years prior to the Expiry Date of the PPA. For the avoidance of doubt, any extension for a period other than 10 years, as above, shall be with the mutual consent of the Parties.
- 3.5.2 The Parties agree that the extension of the PPA as aforesaid, shall be on the same terms and conditions as contained in the PPA, subject to the following conditions in relation to the Extension Period



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3.5.3 For the Extension Period, the Tariff shall be determined as follows:

“Extended Term Tariff” shall mean the sum total of Energy Charge & Capacity Charge as worked out for the Extended Term

Where :

“Capacity Charge for Extended Term” shall mean the Quoted Capacity Charge as specified in the PPA, as applicable for the last Contract Year (falling prior to the Expiry Date). Furthermore, such Quoted Capacity Charge applicable for the last Contract Year as above, shall be increased to factor for additional costs, if any, incurred or to be incurred by the Seller for renovation and modernisation of the Project, and also for the consequential increase in O&M expenses. Such increase in Quoted Capacity Charge shall be determined & approved by GERC in accordance with the applicable GERC Tariff Regulations prevailing then; and

“Energy Charge for Extended Term” shall be determined for each Month of the Extension Period, as under:

Energy Charge payable to the Seller for a Month shall be:

(Energy charge rate in Rs./kWh) x {Scheduled energy (ex-bus) for the Month in kWh.}

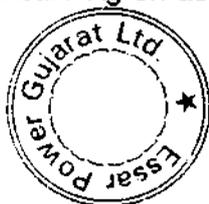
Energy charge rate (ECR) in Rupees per kWh on ex-power plant basis shall be determined to four decimal places in accordance with the following formulae:

$$ECR = \{GHR \times LPPF / CVPF\} \times 100 / (100 - AUX)$$

Where :

AUX = Lower of actual or normative auxiliary energy consumption as specified in the Tariff Regulations as defined herein.i.e. 6.50%

CVPF (as received basis) = Weighted Average Gross calorific value of coal in Kcal / Kg on as billed basis minus lower of (i) actual difference between GCV



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at loading port and unloading port or (ii) 72 Kcal / Kg towards loss of heat during transportation as per ISO 1928 (dated 01.06.2009)

ECR = Energy charge rate, in Rupees per kWh sent out.

GHR = Lower of actual or Gross station heat rate of 2333 in kCal per kWh as specified in the Tariff Regulations as defined herein.

LPPF = Weighted average landed price at the plant site of coal as primary fuel (which for the avoidance of doubt shall include all taxes on the sale, transportation & import of coal and inland transportation costs for transporting and delivering coal to the plant site), in Rupees per kg, during the relevant Month. LPPF shall be worked out as per table in Clause 3.2.4 of this Supplemental Agreement.

The operational parameters viz. "AUX" & "GHR" considered for computation of Energy Charge Rate shall be aligned as per CERC approval in Petition No. 374/MP/2018.

For the avoidance of doubt, the Capacity Charge for Extended Term shall not be subject to adjustment towards Rs 0.20 / Kwh as specified in Clause 3.3 of this Supplemental Agreement.

- 3.6 Notwithstanding anything to the contrary contained in the PPA, it is agreed between Parties that in the 10th Contract Year from the date of signing of this Supplemental Agreement, if Seller's Energy Charges for respective Contracted Capacity under this Supplemental Agreement is higher than marginal coal based thermal power stations having 50% schedule or immediate below, as the case may be, during the previous Contract Year under Merit Order of Procurer, Procurer shall have a right to terminate the PPA & Supplemental Agreement for the Contracted Capacity and / or Additional Contracted Capacity as defined above. In the event of termination pursuant to this clause, neither Party shall be liable for any damages or penalty of any kind to the other Party.
- 3.7 It is clarified that the provisions dealing with Change in Law under the PPA dated 26.02.2007 shall continue to apply including in respect of Additional Contracted Capacity. The impact of additional expenditure to be incurred towards compliance of the Ministry of Environment, Forest & Climate Change

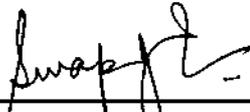
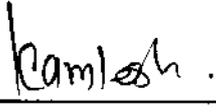
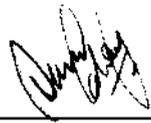
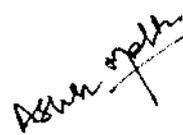
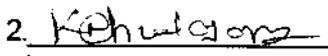


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Notification dated 7.12.2015 are not included in the tariff as per this Supplemental Agreement and any impact thereof on tariff and operational parameters shall be considered pursuant to approval of Appropriate Commission.

In Witness Whereof the Parties have executed this Third Supplemental Agreement to the Power Purchase Agreement on the date mentioned hereinabove through their duly authorized representatives.

<p>FOR AND ON BEHALF OF M/s Essar Power Gujarat Ltd. (EPGL)</p> <p> _____ Authorised Signatory SWARNIL JAIN</p>	<p>FOR AND ON BEHALF OF M/s Gujarat Urja Vikas Nigam Ltd.</p> <p> _____ Authorised Signatory</p>
<p>WITNESSES</p> <p>1.  _____ (SANDEEP SAHAY)</p> <p>2.  _____ (ASHISH MEHTA)</p>	<p>WITNESSES</p> <p>1.  _____ (S.K. Nair)</p> <p>2.  _____ (K.N. Chudasama)</p>



Annexure A

**Working Methodology for determination of equivalent Coal Price based on
HBA Index**

1. Formulae for HPB No. 1-7

$$\text{HPB Marker (i)} = (\text{HBA} * \text{K (i)} * \text{A (i)}) - (\text{B (i)} + \text{U (i)})$$

Where

HBP Marker (i) = HPB of 1 to 7 coal price markers

K (i) = Coal Heat Value (i) / 6322

A (i) = (100 - Coal Water Content (i)) / (100 - 8)

B (i) = (Coal Sulfur Content (i) - 0.8) * 4

U (i) = (Coal Ash Content (i) - 15) * 0.4

2. Formulae for Marker No. Coal Benchmark Price 8

$$\text{HPB Marker (i)} = (\text{HBA} * \text{K (i)} * \text{A (i)}) - (\text{B (i)} + \text{U (i)})$$

Where

HBP Marker (i) = HPB coal price marker 8

K (i) = Coal Heat Value (i) / 6322

A (i) = (100 - Coal Water Content (i)) / (100 - 8 / FKA (i))

FKA (i) = ((((((100-8) / (100 - Coal Water Content (i))) * Coal Water Content (i))) + (100 - 8)) / 100

B (i) = (Coal Sulfur Content (i) - 0.8) * 4

U (i) = (Coal Ash Content (i) - 15) * 0.4

3. Formulae for Price of Other Coal Benchmark No. 9 – 66

$$\text{HPB (j)} = \{(\text{HPB Price Marker (i)} + (\text{B (i)} + \text{U (i)})) * (\text{K (j)} / \text{K (i)}) * [(100 - \text{Water Content (j)}) / (100 - \text{Water Content (i)})] * [(100 - 8) / (100 - 8)]\} - (\text{B (j)} + \text{U (j)})$$

Where

HPB (j) = coal HPB other than coal Price Marker

K (i) = Coal Heat Value (i) / 6322

B (i) = (Coal Sulfur Content (i) - 0.8) * 4

U (i) = (Coal Ash Content (i) - 15) * 0.4

U (j) = (Coal Ash Content (j) - 15) * 0.4

K (j) / K (i) = Coal Calorific Value (j) / Coal Calorific Value (i)

(i) = price marker 1 – 7

(j) = batubara lain 9 – 66



4. Formulae for Price of Other Coal Benchmark No. 67 - 75 (Low Calorie Coal)

a. If TM <40%

$$\text{HPB (j)} = \{(\text{HPB Price Marker (i)} + (\text{B (i)} + \text{U (i)})) * (\text{K (j)} / \text{K (i)}) * [(100 - \text{Water Content (j)}) / (100 - \text{Water Content (i)}) * [(100 - 8 / \text{FKA (i)}) / (100 - 8 / \text{FKA (j)})] - (\text{B (j)} + \text{U (j)})]\}$$

Where

HPB (j) = coal HPB other than coal Price Marker

HPB Marker (i) = HPB coal price marker (i)

B (i) = (Coal Sulfur Content (i) - 0.8) * 4

U (i) = (Coal Ash Content (i) - 15) * 0.4

B (j) = (Coal Sulfur Content (j) - 0.8) * 4

U (j) = (Coal Ash Content (j) - 15) * 0.4

FKA (j) = (((100 Coal Water Content) / (100 - Coal Water Content (j))) * Coal Water Content (j)) + (100 - Coal Water Content) / 100

K (j) / K (i) = Coal Calorific Value (j) / Coal Calorific Value (i)

(i) = price marker 8

(j) = other coal 67 – 69

b. If TM ≥ 40%

$$\text{HPB (j)} = \{(\text{HPB Price Marker (i)} + (\text{B (i)} + \text{U (i)})) * (\text{K (j)} / \text{K (i)}) * [(100 - \text{Water Content (j)}) / (100 - \text{Water Content (i)}) * [(100 - 8 / \text{FKA (i)}) / (100 - 8 / \text{FKA (j)})]\}$$

Where

HPB (j) = coal HPB other than coal Price Marker

HPB Marker (i) = HPB coal price marker (i)

K (j) / K (i) = Coal Calorific Value (j) / Coal Calorific Value (i)

(i) = price marker 8

(j) = other coal 70 - 75

The above formula is English translation of "COAL STEAM STANDARD PRICE FORMULA (THERMAL)" as notified by Govt. of Indonesia as "FORMULA HARGA PATOKAN BATUBARA STEAM (THERMAL)" in January 2017. Govt. of Indonesia has discontinued publishing prices of various categories of coal since Feb-17 and is presently publishing Coal Price for HBA Index i.e. 6322 GCV Coal on monthly basis. Govt. of Indonesia's HBA price notification for Jan-17 month is attached as under for illustrative purpose.



Signature



**HARGA BATUBARA ACUAN (HBA) & HARGA PATOKAN BATUBARA (HPB)
BULAN JANUARI 2017**

HBA		
HBA (US\$/Ton)	86,23	FOB Vessel
Kualitas: CV = 6322 kcal/kg GAR; TM = 8 %; TS = 0,8 % ar; Ash = 15% ar		

HPB BATUBARA MARKER

NO	MEREK DAGANG/ BRAND	KUALITAS TYPICAL				HPB MARKER (US\$/ton)
		CV (kcal/kg GAR)	TM (%)	TS (%, ar)	Ash (%, ar)	
4	Indominco IM, East	5.700	17,50	1,63	4,80	70,48
5	Melawan Coal	5.400	22,50	0,40	5,00	67,65
6	Envirocoal	5.000	26,00	0,10	1,20	63,18
7	Jorong I-1	4.400	32,00	0,25	3,15	50,90

CONTOH HARGA PATOKAN BATUBARA LAINNYA YANG TERDAFTAR DI DITJEN MINERBA

No	MEREK DAGANG/ BRAND	KUALITAS TYPICAL				HPB (US\$/ton)
		CV (kcal/kg, GAR)	TM (%, ar)	TS (%, ar)	Ash (%, ar)	
1	...	6.200	14,00	0,50	5,80	84,83
2	...	6.100	11,00	0,50	10,00	82,83
3	...	6.150	11,00	0,50	12,00	82,87
4	...	6.250	10,00	0,50	12,00	82,99
5	...	5.200	25,00	0,60	3,00	61,82
6	...	6.200	12,00	0,50	10,00	82,88
7	...	5.200	10,00	4,00	12,00	74,38
8	Indominco IM, West / 6500	6.171	15,50	0,76	5,22	81,58
9	...	6.200	10,00	1,00	14,00	82,33
10	Mardiri 2	5.100	26,00	0,60	7,00	59,95
11	Indominco MCV, LS	6.143	14,00	0,76	5,20	82,40
12	SKB Coal	6.130	9,00	2,20	17,00	76,30
13	Bacimarta Coal	6.112	9,50	0,95	13,00	82,21
14	...	6.100	13,50	1,00	12,50	80,24
15	Insani Coal	6.050	19,00	0,15	3,20	78,59
16	PCS Coal	5.915	15,10	0,55	9,40	77,88
17	Indominco IM, West / 6350	6.029	15,50	0,76	5,22	79,30
18	Bangun Coals	6.072	10,02	2,30	14,91	75,44
19	Pihang 6000	6.000	16,00	0,50	5,00	79,52
20	Indominco EMM, MCV, LS	5.970	13,50	1,65	6,85	75,37
21	Multi Coal Low	5.950	15,10	1,00	7,00	76,50
22	Multi Coal Middle	5.900	15,00	2,00	7,00	71,88
23	Pihang 5.500	5.900	15,00	0,50	4,50	74,65
24	Abdullah A5900	5.900	12,00	0,80	13,00	77,38



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No	MEREK DAGANG/ BRAND	Kualitas Tipikal				HPB (US\$/ton)
		CV (kcal/kg GAR)	TM (%, ar)	TS (%, ar)	Ash (%, ar)	
39	Multi Coal High	5.765	16,00	3,20	7,00	65.40
40	KCM Coal	5.730	10,50	0,90	20,50	73.43
41	TSA Coal	5.700	18,00	2,00	8,00	67.30
42	Tanito Coal	5.700	17,50	1,00	8,50	71.52
43	Mahakam Coal	5.700	17,50	1,00	8,50	71.52
44	Ebony High Sulphur	5.700	18,00	1,75	4,70	69.62
45	Pinang 5700	5.700	19,00	0,50	5,00	73.65
46	IBP 5500	5.500	20,00	1,00	7,00	67.63
47	Arutmin A5700	5.700	11,00	0,80	14,00	75.61
48	BSS Coal	5.520	10,00	0,45	15,50	74.85
49	Lanna Harita Coal	5.500	22,00	1,00	6,00	66.40
50	Pinang 5500	5.500	21,00	0,40	5,50	69.82
51	Mahoni Medium Sulphur	5.500	20,00	1,30	4,70	67.35
52	Mahoni	5.500	20,00	0,80	4,70	69.35
53	Mahakam Coal B	5.400	23,00	1,50	8,00	61.65
54	Mahoni B	5.300	22,50	0,80	4,60	65.06
55	Kideco Coal	5.125	24,50	0,10	2,00	65.37
56	Agathis	5.100	25,00	0,82	4,50	60.83
57	Lanna Harita Coal	5.000	27,00	1,20	6,00	56.11
58	IBP 5000	5.000	25,00	1,00	7,00	58.00
59	Sungkai Medium Sulphur	5.000	26,00	1,30	4,50	57.06
60	Sungkai	5.000	26,00	0,90	4,50	58.66
61	Sungkai High Sulphur	5.000	26,00	1,70	4,50	55.46
62	Arutmin A5000	5.000	22,40	0,54	8,90	61.00
63	AGM Warute Coal	4.350	33,00	0,40	4,00	49.21
64	IBP 4600	4.600	28,00	0,50	7,00	53.50
65	Bas Gumay Coal	4.400	35,00	0,50	4,96	47.62
66	IBP 4400	4.400	30,00	0,50	7,00	50.06



Signature



FORMULA HARGA PATOKAN BATUBARA STEAM (THERMAL)

1. Harga Batubara Acuan (dalam kesetaraan nilai kalor 6322 kkal/kg GAR)
 $HBA = 25\% \text{ICI} + 25\% \text{Platts59} + 25\% \text{NEX} + 25\% \text{GC}$

[US\$/ton]

Di mana:

- HBA = Harga Batubara Acuan [US\$/ton]
- ICI = Indonesia Coal Index [US\$/ton]
- NEX = New Castle Export Index [US\$/ton]
- GC = New Castle Global Coal Index [US\$/ton]

Konversi nilai kalor batubara dari kondisi ADB ke GAR.

$$K_{GAR} = K_{ADB} \cdot (100 - TM) / (100 - IM)$$

Di mana:

K GAR = Nilai kalor batubara kondisi GAR (*gross as received*)K ADB = Nilai kalor batubara kondisi ADB (*as dried basis*)

TM = Total moisture

IM = Inherent Moisture

Untuk :

Kandungan Belerang Batubara dalam *as received* (ar)Kandungan Abu Batubara dalam *as received* (ar)

2. Menghitung HPB marker No. 1 - 7

$$\text{HPB Marker } (i) = (HBA \cdot K_{(i)} \cdot A_{(i)}) - (B_{(i)} + U_{(i)})$$

[US\$/ton]

Di mana:

- HBP Marker (i) = HPB dari 7 batubara price marker [US\$/ton]
- $K_{(i)}$ = Nilai Kalor Batubara (i) / 6322 [fraksi]
- $A_{(i)}$ = $(100 - \text{Kandungan Air Batubara } (i)) / (100 - 8)$ [fraksi]
- $B_{(i)}$ = $(\text{Kandungan Belerang Batubara } (i) - 0,8) \cdot 4$ [US\$/ton]
- $U_{(i)}$ = $(\text{Kandungan Abu Batubara } (i) - 15) \cdot 0,4$ [US\$/ton]
- (i) = price marker 1 - 7

3. Harga Patokan Batubara Marker No. 8

$$\text{HPB Marker } (8) = (HBA \cdot K_{(8)} \cdot A_{(8)}) - (B_{(8)} + U_{(8)})$$

[US\$/ton]

Di mana:

- HBP Marker (8) = HBP batubara price marker 8 [US\$/ton]
- $K_{(8)}$ = Nilai Kalor Batubara (8) / 6322 [fraksi]
- $A_{(8)}$ = $(100 - \text{Kandungan Air Batubara } (8)) / (100 - 8 / FKA_{(8)})$ [fraksi]
- $FKA_{(8)}$ = $(\frac{((100 - 8) / (100 - \text{Kandungan Air Batubara } (8))) \cdot \text{Kandungan Air Batubara } (8)}{((100 - 8) / (100 - \text{Kandungan Air Batubara } (8))) + (100 - 8)}) / 100$ [persen]
- $B_{(8)}$ = $(\text{Kandungan Belerang Batubara } (8) - 0,8) \cdot 4$ [US\$/ton]
- $U_{(8)}$ = $(\text{Kandungan Abu Batubara } (8) - 15) \cdot 0,4$ [US\$/ton]
- (8) = price marker 8

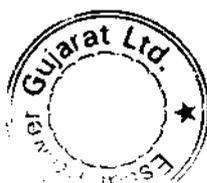
4. Harga Patokan Batubara Lain No. 9 - 66

$$\text{HPB } (6) = \{(\text{HPB Price Marker } (6) + (B_{(6)} + U_{(6)})) \cdot (K_{(6)} / K_{(8)}) \cdot \frac{((100 - \text{Kandungan Air } (6)) / (100 - \text{Kandungan Air } (6))) \cdot ((100 - 8) / (100 - 8))\}} - (B_{(6)} + U_{(6)})$$

[US\$/ton]

Di mana:

- HPB (6) = HPB batubara selain batubara Price Marker [US\$/ton]
- $B_{(6)}$ = $(\text{Kandungan Belerang Batubara } (6) - 0,8) \cdot 4$ [US\$/ton]
- $U_{(6)}$ = $(\text{Kandungan Abu Batubara } (6) - 15) \cdot 0,4$ [US\$/ton]
- $B_{(8)}$ = $(\text{Kandungan Belerang Batubara } (8) - 0,8) \cdot 4$ [US\$/ton]



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- $U_{(j)}$ = (Kandungan Abu Batubara (j) – 15) * 0,4 [US\$/ton]
- $K_{(j)} / K_{(i)}$ = Nilai Kalor Batubara (j) / Nilai Kalor Batubara (i) [fraksi]
- (i) = price marker 1 – 7
- (j) = batubara lain 9 – 66

5. Harga Patokan Batubara Lain No. 67 – 75 (Batubara Kalori Rendah)

– Bila TM < 40%

$$HPB_{(j)} = \{ (HPB \text{ Price Marker }_{(i)} + (B_{(i)} + U_{(i)})) * (K_{(j)} / K_{(i)}) * \frac{[(100 - \text{Kandungan Air }_{(j)}) / (100 - \text{Kandungan Air }_{(i)})]}{[(100 - 8/FKA_{(j)}) / (100 - 8/FKA_{(i)})]} - (B_{(j)} + U_{(j)}) \}$$
 [US\$/ton]

Di mana:

- $HPB_{(j)}$ = HPB batubara selain batubara Price Marker [US\$/ton]
- $HPB \text{ Marker}_{(i)}$ = HPB batubara price marker (i) [US\$/ton]
- $B_{(i)}$ = (Kandungan Belerang Batubara (i) – 0,8) * 4 [US\$/ton]
- $U_{(i)}$ = (Kandungan Abu Batubara (i) – 15) * 0,4 [US\$/ton]
- $B_{(j)}$ = (Kandungan Belerang Batubara (j) – 0,8) * 4 [US\$/ton]
- $U_{(j)}$ = (Kandungan Abu Batubara (j) – 15) * 0,4 [US\$/ton]
- $FKA_{(j)}$ = $\left(\frac{(100 - \text{Kandungan Air Batubara}_{(j)})}{(100 - \text{Kandungan Air Batubara}_{(i)})} * \text{Kandungan Air Batubara}_{(j)} \right) + \frac{100 - \text{Kandungan Air Batubara}_{(j)}}{100}$ [persen]
- $K_{(j)} / K_{(i)}$ = Nilai Kalor Batubara (j) / Nilai Kalor Batubara (i) [fraksi]
- (i) = price marker 8
- (j) = batubara lain 67 – 69

– Bila TM ≥ 40%

$$HPB_{(j)} = \{ (HPB \text{ Price Marker }_{(i)} + (B_{(i)} + U_{(i)})) * (K_{(j)} / K_{(i)}) * \frac{[(100 - \text{Kandungan Air }_{(j)}) / (100 - \text{Kandungan Air }_{(i)})]}{[(100 - 8/FKA_{(j)}) / (100 - 8/FKA_{(i)})]} \}$$
 [US\$/ton]

Di mana:

- $HPB_{(j)}$ = HPB batubara selain batubara Price Marker [US\$/ton]
- $HPB \text{ Marker}_{(i)}$ = HPB batubara price marker (i) [US\$/ton]
- $FKA_{(j)}$ = $\left(\frac{(100 - \text{Kandungan Air Batubara}_{(j)})}{(100 - \text{Kandungan Air Batubara}_{(i)})} * \text{Kandungan Air Batubara}_{(j)} \right) + \frac{100 - \text{Kandungan Air Batubara}_{(j)}}{100}$ [persen]
- $K_{(j)} / K_{(i)}$ = Nilai Kalor Batubara (j) / Nilai Kalor Batubara (i) [fraksi]
- (i) = price marker 8
- (j) = batubara lain 70 – 75

Ketentuan:

1. Harga Batubara Acuan dan Harga Patokan Batubara diatas merupakan harga batubara untuk penjualan *spot* dalam periode 1 Januari 2017 sampai dengan 31 Januari 2017;
2. Dalam hal penjualan batubara dilakukan secara jangka tertentu (*term*), harga batubara mengacu pada rata-rata 3 (tiga) Harga Patokan Batubara terakhir pada bulan dimana dilakukan kesepakatan harga batubara, dengan faktor pengali 50% untuk Harga Patokan Batubara bulan terakhir, 30% untuk Harga Patokan Batubara satu bulan sebelumnya dan 20% untuk Harga Patokan Batubara dua bulan sebelumnya.



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Annexure B

**Reference Rates for Ocean Freight, Insurance & other Transportation /
Handling charges as per Clause 3.2.4 of this Agreement**

Lower of following charges shall be considered (i) Worked out as per Table I or
(ii) Worked out as per Table II

Table I:

Following is worked out from Schedule 10 of EPGL's PPA dated 26.02.2007:

Contract Year	Commencement Date of Contract Year	Quoted Non Escalable Overseas Transportation Charges	Quoted Escalable Overseas Transportation Charges	Quoted Non Escalable Port / Fuel Handling Charges	Quoted Escalable Port / Fuel Handling Charges
		USD/MT	USD/MT	Rs/MT	Rs/MT
(a)	(b)	(c)	(d)	(e)	(f)
7	Oct-18	16.5098	0	274.65	0
8	01-Apr-19	16.5098	Same as above	277.51	Same as above
9	01-Apr-20	16.5098		280.60	
10	01-Apr-21	16.5098		283.47	
11	01-Apr-22	16.5098		286.55	
12	01-Apr-23	16.5098		289.64	
13	01-Apr-24	16.5098		292.72	
14	01-Apr-25	16.5098		295.81	
15	01-Apr-26	16.5098		298.90	
16	01-Apr-27	16.5098		302.20	
17	01-Apr-28	16.5098		305.51	
18	01-Apr-29	16.5098		308.59	
19	01-Apr-30	16.5098		311.90	
20	01-Apr-31	16.5098		315.43	
21	01-Apr-32	16.5098		318.73	
22	01-Apr-33	16.5098		322.04	
23	01-Apr-34	16.5098		325.57	
24	01-Apr-35	16.5098		329.09	
25	01-Apr-36	16.5098		332.62	
26	01-Apr-37	16.5098		335.71	

The above values have been worked out considering the Operating Parameters of 2333 kcal/kwh of Gross Station Heat Rate and Auxiliary Consumption of 6.50% as EPGL had not quoted parameters separately while submitting the bid. (GHR of 2333 kcal/kwh & Aux of 6.50% shall be aligned as per CERC approval in Petition No. 374/MP/2018.)



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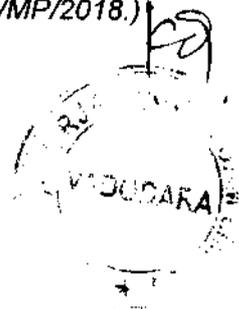


Table II:

Contract Year	Commencement Date of Contract Year	Quoted Non Escalable Overseas Transportation Charges USD/MT	Quoted Escalable Overseas Transportation Charges USD/MT
(a)	(b)	(c)	(d)
7	Oct-18	7.0845	3.1122
8	01-Apr-19	7.0597	To be escalated as per CERC index for Transportation Charges
9	01-Apr-20	7.0597	
10	01-Apr-21	7.0597	
11	01-Apr-22	7.0597	
12	01-Apr-23	7.1094	
13	01-Apr-24	7.1342	
14	01-Apr-25	7.1342	
15	01-Apr-26	7.1342	
16	01-Apr-27	7.1591	
17	01-Apr-28	7.1342	
18	01-Apr-29	7.1342	
19	01-Apr-30	7.1342	
20	01-Apr-31	7.1342	
21	01-Apr-32	7.1342	
22	01-Apr-33	7.1839	
23	01-Apr-34	7.2088	
24	01-Apr-35	7.2088	
25	01-Apr-36	7.2088	
26	01-Apr-37	6.9851	

The above per Metric Ton rates have been benchmarked considering the CGPL's bid

Methodology for Escalation Index shall be as per Schedule 9 of PPA dated 22.04.2007.



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**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION
GANDHINAGAR**

Petition No. 1807 of 2019

In the Matter of:

Petition under Section 86 (1) (b) and (f) of the Electricity Act, 2003 read with Article 18.1 of the Power Purchase Agreement (PPA) dated 26-02-2007 under 1000 MW (Bid - 03), executed between GUVNL and EPGL for approval of amendments to the PPAs by way of Supplemental PPA dated 01-03-2019.

Petitioner: Gujarat Urja Vikas Nigam Limited,

Represented by: Learned Advocate Shri Hemant Sahai,
Advocate Shri Nitish Gupta, Shri Sanjay Mathur,
Shri S.K. Nair and Shri K.N. Chudasama.

Vs.

Respondent No 1: Essar Power Gujarat Limited,

Represented by: Learned Advocate Shri Kunal Nanavati,
Shri Sandeep Sahay, Shri Pankaj Nair,
Advocate Ms. Pooja Rohan Shah.

Respondent No. 2: Energy Watchdog

Represented by: Nobody was present

Respondent No. 3: Prayas (Energy Group)

Represented by: Nobody was present

Objector No. 1: Shri K.K. Bajaj

Represented by: Shri K.K. Bajaj

Objector No. 2: Utility Users' Welfare Association

Represented by: Shri Bharatkumar T. Gohil

Objector No. 3: Jan Kalyan Foundation

Represented by: Nobody was present

Objector No. 4: Laghu Udyog Bharti, Gujarat

Represented by: Shri S.C. Bohra

CORAM

Shri Anand Kumar, Chairman

Shri P.J. Thakkar, Member

Date: 27/04/2020

ORDER

1. The present petition is filed by the Petitioner Gujarat Urja Vikas Nigam Limited (GUVNL) under Sections 86 (1)(b) and 86(1)(f) of the Electricity Act, 2003 read with Article 18.1 of the Power Purchase Agreement (PPA) dated 26.02.2007 for 1000 MW (Bid-03) executed with Essar Power Gujarat Ltd. (EPGL) praying for approval of amendments to the PPAs by way of Supplemental PPA dated 01.03.2019.

2. **Facts mentioned in the petition are detailed below:**
 - 2.1. Petitioner is a Company incorporated under the provisions of the Companies Act, 1956 and is engaged in activities of bulk purchase and bulk supply of electricity and is a Licensee for the said activities under provisions of the Electricity Act, 2003.
 - 2.2. Respondent No.-1, EPGL is a Generating Company within the meaning of Section 2(28) of the Electricity Act, 2003 and has set up a thermal power generating plant having total capacity of 1200 MW (2 x 600 MW) located at Salaya, District Jamnagar, Gujarat.
 - 2.3. Energy Watchdog and Prayas (Energy Group), are the consumer organizations and are Respondent No. 2 & 3 respectively.
 - 2.4. The Petitioner had entered into a PPA with Respondent No.1 through competitive bidding process under Bid No. 03 in accordance with the guidelines issued u/s 63 of

the Electricity Act i.e. PPA dated 26.02.2007 for contracted capacity of 1000 MW to be supplied from Units 1 and 2 of Salaya Power Plant, District Jamnagar, Gujarat.

- 2.5. The present Petition is filed seeking approval for the proposed amendments to Bid-03 PPA through Supplemental PPA dated 01.03.2019 (SPPA) in terms of Article 18.1 of said PPA, pursuant to the Govt. of Gujarat Policy Directive vide Government Resolution (GR) No. CGP-12-2018-166-K dated 01.12.2018 accepting the recommendations of High Power Committee Report (hereinafter "HPC Report") as stated in the GR and the order of Hon'ble Supreme Court dated 29.10.2018 in Miscellaneous Application No. 2705-2706 of 2018 in CA No. 5399-5400 of 2016. Petitioner has submitted that this Commission has jurisdiction to approve the amendments to the PPAs as provided under Section 86(1)(b) read with 86(1)(f) of the Electricity Act. The Petitioner had entered into separate PPAs for purchase of power from (i) Tata-CGPL (ii) Adani-Mundra and (iii) Essar-Salaya power plants in 2007. It is pertinent to note that three projects contribute substantially to cater to the power requirements of the State of Gujarat.
- 2.6. Subsequent to signing of PPAs, Indonesian Government on 23.09.2010 issued Regulation No. 17 of 2010 titled as "Procedures to Determine the Benchmark Price for Mineral and Coal Sales". Government of Indonesia vide this Regulation mandated export of coal on benchmark prices notified by Govt. of Indonesia. The detailed factual background leading up to the constitution of the HPC has been enumerated in Chapter I of the HPC Report. The facts leading to the promulgation of the Indonesian Regulations and their impact on the Indian power projects, including the Mundra Power Project, have been enumerated in Chapter II of the HPC Report. The Generators i.e. the Tata-CGPL and Adani-Mundra had approached the CERC seeking relief to offset the adverse financial impact of the Indonesian Regulation.
- 2.7. The Respondent No. 1 has shut down its thermal power plant since past 1 year and is not supplying electricity to the Petitioner. The matter with respect to the Tata-CGPL and Adani-Mundra travelled up to the Supreme Court and the Hon'ble Supreme Court vide its Judgment dated 11.04.2017 in CA No. 5399-5400 of 2016 had decided that

enactment of Indonesian Regulations did not constitute either a change in law event or Force Majeure, as contractually specified under the PPAs. The detailed chronology of the legal proceedings leading to the aforesaid Energy Watchdog matter in the Supreme Court, has been enumerated in Chapter III of the HPC Report.

- 2.8. Out of the aforesaid three imported coal-based power projects, Essar's Salaya power plant had discontinued power supply under the contracts whereas the other imported coal based power plants supplied less quantum citing the issue of non-viability and liquidity issues due to Indonesian Regulation.
- 2.9. The generators had made several representations to the Government of Gujarat and the Petitioner that they are unable to sustain generation on a long-term basis to honour their obligations under the PPAs and requested for redressal of the issue. The brief of representations received from generators is as follows:
- 2.10. Respondent No.1 addressed a letter to the Petitioner on 19.04.2017 and submitted that there will be no cash-flows available in the company due to under recovery in energy charges and requested for a long term viable solution to ensure sustainability of the company. Essar Power has shut down its power plant for around one year and is not supplying power to GUVNL. Essar Power through its letter dated 09.06.2017 stating the difficulties being faced due to inadequate cash-flows, requested the Petitioner to take early appropriate decision so that operations of Essar Power can continue and consumers are not affected. Essar Power in the letter dated 09.06.2017 has stated that net-worth of Essar Power has been wiped out and the debt has increased to Rs. 5062 crores due to losses incurred so far. Due to continued financial difficulties, Essar Power has shut down its plant for over a year.
- 2.11. Coastal Gujarat Power Ltd. has in its letter dated 25.04.2017 addressed to the Petitioner stated that if urgent remedial measures are not taken, then, in spite of best efforts of CGPL/Tata Power it may be very difficult to continue the operations. It is matter of fact, that CGPL's tariff even with addition of compensatory tariff (as was

allowed by CERC) will be among the cheapest power available. CGPL has accumulated losses of Rs. 6,306 crores and 100% of the equity has been wiped out. CGPL addressed another letter dated 07.06.2017 to the Petitioner to resolve the issue based on various proposals offered by CGPL.

- 2.12. Adani Power (Mundra) Ltd has vide its letter dated 16.04.2017 addressed to the Petitioner submitted a proposal to take over 51% of equity of Mundra Project (Units 1 to 6) at value of Rs. 1 and purchase power from Mundra Project on cost plus basis. It was further stated that, "Since the existing coal stock is at critical level, adequate for only 7-10 days of operation, and the Financial Institutions are not willing to extend any further support, we request GUVNL to procure coal and supply to APL and APL will supply power utilizing such coal and will charge only capacity charges as per PPA so that operations of Mundra Project is continued." APML has addressed various letters to the Petitioner dated 21.04.2017, 06.05.2017, 12.05.2017 and 25.05.2017 to have early resolution and decision on the proposals offered by it, in light of the severe power shortage issues.

3. Efforts made by the State for resolution of the issues:

- 3.1. Subsequent to representations made by Imported Coal based Project Developers, Government of Gujarat, on 20.04.2017, had written a letter to Ministry of Power, Government of India as follows, "since the matter is of urgent nature and impacting supply of power to various states, your kind intervention at the earliest is solicited for resolving the issue by arranging a meeting of all the stakeholders, at your convenience." Therefore, the State of Gujarat sought for intervention of the Central Government to resolve the crisis. A request was made to the Ministry of Power, Govt. of India to call for a meeting of all the stakeholders.
- 3.2. In view of the above, on 20.06.2017, a meeting was held at New Delhi by the Ministry of Power, Union of India of all stakeholders including the representatives from the State Governments of Gujarat, Maharashtra, Punjab, Haryana, Rajasthan, representatives

from various Banks and Financial Institutions (PFC & REC) and representatives from generating companies for resolution of the issues being faced by Imported coal based power plants.

- 3.3. Pursuant to the said meeting, a Working Group was constituted of members of all the procurer States, and banks represented by Punjab National Bank and Canara Bank with the SBI acting as a convener to find a solution through a consultative process.
- 3.4. The Working Group Committee submitted its' report on 10.01.2018 after undertaking due diligence on technical, legal and financial aspects of these 3 Imported coal based power projects in Gujarat. The Working Group Committee inter-alia recommended two options;
 - (i) State Govt. to takeover projects through majority stake and subsequently PPAs be amended to address viability issues by allowing fuel cost pass through, or
 - (ii) Amending PPAs without change in ownership, wherein Procurers may agree for pass through of fuel cost.
- 3.5. Subsequent to the submission of report by the Working Group Committee and in furtherance of the Working Group Committee Report, SBI on 17.01.2018 wrote to Govt. of India that Government of Gujarat may form a High Power Committee comprising of individuals with proven expertise drawn from the Judiciary, Banking and Power Sectors (with Regulatory knowledge) to review the report of the Working Group and suggest means for early resolution of issues relating to these Projects.
- 3.6. Thereafter by enclosing copies of (i) SBI letter dated 05.03.2018 and (ii) Ministry of Finance letter dated 05.04.2018, the Ministry of Power addressed a letter to Government of Gujarat on 13.04.2018 stating that being a lead procurer/major procurer in the three imported coal power plants based in Gujarat, the Government of Gujarat may take further actions for resolution of the issues related to these power plants.

- 3.7. In view of the above, Government of Gujarat on 03.07.2018 issued Resolution No. CGP-12-2018-166-K constituting the High Power Committee for reviewing the report of Working Group and obtaining its recommendations, with regard to resolution of the issues of the imported coal based Power Projects located in the State of Gujarat. The resolution is extracted below:

“Resolution:

After careful consideration, the Government of Gujarat is, therefore, pleased to form a High Power Committee comprising of the following, for reviewing the report of working group and obtaining its recommendations, with high regard to resolution of the issues of the Imported Coal based Power Projects, located in the State of Gujarat:

<i>(i)</i>	<i>Hon. Mr. Justice R. K. Agrawal, Former Justice of Supreme Court</i>	<i>Chairman</i>
<i>(ii)</i>	<i>Shri S. S. Mundra, Former Deputy Governor, RBI</i>	<i>Member</i>
<i>(iii)</i>	<i>Dr. Pramod Deo, Former Chairman, CERC</i>	<i>Member</i>

SBI Caps – Mumbai shall provide secretarial support to the Committee.

Suggestive terms of reference of High Power Committee:

- (i) The Committee should examine and analyse all the relevant documents related to the Projects;*
- (ii) Analyze and ascertain any hardship faced by these projects – If yes, mode and manner for mitigating the hardship faced by the Projects on account of Indonesian Regulations and subsequent orders/judgments in the matter;*
- (iii) Call relevant parties for submission of details/clarification as required by the Committee;*
- (iv) Contribution by each Stakeholders viz. Banks, Project Developers & Procurers by way of concessions for mitigating hardship;*
- (v) Any other relevant issues which Committee would like to discuss and Study.*
- (vi) Suggest sustainable solutions(s) – for resolving the issue; and*

(vii) The Committee may suggest any other measure for overall reduction in the cost of Generation of Power in the interest of the consumers.”

3.8. The High Power Committee conducted various meetings with all the stakeholders viz. Discoms /officials of procurer states, consumer representative groups, lenders and generators. It is pertinent to note that the Appellant before the Hon'ble Supreme Court in CA No. 5399-5400 of 2016 i.e. Energy Watchdog was also heard in the meeting held on 22.07.2018 by the HPC. After taking into account the views / suggestions of all the stakeholders the HPC has submitted its submissions and recommendations as extracted below:

“10.1 ...HPC while undertaking the analyses and making the recommendations in this Report has the ‘consumer interest’ paramount and this has been the focal point of their approach.

10.2 On the touchstone of ‘consumer interest’, it can be safely concluded that these Projects need to be salvaged. Sustainable operation of these Projects is of critical importance, essentially due to the fact that these Projects are instrumental in fulfilling the increasing demand of the procurer States. Consumer interest thus lies in ensuring that reliable and relatively inexpensive power is secured in a sustainable manner to meet current and future demand projections. This in turn would also ensure that the economic growth of the procurer States is not vitiated.

10.3 In contrast, if these Projects are not salvaged, consumer interest will be adversely affected on account of various reasons, gist of which are set out below:

- (i) the capacities from these Projects will have to be replaced from alternative sources and therefore, prices will further go up in view of the clear co-relation between demand and supply;*
- (ii) the cost of replacement power at today’s market price would be higher;*
- (iii) setting up new projects in any event will be more expensive and will take another 4-5 years to commence supply;*
- (iv) increase in cost on account of procurement of power from in-efficient and old plants which would also have reliability issue;*
- (v) resorting to load shedding on account of difficulties associated with complete replacement of power from these Projects; and*

- (vi) *any insolvency or liquidation of these Projects would hardly address the issues of power supply.*

10.4 *Therefore, ensuring sustainable operation of these Projects would only be possible by making them economically viable. It is however evident that the economic viability of these Projects has been severely impacted due to the promulgation of Indonesian Regulations 2010, which led to an unprecedented rise in the price of coal. This situation has further been exacerbated in view of the fact that the Generators could not pass the uncontrollable increase in the fuel prices on the Procurers under the PPAs.*

10.5 *In light of the findings as given by the Hon'ble Supreme Court in the Energy Watchdog Judgment, this HPC has sought to recommend solutions to mitigate the hardships being faced by the Generators only on the basis of 'consumer interest' which has been discussed at length in Chapter - VII. This primarily entails undertaking financial and commercial re-structuring which is based on the premise that the burden of hardships will have to be borne by all the stakeholders. The details of financial and commercial restructuring be followed in terms of Chapter – VIII which primarily envisage the following:*

- (i) *Reduction of capacity charge on account of sacrifice by lenders;*
- (ii) *Past losses to be borne by Developers and the financial resolution plan being applicable from a prospective cut-off date of 15th October 2018;*
- (iii) *Option for extension of PPA tenure by another period of 10 years after the completion of the PPA tenure of 25 years;*
- (iv) *Offer for tie-up of free capacity; and*
- (v) *Sharing of profit from the Indonesian mines.*

10.6 *The financial and commercial resolution package that is accepted by the procurer State Governments will need to be incorporated as revised contractual provisions into the PPAs and such amendments to the PPA will need to be approved by the Appropriate Commission.*

10.7 *The option recommended for amending the PPAs are discussed in detail in Chapter-IX. The HPC accordingly recommends the implementation of the said option. Though the steps to be taken under this option are set out in detail at Section 9.10 of this Report, it is imperative to mention that as part of this option, a directive may be issued by the State Government(s) to their Discoms. The said directive would primarily state that the Discoms*

have to ensure adequate supply of energy on the least possible tariff and while doing so, they should consider whether the same can be achieved by way of facilitating and promoting the revival and rehabilitation of existing thermal capacities already installed in the State, that may have, for diverse reasons, become financially stressed and economically unviable to be operated in a sustainable basis.

10.8 Draft Supplemental PPA for effecting Amendment to the PPAs

10.8.1 The HPC recognises that the economic, financial and commercial components of the recommendations of this HPC, as set out hereinabove, may be susceptible to conflicting interpretations. Accordingly, to ensure effective and accurate implementation of the HPC's recommendations, the HPC has crafted a model draft of the supplemental PPA for amending the PPAs of the Projects, incorporating the rehabilitation package in detailed legal and contractual language. It is re iterated that this model Supplemental PPA incorporates the intention and detailed application of the HPC's recommendations for the rehabilitation of the concerned Projects.

10.8.2 With the above premise, the HPC stipulates that the model draft of the supplemental PPA for amending the PPAs of the Projects, which is annexed hereto as Annexure – VI shall be taken as an integral part of this HPC report and shall be applied for interpreting the true intent, meaning and application of the detailed terms of this HPC Report.

3.9. As regards the recommendations of High Power Committee the Petitioner submitted in brief that the HPC keeping the interests of the consumers as paramount has recommended as follows:

- a. **Amendment in the PPA:** The agreement between the procurer i.e. DISCOMs and power producers would be amended and effective w.e.f. 15.10.2018 to reflect the tariff based on the report of the Committee in order to ensure the projects keep running without any benefit to the power producers and at the same time the interest of the banks who have lent monies and consumers are safeguarded. Only energy charge tariff will be marginally increased but the same would be limited to a cap to ensure that the increase is not unlimited.

- b. **Sacrifice by Lenders:** At the same time, to keep the burden on end consumer low, Lenders have agreed to sacrifice and reduce debt equivalent to reduction of 20 paise in the capacity charge for Essar Power Gujarat Ltd (1000 MW) with a debt reduction of Rs.1154 Crores.

Lenders' sacrifice may be higher as they may have to reduce the outstanding debt by around Rs. 2324 crore (excluding undisbursed loan of Rs. 250 crore) to make the debt sustainable after implementation of this scheme. Over and above that, there is invoked BG of Rs. 250 crores and devolved LCs of Rs. 481 crores. Additionally, the lenders will be reducing the interest rate in all these three Projects. In case of Essar, lenders may have to reduce the debt further to make this specific TPP sustainable.

- c. **Sacrifice by Promoters:** Promoters have agreed to bear the past losses to the extent of about Rs.3600 Crore. Accordingly, this solution would be prospective and Generators have to bear accumulated loss. In addition, Promoters have agreed to extend the tenure of the PPA for a further period of 10 years after the completion of the PPA tenure of 25 years, which will also benefit the end consumer in getting the power at a cheaper rate. Further, Committee has recommended to increase the availability from 80% to 90% and also to offer to procurers the untied capacity available with M/s Essar Power.
- d. Tariff as recommended by the HPC would be incorporated by amendment of PPA.
- e. Such an amendment is provided for in the PPA itself.
- f. The amendment would be subject to regulatory approval of the appropriate electricity regulatory commission.

- 3.10. Government of Gujarat and the Petitioner approached the Hon'ble Supreme Court by filing Miscellaneous Application No. 2705-2706 of 2018 in CA No. 5399-5400 of 2016 dated 08.10.2018 seeking clarification about impingement of Hon'ble Supreme Court

judgment dated 11.04.2017 if the recommendations of HPC are accepted and PPAs are suitably modified. The Prayers of the Miscellaneous Application filed before the Hon'ble Supreme Court are as follows:

- “a) Clarify the judgment of this Hon'ble Court in (2017) 14 SCC 80 to the extent that the same does not in any manner impinge upon to exercise the option to operate clause 18.1 and amend PPA in public interest;*
- b) Pass directions to the concerned regulatory commissions to expeditiously dispose of applications seeking such amendment of PPA;*
- c) Pass any such further orders as it may deem fit in the facts and circumstances of the case.”*

Petitioner has also filed the copy of the Miscellaneous Application dated 08.10.2018 filed before the Hon'ble Supreme Court along with the petition.

- 3.11. Hon'ble Supreme Court in the case filed by the Petitioner has after perusal of the record, the HPC Report and hearing parties issued its order dated 29.10.2018 inter-alia clarifying that the parties can approach the Central Electricity Regulatory Commission for approval of proposed amendment and that Judgment dated 11.04.2017 will not stand in the way of such amendment. The Hon'ble Supreme Court has also directed the Commission to decide the matter as expeditiously as possible, and definitely within a period of eight weeks from 29.10.2018 taking note of the conclusions in the HPC Report. The relevant portion of the said Judgment is extracted below:

“Having heard learned counsel for the parties, including the learned Attorney General appearing for the State of Gujarat, we allow the application for impleadment of the State of Gujarat. We are of the view that, having perused the High Power Committee's report, which was given after our judgment dated 11th April, 2017, it will be open to the applicants to approach the Central Electricity Regulatory Commission (C.E.R.C.) for approval of the proposed amendments to be made to the Power Purchase Agreements (PPAs) in question.

We make it clear that our judgment will not stand in the way of maintaining such applications. We also make it clear that each of the consumer groups, who had appeared before us and who have appeared before us today, will be heard on all objections that they may make to the proposed amendments to the PPA, after which, it will be open to the C.E.R.C. to decide the matter in accordance with law. Given the conclusions in the High Power Committee report, we are of the view that the C.E.R.C.

should decide this matter as expeditiously as possible, and definitely within a period of eight weeks from today.

*The miscellaneous applications are disposed of accordingly.
Pending applications, if any, stand disposed of.”*

- 3.12. As regards the amendment of the PPA in Public Interest it is submitted that, the proposal for amendment of the PPA through the present petition is the fair course which would protect the interest of all stakeholders, especially the consumers, and would also ensure the availability of power in large quantities from these power plants, which is a vital necessity for the economic growth of the State of Gujarat as well as the country. The commercial insolvency of the companies would lead to inevitable shut down of the power plants, will result in a huge shortfall in the availability of power to the State. In the circumstances and considering the substantial implications on end consumers, the Petitioner in accordance with Policy Directives from Govt. of Gujarat has accepted the recommendations of the HPC as stated in GR dated 01.12.2018 and has filed the present petition in terms of liberty granted by the Hon'ble Supreme Court on 29.10.2018 in C.A. Nos. 5399-5400 of 2016.
- 3.13. It is further submitted that the proposed amendments to the PPAs are in the interest of consumer since the non-availability of power from Respondent No. 1 will result in the Petitioner not only incurring higher cost for replacement of such power but may also result in not being able to provide uninterrupted power supply to the consumers as the availability of such huge quantity from alternate sources is uncertain and procurement from new sources takes 4-5 years' time.
- 3.14. The High Power Committee has carried out detailed consultative process and also analyzed the circumstances, facts associated with the issue and submissions by all the stakeholders viz. the Developers, Procurers, consumer representative groups and the lenders and accordingly at para 7.1 of the Report, HPC has noted that *“Only a mechanism which results in savings to the consumers in the long run is to be considered.”* Further, the HPC in Chapter 7, has analyzed aspects such as Importance of the three Projects, Price competitiveness of power produced from these Projects &

Reliability, Impact of Shutting Down of these Projects on DISCOMs / End Consumers, Lenders, State Government, Generators, Transmission System etc.

3.15. Some of the important extracts from HPC report analysing and identifying the consumer/public interest are extracted below:

a. The criticality of this project is evident from the fact that this projects contribute to approximately 45% requirement of GUVNL.

b. The average variable charge is Rs. 1.74 per kWh as against overall average variable charge of about Rs. 2.59 per kWh.

c. This projects are undoubtedly cheaper source of electricity compared to State Discoms for procuring power.

d. The entire power from this projects get scheduled, which makes it clear that even after considering the actual coal cost, these PPAs are competitive.

e. There will be impact of shutting down of these projects on Discoms/end consumers as these projects fulfilled power requirement of almost 16-18% of five states, which is not possible to replace. These projects are more efficient as based on supercritical technology having higher capacity, lower auxiliary consumption which leads to almost 18.5% saving in the fuel cost for power generated from these projects.

g. Based on the analysis of the prices discovered under the recent Case 1 bidding process, which is on an average between Rs. 4.20 per unit to Rs. 5.06 per unit and in the short term market it is around Rs. 4 per unit.

h. The new capacity is also not feasible since end consumers are going to pay higher tariff in view of the fact that the capital cost of new projects is ranging between Rs. 6.32 Crore per MW to Rs. 8.50 Crore per MW and it will take gestation period of around 4 to 5 years, which will lead to increase in capital cost of around 40% as compared to these projects.

3.16. It is submitted that while parties are free to amend a contract through mutual consent under general law, the PPA too contain a specific provision being Article 18.1, allowing the parties to amend the Bid-03 PPA, with the approval of the Appropriate Commission.

“18.1 Amendment

This agreement may only be amended or supplemented by a written agreement between the parties and after duly obtaining the approval of the Appropriate Commission, where necessary.”

- 3.17. The Government of Gujarat keeping in view the aforesaid aspects and the policy directions contained in Resolution No. CGP-12-2018-166-k dated 01.12.2018*, has accepted the recommendations of the HPC with modifications as stated in the GR and decided to implement the same and consequently directed the Petitioner herein to amend the PPA and to approach this Hon'ble Commission in the light of the decision of the Hon'ble Supreme Court dated 29.10.2018. (*Annexure - 1)
- 3.18. Accordingly, on the basis of above and recommendation by HPC for execution of Supplemental Agreement incorporating the amendments, the Petitioner and the Respondent No. 1 have mutually agreed and signed the *Supplemental PPA in Bid-03 PPA on 01.03.2019 as provided in Article 18.1 of the PPA pursuant to and considering the recommendations of the HPC. (*Annexure – 2)
- 3.19. The amendment in Bid-03 PPA as executed with the Respondent No. 1 is the most preferred option in the Consumer Interest and therefore, the Petitioner is filing the present Petition before this Commission to approve the amendments in the PPA as directed by the Hon'ble Supreme Court after duly taking into consideration views of Respondents Consumer Groups.
- 3.20. The Commission has the jurisdiction to approve the amendments to the PPAs as provided under Section 86(1)(b) read with 86(1)(f) of the Electricity Act and has accordingly prayed that this Commission may approve the proposal to amend the terms of the PPA to the extent provided in the Supplemental PPA with all the other terms and conditions in the PPA remaining unaltered.

Respondent's Submissions

4. The Respondent No.3 (Prayas Energy Group) has raised the following contentions:
 - 4.1. It is submitted that the Petitioner has filed the above-mentioned petition for approval of the amendments to the Power Purchase Agreement (PPA) dated 26.02.2007 for 1000 MW relating to Bid No. 3 initiated by the petitioner for procurement of power for distribution and retail supply of electricity to the Consumers in the State of Gujarat should not be permitted and further that the amendments proposed are not in public interest.
 - 4.2. The extent to which the tariff terms and conditions are being proposed to be varied in favor of Essar Power Gujarat Limited is not justified even as per the resolution passed by the Government of Gujarat appointing the HPC to make recommendation and the stated purpose for which the HPC considered the matter.
 - 4.3. The Hon'ble Supreme Court in the above Order dated 29.10.2018 has not given any mandate that the amendments sought for should be allowed. The directions given is only that the amendment application can be considered in accordance with law after taking into account all objections and submissions of the consumer groups.
 - 4.4. It is further submitted that as the Commission has to safeguard the interest of consumers at large, hence the Commission is not bound by the recommendations of HPC or directives of the Gujarat Government. The Commission has to take an independent and unbiased views of the matter and take a judicial decision after considering the view of all the stakeholders, including the consumer groups, in accordance with law with consideration of overall public interest and interest of the consumers.
 - 4.5. It is further submitted that there cannot be any pre-determined prescription or mandate on the Commission to determine the additional amount by way of tariff to be

paid to the generators. The touchstone should be whether the amendments being approved would be in the interest of the consumers.

- 4.6. It is further submitted that there are serious legal and propriety issues in the supplementary agreement as proposed. The proposal is to convert the project, which should have the characteristics of Tariff Based Competitive Bid Process under Section 63 of the Electricity Act only, to a hybrid of Sections 62 and 63, namely partly based on Section 63 and whenever Project Developer has claimed hardship, actual cost being considered which is outside the scope of Section 63 and falls under Section 62 concerning tariff determination.
- 4.7. There is no legislative sanction to such a hybrid scheme of tariff determination under the Electricity Act, 2003 and Section 63 is to keep tariff based competitive bid tariff being not subject to actual cost based tariff and that too only on selective elements of tariff sought for by the generator, is fundamental to the scheme of tariff determination under Section 62 of the Electricity Act, 2003.
- 4.8. The case of a project based on imported coal, one being considered for increase in tariff, has already been adjudicated by the Supreme Court of India in Energy Watchdog Case (2017) 14 SCC 80 to be not admissible in law. As per the law laid down by the Supreme Court the project developer is not entitled to any relief as far as use of imported coal is concerned. The basic question then arises as to whether the reliefs which were sought for by the Project Developers, but rejected by the Hon'ble Supreme Court of India, can be allowed by way of amendment in the PPA with the approval by the Commission.
- 4.9. It is further submitted that considering any increase in tariff for the Project Developer in the circumstances when in law the reliefs had been held to be not admissible, will be in direct violation of the objectives to be achieved as provided in the Guidelines issued under Section 63 of the Electricity Act. Under such circumstances, there is a greater responsibility on the Commission to protect consumer interest and ensure that the project developer does not, contrary to law, have undue gain or advantage

at the cost of the consumers. The intention behind Section 63 of the Electricity Act regarding tariff being determined through a competitive bid process in which the quoted tariff is sacrosanct needs to be the guiding factor. It is fundamentally against public interest and a bad precedent that a competitive bid tariff is given a go by and the PPAs are allowed to be amended and converted into actual cost determination. If allowed to be adopted through amendment of PPAs, will render the provisions of Section 63 of the Electricity Act and the scheme to make the electricity industry competitive, redundant and meaningless.

4.10. The scheme of allowing amendments providing for increase in tariff of substantial amounts on grounds of hardship has far reaching implications.

4.11. The Central Commission however decided purported to use General regulatory powers to grant the projects what it terms as “compensatory tariff” over and above the tariff as per PPA terms. The said orders of the Central Commission were challenged before the Appellate Tribunal for Electricity (APTEL). In this context, it is important to reiterate the main principles laid down in the decision of this Hon’ble Court in the Energy Watchdog case (supra). The same are briefly mentioned below:

(a) Supreme Court has overruled use of regulatory powers to alter tariff or any provisions of the contract, so long as the existing Guidelines and model PPA deals with such issues. Since the Power Purchase Agreement (PPA) and bidding guidelines clearly define when and in what manner can the quoted tariffs be changed, the commission cannot use its regulatory powers to overrule such provisions. This finding is salient as it upholds the sanctity of contracts while not taking away the regulatory power if it is needed in a situation where the contract or other legal / policy provisions are silent or inadequate.

(b) The Hon’ble Supreme Court has held that the promulgation of the Indonesian regulation and the resultant price rise cannot be treated as force majeure event. The Hon’ble Court has also ruled that laws referred to in the PPA and guidelines can only be applied to Indian laws, and hence the promulgation of the Indonesian

regulation cannot be treated as a change in law event. Hence no tariff increase can be claimed by projects on account of the change in Indonesian Regulations.

(c) The Judgement of the Hon'ble Court has held that the amendment to the New Coal Distribution Policy (July 2013) should be considered as change in law event. Hence, relief as per change in law provisions of the PPA will be applicable for projects which experience shortfall in domestic coal supply by virtue of such change namely, shortfall in Supply from CIL/ coal companies in India after July 2013.

4.12. The quantum of relief will have to be decided by Regulatory Commissions on case to case basis taking into consideration the respective fuel supply agreement and the level of actual coal shortage and its cost implications.

4.13. It is further submitted that the present Petition which is based on the report submitted by the said committee and for the proposed amendment to the Power Purchase Agreement, seek to fundamentally alter the basic premise on which the contracts were awarded to the projects.

(a) The proposed amendment seeks to pass through the fuel costs on actual basis up to an imported coal cost 110 USD/MT, which is very high. An alteration of PPA agreed tariff is not permissible under the contractual framework, and such an act was precisely rejected by the Hon'ble Supreme Court in the Energy Watchdog case (Supra).

(b) Issues faced by the projects importing coal from Indonesia and which are impacted by the promulgation of the Indonesian regulation, dated September 2010, the committee has exceeded its mandate and suggested pass through of fuel price in case of change in source of coal import and legally untenable and cannot be allowed.

(c) The committee has failed to consider the fact that some of the projects are not contractually bound to use imported coal and can be run at a lower cost by

utilizing domestic coal. Such change in fuel source would not necessitate any legal or contractual changes but such legally permissible remedies that do not require any change in the PPA agreed tariff have not been considered by the Committee at all.

- (d) Issue of fuel price variation is not alone but the Committee has proposed a formula which would also pass on fuel transportation and other fuel related costs to consumers. There has been no event affecting these costs and hence bringing in such considerations and making the consumers bear such additional costs is completely untenable.
- (e) Once again, the existing PPA and bid documents provide mechanisms for addressing any legitimate increase in these costs, but overruling such existing provisions in the contract, the committee is attempting to completely change the tariff structure post facto, which is also against the order of this Hon'ble Court.
- (f) To the customers all the risk associated with currency variation, which at the time of bidding was voluntarily assumed by some of the projects by not quoting their bids in US dollars although the projects are claimed to be based on imported coal. This is again not a legally and contractually tenable proposition and is indeed a fundamental change in the nature and terms of the contract.
- (g) The committee makes it seem as if the project developer is made to deliver more than his obligatory supply of 80% of normative availability by suggesting that project should declare availability of 90%. However, at the same time the penalty for failure to achieve this is so minimal (around 1% of annual fixed cost payment) that is unlikely to have any impact and will not be commensurate enough as mitigation on the part of the generators to be considered. More importantly, while making it seem like a mandatory requirement the committee has allowed the generator to keep all the incentives on account on increased availability as per the existing PPA terms. Thus, the consumers get no certainty of additional generation but the generator is assured of increase in revenue if

availability increases while not facing any real penalty for failure to perform. This once again highlights the lopsidedness of the committee's approach to the problem. Thus, the examples above highlight how the committee is seeking to bring in changes which are legally not permissible and have been explicitly ruled out by this court vide its judgement.

- (h) Therefore, such attempts at *post facto* altering the basic premise on which the contract is based should be summarily rejected and disallowed.
- (i) The Procurer– Distribution Licensees and intermediaries acting on behalf of the Distribution Licensees in the State of Gujarat purchasing electricity from generators such as Essar Power Limited, should not be allowed to amend the Power Purchase Agreement to agree to provide a tariff more than the tariff admissible under the relevant PPA when, such PPA is in pursuance to a tariff based competitive bidding process under Section 63 of the Electricity Act, 2003 with quoted tariff being sacrosanct; and
- (j) The extra cost to be paid by the Procurers, which is substantial, is being sought to be claimed as a pass through in the consumer's Tariff and thereby burdening the consumers substantially.

4.14. It is further submitted that the Judgement dated 07.04.2018 in Energy Watchdog Case reported as (2017) 14 SCC 8 and also in All India Power Engineers Federation vs. Sasan Power Limited (2017) 1 SCC 487, the Hon'ble Supreme Court of India emphasized on the sanctity of the contract and the bidding guidelines and bidding process, and also the plea that contract has become onerous, burdensome etc. are not grounds for varying the terms of the contract. The fundamental aspect in a tariff based competitive bidding process is the quoted tariff. The bidders are required to make estimation of the cost elements and quote a tariff. The risk and reward if the quoted tariff being less or more to cover the cost and return is entirely to the account of the bidder. Each bidder decides on the competitiveness of the tariff to be quoted to hedge out the other bidders and get selected bidder cannot then complain that the

quoted tariff is not adequate. In the PPA dealing with amendment generally cannot be applied to allow tariff increase by tariff adjustments.

- 4.15. The Public interest, namely the safeguarding of consumer interest and very scheme of the tariff based competitive bid process provided in section 63 of the Electricity Act, 2003, is against such amendment to increase the tariff post bidding. The quoted Tariff is subject to adjustment only as per the specific provisions of the PPA namely (a) if the quoted tariff is stipulated to be escalable; (b) the changes on account of changes in law as dealt in the PPA itself; and (c) to limited extent as provided in the Available Reliefs for force majeure as dealt in the PPA. The quoted tariff is otherwise sacrosanct and it cannot be allowed to be varied by consent of the parties to the PPA and approval of the Regulatory Commission.
- 4.16. It is further submitted that with regard to the aforesaid decisions, it is clear that the waiver is spoken of in the realm of the Indian Contract Act, 1872 governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. But the matter does not end here. It is also clear that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to such public interest. This is clear from a reading of the following authorities.
- 4.17. The general principle is that everyone has a right to waive and to agree to waive the advantage of law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus, the maxim which sanctions the non-observance of the statutory provisions is *cuiuslibet licet juri pro se introducto renuntiare*. (See Maxwell on Interpretation of statutes, Eleventh Edn., pp. 375 and 376.)
- 4.18. As per the judgement in *Indira Boi v. Nand kishor* (1990) 4 SCC 668], it was held: (SCC p.672, para 5):

“The test to determine the nature of interest, namely, private or public is whether the right which is renounced is the right of party alone or of the public also in the sense that the general welfare of the society is involved. If the answer is latter, then it may be difficult to put estoppel as a defence. But if it is right of party alone then it is capable of being abnegated either in writing or by conduct.”

If there is any express prohibition against contracting out of a statute in it then no question can arise of anyone entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether as Act is intended to have a more extensive operation as a matter of public policy.

- 4.19. The principles of waiver although between is akin to the principle of estoppel; the difference between the two, however is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.
- 4.20. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct. It is thus clear that if there is any element of public interest involved, the court steps in to thwart any waiver which may be contrary to such public interest.
- 4.21. On the facts of this case, it is clear that the moment electricity tariff gets affected, the consumer interest comes in and public interest gets affected. This is in fact statutorily recognized by the Electricity Act in Sections 61 to 63 thereof. Under Section 61, the appropriate Commission when it specifies terms and conditions for determination of tariff, is to be guided inter alia by the safeguarding of the consumer interest and the recovery of the cost of electricity in a reasonable manner. For this purpose, factors that encourage competition, efficiency and good performance are also to be heeded.

Under Section 62 of the Act, the appropriate with the principles contained in Section 61. The present case however is covered by Section 63 which begins with a non obstante clause stating that notwithstanding anything contained in Section 62, the appropriate Commission shall adopt the tariff, if such tariff has been determined through a transparent process of bidding in accordance with the Guidelines issued by the Central Government.

Clause 2.3 of the said Guidelines reads as follows:

“.....

2.3 Unless explicitly specified in these Guidelines, the provisions of these Guidelines shall be binding on the procurer. The process to be adopted in event of any deviation proposed from these Guidelines is specified later in these Guidelines under Para 5.16.”

- 4.22. The appropriateness of the course of action suggested by the Government of Gujarat needs to be considered in the circumstances mentioned above and more importantly that it will open up an unintended and uncontrollable avenue resulting in substantial increase in tariff to consumer at large for no reason attributable to them. The consequences of the course adopted will have far reaching implications to the consumers in different States throughout the country. The same Generators for whom the course of action has been suggested will again seek similar dispensation in future. If the Government of Gujarat considers as a Sovereign that there should be a ‘bail-out’ of the Generators in Gujarat in the context of the need for the survival of the Industry and continued generation and supply of electricity, the course is not be to increase the tariff for the consumers. The course of increasing the tariff of the consumers, it is humbly submitted, it will set a bad precedent of virtually converting a tariff based competitive bid process to a determination of tariff on actual cost and expenses basis, setting at naught the entire scheme evolved under the Electricity Act, 2003. The preamble of the Electricity Act, 2003, the Statement of Object and Reasons, the National Tariff Policy notified by the Central Government under Section 3 of the Electricity Act, 2003 envisages the activities of the electricity industry to be conducted as competitive principles and provides for promotion of competitive environment. Further, such a course will contrary to the parliamentary scheme of

enacting the insolvency and Bankruptcy Code, 2016 to bring in financial discipline in the business and commercial activities in India.

- 4.23. As highlighted above these matters have been litigated right up to the highest forum and the Hon'ble Supreme Court has upheld the Sanctity of the contract. Therefore, it is of utmost importance to ensure the procurers' right to get power supply at PPA agreed tariff, and terms conditions throughout the term of the PPA. This is also crucial to safeguard the basic tenets of competition and bidding process. Any scheme considered for bailing out the Power projects should not place the procurers and consumers in an adverse position of making higher tariff with no benefit to them.
- 4.24. As per the terms of reference of the committee, only projects that are exclusively based on imported coal and are impacted by the Indonesian regulation can be considered for relief, if any. Therefore, projects / units that have been either granted letter of assurance of domestic coal supply or have signed fuel supply agreement with any Indian coal company, or are presently running on domestic coal, or are claiming relief under domestic coal related change in law events, cannot be considered for any relief.
- 4.25. Similarly, any projects / unit for which procurers have not specified imported coal as the primary fuel at the time of bidding cannot be considered for any relief. Since legally and contractually no relief is available to imported coal based projects, any bailout scheme devised for such burden, if any, amongst all concerned stakeholders namely, lenders, project developers, and consumers. Allowing any relief beyond the PPA terms and conditions would imply passing on to the consumers, commercial risks that were voluntarily assumed by the project developers to win the contract. These project developers would not have obviously passed on any reduction in the price of imported coal had the position had been reverse namely fall in prices of imported coal. Accordingly, and consistent with section 61 (d) of the Electricity Act, 2003, the consumers should be adequately compensated for supporting and sustaining such stressed assets. The safeguarding of the consumer interest should be the touchstone in considering any bailout to the projects.

- 4.26. It is further submitted that the relief, if any should only be prospective in nature and not retrospective applicability and no pass through of past liabilities or losses should be considered while devising any relief or mitigation plan. Any such consideration would be highly inappropriate and fundamentally against the Hon'ble Supreme Court Judgement in these matters. Further the purpose of considering bail out is that the procures/consumers to get the electricity in future and not that any extra amount to be paid for the past. The consideration for the generation and supply of electricity in the past as per the contractual obligations should be as per the amount admissible by law as laid down by the Hon'ble Supreme Court and not something over and above the same. If any such compensation is considered for the past it would amount to rewriting the law laid down.
- 4.27. It is further submitted that the transparent process with adequate time and opportunity for public consultation, as highlighted by them from time to time, any decision in such matters needs to be undertaken based on a thoroughly transparent process and after undertaking a much wider consultation with consumers as well as the public at large. Given the extent of stressed assets, in the power sector, it is of utmost importance to set highest governance standards for any bailout processes. This is also extremely important from the point of view of avoiding such Incidents in the future. In fact, in the past the Committee appointed by the CERC did not follow such transparent process and did not have the benefit of the consultation with the consumer groups.
- 4.28. It is further submitted the recommendation made by the Committee to arrive at the amount of increased tariff is not as per consideration of all relevant aspects. The Committee appointed should not have proceeded to decide on the quantum of the increased tariff without undertaking much deeper consultation, wider participation and examination of various complex aspects. The generators having been selected through a competitive bid process with the quoted tariff being the selection criteria there cannot be a blanket consideration of all the cost elements as if it is a determination of tariff under section 62 of the Electricity Act, 2003. If the claim of the three generators for increase in tariff is the increase in the prices of Imported coal on

account of promulgation of Indonesian Regulations, the financial Impact to be considered should have been limited to the same. It could not have been extended for giving relief on other aspects.

- 4.29. The Committee has however proceeded to recommend the entire difference in the landed cost of imported coal and the quoted energy price by the generator. The actual export price of coal from the Indonesian mine and the export price supported by the quoted energy charges could alone be the consideration.
- 4.30. The issue of independent and impartial assessment by the committee is also relevant in view of the fact that one of the members of the Committee is a former Chairperson of the Central Commission. The Central Commission had passed the order dated 02.04.2013 (when the said Member was the Chairperson) proposing that the compensatory tariff be considered under exercise of general regulatory power to Adani Power and Coastal Gujarat Power Limited. The above was set aside by this Hon'ble Court in Energy Watchdog case. The recommendation by the Committee is in essence again the same proposal which was recommended by an earlier Committee appointed by the Central Commission vide the above order dated 21.04.2013 for exercise of Regulatory powers by the Central Commission, which was set aside by the Appellate Tribunal and by this Hon'ble Court in the Energy Watch Dog Case (2017) 14 SCC 80.
- 4.31. The tariff quoted by each of the generators is broadly in two parts, namely, quoted fixed charges and quoted energy charges. The quoted fixed charges are based on the capital cost incurred, primarily, up to the stage of Commercial Operation Date. The quoted capacity charges were left to the bidder to decide. There have been no external factors affecting such cost and therefore, no relief is admissible for the wrong estimation of the capacity. charges by the bidders including Adani Power, Essar Power and Coastal Gujarat Power Limited. Such capacity charges have no bearing on the day to day operation of the power plant except to a limited extent of Operation and Maintenance (O&M) expenses.

- 4.32. There have been no external factors affecting the O&M expenses. The PPA also provides for changes in law to be compensated and therefore, any increase in the cost due to change in law is also allowed. The capacity charge also includes a reasonable return over and above the cost and expenses to be incurred. Each of the bidders does factor in such reasonable return in the region of 12% to 16% (post tax) in the bid. It is further stated that allowing any relief beyond the PPA terms and conditions would imply passing on to the consumers, commercial risks that were voluntarily assumed by the project developer to win the contract. These project developers would not have obviously passed on any reduction in the prices of imported coal had the position been reversed, namely, fall in prices of imported coal. Accordingly, and consistent with section 61 (d) of the Electricity Act, 2003, the consumers should be adequately compensated for supporting and sustaining such stressed assets. The safeguarding of the consumer interest should be the touchstone in considering any bailout to the projects.
- 4.33. The judgment of this Hon'ble Court in, *M/s Alopi Parshad & Sons Ltd. -- Union of India* (AIR 1960 SC 588), wherein it has held under:

"The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, In the course of carrying it out, with a turn of events which they now unexpectedly emerged, the contract ceases to bind at that point - not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because of its true construction it does not apply in that situation."

Complete execution of the work." In these parameters of the terms and conditions, that the price quoted for the entire work shall remain firm and fixed till the complete execution of the work, the heading pricing and currency changes leaves no manner of doubt that there is no scope for giving any benefit of fluctuation on the exchange rates. Once the price is fixed there is no provision for giving any benefit for fluctuation in terms of the contract then in that case, the claimant 1026 DIC cannot raise the claim of excess payment made towards customs duty on account of fluctuation on exchange rate. The minority view expressed by Justice M. M. Dutt appears to be correct. Had there been downward trend in the exchange rate, then the DIC would not have slashed the exchange rate. If the downward trend cannot benefit either party, then equally the up-ward trend cannot benefit the Dic for claiming the payment

of the higher customs duty on account of fluctuation in exchange rate. Therefore, the expression, 'firm and fixed' is clear answer to the question if during the course of contract certain fluctuation has taken place in the market then on that count the claimant cannot raise extra demand on account of upward trend in the exchange rate. In this connection, reliance was placed on a decision of this Court in Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission [(2003) 8 SCC 593]. In this case this court granted the contractor's claim for being compensated for foreign exchange fluctuation and not for any escalation in the price. This court held that the claimant does not violate any terms of contract. In the present case, in view of the fact that the price is firmly fixed and DIC has clearly understood and agreed the terms of the contract, and it was clearly stipulated in Clause 12.2. that no financial adjustment arising there from shall be permitted by the owner. In these circumstances, the minority view taken by the Arbitrator, Justice M. M. Dutt appears to be well founded. Pure Helium India (P) Ltd. (supra) was decided on peculiar facts. As such, it cannot provide us any assistance.

- 4.34. It is submitted that in terms of the above, Essar Power should not be entitled to any relief for foreign exchange rate variation namely, the difference in US Dollars prevalent at the time of bidding and rate prevalent at the time of import of coal. Similarly, any project / unit for which procurers have not specified imported coal as the primary fuel at the time of bidding cannot be considered for any relief namely, difference with US dollars prevalent at the time of bidding and rate prevalent at the time of import of the coal.
- 4.35. Since the primary responsibility of managing the risks on account of fuel price variation rests with the project developer, every effort should be made by it to mitigate this risk before deviating from PPA terms and putting additional burden on the consumers. In this regard, avenues such as blending of lower cost coal, ploughing back of mining profits to the maximum possible extent, exploring alternate cheaper sources for coal procurement financial restructuring, debt write-off etc. should be thoroughly explored and fully utilized before any other relief is granted. The project developers have also proceeded with the projects with Special Purpose Vehicle established for the purpose after having participated in the bidding through their holding company based on the technical and financial qualification of the parent/group Companies. The project companies should not therefore be considered separately. There has to be sacrifices from the holding company/parent company

also, particularly the company which was the bidder in the competitive bid process and was selected based on the financial qualification of the said company.

4.36. Other Suggested Approach given in the submissions made by Prayas (Energy Group) before the Committee is also being submitted before the Commission. These are:

- i. The project should ensure 80% availability during any three-month peak season duration, as may be specified by the procurers.
- ii. The term of PPA should be extended by 15 years beyond the present term of the contract. The renovation expenditure for such extension should be to the account of the project developer and not passed on to the Procurers. For these additional fifteen years, the capacity charge should be kept constant at the last year capacity charge quoted in the PPA. The fuel cost and any operation and maintenance related charges for the extended PPA duration should be decided by the appropriate commission, subject to prudence check This would ensure benefit to the procurers.

5. The matter was kept for hearing on 06.08.2019 wherein the Commission after hearing the parties at para 7 of the daily Order dated 20.08.2019 decided and directed to the petitioner to issue a public notice in Gujarati and English newspaper and invite comment and suggestions from the consumers on the petition.

6. The Petitioner has complied with the Daily Order of the Commission dated 20.08.2019 by issuing a public notice in two Gujarati newspapers and one English newspaper viz. Sandesh, Divya Bhaskar and Indian Express on 28.08.2019 for inviting objections on the petition. In pursuance to the public notice issued by the Petitioner in newspapers for inviting comments/suggestions/objections from the stakeholders, the following Objectors filed their submissions:

- (i). Shri K. K. Bajaj
- (ii). Utility Users' Welfare Association
- (iii). Jan Kalyan Foundation
- (iv). Laghu Udyog Bharti

7. The details of the submissions / objections filed by above Objectors are being discussed here as under:
8. Shri K. K. Bajaj filed his submissions/objections as under:
 - 8.1. It is submitted that the Petitioner had signed Power Purchase Agreement No. 1 on 26.2.2007 to supply 1000 MW of electricity at Rs. 2.54 per unit pursuant to selection of Respondent No. 1 as a successful bidder for supply of electricity using imported coal. It is submitted by Respondent Generator that due to change in Indonesian Coal Regulation, it is not possible to supply power at tariff fixed in PPA for 25 years. The Respondent Generator intermittently was discontinuing power supply to reduce its financial losses. The Petitioner failed to take any action or file petition against Generators before Commission despite violation of terms and conditions of PPA.
 - 8.2. The supplementary PPA has been signed in the interest of generators and not in interest of consumers of Gujarat.
 - 8.3. It is submitted that the Hon'ble Supreme Court in its order dated 29.10.2018 has not given any mandate that the amendment sought for should be allowed. The direction given is only that the amendment application should be considered in accordance with law after considering all objections and submissions of the Consumer Groups. Earlier the Hon'ble Supreme Court has rejected the amendment of PPA on ground of Change in Law and Force Majeure ground.
 - 8.4. The Commission is not bound by the recommendations of HPC or directives of the Gujarat Government but is required to take an independent and unbiased view of the matter and take a judicial decision after considering the views of all stakeholders, including the Consumer Groups in accordance with law on the basis of as to whether the amendment being sought to be approved would be in the interest of the consumers. The HPC is constituted by GOG and though consumers of Gujarat will have major impact, the HPC meetings were not held in Gujarat and even Consumer Groups of Gujarat were not invited to participate in HPC proceedings for which the Petitioner and

GOG need to submit the explanation as to why GOG / GUVNL has not issued public notice and not invited the Consumer Groups of Gujarat.

- 8.5. It is further submitted that there are serious legal and proprietary issues in the Supplemental PPAs as has been proposed since the proposal is to convert a tariff based competitively bid project under Section 63 of the Act into a hybrid of Sections 62 and 63 of the Act for which there is no legislative sanction under the Act. Therefore, the proposed amendment contrary to the Bidding Guidelines cannot be accepted.
- 8.6. It is also submitted that entering into necessary Fuel Supply Agreement was the responsibility of Generator and lenders were expected to conduct necessary commercial prudence at appropriate time. If any business decision is being taken by the Respondent Generator and lenders based on their risk perception, the cost implication should be to the Respondent Generator/ lenders. However, to favour these Generators, GUVNL has entered into the supplementary agreement for the benefits of the Generators at the cost of consumers. SBI and other lenders have continued to fund such generators in acquiring various stressed assets though they are aware about the past records of such generators.
- 8.7. It is submitted that the recommendations of the HPC and the Supplemental Agreements have been proposed on the basis of the misplaced view that the process provided under the Insolvency and Bankruptcy Code (IBC) needs to be avoided at any cost and the Project Developer should be bailed out at the cost of the procurer and consumers at large.
- 8.8. The High Power Committee has neither dealt with nor looked into two important aspects such as over invoicing of import of machinery and coal and the role of lenders by not sharing documents with Directorate of Revenue Intelligence (DRI). As per media reports Directorate of Revenue Intelligence is investigating against Essar Power & Others in respect of over-invoicing of import of coal and import of machinery at their power plants. However, as per reports, the Generators are not cooperating with the DRI. Lenders have allowed the Generators to loot public money through over-invoicing

of equipment imports and coal imports and lenders are not cooperating with DRI, why Government of Gujarat / GUVNL has considered the plea of Lenders? Though this issue is directly relevant, the Government of Gujarat and/ or GUVNL did not seek any clarification on these aspects from Generator and/or Lenders which needs to be clarified by the Petitioner as to why this issue has not been taken up before the HPC when GUVNL generally acts against each and every small consumer. Commission should give its finding based on the submissions of GUVNL. Further, the Generators had earlier offered the ownership of 51% of the project at Re.1/- per unit which was not accepted by Government of Gujarat and GUVNL. Now GUVNL has agreed to give full energy cost as pass through in addition to the entire fixed cost quoted in the tariff and thereby Generators would be allowed to earn ROE for the entire balance life including for the extended term under the pretext of benefits to the consumers, which needs to be looked into by the Commission.

- 8.9. The High Power Committee did not inquire as to why developers were interested in retaining 49% stake and why not offered 100% stake, when project is unviable. Petitioner needs to clarify for rejection of such proposal for 51% stake vis-à-vis how the present amendment is more beneficial to GUVNL/ Consumers and share copy of all communications by the Petitioner with all Generators along with internal approvals of top management.
- 8.10. It is submitted that in case the recommendations of HPC are accepted, it would lead to an impact of Rs.1.29 lakh crore over 30 years' period on the consumers of Gujarat, Haryana, Maharashtra, Punjab and Rajasthan in addition to the impact of Rs. 18,000 crores on the lenders of the said IPPs. The HPC report is a ploy to circumvent the Hon'ble Supreme Court judgment dated 11.04.2017 in Energy Watchdog Case which clearly upholds the sanctity of the PPA and allows no room for grant of any relief to the said IPPs.
- 8.11. Based on above submission he submitted that since approval sought for supplementary Agreement is contrary to the provisions of EA, 2003 including regulatory framework and settled position of law the petition is not admissible and

maintainable. The proposed approval will also put additional burden on consumers of Gujarat. It is going to set a bad precedent and the bidding process will lose its sanctity. In the present submissions, the Objector has sought various information / explanation from the Petitioner and or Generator to provide necessary information so as to assist the Hon'ble Commission in the subject matter.

8.12. It is important to note that SBI and other lenders have continued to fund such generators in acquiring various stressed assets though they are aware about the past records of such generators. In such a scenario, the GUVNL is required to provide detailed explanation as to why Government of Gujarat/GUVNL have taken the lead to act on the request of such Generators/lenders. The Objector requests the Commission to implead Government of Gujarat and lenders including SBI as party to the proceedings so as to understand the nitty gritty of the issues involved.

8.13. It is going to set a bad precedent and the bidding process will lose its sanctity. The Objector humbly requests Commission to consider the submission made herein above and reject the present petition. In the present submissions, the Objector has sought various information / explanation from the Petitioner and or Generator to provide necessary information. Upon receipt of such information/ explanation, the Objector reserves its right to make further submissions to assist the Hon'ble Commission in the subject matter.

9. The Objector UUWA has filed the following objections:

9.1. The Objector has submitted that the Commission has no jurisdiction to decide the present Petition in view of the following legal position. The Commission is consisting of three members. Out of three, there are two members, Chairman Shri Anand Kumar and Shri P.J. Thakkar both are technical members and only one member Shri K.M. Shringarpure is a member from finance.

9.2. It is further submitted that as contemplated in Chapter- II Establishment and Constitution of Commission, Clause-5 of Gujarat Electricity Industry (Reorganization

and Regulation) Act, 2003 which reads “Constitutions of Commission, 5(1) The commission shall consist of a Chairperson and two other members to be appointed by the State Government on the recommendation of a selection Committee constituted under Section 6. (2) out of three members one shall be a person who has special knowledge and professional experience in the field of engineering related to generation, transmission, distribution or supply of electricity; b. The other two shall be the person who have special knowledge and professional experience in the field of finance, commerce, economics, regulation of industry, law or management: Provided that not more than one member shall be appointed having professional Knowledge and experience in the same field. (3) A member of the Commission shall render whole time service and shall not hold any other office during his tenure of office. (4) On occurrence of any vacancy in the office of a member due to death, resignation or any other reason, the same shall be filled in by the State Government in the manner provided in this Act.

- 9.3. It is further submitted that earlier the Respondent Essar Power Gujarat Ltd. had filed the Petition No. 1389 of 2014 for adjudication of the disputes between Petitioner GUVNL and respondent Essar Power Gujarat Limited where in rate of power to be supplied is requested to increase because of financing stringency of the Respondent Essar Power Gujarat Limited under Section 86 (1) (a) (b), (f) and (k) of the Electricity Act, 2003 read with Article 12, 13 and 17 of the Power Purchase Agreement executed dated 26.02.2007 between Essar Power Gujarat Limited and GUVNL. The objector UUWA representing the consumers’ interest, have been impleaded and joined as an affected party during the proceedings of the above Petition No. 1389 of 2014. That Commission was of two members one Chairman Hon’ble Shri Pravinbhai Patel and second Hon’ble Member Shri Dr. M.K. Iyer. The Commission, the Respondent GUVNL and the State Government in the Petition No. 1389 of 2014 are the State within meaning of Article 12 of the Constitution of India. While adjudicating the dispute between Essar Power Gujarat Ltd. as generator and GUVNL as trading licensee under Section 86 (1) (f) of Electricity Act, 2003, Commission has to exercise the power of the State vested in the Civil Courts. For exercise of the powers of the State vested in Civil Courts, the Commission must have one of the members from the judicial background. Since there was no Member from Judicial background, UUWA filed a Writ Petition in

the form of PIL before Hon'ble High Court of Gujarat bearing No. WP (PIL) 172 of 2014. Hon'ble High Court of Gujarat has been pleased to announce the judgement dated 08.10.2015 in favor of UUWA who has challenged the adjudication judicial proceedings by the Commission in absence of the judicial member.

- 9.4. The Judgement of the Hon'ble High Court of Gujarat has been challenged by the State of Gujarat, before Hon'ble Supreme Court of India in Civil Appeal No. 14697 of 2015 State of Gujarat & Ors. Vs. Utility Users' Welfare Association & Ors. The Hon'ble Supreme Court of India in its judgement dated 12.04.2018 at para No. 114 of page No. 82 concluded is reproduced as below:

“

114. In view of our observations above, we conclude as under: i. Section 84(2) of the said Act is only an enabling provision to appoint a High Court Judge as a Chairperson of the State Commission of the said Act and it is not mandatory to do so. ii. It is mandatory that there should be a person of law as a Member of the Commission, which requires a person, who is, or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law, who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge. iii. That in any adjudicatory function of the State Page 82 of 84 Commission, it is mandatory for a member having the aforesaid legal expertise to be a member of the Bench. iv. The challenge to the appointment of the Chairman and Member of the Tamil Nadu State Commission is rejected as also the suo moto proceedings carried out by the Commission. v. Our judgment will apply prospectively and would not affect the orders already passed by the Commission from time to time. vi. In case there is no member from law as a member of the Commission as required aforesaid in para 2 of our conclusion, the next vacancy arising in every State Commission shall be filled in by a Member of law in terms of clause (ii) above.

.....”

In light of the above Judgement of the Hon'ble Supreme Court of India, the present Commission is not consisting of any Member of law as mentioned at para (ii) supra, and is requested not to proceed with the Petition filed by GUVNL.

- 9.5. If the plea is taken that as mentioned above that the present Commission can adjudicate and proceed with this Petition, it is to mention that this was a very case in which the need of Member of law in the Commission has been challenged and all the

Petitioners, Respondents are the same including the Commission. The issue of adjudication of dispute between GUVNL and Essar is pending since last five years and it will be unethical, unfair, illegal, undue and gross violation of jurisprudence to proceed in the matter for the Commission.

- 9.6. The present petition is filed by GUVNL as Petitioner under Section 86 (1) (b) and 86 (1) (f) of the Electricity Act, 2003 read with Article 18.1 of the Power Purchase Agreement (PPA) dated 26.02.2007 under 1000 MW (Bid-03), executed between GUVNL and Essar Power Gujarat Ltd. for approval of amendments to the PPAs by way of Supplemental PPA dated 01.03.2019. The approval to the recommendations made by the High Power Committee constituted by Govt. of Gujarat for resolution of the issues involving the imported coal based generating companies in the State of Gujarat who have executed PPA for supplying power to GUVNL and the subsequent policy decision dated 01.12.2018 taken by the Govt. of Gujarat based on HPC recommendations.
- 9.7. The Respondent No.1 has after signing PPA with GUVNL for supply of power, not fulfilled their obligation saying that because of change in law in Indonesia from where their coal mines are situated, has approached the legal forums up to Supreme Court of India for increase in the tariff than the quoted tariff under transparent competitive bidding as per guidelines from Ministry of Power, GoI, 2005. The Supreme Court of India has rejected the claim of generators as there is no scope legally possible to justify it and to get any relief.
- 9.8. It is further submitted that All the stakeholders (except Consumers and Consumers' Organization) like financial agencies, generators, procurers and Govt. of Gujarat are attempting to help the generators under the guise of Public Interest, particularly the Petitioner GUVNL by filing this Petition has attempted to get something done indirectly, which it has not been able to get directly. This is against the well settled principle of law i.e. 'what may not be done directly cannot be allowed to be done indirectly' as has been held by the Hon'ble Supreme Court in the case of *Jagir Singh vs. Ranbir Singh*, reported in (1979) 1 SCC 560 (para 5 may be seen therein) and later reiterated in the

case of *State of Tamil Nadu vs. K. Shyam Sunder*, reported in (2011) 8 SCC 737 (para 28 may be seen therein).

- 9.9. It is further submitted that the Petitioner has given more weight to the Public Interest in the present petition and on that ground the Petitioner has sought the approval of amendment called re-opening of the PPA and redetermination of tariff. The Commission has made it crystal clear on the issue of public interest, in its Order dated 08.08.2013 in the Petition No. 1320 of 2013 filed by the Petitioner GUVNL the relevant Sections of Electricity Act, 2003 are Section 65 and Section 108 of the Electricity Act, 2003 which is reproduced below:

“....

Section 65, if the State Government required the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under Section 62, the State Government shall, notwithstanding any direction which may be given under Section 108, pay, in advance in the manner as may be specified, by the State Commission the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the license or any other person concerned to implement the subsidy provided for by the State Government:

Provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by State Commission shall be applicable from the date of issue of orders by the Commission in this regard.

Section 108

108 (1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.

From the reading of above sections, it transpires that if the State Government desires to grant subsidy to a particular category of the consumers for public interest the Commission may allow the same. Similarly, under Section 108 of the Electricity Act, 2003 the Government is empowered to pass an order and direct the Commission in the matter of Policy involving the Public Interest. Thus the aforesaid sections of the Act do not provide any power to the Commission to re-open a PPA under the guise of amendment of PPA and to re-determine the tariff discovered under transparent competitive bidding and adopted by Hon'ble Commission under Section 63 of Electricity Act, 2003 and executed the PPA accordingly.

- 9.10. It is further submitted that the Commission is not empowered to follow the direction given by the Govt. of Gujarat and recommendations of HPC for revision of the tariff discovered under Section 63 of the Electricity Act, 2003. The question as to whether the State Commission has either judicial power, adjudicatory power, legislative power, regulatory power or administrative power vested under any provision of the Electricity Act, 2003, Regulations, Rules made there under or is there any enabling provision of any other law prevailing in the land of India which empowers the Commission to approve the amendment in the PPA executed between Petitioner and the Respondent? The answer is no as per the various judgements pronounced by Hon'ble Supreme Court of India in the same matter. It is pertinent to mention that the Commission has set a bench mark in two of its judgement (i) dated 11.07.2013 in the Petition No. 1254 of 2012 State of Gujarat Vs. GUVNL & Ores. And (ii) dated 09.05.2019 in the Petition Nos. 1716/1717, 1718, 1720 & 1728 of 2018 Shah Alloys Steel Ltd., Shaifali Steels Ltd., Shaifali Rolls Ltd., RMG Alloys Steel Ltd. and Electrotherm (India) Ltd., Vs. DISCOMs, GUVNL and Energy & Petrochemical Department, Govt. of Gujarat. In Petition No. 1254 of 2012 Govt. of Gujarat has sought this Commission's approval for power tariff subsidy to the spinning and weaving Industry which were/are starving for their existence and are facing tremendous financial hard ship and just to help them, Industry & Mines Dept., GoG had introduced the textile policy and published the G.R. dated 05.09.2012. This Commission has not approved any subsidy into the tariff of textile industry saying that GoG can give direct subsidy to the textile consumers under Section 65 of the Electricity Act, 2003.
- 9.11. It is further submitted that in the Petition No. 1716/17/18/19/20 and 1728 of 2018, all the Petitioners were steel Industries who were declared sick under provision of Sick Industrial Companies (Special Provisions) Act, 1985. All the Petitioners are the Companies registered under Companies Act, 1956 and are struggling for their existence and are facing tremendous financial hardship and have prayed for reduction in the HT tariff from Rs. 7.34 per unit to Rs. 4.40 per unit (including demand charges). The reasons submitted for reduction in tariff by the above Petitioners are that in the present scenario of global recession coupled with economic slowdown, industries are

passing through its toughest phase and facing challenges for its survival. In such scenario, it is difficult for the Sick Industries to compete in the market due to higher power cost as these industries are already facing financial crunch. The sick Industries as Petitioner also submitted that due to unviable electricity tariff, the operations of such industries may have to be closed down which in turn, may lead to (i) creation of NPAs, (ii) hampering of infrastructure activities due to loss of production, (iii) loss of revenue to DISCOMs, (iv) loss of revenue to Government and (v) loss of direct/indirect employment. The Government of Gujarat has issued a G.R. Policy dated 11.09.2017 for revival of viable Sick Industries in Gujarat. The preamble of the said Policy emphasizes on the need for providing support to viable Sick Industries from financial institutions, Government and from owners for revival as closer of these industries will lead to problems like unemployment, revenue loss to State and Central Govt. and increase in non-performing assets leading to stress on the banking system. The Petitioners have been registered as viable sick Industries under the said Policy. In the Judgement in this petition Nos. 1716-1720 and 1728 of 2018, dated 09.05.2019, this Commission has not approved the special reduced tariff to the Petitioners and not acted as per the direction given by the Govt. of Gujarat under Section 108 of the Electricity Act, 2003 vide letter No. GUV-12-2018-3571-K dated 31.01.2019.

- 9.12. It is further submitted that the Petitioner GUVNL has adopted the double standards, (i) to favour the private generators by proposing approval of such amendment in the PPA to increase the tariff of power to be supplied by three generators unfairly, illegally, unduly considering the financial crunch/hardship of generators for viability of their units,(ii) that GUVNL in case of Sick Industries is not ready to sacrifice even their profit and wants full recovery of the ARR of its Distribution licensees.
- 9.13. They have further submitted that, here it is a similar case of survival, revival, NPAs of the banks, unemployment of the people, loss of revenue to the DISCOMs, GoG and Gol etc. On one hand GUVNL is worrying about the financial hardships of power generating companies who are supposed to supply power at the quoted rate under transparent competitive bidding as per guide lines of MoP, Gol, 2005 and as per terms

of PPA executed between GUVNL and generators and even exhaust of all legal remedy.

- 9.14. It is further submitted that the Petitioner has with a view to engineer an appearance of so called Public Interest is not a bona fide and just to favour the generators by hook or crook to help financial hardship and survival of the generators if higher tariff is not granted, on that hand the Petitioner is strict in recovering their ARR and not interested to find the ways and means to assist their valuable HT consumers who has so far paid lots of energy bills of crores of rupees, and GUVNL/DISCOMs have made profit out of their payments so far, here in the case of HT large scale industrial consumers, either GUVNL or GoG does not find any Public Interest is strange.
- 9.15. They have further submitted that the Petitioner is having double standards is also evident from the judgement of Hon'ble Gujarat High Court in SCA/2186 of 2007 Jindal Power Ltd. and PTC India Ltd. V/s. GUVN: which is an eye opening that how GUVNL showing Public Interest and has favoured a private generator Adani Enterprises by keeping the Jindal Power Ltd. and PTC India Ltd. kept out who were also successful bidders in the same case.
- 9.16. If the PPA with Jindal Power Ltd. and PTC India were executed, GUVNL would have not faced this problem of non- supply of power from these three generators. The observation made by the Hon'ble High Court of Gujarat in the SCA/2186 of 2007 in its judgement dated 29.04.2007 for conduct of the Petitioner is narrated at para 26 to 29 on page no. 38 to 40 which is reproduced hereunder.

“.....

26. It is interesting to refer to the figures given by the respondent Corporation to justify its decision not to enter into PPA with PTC India for purchasing 440 MW of power at the rate of Rs. 2.89 per unit. The following figures are given in its affidavit dated 18.8.2007(para 16):- Considering the capacity offered of 590 MW which was proposed to be supplied by the petitioners-M/s. PTC India Ltd. and M/s. Jindal Power Ltd., if electricity is purchased by the respondent M/s. Jindal Power Ltd. , if electricity is purchased by the respondent M/s. Jindal Power Ltd., if electricity is purchase d by the respondent Corporation at the levelized tariff of Rs. 2.89 per unit, then the total cost would come to Rs. 1195/- crores per annum. Similarly, if electricity can be permitted to be purchased by the respondent Corporation at

levelized tariff of Rs. 2.20 per unit (the rate offered by KSK Energy Ltd.) then the total cost would come down to Rs. 909 crores per annum which would save Rs. 286 crores per annum and saving of about Rs. 7150 crores over the period of for 25 years. In a comparative table the above figures are placed in column (A). If the respondent Corporation had cared to apply the same logic to the burden taken upon itself on the basis of the PPA with respondent No. 3 at the rate of Rs. 2.89, the figures would read as indicated in column (B):-

Additional Burden on account of entering into PPA at the rate of Rs. 2.89 per unit

	With Petitioners	With Respondent No. 3
	(A)	(B)
Power Capacity MW	590	1000
Annual burden	Rs. 286 crores	Rs. 484 crores
Burden over 25 years	Rs. 7150 crores	Rs. 12118 crores.

While the figures in Table A are those indicated in Paragraph 16 of the respondent-Corporation's affidavit dated 18.08.2007, the figures in Column B are worked out by applying the rule of three. Working out the exact amount on the basis of varying rates applicable for the relevant years may result into minor variations, but the facts remains that the respondent Corporation is not in a position to dispute that the respondent Corporation was eager to purchase power from M/s. Adani Power Pvt. Ltd. – respondent No. 3 at the rate of Rs. 2.89 per unit, but in the last nine months has not entered into any PPA except under bid. Nos. 1, 2 and 3. The Court's attention is not even invited to any notice inviting tenders for supplying power at any such rates lower than Rs. 2.89 on the same terms and conditions as contained in the PPA entered into with the third respondent under bid No. 1. This coupled with the fact that the respondent Corporation has been purchasing power from the second respondent – (both M/s. Adani Enterprises Ltd. – second respondent and M/s. Adani Power Pvt. Ltd. – third respondent are admittedly belonging to the same Adani group) on a short term basis at the average rate of Rs.5.31 to 5.45 per unit since October 2006 and the amount being paid for such short term purchase from the Adani group has been shown to be Rs. 322.01 crores from October 2006 to August 2007, as against power purchased from other suppliers on short term basis aggregating to only Rs. 36.35 crores during the same period, the Court finds considerable substance in the submissions of the petitioners and particularly PTC India that the decisions of the respondent Corporation impugned in these petitions were not bona fide, but were made with a view to engineer an appearance of default so as to weed out the other successful bidders like M/s. PTC India Ltd. from the arena. Yes, "from the arena", and not "from the competition", because there is no competition. There was and is enough power demand – to accept the power offered by the respondent – Adanis as well as by the petitioners.

29. At the hearing, reference was made to the advantage the Adani Group pf Industries (to which the second and third respondents belong) have of "local

accessibility". In view of the finds already given earlier, it is not necessary to look into this issue.

30. The respondent Corporation through the learned Advocate General had already made a statement before this Court on 22.2.2007 which was also reiterated before the Hon'ble Supreme Court on 26.3.2007 that in the event of the petitioner PTC India finally succeeding in the matter, they will be accommodated for the purpose of bid No. 1 in respect of their offered quantity of 440 MW of power. In view of the levelized average tariff rate of Rs. 2.89 per unit, we direct the respondent Corporation to enter into a similar PPA with PTC India Ltd. which it has entered into with the third respondent.

31. However, as far as Jindal Power is concerned, it is not prepared to reduce its price from Rs. 3.24 per unit (as indicated in the letter of Intent dated 8.12.2006) to Rs. 2.89 per unit. Letter of Intent is an expression of intent and not a finding enforceable agreement. Since Jindal Power is not ready and willing to reduce the rate so as to match the rate offered by the third respondent and PTC India i.e. Rs. 2.89 per unit, no mandamus can be issued in favour of Jindal Power.

32. In the result, the petitions are disposed of in the following terms:- (i) Special Civil Application No. 3514 of 2007 is allowed. Respondent No. 1 is directed to enter into the Power Purchase Agreement (PPA) with petitioner – M/s. PTC India Ltd. at the levelized rate of Rs. 2.89 per unit on the same terms and conditions which were incorporated in the PPA dated 6.2.2007 between the respondent Corporation and M/s. Adani Power Pvt. Ltd. – third respondent, within one month from today. (ii) Special Civil Application No. 2186 of 2007 is disposed of after recording the statement made by Mr. K.S. Nanavati, learned counsel for petitioner – M/s. Jindal Power Ltd. to the effect that it is not prepared to offer power to the respondent Corporation at the levelized tariff of Rs. 2.89 per unit under bid NO. 1, but that M/s. Jindal power Ltd. is prepared to offer 100 MW of power to the respondent Corporation at the levelized tariff of Rs. 3.2483 for a period of seven years commencing from 16.06.2008 provided advance intimation of at least three months is given before requiring the petitioner Company to supply the power at the above rate and from the above date. (A detailed pricing year wise is indicated in their letter dated 30.08.2007 addressed to their advocates – M/s. Nanavati Associates, which letter is placed by them on the record of the petition). (iii) The respondent Corporation shall take into account the above offer if M/s. Jindal Power Ltd. supplier from 16.6.2008 onwards.

33. Since both the petitions are disposed of, the Civil Applications are also disposed of.

(M.S. Shah, J.)
K.A. PUJ, J.)

.....”

- 9.17. The Extent to which the tariff terms and conditions are being proposed to be varied in favour of Essar Power Gujarat Limited is not justified even as per the resolution passed by the Government of Gujarat appointing the HPC to make recommendation and the stated purpose for which the HPC has considered the implications of Indonesian Regulations on prices of coal imported from Indonesia.

- 9.18. They have further stated that the Hon'ble Supreme Court of India in its Order dated 29.10.2018 has not given any mandate that the amendments sought for should be allowed. The direction given is only that amendment application can be considered in accordance with law after taking into account all the objections and submissions of the consumers groups. For the sake of clarity, the Order dated 29.10.2018, the Apex Court had directed as follows:

“

Having heard learned counsel for the parties, including the learned Attorney General appearing for the State of Gujarat, we allow the application for impleadment of the State of Gujarat. We are of the view that, having perused the High Power Committee's report, which was given after our judgement dated 11th April, 2017, it will be open to the applicants to approach the Central Electricity Regulatory Commission (C.E.R.C) for approval of the proposed amendments to be made to the Power Purchase Agreements (PPAs) in question.

We make it clear that our judgement will not stand in the way of maintaining such applications, we also make it clear that each of the consumer groups, who had appeared before us and who have appeared before us today, will be heard on the objections that they may make to the proposed amendments to the PPA, after which, it will be open to the C.E.R.C. to decide the matter in accordance with law. Given the conclusions in the High Power Committee report, we are of the view that the C.E.R.C. should decide this matter as expeditiously as possible, and definitely within a period of eight weeks from today, The miscellaneous applications are disposed of accordingly. Pending applications, if any, stand disposed of.”

- 9.19. The Commission being a statutory body is not bound to act as per the direction of the State Government, if the direction of the State Government is not consistent with the provisions of the Act, 2003, Rules and Regulations framed under the Act, 2003 and policies in view of the various judgements rendered by the Hon'ble APTEL and Hon'ble Supreme Court of India. UUWA in support quote the judgement of Hon'ble APTEL in the judgement dated 31.01.2011 in the Appeal No. 41, 42 and 43 of 2010 which had been considered by this Commission too on the issue.

“

Section 62 (1) The State Commission is independent statutory body. Therefore, the policy directions issued by the State Government are not binding on the State Commission, as those directions cannot curtail the power of the State Commission in the matter of determination of tariff. The State Government may give any such policy direction in order to cater to the popular demand made by the public but while determining tariff the State Commission may take those directions or suggestions for consideration but it is for the State Commission which has statutory

duty to perform either to accept the suggestion or reject those directions taking note of the various circumstances.

It is purely discretionary on the part of the State Commission on acceptability of the directions issued by the State Government in the matter of determination of tariff.

(2) From the perusal of the impugned order it is the State Commission has fully accepted and acted upon the State Government's policy directions in the light of the legal expert's opinion holding that the State Government directions is binding. Therefore the finding given by the State Commission that the directions of the State Government under Section 108 of the Act is binding on the State Commission is wrong.....”.

9.20. The Order of the Supreme Court dated 29.10.2018 specifically states that each of the consumer groups who had appeared before the Supreme Court will be heard on the objections that they may have to the proposed amendment to the PPA by the Commission and the Commission will decide the matter in accordance with law. Accordingly, all objections to the proposed amendments need to be considered including the issues of maintainability of the petition for such approval of the amendments. These include, the consideration of the objections that in view of the claim of the Project Developer for compensatory tariff under general exercise of Regulatory powers and / or for relief under the Change in Law and Force Majeure in terms of the PPAs, having been rejected by the Supreme Court and in law no relief is admissible, there is no justification for allowing any relief in the present proceedings by way of amending the tariff terms and conditions.

9.21. It is further submitted that what has been specially rejected in law by the Supreme Court should not be now allowed to be claimed through amendment of the PPA. The consideration of any part of the claim which has been rejected in law, cannot per se be in the public interest, in this regard it is not in the interest of the consumers at large that they should be required to pay significantly higher amount of tariff on account of the consideration of hardship claimed by the project developer EPGL, particularly when the PPAs in pursuance to a tariff based competitive bid process under the Section 63 of the Electricity Act, 2003. The proposed amendments of the tariff terms and conditions determined under Section 63 of the Electricity Act, 2003 will result in determination of tariff under Section 62 of the Act based on actual cost. The above will be contrary to the basic scheme and objective of the Electricity Act providing for such

tariff based competitive bid process of determination of tariff under Section 63 as an independent and distinct process from Section 62 with a non obstante clause.

- 9.22. The consideration of modifications to the tariff terms and conditions on the basis of actual cost claimed by the project developer to the Section 63 determined tariff is patently contrary to the Parliamentary intention and scheme in enacting the special provision of introducing competition in the electricity sector. Such a course will be against the basic principles of law governing the contract and sanctity of bidding process, as laid down by the Supreme Court.
- 9.23. The decision of the Government of Gujarat to issue Policy Directive for amendment of the PPAs and the decision of the Petitioner GUVNL in proposing the amendment of the said PPAs in the manner suggested in the present petition, which will result in significantly increased consumer tariff, cannot be sustained in law. It would be unfair, unjust and improper that what is not permissible in law and what has been so adjudicated and rejected by the Supreme Court in Energy Watchdog Case in Civil Appeal Nos. 5399-5400 of 2016, is now being claimed by way of amendment under the provision of the PPA, particularly requiring the procurers and thereby the consumers at large to share significant burden of the increased tariff.
- 9.24. The submission herein above and in any event the extent of the amendments to the tariff, terms and conditions, need to be restricted to the direct and consequential effect of the alleged hardship that could be said to have been caused by the promulgation of the Indonesian Regulations providing for benchmark process for export of coal. It cannot be (i). extended to other aspects such as, freight or transportation cost, import of coal from countries other than Indonesia, insurance port handling charges, etc.; or; (ii) to modify aspects expressly or impliedly covered by the statutory guidelines notified by the Central Government under Section 63 of the Electricity Act, 2003 as applicable at the cut-off date.
- 9.25. The Petitioner GUVNL has a share of 1000 MW in the power project of EPGL which comprises of two generating units each of 600 MW at Salaya sea port Dist. Jamnagar,

Gujarat under the PPA dated 26.02.2007 entered into in pursuance of the Tariff Based Competitive Bid Process held as per Guidelines contained under Section 63 of the E.A., 2003. The tariff discovered through competitive bid process of Essar Group (Promoter) bid was adopted by the State Commission is Rs. 2.40 per unit. The quoted transportation, energy charges etc. as per the Bid given is sacrosanct and has been incorporated in the PPA.

- 9.26. In the Energy watchdog case (2017) 14 SCC 80 the Hon'ble Supreme Court has rejected the claim of CGPL as well as Adani power for any increase in the tariff on account of the promulgation of Indonesian Regulations either under change in law or under the Force Majeure clause of the PPA or otherwise in exercise of General Regulatory Powers of the Central Electricity Regulatory Commission, Accordingly, in law, there is no remedy to CGPL and APL for any increase in the tariff.
- 9.27. That EPGL does not have "Composite Scheme" and does not supply power to more than one State, the jurisdiction for adjudication is lying with the Commission and for which EPGL has submitted Petition No. 1389 of 2014 for compensatory tariff in the line with CGPL and Adani Power Ltd. Now both CGPL and APL's PPAs amendment Petitions are for the consideration for approval of Central Commission, GUVNL has submitted the amendment Petition for approval of this Commission. It is a fact that EPGL could not get legal judgement from any forum including GERC like CGPL and APL, however, GUVNL has come for approval of the proposed amendment of PPA in line with CGPL and APL.
- 9.28. That the case of EPGL is quite distinct and different than the case of CGPL and APL and cannot be compared with these two UMPP of CGPL and APL. The issues of EPGL which were submitted in the Petition No. 1389 of 2014 were different over and above the promulgation of Indonesian Regulations.
- 9.29. The High Powered Committee has not discussed and recommended anything for EPGL separately. However, if Commission is to consider the case of EPGL in line with APL and CGPL, UUWA is of considered opinion that recommendations of High

Powered Committee put forward, ought not to be considered at all in the Public Interest as such recommendations are contrary to law. Mentioned above are the primary issues as to why UUWA is of the opinion that the Supplementary Agreement should not be entered into with EPGL.

9.30. There are few other important aspects which may please be considered as to why UUWA is of opinion that the amendment sought and Supplementary Agreement is not in Public Interest or in the interest of the consumers and ought to be rejected at threshold.

(1) Penalty @ 10% (about 9 paisa/Unit) of capacity charges has been proposed in case of non-availability from 75 to 90% as compared to 20% (about 18 paisa/Unit) stipulated in the old PPA for availability below 75 %. Penalty rate must be in line with PPA dated 26.02.2007.

(2) As per PPA dated 26.02.2007, normative availability is 80% and Incentive is 40% of the Capacity Charges subject to ceiling of 25 paisa/Unit, which is required to be paid only for cumulative availability above 85%. However, in supplementary PPA dated 01.03.2019 availability for incentive is also kept at 85%, which is not proper. Therefore, incentive should be considered only after 95% availability instead of above 85% availability.

(3) In the revised PPA availability and penalty should be applicable on half yearly basis rather than on yearly basis.

(4) Lenders have sacrificed a portion of the Loan, which translates to 20 Paisa/Unit and the same has been recommended by HPC as a reduction from Variable Charges, however it is suggested that it must be reduced from the Capacity Charges as the interest on Term Loan is a part of Capacity Charges.

9.31. As per the HPC report, beneficiaries have a right to extend the PPA by 10 years, if deems fit, however as per the recommendations of HPC, mining profit and discount on

capacity charges shall not be allowed in the extended term. In fact, Profit sharing from the mines must be continued in extended period.

10. The Objector Jan Kalyan Foundation has filed the following objections:
 - 10.1. It is submitted that they have come to know that suggestion/objections have been invited by the Commission in the present matter and as decision in this matter may affect consumers in long-term.
 - 10.2. It is requested to consider the representations as given below by giving reasoned decision in the said matter.
 - a. Whether the petition required to be admitted?
 - b. Which are the provisions under which this petition can be admitted?
 - c. Earlier petition number 1389 of 2013 was withdrawn by the Petitioner on condition that the present petition will be admitted?
 - d. Can the High-Power Committee decide about tariff hike as demanded by the Essar Power in the Petition No. 1389 without giving an opportunity of being heard to the consumers?
 - e. Can the hike in tariff recommended by High Power Committee be implemented without hearing the consumers?
 - f. Whether the documents submitted by the parties before High Power Committee are submitted by the Petitioner in this petition?
 - g. Whether decision by High Power Committee is taken without giving a Right to being heard to the consumer groups on the basis of partial information submitted by the parties?
 - 10.3. It is requested to the Commission to direct the Petitioner to provide copy of aforesaid documents which was submitted before HPC along with meeting notes and other noting of the HPC in the matter and provide some time to make detailed submission in the matter. We would like to get decision of the Commission in this regard first and if required we would like to file appeal on the decision of Commission before Hon'ble High Court of Gujarat.

- 10.4. It is requested to the Commission to merge all cases of Essar Power and keep hearing in all matters together and also provide information about all the claims of both the parties. It is further requested to provide component wise details.
- 10.5. It is further requested to check whether all the supporting documents in connection with the above are checked by the HPC and whether it is consistent with the submissions. Kindly allow us to study and represent ourselves on this aspect. The Commission may decide first about allowing us to implead in the Petition accordingly.
- 10.6. It is further submitted that under which provision of the Act the HPC was constituted by Government and whether the recommendations of this Committee enforced on the agreement signed between GUVNL and Essar? If it is not covered in any provision than the HPC is not legal and its recommendations cannot be enforced. Who can approve the modification in the said PPA between GUVNL and Essar? Specifically, when it is resulting into costly power to consumers. There are other PPAs where power is procured by GUVNL from Rs. 5 to 15 per kWh from Solar and Wind Generation. But now due to reduction in cost of solar and wind generation, it is required to constitute committee for reduction in these PPAs also.
- 10.7. It is further submitted that in view of the current situation of farmers and businesses and industries, it is required to provide subsidy of 75% in electricity rates. It is required to constitute Committee to review situation of consumers and decide about reasonable rates to consumers. Why Commission is not deciding or keeping hearing of the petitions filed before petition no 1807? It is further submitted to consider their representation while giving reasoned decision.
- 10.8. The Petitioner has under the PPA executed with the Respondent imposed the tariff hike on consumers, which is illegal. Therefore, the Petitioner may run the plant on his own or third party.

- 10.9. It is further submitted that any bank or financial institution under loss due to their own fault then they may have initiated the process regarding the purported benefits of adopted the process as laid down under the Insolvency and Bankruptcy Code, 2016.
- 10.10. The High Power Committee has not considered the loss of amount of Rs. 5000 Crores approximately occurred due to non-supply of power by Essar Power Limited, Adani Power Limited and Tata Power Limited. The said loss is affected to GUVNL and now imposed on the consumers of Gujarat. The High Power Committee has not considered the following issues, which needs to be considered by the Commission and pass reasoned order with legal grounds so that the same can be challenged by the Objector, Jan Kalyan Foundation before the Hon'ble High Court of Gujarat.
- 10.11. Currently the present Coram of the Commission is constituted by the Chairperson Shri Anand Kumar and Member (Tech), Shri P.J. Thakkar. They are not possessing the degree or experience in the field of Law and finance. Under such situation in the present case whether the present Commission/Coram is competent enough to deal with such issues regarding law and finance matters. Therefore, in the absence of the member having knowledge of law and finance the present matter cannot be decided.
- 10.12. Whether the High Power Committee constituted under the ambit of the Electricity Act, 2003 and if the same is done than under which Section the HPC is constituted may be clarified by the Commission. If the said committee is not constituted under the ambit of Electricity Act, 2003 than whether this Commission is empowered to decide such issues raised in the present petition and whether the decision made under the HPC report is bound to decide by the Commission or not need to be clarified.
- 10.13. Whether the Government of Gujarat had taken the approval of the Commission (GERC) before constitution of the High Power Committee, who is deciding the tariff related matter and the impact of such tariff is imposed on the consumers of Gujarat. Therefore, it is required to be looked into that without the approval of the Commission whether this High Power Committee is competent authority or valid committee and the

decision made under such committee can be legally valid or not, needs to be considered by the Commission.

- 10.14. Since the amendments to the PPA by the Supplemental PPA, the approval of which amendments has been sought in the present Petition, which is manifestly in the larger public interest for the reasons expressly and explicitly stated in the Report of the HPC containing the recommendations for implementation to mitigate the hardship and stress faced by imported coal based power project located in Gujarat.
- 10.15. In the earlier PPA executed between the parties, under which the Essar Power Limited (Respondent) was selected based on the competitiveness of price discovered through competitive bidding and bound to supply the electricity for 25 years at the agreed tariff approved by the Commission in the PPA. Now the High Power Committee has given suggestions/observations and based on which the Petitioner sought an amendment in PPA by way of present petition. Whether the High Power Committee is competent enough to revise the tariff/rate which was already approved by the Commission for 25 years under competitive bidding process. The present High Power Committee report recommendations are not in the legal boundary of the proceeding of competitive bidding, which seems to be not legal and valid. Therefore, the Commission may decide the same with legal grounds.
- 10.16. Whether the High Power Committee considered the suggestions or observations of earlier bidders who were participated in the bidding process in earlier proceedings approved by the Commission in Order No. 4 of 2007 dated 20.12.2007. If the same was not considered, it transpires that the HPC report is not legal and valid and its only considered the grounds of the Petitioner and the Respondents and try to impose tariff penalty on the consumers of Gujarat.
- 10.17. In the PPA executed between the parties vide Order No. 4 of 2007 dated 20.12.2007 the tariff rate was approved as Rs. 2.35 per unit. However, the HPC report recommendations tariff of Rs. 3.20 per unit i.e. more than 60 paise increase and if the same required to be approved by the Government of Gujarat, than the only way is pass

through the said increase in tariff as subsidy but not through imposed tariff increase on the consumers of Gujarat. Any tariff increase pass through can be allowed through tariff subsidy by Government of Gujarat, which needs to be clarified by the Commission.

- 10.18. Moreover, HPC report recommendations tariff increase than the Petitioner GUVNL, can reduce the equity from 14% to 7% of their parent subsidiary companies namely, MGVCL, UGVCL, PGVCL and DGVCL instead of imposing the tariff increase on consumers.
- 10.19. Based on the recommendations of High Power Committee it is observed by the Objector, Jan Kalyan foundation that there are lots of anomalies in the report and the recommendations are illegal and not in the consumer interest.
- 10.20. Whether High Power Committee had issued any public notice from the stakeholders. If no, then the clarifications or explanations sought from HPC.
- 10.21. Whether the Petitioner had run the plant on his own under the provisions of the PPA or whether allocated to other power producer then the tariff recommended by the HPC will be the same or not. If this kind of procedure were initiated in past or not. If not, then the reason thereof.
- 10.22. It was observed that in such cases where the power producers were not eligible to generate power in such cases the plants were purchased by other power producers i.e. Tata Power Limited, Adani Power Limited and other companies with the same terms and conditions including the same tariff or lower tariff rate. Per contra, the said procedure has not been followed, and based on the HPC report statement that under Insolvency Bankruptcy the plant is not in running condition, which was not scrutinized and not followed by way of documentary evidence. It was informed that there is tariff reduction in the recommendation of the HPC report. Therefore, it is the question of law that whether the report of High Power Committee can be considered as valid or not.

- 10.23. The objector submitted that it is the duty of the Respondent to supply the electricity at the agreed rate as per the terms of the PPA after considering the price of coal and other materials at the time of bidding. Now because of default on part of the Respondent, the tariff burden cannot pass on to the consumers of Gujarat.
- 10.24. Whether the High Power Committee investigated that the financial institutions before giving the loan approval sought the details from the parties that whether they are eligible to supply the coal for 25 years and at which rate? Moreover, as per the agreement executed with coal suppliers and Respondent, if the coal suppliers were not eligible to supply the same then under the terms of the PPA, whether the generator claimed for the compensation or not. From the cause of the action it transpires that the financial institutions had given loan approval without prudence check and the High Power Committee also not given any comments on these illegal proceedings. The Commission is requested to consider the same and give a reasoned order.
- 10.25. If the present petition will be allowed whether the tariff hike impacted on BPL consumers? If no, then which category of other consumers i.e. agriculture, residential and HT categories the tariff hike will be imposed that need to be clarified by the Commission.
- 10.26. As per the present situation the Respondent plant not generated electricity since last two years and due to that Petitioner GUVNL is required to purchase at higher tariff rate from other generators, which impacted on the consumers. Under this situation it leads to effect on factories, commercial organizations and farmers. The High Power Committee has not considered the following details before giving their recommendations.
- 10.27. The Commission is requested to consider the suggestions filed by Jan Kalyan Foundation and pass reasoned order, so that the same can be challenged before the Hon'ble High Court of Gujarat.

- 10.28. The Essar Power Limited filed their reply to the limited objections of the Objector Jan Kalyan Foundation. The Respondent No.1 has not dealt with facts and the legal issues raised by the objector. Therefore, it is requested to the Commission to consider the same while deciding this matter.
- 10.29. It is further submitted that as per the recommendations of the High Power Committee the details regarding coal supply by the companies and their contracts with the Essar Power Limited and other relevant details not revealed by the parties. Moreover, it is not clarified that the coal supply is as per the recommendation of the High Power Committee Report or not. In the case of coal uncertainty, the Essar Power Limited through international tender invited the bids and the same may be approved by the Commission. The Commission should also constitute a committee who can do the prudence check of the tender documents and approve the same. Based on the recommendation of the committee the Commission may allow the same to reduce the tariff hike on the consumers of Gujarat.
- 10.30. The Commission vide its Order dated 23.12.2019 in Petition No. 1680 of 2017 decided that the impact of Changes in Law as approved by the Commission shall be applicable till 14.10.2018 as the Petitioner and the Respondents have executed a Supplementary PPA on 01.03.2019 to be effective from 15.10.2018. It is also informed that the said issues are also subject matter to the present petition also. Moreover, in Petition No. 1680 of 2017 the supplemental PPA effective from 15.10.2018 whether its approved by the Commission or not is not clarified. Based on that how the Commission can decide such matter. It is therefore requested to the Commission to wait for the recruitment for the Member (Law) and till then the order will not be issued.
- 10.31. Moreover, looking to the penetration of the renewable energy and the generation from the renewable sources, i.e. solar, wind, hydro and others increased in the State. Moreover, based on that the Commission has also issued RPO regulations for the same. Looking to the present renewable energy scenario and its generation the coal and gas based power plants may be shut down, so that the feeder cost can be avoided. Moreover, the parties to the present petition has not submitted the details thereof.

Therefore, it is requested to the Commission to bring such details on record and also approve the Power Purchase Agreement for 10 years and renew thereafter. It is also requested to constitute a committee comprising of the stakeholders, non-retired members from the competent organization and based on the recommendations the decision should be made.

- 10.32. Based on the above, it is requested to the Commission to wait the appointment of the member and thereafter decision the same. However, in case the decision will be made than the Commission may pass reasoned Order. The Commission is also requested to pass detailed order on the representations/suggestions made by Jan Kalyan Foundation so that the same can be challenged before the Hon'ble High Court of Gujarat.
11. Shri Naresh Balvantbhai Patel and Shri Hitesh Mahadevbhai Patel have filed an Application on 16.01.2020 in Petition No. 1807 of 2019 to implead them as a party Respondent.

12. The Petitioner's (GUVNL) submissions:

- 12.1. It is settled legal position that policy decisions taken by a Government in larger public interest are not justiciable and cannot be challenged before a Court except in cases of manifest arbitrariness. The accompanying petition has been filed in order to implement and give effect to the policy decision of the Govt. of Gujarat to rehabilitate, the three thermal power projects in the State of Gujarat based on imported coal from Indonesia including the Mundra Power Plant, pursuant to and consistent with the recommendations of HPC, which too had been constituted pursuant to a policy decision of the Govt. of Gujarat.
- 12.2. It is further submitted that the implementation of the diverse components of the rehabilitation plan recommended by the HPC, as aforesaid, includes diverse components out of which only a few components require an amendment to the PPA.

Moreover, the emphasis of the recommendations of the HPC has always been to protect consumer interest and as has been articulated in detail therein.

- 12.3. All the present amendments are being carried out in furtherance of the recommendations given by the policy directions contained in Policy GR dated 01.12.2018 issued by the Government of state of Gujarat to implement the recommendations given by the HPC. It is relevant to highlight that it is settled that economic/financial policies of a Govt. are not justiciable except in cases of arbitrariness or being inconsistent with the laws of land.
- 12.4. The policy decisions of the Govt. of Gujarat are evident from the GR dated 03.07.2018 constituting the High Power Committee and the GR dated 01.12.2018 pursuant to which the present petition has been filed. The present petition and the proposed amendments to the PPA constitute a part of the entire rehabilitation package recommended by the High-Power Committee and which is being pursuant to the policy decisions of the Govt. of Gujarat.
- 12.5. It is further stated that Hon'ble Supreme Court in Energy Watchdog Case has observed that "in a situation where the guidelines are given, the Commission must exercise its regulatory functions, albeit under Section 79 (1)(b), only in accordance with those guidelines." Since the PPAs contain provisions for amendment, the same can be given effect to if the parties agree to amend the provisions of the PPAs and this Commission approves the same. It is pertinent to mention that Article 18.1 of the PPAs provides that "this Agreement may only be amended or supplemented by a written agreement by the parties". Thus, the provisions for amendment of the PPAs apply to all provisions including the provisions for determination of capacity charge and energy charge. If the parties to the PPAs agree to a different tariff structure through Supplemental Agreement, the same shall be given effect to with the approval of the Commission. However, in terms of the judgment in Sasan Case, the Commission while approving such amendment shall have to be guided by consideration of public interest. In our view, amendment of the PPAs by the parties to prescribe a different tariff structure, for energy charge is in term of Article 18.1 of the PPAs and cannot be termed as tariff

determination under Section 62 of the Act. The said amendments to the PPA are being carried out with the consent of both the parties which executed the PPA and are now ad idem on the new provisions of the PPA. The original PPA itself under Clause 18.1 recognizes the Right of the Parties to amend the said PPA, if mutually agreed and with the approval of the Commission.

- 12.6. The Policy GR has been issued pursuant to the findings of the HPC, which conclusively demonstrated that even after allowing pass through of energy charges, the tariff of the EPGL's project would remain amongst the most competitive tariff. Even after allowing pass through of energy charges, the tariff of the plant in question is much lower than prices discovered under Case I bidding process and current alternative power sources and will continue to remain within the merit order. Thus, it is clear that the rehabilitation plan of Govt. of Gujarat for salvaging the power plant in question is in the larger public interest. Further procurement of power from new projects will entail significantly higher capacity charge, any attempt to replace the entire existing capacity with alternate sources would not only lead to a significant surge in the tariff and the Petitioner will also not be able to cater to the prevailing demand in the short term on account of higher gestation period of new projects.
- 12.7. It is also a matter of public record that various Electricity Regulatory Commissions including CERC have approved amendments to be made to Sections 63 PPAs leading to change in tariff in compliance of the SHAKTI scheme i.e. policy decision of the Union Ministry of Coal. Few such orders are as under:
- i. Order dated 21.02.018 passed by CERC in the matter of KSK Mahanadi Power Co. Ltd vs TANGEDCO & Ors. Petition no. 41/MP/2018;
 - ii. Order dated 21.02.2018 passed by CERC in the mater of GMR Kamalanga Energy Ltd. vs. GRIDCO Ltd. & Anr., Petition No. 41/MP/2018 and;
 - iii. Order dated 20.03.2018 passed by MERC in the matter of Adani Power Maharashtra Ltd. vs MSEDCL, Petition No. 70 of 2018

- 12.8. A clear analogy can be drawn from the aforesaid insofar as in the said cases, amendments to PPAs were allowed in furtherance of SHAKTI Scheme of the Union Ministry of Coal, similarly in this case the amendments proposed are in furtherance of the policy decision of Govt. of Gujarat acting through Energy & Petrochemical Department, which is evident from the Policy GR dated 01.12.2018, pursuant to which the accompanying petition has been filed. Further, it is submitted that the contentions of the Respondents No. 3 seeking impleadment of Government of Gujarat and lenders including as a party to the present proceedings is misconceived and misconstrued.
- 12.9. The suggestions given by Prayas (Energy group) with respect to the measures for implementing neutrality of financial outflow to the procurers have been extensively dealt in the HPC report. Chapters VIII and IX of the said report set out the way forward, which includes the suggestions that have been given by Prayas (Energy group), such as reduction of interest rate on the debt by the lenders, increasing the tenure of the PPA and so on.
- 12.10. The present petition and the proposed amendments to the PPA constitute a part of the entire rehabilitation package recommended by the High-Power Committee and which is being implemented pursuant to the policy decisions of the Govt. of the State of Gujarat. The HPC report makes it clear that all the submissions made by the consumer groups before the HPC were duly considered and it was highlighted by the HPC that proposed amendments are most beneficial to the consumer.
- 12.11. It is further submitted that on the point of purported benefits of adopting the process as laid down under the insolvency and Bankruptcy Code, 2016 (“IBC”) are denied as being devoid of merits. In this regard it is submitted that Chapter IX of the HPC report deals with the option of exploring the NCLT route in detail and has even considered the findings of the 37th and 40th report presented by the Standing Committee on Energy (“SCE”) in this regard. The SCE in its report has inter alia highlighted that there is a need to preserve, protect, and conserve stressed assets, and not emphasis on procedures that focus more on dissolution than on resolution of stressed assets.

12.12. It was thus emphasized by the SCE that the consequences of approaching the NCLT. In light of the same, it was concluded by the HPC report that revival of the said projects at this stage itself would yield more fruitful results, as against opting for resolution by way of an NCLT referral. The said recommendations of the HPC have been duly accepted by the Govt. of Gujarat as a policy decision in the large consumer interest. The HPC has duly considered the merits and de-merits of adopting the NCLT route and has thereafter made reasoned recommendations, which have duly been accepted and implemented by the policy decision of the Govt. of Gujarat vide its GR dated 01.12.2018. The said policy decisions are based on cogent reasons and analysis and are not arbitrary. It is not open for the Respondent to seek to impose its own subjective analysis relating to referring the projects to the NCLT, by looking at this single issue in an isolation and selective basis, without considering the overall rehabilitation package and the overall objectives of the entire policy exercise.

12.13. The recommendations of the HPC have duly been evaluated and considered from all perspectives, including the IBC/NCLT option, by experts. The proposed outcomes have been duly considered by eminent banking personalities who are experts in the field as well as the lenders banks, who have concluded that adopting the NCLT route would not be feasible in the present facts and circumstances. Pertinently, Govt. of India & Govt. of Gujarat have also received representation from the State Bank of India to find a solution keeping in view large exposure by nationalized banks. In this regard one of the findings returned by CERC in its order dated 12.04.2019 is important, which is reproduced herein below:

“69. As opposed to recommendations of HPC and directives in the GR to salvage the projects, the Consumer Groups have submitted that the plants should have been allowed to be referred to insolvency proceedings under the Insolvency and Bankruptcy Code, which is a statutory framework to deal with such stressed assets. They have further submitted that the recommendations of the HPC and the Supplemental PPAs have proceeded on the basis of a misplaced view that the process provided under the IBC needs to be avoided at all costs.

12.14. There cannot be a bail out of a corporate entity on the ground that it is the corporate entity taken to liquidation, there may be a requirement to pay higher price for goods

manufactured by the said entity, and therefore the corporate entity should it self be given the higher price', is denied as being illogical, absurd and devoid of merits.

- 12.15. The HPC recommendations and the policy decision of the Govt. of Gujarat is not to bail out the projects, but suggested rehabilitation package proposed by the HPC requires the corporate to absorb the accumulated financial losses and also a significant reduction in the future cash flows and returns.
- 12.16. The rehabilitation package being implemented merely stems further financial losses for future operations and also mandates the developers to continue to operate the plants within very strictly defined parameters. Looking at one of the components of the entire package in isolation is not permissible and will only result in a distorted interpretation and understanding of the complete rehabilitation package.
- 12.17. It is submitted in this regard that Chapter V of the HPC report categorically deals with the implications of the increase in price of Indonesian coal on all the stakeholders i.e. the generators, procurers/distribution companies and lenders. In terms of the said Chapter, the Respondent No. 1 has been suffering huge under recovery of energy charges on account of the promulgation of Indonesian regulations 2010 which forced it to procure coal at international indexed benchmark prices as against the negotiated prices based on which the PPA were entered into. As a result, therefore, till 31.03.2018, Respondent No.1 has incurred losses to the tune of Rs. 3600 Crores and the Promoters' contribution till 31.03.2018 has been Rs. 3283 Crores. Further, the HPC in Chapter V records that the operation of Respondent No. 1's plant has become unviable and is under shutdown for past more than months. The HPC appreciated the fact that promoters of these projects have incurred losses that are substantially higher than the liquidated damages payable by them for termination under the respective PPAs. It is also to be seen that the Developers are offering the untied-capacity and the extended tenure, sacrificing the margins that could potentially have been made by the Developers by selling these capacities in the open market or other long term PPAs.

- 12.18. The HPC recommendations have been finely balanced with the intention of resolving the financial and cash flow mismatch issues being faced by the projects in a sustainable manner, and not to create fresh financial issues. It is pertinent to recognize that the said plan envisages an appropriate re-structuring that will result in making the projects financially self-sustaining in its operations, while at the same time requiring the developers to absorb all past accumulated losses and also taking significant financial haircuts in the future operations of the projects. The developers are also undertaking significant financial and operating commitments for the future operations of the projects. The entire rehabilitation plan includes diverse components out of which only few components require an amendment to the PPA. The present petition seeks to implement only those components of the rehabilitation plan that require an amendment to the PPA. Further, the contention of Respondent No, 3 that the proposed amendments to the PPAs cannot be converted to giving relief to the project developer by way of modification to the tariff terms and conditions to allow all actual costs is again incorrect and does not deserve any consideration. It is submitted that the HPC report in its conclusions and recommendations under Chapter X records that HPC while undertaking the analysis and making the recommendations in the report, has the 'consumer interest' as paramount and the same has been the focal point of their approach, and on the touchstone of the consumer interest. The submissions being made by Respondent No. 3 disputing various components of the rehabilitation package singularly, have no application on the facts and circumstances of the present case insofar as the present case deals with an unprecedented financial stress faced by the power project in question which necessitated appropriate financial and contractual restructuring in order to salvage the power project in the larger public interest, which is being implemented through policy decisions.
- 12.19. It is further submitted that the contentions of the Respondent No. 3 as regards the operating parameters such as GHR and Auxiliary consumption to be considered as per the bid or actual or tariff regulations whichever is lower, it is submitted that the inference is from this Commission. The HPC, which is an expert committee, provided a model draft of the supplemental PPA along with its report. The stipulations/operating parameters of GHR and Auxiliary consumption contained in the supplemental PPA

provides that the same shall be aligned as per Hon'ble CERC's order/approval in Petition No. 374/MP/2008. Importantly, Hon'ble CERC has already approved a similar supplementary PPA entered between the Petitioner and Adani Power Ltd. with respect to its Mundra Power plant. In any case, it is submitted that the HPC report, Govt. of Gujarat's Policy GR dated 01.12.2018 as well as the supplemental PPAs entered in furtherance thereof form part of the diverse components of the rehabilitation plan and thus, the same needs to be holistically interpreted by this Commission in order to implement the same in the larger public interest. The contentions of Respondent No. 3 with respect to the tolerance limit of 10% increase over and above the HBA price shall mean the HBA Index FOB price of Indonesian imported coal published by Govt. of Indonesian from time to time for coal quality of 6322 Kcal/Kg as adjusted for quality of coal consumed in the projects. HPC Report provided for adjustment of HBA Index FOB price of coal supplied bases on GCV of coal supplied as against standard GCV of 6322 Kcal/Kg. The said policy decision cannot be called in question on mere technicalities and must be viewed holistically as a complete rehabilitation package in the larger public/consumer interest. The contentions of the Respondent no. 3 with respect to the extension of the PPAs' term from 10 years to 15 years thereby aggregating 40 years as well as consideration of freight, insurance, port fuel handling charges and other charges are misconceived, lacks merit and does not call for any interference from this Commission. The HPC in its recommendation as contained in Chapter X of the HPC report suggested the option of extension of PPA tenure by a further period of 10 years and not 15 years. The Government of Gujarat's Policy GR dated 01.12.2018 provides for calculation of freight, insurance, port fuel handling charges in a particular manner. It is submitted that amendments sought to be made by way of supplemental PPA are in furtherance of the policy decision taken by the Govt. of Gujarat to salvage the power plant in question keeping in mind the larger public interest involved. A detailed analysis of the diverse conflicting imperatives of all stakeholders and a detailed identification of the consumer interest in salvaging these projects, has already been enumerated in Chapter VII of the HPC report and the same is not being repeated herein for the sake of brevity. The rehabilitation plan of the Govt. of Gujarat which, has been taken after taking into consideration all the aspects of the

matter especially the consumer interest involved is not justiciable and needs to be appreciated holistically.

- 12.20. It is further stated that the HPC has considered all aspects and has made balanced recommendations in order to arrive at a substantial rehabilitation plan. The proposal by the Respondent to increase the period of re-set to 10 years will create an issue that it is not possible to predict coal price movement over a long period of 10 years and therefore, once again putting the risk on the developers potentially leading to the same financial problems that the rehabilitation plan seeks to alleviate. Any downward movement in the coal prices will result in the benefit being passed on to the procurers and consumers. The model draft supplemental PPA provided in the HPC report also provides for ceiling price to be fixed for 5 years. The contention of the Respondent No. 3 regarding the effective date of revision of tariff is concerned, it is submitted that the HPC recommendations as well as the Policy GR of the Govt. Gujarat dated 01.12.2018 provided for fixing the date of implementation as 15.10.2018. The total accumulated losses of the Developers of all the three projects which have been considered on the HPC report is around Rs. 23815 Crore till 30.09.2018. There is no reason for disturbing this cut-off date. Any change in this date will have a cascading financial impact on the entire package and also on the stakeholders. Further, the effective date of implementation cannot be kept open in order to fix the extent of past losses to be borne by the promoters and to enable the lenders to come forward for funding the required working capital. The proposal for amendment of the PPA as contained in this petition seeking to implement and give effect to certain components of the overall rehabilitation plan which – “primarily entails undertaking financial and commercial re-structuring” of the concerned power plants, including the Salaya Power Plant, is the fair course which would protect the interests of all stakeholders, especially the consumers, and would also ensure the availability of power in large quantities and at a relatively the cheapest prices from these power plants, which is a vital necessity for the economic growth of the State of Gujarat as well as the country. Prayas (Energy group) raised similar contentions before CERC in proceedings relating to Petition No. 374/MP/2018, hence, the Petitioner seeks liberty to rely and refer on the findings/observations of CERC in this regard during the course of hearing.

12.21. It is submitted that the Petitioner is not in position to proceed with the present terms and conditions of supplemental PPA dated 01.03.2019 considering the terms and condition of agreement in order to protect and safeguard the interest of the consumers it is necessary to incorporate the explicit provisions in the supplemental PPA to ensure that past losses are not claimed by the Respondent No. 1 Essar Power Gujarat Ltd. In any manner in the future as the same is to be borne by Respondent No. 1 in line with HPC Report and Government of Gujarat GR Dated 01.12.2018.

12.22. It is further submitted that the Petitioner has taken up the matter with Respondent No. 1 to sign the *Addendum to the supplemental PPA dated 01.03.2019 by incorporating the following clauses as Clause No. 3.8 and 3.9 after Clause 3.7 of the Supplemental Agreement dated 01.03.2019.: (*Annexure – 3)

“Clause 3.8:

Seller shall bear the losses for prior period i.e. before 15.10.2018. Further, Seller shall not raise any claim / dispute with regard to past period items before any Forum / Court in the future.

Clause 3.9:

Seller shall unconditionally withdraw all pending cases / litigations / waive claims against GUVNL (other than Change in Law in India) before various Forums in lieu of the relief granted vide Govt. of Gujarat G.R. dated 01.12.2018 towards pass through of actual fuel cost w.e.f. 15.10.2018. Only the cases / litigations filed by GUVNL which are under adjudication shall be considered upon decision by appropriate forum / Court to extent of GUVNL’s prayer in the matter.”

12.23. Further, it is submitted that the aforesaid clauses are incorporated in addendum dated 23.01.2020 to supplemental PPA dated 01.03.2019. The respondent No. 1 has submitted the copy of the affidavits seeking for withdrawal of pending cases before the various authorities in lieu of Govt. GR dated 01/12/2018 the detail of the same are as under:

Sr. No	Legal Forum	Case No.	Affidavit date
1	Hon’ble GERC, Gandhinagar	1404 of 2014	22-01-2020
2	Hon’ble GERC, Gandhinagar	1532 of 2015	22-01-2020

3	Hon'ble APTEL, New Delhi	90 of 2016	22-01-2020
4	Hon'ble Supreme Court of India, New Delhi	9324-9325 of 2016	23-01-2020

Based on above, the Petitioner submitted that the Commission may consider the addendum dated 23.01.2020 to the supplemental PPA dated 01.03.2019 as part and parcel of PPA dated 26.02.2007 and may proceed further in the matter for approval of the addendum in the PPA dated 26.02.2007 along with supplemental PPA dated 01.03.2019.

- 12.24. All the contentions raised on behalf of Jan Kalyan are misplaced, misconceived and is an attempt to stall the present proceedings. Pertinently, Jan Kalyan is questioning the jurisdiction of the Commission to adjudicate the present proceedings on the basis that the present Bench of this Commission does not comprise of a Judicial Member. However, a bare perusal of the Hon'ble Supreme Court of India judgment dated 12.04.2018 in Civil Appeal No. 14697 of 2015, titled State of Gujarat & Ors Vs Utility Users Welfare Association & Ors shows that the next vacancy arising in the Commission needs to be filled in by a legal member. Without prejudice, if the submissions of Jan Kalyan in this regard are accepted then all the proceedings and orders passed by this Hon'ble Commission since 12.04.2018 i.e. the date of Supreme Court's order will be illegal and without jurisdiction.
- 12.25. The present Petition seeking approval of the amendments to the PPA constitute a part of larger rehabilitation plan recommended by the High Powered Committee and being implemented pursuant to the policy decision taken by the Govt. of Gujarat to rehabilitate the three power projects in the State of Gujarat, including the power project in question.
- 12.26. Petition has been filed on 28.03.2019. Whereas the other Petition i.e. Petition No. 1389 of 2014 was filed on behalf of the Respondent No. 1 seeking relief in terms of the PPA provisions relating to Force Majeure and Change in Law. Petition No. 1389 of 2014 has been withdrawn by the Respondent No. 1 as the present petition cannot be proceeded with till the pendency of Petition No. 1389 of 2014. The order dated

20.08.2019, passed by the Commission in furtherance of hearing held on 06.08.2019 duly records this fact.

- 12.27. As regards the formation of the High Power Committee by Government of Gujarat, it is to submit that the said plan is being implemented pursuant to the policy decision taken by the Govt. of State of Gujarat to rehabilitate the three power projects in the State of Gujarat, including the power project in question, pursuant to and consistent with the recommendations of the High Power Committee. The policy decisions of the Govt. of State of Gujarat are evident from the GR dated 03.07.2018 constituting the High Power Committee and the GR dated 01.12.2018 pursuant to which the present petition has been filed.
- 12.28. The present petition and proposed amendments to the PPA constitute a part of the entire rehabilitation package recommended by the High Power Committee and which is being implemented pursuant to the policy decisions of the Govt. of State of Gujarat. The Policy GR dated 03.07.2018 and 01.12.2018 issued by the Govt. of Gujarat have been issued in exercise of sovereign powers of the State Government.
- 12.29. It is a settled legal position that policy decisions taken by a Government in larger public interest are not justiciable and cannot be challenged before a Court except in cases of manifest arbitrariness.
- 12.30. The power to approve amendments by the Commission contained in Article 18.1 of the PPA flow from and are consistent with Guidelines and Section 63 of the Electricity Act, 2003.
- 12.31. The Hon'ble Supreme Court in the judgment passed in Sasan Case and Energy Watchdog Case has held that an Electricity Regulatory Commission is empowered to regulate tariff even in case of Section 63 if the same is in the larger public interest.
- 12.32. The Petitioner respectfully submits that the Commission's power to approve amendments to the PPAs in the public interest even in cases of determination of tariff

by bidding process in accordance with guidelines issued by the Central Govt. under Section 63 of the Electricity Act, 2013 (hereinafter “the Act”) flows from the said Section 63 of the Act itself as demonstrated herein below:

- A. In furtherance of Section 63 of the Act, the Central Govt. issued the competitive bidding guidelines dated 19.01.2005 and subsequently issued the Standard Bidding Documents which, included the model PPA.
- B. As per the said guidelines, the Procurers, in this case GUVNL furnished to the bidders the Model PPA along with the RfQ/RfP. The said model PPA in fact, contained a provision for amendments of PPA if, so agreed by the parties and approved by this Hon’ble Commission.
- C. Similarly, PPA dated 26.02.2007 entered between the Petitioner and Respondent No. 1 contained a specific provision being Article 18.1 allowing the parties to amend the PPAs with the approval of this Hon’ble Commission.
- D. From the above, it can very well be deduced that the Commission’s power to amend the PPA flows from competitive bidding guidelines dated 19.01.2005 of the Central Govt. issued under Section 63 of the Act thereby leading to an invariable conclusion that the said power flows from Section 63 of the Act itself.

12.33. The various Electricity Regulatory Commissions including this Commission and CERC have approved amendments to be made to Section 63 PPAs leading to change in tariff in compliance of the SHAKTI scheme i.e. a policy decision of the Union Ministry of Coal. Few such orders are as under:

- I. Order dated 02.02.2018 in Petition No. 1703 of 2018 read along with Order dated 15.03.2018 in Review Petition No.1707 of 2018, passed by this Hon’ble Commission;
- II. Order dated 21.02.2018 passed by CERC in the matter of KSK Mahanadi Power Co. Ltd. vs TANGEDCO & Ors., Pet. No. 21/MP/2018;
- III. Order dated 21.02.2018 passed by CERC in the matter of GMR Kamalanga Energy Ltd. vs GRIDCO Ltd. & Anr., Pet. No. 41/MP/2018 and;

- IV. Order dated 20.03.2018 passed by MERC in the matter of Adani Power Maharashtra Ltd. vs MSEDCL, Pet. No. 70 of 2018.
- 12.34. A clear analogy can be drawn from the aforesaid insofar as in the said cases, amendments to PPAs were allowed in furtherance of SHAKTI Scheme of the Union Ministry of Coal, similarly in this case the amendments proposed are in furtherance of the policy decision of the Govt. of Gujarat acting through Energy & Petrochemical Department, which is evident from the Policy GR dated 03.07.2018 constituting HPC and the Policy GR dated 01.12.2018 pursuant to which the accompanying petition has been filed.
- 12.35. Jan Kalyan in its reply has raised preliminary issues as to why Supplementary Agreement is not in the public interest and thus, should not be approved by this Hon'ble Commission. It is important to point out that all these issues were also raised by the Consumer Groups before the Hon'ble CERC in Petition No. 374/MP/2018. The Hon'ble CERC has dealt with all these issues/suggestions on their merits and was pleased to reject the same. It is the most respectful submission of Petitioner/GUVNL that for the same reasons the issues on behalf of Jan Kalyan which are identical to issues/suggestions given by Prayas (Energy Group) before Hon'ble CERC are liable to be rejected out rightly.
- 12.36. As regards to the submission by Jan Kalyan to consider each individual component of tariff independently, it is submitted that the rehabilitation package being implemented mandates the developers to continue to operate the plants within very strictly defined parameters. Looking at one of the components of the entire package in isolation is not permissible and will only result in a distorted interpretation and understanding of the complete rehabilitation package.
- 12.37. The contention of Jan Kalyan that the HPC has sought to mitigate the hardship of the generators by burdening the consumers is absurd and factually incorrect. The contents of the HPC report particularly Chapters VII and VIII are being reiterated in this regard. A perusal of the relevant portion of the HPC report makes it clear that all the

submissions made by the consumer groups before the HPC were duly considered and it was highlighted by the HPC that proposed amendments are most beneficial to the consumer.

- 12.38. The contention of Jan Kalyan that the decision of the Government of Gujarat to issue a policy directive, and the subsequent decision of the Petitioner to approach the Commission seeking amendment of the PPA is not sustainable in law, is denied as being erroneous and contrary to law. The Objector No.4 has failed to provide any specific basis for this averment and is making vague and unsubstantiated statements with a view to cast aspersions not only on the sanctity of the report submitted by the HPC, but also on the Policy GRs issued by the Government of Gujarat, as well as the decision of the Hon'ble Supreme Court in its order dated 29.10.2018. The attempt on the part of Jan Kalyan to thus challenge the maintainability of the present petition is an attempt to render nugatory the policy decision taken by the Govt. of the State of Gujarat.
- 12.39. The contention of Jan Kalyan that the proposed amendments to the PPAs cannot be converted to giving relief to the project developer by way of modification to the tariff terms and conditions to allow all actual costs is again incorrect and does not deserve any consideration. It is submitted that the HPC report in its conclusions and recommendations under Chapter X records that HPC while undertaking the analysis and making the recommendations in the report, has the 'consumer interest' as paramount and the same has been the focal point of their approach. Thus, on the touchstone of the consumer interest, HPC concluded that the power project in question needs to be salvaged by making them economically viable i.e. by allowing pass through of the energy charges. The restructuring in terms of the HPC report primarily envisaged the following other aspects:
- (i) Reduction of capacity charge on account of sacrifice by lenders;
 - (ii) Past losses to be borne by Developers and the financial resolution plan being applicable from a prospective cut-off date of 15th October, 2018;

- (iii) Option for extension of PPA tenure by another period of 10 years after the completion of PPA tenure of 25 years;
- (iv) Offer for tie-up of free capacity and;
- (v) Sharing of profit from Indonesian mines (Not applicable in Essar's case).

12.40. From the above it is to be seen that Government of Gujarat has taken a policy decision to allow pass through of energy charges for rehabilitating the concerned power projects, including the project in question vide the Policy GR dated 01.12.2018, issued in furtherance of and accepting the recommendations of the HPC. Pertinently, the reply filed on behalf of Jan Kalyan fails to point out any valid ground to question/challenge the policy decision of the Government of Gujarat and has failed to demonstrate as to how the policy decision of the Government of Gujarat is against the consumer/public interests.

12.41. It is submitted that all other contentions which have not been specifically dealt with by the Petitioner in the present rejoinder are denied in terms of the submissions made hereinabove. The Petitioner further, craves leave of this Hon'ble Commission to file any other additional documents as may be necessary or as directed by this Hon'ble Commission.

12.42. Further it is submitted that Letters dated 16.01.2020 filed by Shri Naresh Balvantbhai Patel and Shri Hitesh Mahadevbhai Patel before the Commission seeking impleadment in the Petition. It is submitted that the Petitioner has filed the Petition seeking approval of Supplemental PPA signed with Respondent No. 1 pursuant to Hon'ble Supreme Court judgment dated 29.10.2018 in the Miscellaneous Application Nos. 2705 - 2706 of 2018 filed in Civil Appeal No. 5399-5400 of 2016 by the Petitioner, seeking clarification on the concerns raised by the consumer organizations. After perusal of the HPC report, the Hon'ble Supreme Court passed the Order dated 29.10.2018 inter-alia clarifying that the parties can approach the respective Commissions for approval of proposed amendments and the judgment dated 11.04.2017 will not stand in the way of such amendment. Further, Hon'ble Supreme

Court had clarified that each of the consumer groups, who has appeared before us and who has appeared before us today, will be heard on all objections that they may make to the proposed amendments to the PPA, after which, it will be open to the CERC to decide the matter in accordance with law.

- 12.43. Accordingly, as per Hon'ble Supreme Court order dated 29.10.2018, Petitioner had impleaded all the Consumer Forum in the instant Petition filed before Hon'ble Commission. Further, Hon'ble Commission decided to hold a Public Hearing in the Petition and issued Public Notice dated 08.11.2019 notifying Public Hearing in the Petition on 21.11.2019 and seeking comments / objections from interested parties on or before 21.11.2019 or parties to remain present during the Public Hearing.
- 12.44. Shri Naresh Balvantbhai Patel and Shri Hitesh Mahadevbhai Patel have not filed any response / objection to the Petition as sought by Hon'ble Commission before 21.11.2019 and also did not attend the public hearing in the matter. Further, Prayas Energy and the four other objectors who have participated in the proceedings in the Petition, have made elaborate submissions taking consumer interest into consideration and Petitioner has responded to each of the submissions. In view of above facts and submissions, Hon'ble Commission may take appropriate view in the matter.
13. Reply of Respondent No. 1 to the objection / representation dated 20th November 2011 and 15.01.2020 filed by Jan Kalyan Foundation and other Objectors is given as here under.
- 13.1. The Objector shall be put to strict proof of the fact that they filed their Objections on 20.11.2019 and in case, the Objector fails to discharge the said burden, then it can be rejected totally on the ground that the same have been filed by the Objector after the expiry of the time period mentioned in the said Public Notice.
- 13.2. In the Public hearing held on 22.11.2019, no one had remained present on behalf of the Objector Jan Kalyan Foundation. Even thereafter, the Respondent No. 1 has never received any objections from the Objector Jan Kalyan Foundation.

- 13.3. In the subsequent hearing held on 16.01.2020, representative of the Objector appeared for the first time and sought time to file objections. Thereafter also, the Respondent No. 1 has received copy of the Objections from the Petitioner GUVNL only on 22.01.2020.
- 13.4. Hence the Objection filed by the Objector Jan Kalyan Foundation deserves to be dismissed only on this ground.
- 13.5. The Objections raised by the Objector in the Objections are substantially similar to the Objections filed by the other Objectors in the present proceedings before this Hon'ble Commission.
- 13.6. The Respondent No. 1 does not intend to repeat its various statements, contentions and submissions contained in its said replies and further craves leave of this Hon'ble Commission to refer to and rely upon the same as a part of its reply to the present Objections as if the same are reproduced herein.
- 13.7. Respondent No. 1 has filed Affidavit-in-Reply dated 20.11.2019 to the Objections of Utility Users Welfare Association and submit that the undisputed facts and circumstances of the case clearly show that as a matter of fact, the Government of Gujarat (the "GOG") in the larger public interest has formulated and issued as implementation Policy in 01.12.2018 which is more particularly referred to hereunder, on the basis of the recommendations made by the High Power Committee constituted by it, to ensure adequate and efficient supply of energy at economical tariff by the Petitioner among other Developers, having the imported coal based power plants located in Gujarat and maintain its respective energy basket in a manner that has a mix of power sources that addresses all issues including availability of reliable power generation, optimum utilization of existing resources and installed generation capacities, etc. by allowing revival and rehabilitation package to the financial stressed and economically unviable imported coal based power projects located in Gujarat, which include imported coal based power plant of the respondent No. 1, through

consequential amendment(s)/modification(s) in the existing Power Purchase agreement.

- 13.8. The Only question that arises in this Petition for the decision of this Commission is whether in the facts and circumstances of the case, the above decisions of the GOG are in the larger public interest or not.
- 13.9. The Respondent No. 1, the undeniable facts and circumstances of the case, manifestly show that the decisions of the GOG in question are in a larger public interest and not at its expense or consumers' interest, as alleged by the Association in the Objections or at all.
- 13.10. The Respondent No.1 denies all and singular the allegations, statements, contentions and submissions of the Association in the Objections that are contrary thereto or inconsistent therewith.
- 13.11. The Implementation Policy which takes note of the conclusions drawn by the HPC and concurred therewith in essence.
- 13.12. The Supplemental PPA is based on the Implementation Policy and is in larger Public Interest, the Objections filed by the Objectors Jan Kalyan Foundation deserves to be rejected.
- 13.13. This Commission, vide its Order dated 20.08.2019 had directed the Petitioner to issue a Public Notice calling upon person(s) who may be aggrieved by the Petitioner seeking approval of the Supplemental PPA from this Commission to file their Objections, if any, before this Commission supported by way of an Affidavit. Since the Objections filed by the Objectors are not under oath, the objections are liable to be rejected by this Hon'ble Commission as not maintainable.
- 13.14. The Supplemental PPA dated 01.03.2019 entered into between the parties and the GR issued by the Government of Gujarat in larger public interest. Since the prayers prayed for in the said Petition pertaining to revision of capacity and energy charges did not

survive, in view of the Supplemental PPA entered into between the Petitioner and respondent No. 1, the Respondent No. 1 withdrew the said Petition, which was duly and rightly permitted by this Commission. Therefore. The objection by the Objector with regard to permission granted by the Hon'ble Commission to the Respondent No. 1 to withdraw the said Petition No. 1389 of 2014, is ill-founded and unsustainable.

- 13.15. With regard to para-3 of the Objections dated 15.01.2020 regarding the purported benefits of adopting the process as laid down under the Insolvency and Bankruptcy Codes, 2016, the same are denied as being devoid of merits.
- 13.16. Chapter – IX of the HPC Report deals with the option of exploring the NCLT route in detail and has even considered the findings of the 37th and 40th report presented by the Standard Committee on Energy (“SCE”).
- 13.17. The SCE in its report has inter alia highlighted that there is a need to preserve, protect and conserve stressed assets, and not emphasize on procedure that focus more in dissolution than on resolution of stressed assets. It was emphasized by the SCE that the consequences of reviving the power plants would be less burdensome and more fruitful, as opposed to the enormity of the consequences of approaching the NCLT.
- 13.18. It was concluded by the HPC report that revival of the said projects at this stage itself would yield more fruitful results, as against opting for resolution by way of an NCLT referral. The said recommendations of the HPC have been duly accepted by the Government of Gujarat as a policy decision in larger consumer interest.
- 13.19. The Policy decisions of the Government of Gujarat are evident from the GR dated 03.07.2018 constituting the HPC and the GR dated 01.12.2018 pursuant to which the present petition has been filed.
- 13.20. The Commission has the power, inter alia, to adjudicate itself upon the dispute between the licensees such as the Petitioner and the generating companies such as the respondent No. 1 when it has no person of law as a member of the Commission

possessing professional qualification and substantial experience in the practice of law for being appointed as a Judge of the High Court or a District Judge as stipulated in Section 84(2) of the Gujarat Electricity Industry (Re-organization and Regulation) Act, 2003.

- 13.21. The Commission can perform and/or continue to perform its adjudicatory functions under the Electricity Act, 2003, notwithstanding that it has no judicial member. Neither the aforesaid Section nor the judgment of the Hon'ble Supreme Court of India in the case, being the Civil Appeal No. 14697 of 2015 the State of Gujarat & Ors. Vs. Utility Users' Welfare Association & Ors. relied upon by the Association neither expressly or impliedly support the contention of the Association to the contrary stating that the Commission should not proceed to decide the petition, is totally devoid of any merit. The Association has taken the said contention knowing it to be false or without believing it to be true with an ulterior motive to cause or delay the adjudication of the dispute involved in the petition by the Commission in order to cause serious loss, harm and prejudice not only to the interest of the respondent No. 1, but to the interests of consumers' in Gujarat.
- 13.22. The Objectors have erroneously submitted that the HPC Report does not take into record interest of the consumers and needs to be revisited by this Commission. It is submitted that the HPC Report in its conclusions and recommendations under Chapter – X records that HPC, while undertaking the analysis and making the recommendations in the report, has the 'Consumer Interest' paramount and the same has been the focal point of their approach. On the touchstone of the consumer interest, the HPC concluded that the power project in question need to be salvaged and this can only be done by ensuring sustainable operation of the power project by making them economically viable i.e. by allowing pass through of the energy charges.
- 13.23. From the recommendations of the HPC report and the Implementation Policy, it is clear that the State Government has taken policy decision to allow pass through of energy charges for rehabilitating the concerned power project including that of Respondent No. 1 Company vide Policy GR dated 01.12.2018 issued in furtherance to and

accepting the Recommendations of the HPC. Therefore, the objections raised by the Objectors are misconceived, ill-founded and therefore deserve to be rejected.

- 13.24. Since the amendments to the PPA by the Supplemental PPA, the approval of which has been sought in the present Petition, is manifestly in the larger public interest for the reasons expressly and explicitly stated in the Report of the HPC containing recommendations for implementation to mitigate the hardship and stress faced by imported coal based power projects located in Gujarat, the contention of the Objector that only because amendments to the PPA approved for payment of a higher tariff by consumers in Gujarat to the Respondent No. 1 is not in public interest is not just and proper.
- 13.25. In deciding whether the Implementation Policy is in public interest or not, various other reasons given in paragraph 10.2 of the Implementation Policy are relevant. Considering the said reasons, the contentions of the Objector Jan Kalyan Foundation have no merit.
- 13.26. There is absolutely no merit in any of the contentions raised by the Objector Jan Kalyan Foundation in its Objections for opposing the grant of the present Petition by the Commission.
- 13.27. Therefore, the prayer of the Petitioner seeking approval of the Supplemental PPA deserves to be allowed by granting the relief as prayed for therein by the Petitioner.
14. The matter was heard by the Commission on 06.08.2019, 21.11.2019, 16.01.2020, 29.02.2020 and finally heard on 07.03.2020 and daily orders were issued on 28.08.2019, 05.12.2019, 27.01.2020, 29.02.2020 and 09.03.2020 respectively.
15. The Petitioner has made written submission on 16.03.2020 for deliberations during the hearing by Learned Advocate Shri Hemant Sahai on its behalf, which are as mentioned below:

- 15.1. He submitted that initially the present petition was filed under Section 86(1)(b) and 86 (1)(f) of the Act. However, during the course of hearing the Petitioner without prejudice to its rights and contentions vide its letter dated 02.03.2020 has sought for the amendment of the memo of the Petition to be as under Section 86(1)(b) only. Therefore, the Petition be considered as having been filed under 86(1)(b) of the Electricity Act, 2003 alongwith the relevant provisions of the PPA. An affidavit in this regard has also been filed by the Petitioner. Thus, on withdrawal of aforesaid provision u/s 86 (1) (f) by the Petitioner the Petition now falls under Section 86 (1) (b) of the Act only. Hence, the Commission shall require to approve the PPA with consideration of 86 (1) (b) only.
- 15.2. The contentions of the Respondents / Objectors have been dealt with by the Central Electricity Regulatory Commission in its Order dated 12.04.2019 passed in Petition No. 374/MP/2018 where issues were identical to those in the present case. While the decision of the Central Commission is not binding on this Commission, it is a settled law that to deviate from the views of the Central Commission on identical issues, the Commission will have to record strong reasons. In support of above submissions, he relied upon following decisions:
- I. *Commissioner of Income Tax, Gujarat v Sarabhai Sons Ltd. (Income Tax Reference No. 38 of 1978)* and;
 - II. *N.R Paper and Board Limited & Ors. v Deputy Commissioner of Income Tax (Special Civil Application Nos. 1144-1147 of 1998).*
- 15.3. The Commission is vested with necessary powers/jurisdiction under Section 86(1)(b) of the Electricity Act to approve the amendments sought to be made to the PPA dated 26.02.2007 executed between Petitioner and Respondent No. 1. The Hon'ble Supreme Court in its recent pronouncements has upheld the wide scope of the Central Commission's regulatory powers under Section 79 (1)(b) [*pari materia to 86 (1) (b)*] of the Act to regulate the tariff of a generating company having a composite scheme of generation and sale of electricity in more than one State *even in cases of* adoption of tariff under Section 63 of the Electricity Act. Therefore, it cannot be argued that this Hon'ble Commission lacks necessary power to approve the amendments to PPAs

having an impact on tariff adopted under Section 63 of the Act. In support of the said submissions he relied upon the following judgements.

- I. The Hon'ble Supreme Court judgement in the case of *All India Power Engineer Federation & Ors. Vs Sasan Power Ltd. &Ors.*, reported as (2017) 1 SCC 487.
- II. Judgement in the case of *Energy Watchdog v Central Electricity Regulatory Commission & Ors.* reported as (2017) 14 SCC 80.

15.4. The Commission is having power to approve the amendments to the PPA in the public interest even in cases of determination of tariff in accordance with the guidelines issued by the Central Government under Section 63 of the Electricity Act flows from the said provision itself. The same is demonstrated as under:

- A. Under Section 63 of the Act, the Central Govt. issued the competitive bidding guidelines dated 19.01.2005 and subsequently issued the Standard Bidding Documents which, included the model PPA.
- B. As per the said guidelines, the Procurers, in this case GUVNL furnished to the bidders the Model PPA along with the RfQ/RfP. The said model PPA in fact, contained a provision for amendments of PPA if, so agreed by the parties and approved by this Hon'ble Commission.
- C. Similarly, PPA dated 26.02.2007 entered between the Petitioner and Respondent No. 1 contained a specific provision being Article 18.1 allowing the parties to amend the PPAs with the approval of this Hon'ble Commission.
- D. From the above, it can very well be deduced that this Hon'ble Commission's power to amend the PPAs flows from competitive bidding guidelines dated 19.01.2005 of the Central Govt. issued under Section 63 of the Act thereby leading to an invariable conclusion that the said power flows from Section 63 of the Act itself.

15.5. The various Electricity Regulatory Commissions including this Commission have approved amendments to be made to Section 63 PPAs leading to change in tariff in compliance of the SHAKTI scheme i.e. a policy decision of the Union Ministry of Coal. During the course of arguments, the Petitioner relied upon such similar orders, details of which are as under:

- i. Order dated 21.02.2018 passed by the Central Commission in the matter of KSK Mahanadi Power Co. Ltd. vs TANGEDCO & Ors., Petition No. 21/MP/2018;
- ii. Order dated 21.02.2018 passed by the Central Commission in the matter of GMR Kamalanga Energy Ltd. vs GRIDCO Ltd. & Anr., Petition No. 41/MP/2018 and;
- iii. Order dated 02.02.2018 passed by this Hon'ble Commission in the matter of GUVNL v ACB (India) Limited, Petition No. 1703 of 2018 read along with Order dated 15.03.2018 passed by this Hon'ble Commission in the matter of GUVNL v ACB (India) Limited, Petition No. 1707 of 2018.
- iv. Order dated 20.03.2018 passed by MERC in the matter of Adani Power Maharashtra Ltd. vs MSEDCL, Petition No. 70 of 2018.
- v. Order dated 24.01.2018 passed by the Rajasthan Electricity Regulatory Commission in the matter of Adani Power Limited v Jaipur Vidyut Vitaran Nigam Limited & Ors., Petition No. RERC-1313/18.

15.6. From the perusal of the aforesaid Orders, especially the Order dated 02.02.2018 passed by this Hon'ble Commission in the matter of GUVNL vs ACB (India) Ltd., Petition No. 1703 of 2018, it is clear that the this Hon'ble Commission allowed amendments to be made in Section 63 PPAs having an impact on tariff in compliance of the SHAKTI policy of the Union Ministry of Coal dated 22.05.2017 which envisaged amendments to be made to Section 63 PPAs as mutually agreed between the developer and the procurer after approval of appropriate Commission. A clear analogy

can be drawn from the aforesaid Orders that the Commission may allow the proposed amendments in the present case as well.

- 15.7. As in the said case amendments to PPAs were allowed by the Central Commission in furtherance of SHAKTI Scheme of Union Ministry of Coal. Similarly, in this case the amendments proposed are in furtherance of the policy decision of the Govt. of Gujarat acting through Energy & Petrochemical Department, which is evident from the GR dated 03.07.2018 constituting the HPC and the GR dated 01.12.2018 pursuant to which the accompanying petition has been filed. Therefore, the arguments advanced on behalf of the Consumer Groups / Objectors equating the policy decision of the Govt. of Gujarat with a policy directive as envisaged in Section 107/108 of the Electricity Act is misplaced, misconceived and do not deserve any consideration insofar as the present case is a case of implementation of economic policy of the Govt. of Gujarat and not a policy directive under Section 107 or 108 of the Act. It is for this reason that the GR dated 01.12.2018 makes no reference to Section 107 or 108 of the Act.
- 15.8. All questions regarding the jurisdiction/power of this Hon'ble Commission to approve the amendments in question, which, indisputably are in the larger public interest and being implemented through a policy decision of the Govt. of Gujarat, has been put to rest by the order dated 29.10.2018 passed by Hon'ble Supreme Court in Miscellaneous Application Nos. 2705-2706 of 2018 in Civil Appeal no. 5399-5400 of 2016. The said order was passed by the Hon'ble Supreme Court in furtherance of Miscellaneous Applications filed on behalf of the Petitioner thereby seeking the indulgence of the Hon'ble Supreme Court to clarify its judgment in (2017) 14 SCC 80 to the extent that the same does not in any manner impinge upon to exercise the option to operate clause 18.1 and amend PPA in public interest.
- 15.9. A clear analogy can also be drawn from the CERC's order dated 12.04.2019, passed in Petition No. 374/MP/2018 filed for approval of supplemental PPA of exactly similar nature on behalf of another power generator considered by the HPC. CERC in the said order has discussed and adjudicated upon the issue – *“Whether the Commission has the power to approve the proposed amendments, especially since the tariffs specified*

in the PPAs were determined under Section 63 of the Act?” – in great detail and has returned an affirmative finding holding that it has necessary regulatory jurisdiction. In support of the said submissions he relied upon the para 51,55 and 57 of the said judgement.

- 15.10. The Commission has necessary powers under the Electricity Act to approve the proposed amendments. While approving the proposed amendments, the Commission needs to consider if the said amendments are in public interest. The rehabilitation scheme of the Govt. of Gujarat which is being implemented in the larger public interest by way of a policy decision ensures that the project is revived and alternate expensive power does not have to be resorted to. Besides this, the Commission must take cognizance of the Policy GR dated 01.12.2018 to ascertain whether the proposed amendments are in the public interest. The extent the rehabilitation package is implemented through the policy decision of the Govt. of Gujarat taken in the larger public interest the Commission should accept the same and allow amendments to be made to the PPA dated 26.02.2007 as done in the aforesaid cases to implement the SHAKTI scheme.
- 15.11. The Policy GR dated 01.12.2018 shows that the Government of Gujarat has deliberated on all recommendations of the HPC in detail against the background of the existing and emerging power scenarios in the State of Gujarat which are as under:
- a. Gujarat has a share of 4805 MW from the three projects in question, which contribute around 45% of its total energy requirement. Having the highest share of power from these projects Gujarat is the most affected State. The State grid is already facing low voltage issues in the Saurashtra and Kutch areas and the discontinuation of supply from these projects located in Kutch area would have further adverse ramifications on the quality of power and the power supply position;
 - b. These projects are based on advanced technology, are efficient in operation and have a higher priority in the Merit Order scheduling;

- c. In case these projects were to shut down, replacing such huge capacity with alternate sources from market would not be feasible as the short-term market prices are not only much higher and volatile, the availability of power is uncertain;
- d. In the recent Case I long term bids invited by other States like Andhra Pradesh, Uttar Pradesh, Telangana etc. the tariff discovered was in range of Rs. 3.94-6.31/unit;
- e. In the recent bids invited by M/s PTC on medium term basis, the rate of Rs.4.24/unit was discovered at the Generator bus bar which works out to Rs.4.75/unit at the Gujarat periphery;
- f. Since the State had surplus power due to sustained availability of power from these projects, the State did not plan new capacity addition except at Wanakbori 8 (800 MW). Further, this surplus capacity also includes Gas based stations of 3300 MW for which gas at economical rate is available only to operate 300 MW. Operating these gas based projects on costlier Re-gasified Liquefied Natural Gas has significantly higher generation cost and would further increase the Fuel Surcharge on consumers.
- g. Establishing new imported/indigenous coal-based power plants would have significantly higher fixed and variable costs and the gestation period would be about 5 years and hence, would not offer any solution to immediate power requirement;
- h. To meet the generation loss due to non-availability of power from these projects, the Petitioner has purchased substantial quantum of power at an average rate of Rs.4.66/unit during FY 2018-19 (up to October) from power exchanges and under bilateral arrangement. New projects are not expected to get commissioned in the near future and hence the rate at the power exchange would remain higher. Had the Petitioner not purchased such quantum of power, it would have led to the undesirable situation of load shedding in the State and;
- i. The thermal power projects across the country with long-term linkages are already facing critical coal stock situation in addition to issues related

to availability of adequate infrastructure for transportation of coal through railways and high freight cost. Therefore, optimum utilization of generation capacity of these plants, based on imported coal, located in the coastal areas, merits consideration.

15.12. The judgments relied upon by the Petitioner lay down the principles for adjudication and scope for interference by a court of law in policy decisions of the Government taken in the larger public interest. The said principles are as under:

- a. The courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality nor the courts can substitute their opinion for illegalities, or the unconstitutionality nor can the courts substitute their opinion for the bona fide opinion of the State executive. The courts are not concerned with the ultimate decision but only with the fairness of the decision-making process;
- b. The Government is entitled to make pragmatic adjustments and policy decision which may be necessary or called for under the prevalent peculiar circumstances. The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or wise or more scientific or logical;
- c. If the Govt. is alive to the various considerations requiring thought and deliberation and had arrived at a conscious decision after taking them into account, it may not be for the Court to interfere in the absence of mala fides.
- d. It is not necessary for a court of law to enter upon any exercise for finding out the wisdom in the policy decision of the State Government. It is immaterial whether a better or more comprehensive policy decision could have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be

struck down. It should be borne in mind that except for limited purpose of testing a public policy in the context of illegality and unconstitutionality, courts should avoid “embarking on uncharted ocean of public policy” and;

- e. Court cannot sit in judgment over commercial or business decision taken by the State or its instrumentalities, which has been duly taken after evaluating and assessing the monetary and financial implications, unless the decision is in clear violation of statutory provisions or is perverse or is taken for extraneous considerations or improper motives. State and its instrumentalities can enter into various contracts which may involve complex economic factors. There is always an element of risk in such decisions. However, if the decision is taken bona fide and in public interest, the mere fact that a decision ultimately proves to be wrong, would not by itself be a ground to hold that the decision was mala fide or taken with ulterior motives. Matters relating to economic issues always have an element of trial and error, and so long as the trial and error is bona fide and with best intentions, such decisions cannot be questioned as arbitrary, capricious or illegal.

- 15.13. Tested on the aforesaid principles, the policy decision of the Government of Gujarat taken in the larger public interest to salvage the project in question which included carrying out certain amendments to the PPAs after obtaining necessary approval from the Commission should not be interfered by the Commission. The contentions of the Consumer Groups in their replies and during the course of arguments questioning some of the aspects of the policy decision on merits in isolation to others is not a correct approach to be adopted. It is settled that a policy document needs to be read as a whole. The disturbing any one component of the complete rehabilitation plan will only result in distorting the entire plan and instead of resolving the current financial and cash flow mismatch issues being faced by the projects, will end up creating fresh cash flow mismatch issues for the projects. The HPC recommendations have been finely balanced with the intention of resolving the financial and cash flow mismatch issues being faced by the projects in a sustainable manner, and not to create fresh financial

issues. The plan envisages an appropriate re-structuring that will result in making the projects financially self-sustaining in its operations, while at the same time requiring the developers to absorb all past accumulated losses and also taking significant financial haircuts in the future operations of the projects. All this is being done in the larger public interest by way of a policy decision of the Govt. of Gujarat which is evident from the Policy GR dated 03.07.2018 constituting the HPC and Policy GR dated 01.12.2018 accepting the recommendations of HPC.

- 15.14. A clear analogy can also be drawn from the Ld. CERC's order dated 12.04.2019, passed in Petition No. 374/MP/2018 filed for approval of supplemental PPA of exactly similar nature on behalf of another power generator considered by the HPC. In support of above submissions, the petitioner relied upon the para 59, 62 and 63 of the said order.
- 15.15. The necessary jurisdiction to regulate the tariff adopted under Section 63 of the Electricity Act will include the amendments to PPA, if the same are being implemented through a policy decision of the Government taken in the larger public interest by the Commission. The proposed amendments are in interest of consumers since the non-availability of power from Essar Power Gujarat Ltd. will result in the Petitioner not only incurring higher cost of replacement of such power but may also result in DISCOMs not being able to provide uninterrupted power supply to the consumers as the availability of such huge quantity from alternate sources is uncertain and procurement from new sources takes 4-5 years' time at the very least. The HPC has carried out detailed consultative process and also analysed the circumstances, facts associated with the issue and submissions by all stakeholders viz. the Developers, Procurers, Lenders as well as the consumer representative groups. The consultative process undertaken with the diverse stakeholders by the HPC and also seen the public/consumers interest etc. which are stated in para V, VI and VII of the HPC report.
- 15.16. The Petitioner and the Respondent No. 1 have mutually agreed and signed the Supplemental PPA on 01.03.2019 as provided in Article 18.1 of the respective original PPA pursuant to and consistent with the recommendations of the HPC and pursuant to policy decision of the Govt. of Gujarat dated 01.12.2018.

15.17. The salient features of the supplemental PPA dated 01.03.2019 which, includes amendments to various other components besides tariff, are in the interest of State and the consumers are reproduced herein below for ready reference of this Hon'ble Commission:

- a. Date of applicability shall be prospective from 15th October 2018. Therefore, all the past losses to the procurers shall be borne by Respondent No. 1 only and not passed on to the consumers.
- b. Fuel Cost shall be pass-through on actual basis subject to ceiling of imported coal cost of 110 USD/MT. The Generators shall carry the price risk beyond the capped ceiling. Such capped ceiling shall be reviewed after five years.
- c. Lenders shall bear the burden to the extent of Rs 0.20 per kWh by way of reduction in Capacity Charge.
- d. Tie-up of free capacity at the capacity charge equal to the levelized capacity charge of the existing PPAs without any discount and the Energy Charge as actual.
- e. Extension of PPA tenure by 10 years with capacity charge equal to the quoted capacity tariff of the terminal year without any discount and the energy charge as actual. The Capital Cost of renovation and modernization as well as incremental O&M expenses shall be allowed additionally in the capacity charge as per the mechanism provided in the Supplemental PPAs.
- f. Increased availability from 80-90% without additional capacity charges for the incremental availability.

15.18. A clear analogy can also be drawn from the para 17 of the Ld. CERC's order dated 12.04.2019, passed in Petition No. 374/MP/2018 filed for approval of supplemental PPA of exactly similar nature on behalf of another power generator considered by the HPC.

15.19. The replies filed on behalf of consumer groups / objectors as well as the arguments advanced were repetitive in nature and do not deserve any consideration. A perusal of

the said replies/objections makes it apparent that on merits of the case in hand, all the consumers/objectors have more or less adopted the submissions of Prayas (Energy) Group.

- 15.20. The Objectors have raised certain other issues which does not deserve any consideration as the same does not impact the present proceedings at all and have been raised purely to prejudice the Hon'ble Commission against the Petitioner which, is a Statutory Authority. The objections filed on behalf of UUWA and LUBG are verbatim similar. The replies/objections filed on behalf of the Consumers Groups are based on an erroneous premise that the Commission has no power to approve amendments to be made in the Section 63 PPAs or; that policy decision taken by the Govt. of Gujarat in the larger public interest deserves to be interfered by this Hon'ble Commission on merits.
- 15.21. Public interest was supreme in the considerations of the HPC while evaluating the methodology of the way forward. A bare perusal of the Policy GR dated 03.07.2018, HPC Report and Policy GR dated 01.12.2018 makes it abundantly clear that public interest has been of paramount importance while formulating an equitable solution to mitigate the hardship being suffered by the power generators. Chapter VII of the HPC Report highlights the importance of salvaging the projects by demonstrating how closure of the said projects would have an adverse impact on consumer tariff. These projects contribute to a significant amount of the country's peak demand and contribute to approximately 45% of the requirement of the Petitioner herein. Moreover, it is imperative to highlight that the project of Respondent No. 1 is a cheaper source of electricity as compared to other sources/projects from whom the DISCOMs have been constrained to procure power. Even after allowing pass through of the price of coal, the tariff of Respondent No. 1's project would still be competitive. The said projects have also been developed on supercritical technology and are more efficient leading to higher saving of fuel cost.
- 15.22. The aforesaid findings of the HPC Report, the Government of Gujarat vide its Policy GR dated 01.12.2018, adopted the recommendations given in the HPC Report with

certain modifications. The preamble of the Policy GR dated 01.12.2018 in itself states that the policy directive is being issued for rehabilitation of stressed imported coal-based projects in consumer interest. Further, the Policy GR has also taken note of the analysis of the HPC Report qua consumer interest involved in salvaging the present projects. The Policy GR has thus been issued keeping the larger public/consumer interest in mind. It is noteworthy that certain modifications that have been made by the Policy GR have been carried out so as to safeguard consumer interest and ensure that no undue benefit is given to the generators. The CERC has considered the aforesaid issue in great detail at paragraphs 68 and 71 of its order dated 12.04.2019, passed in Petition No. 374/MP/2018.

- 15.23. Before implementing the recommendations of the HPC which, includes amending the PPAs, the Govt. of Gujarat found it prudent to seek a clarification from the Hon'ble Supreme Court of India on the concerns raised by the Consumer Organizations (Energy Watchdog and Prayas (Energy) Group) that any amendments to the PPAs will be on the face of the judgment of the Hon'ble Supreme Court dated 11.04.2017 in Civil Appeal No. 5399-5400 of 2016 (Energy Watchdog judgment). Accordingly, Applications seeking clarifications to this effect were filed by the Govt. of Gujarat and Petitioner herein before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court of India vide its order dated 29.10.2018 after perusing the HPC report was pleased to clarify that it will be open to the applicants (Petitioner herein) to approach the Central Electricity Regulatory Commission for approval of the proposed amendments to be made to the PPAs in question. Accordingly, the Petitioner filed the present Petition seeking approval to the proposed amendments to the PPAs as contained in the Supplemental PPAs dated 01.03.2019.
- 15.24. The first round of litigation with regard to the present dispute, which culminated in the Energy Watchdog Judgment being passed by the Hon'ble Supreme Court, was with regard to the PPAs as they stood then. The present proceedings are however related to approval of supplemental PPAs by way of an amendment, which has been proposed pursuant to the policy decision of the Govt. of Gujarat, for rehabilitation of the

concerned projects. Thus, the Energy watchdog judgment of the Hon'ble Supreme Court will not have any implications on approving the amendments to the PPAs.

- 15.25. The allegation of the consumer groups that as per the Petitioner, the Commission is not required to look into the objections of the consumer groups and ipso facto approve the proposed amendments, is fallacious. The Petitioner has never contended that the Commission should approve the amendments to the PPAs without looking into the various aspects of the matter. The Petitioner has only emphasized that the Commission may consider the entire rehabilitation package as a whole, and not look at specific aspects in isolation.
- 15.26. The CERC has considered the aforesaid issue in great detail in para 45 of its order dated 12.04.2019, passed in Petition No. 374/MP/2018 and has held that the amendments are in public interest.
- 15.27. The HPC Report has looked into each and every aspect of the rehabilitation proposal in great detail and made the final suggestions after having considered each and every aspect, keeping in view the consumer interest as paramount. In fact, by way of the policy GR dated 01.12.2018, the Petitioner further modified the suggestions made by the HPC and made them stricter for Respondent No. 1 with a view of safeguarding the interest of the consumers. Pertinently, similar suggestions were also made by the Consumer Groups before the HPC, which have been duly considered in the HPC report.
- 15.28. The Extension of loan repayment tenor aspect has already been considered by the Lenders. Extension of repayment tenor would result in increase of interest amount on overall basis and thus the cost will become higher on an NPV basis. In Para 5.7.2 of the HPC Report it is highlighted that lenders have already extended their support by providing working capital support, interest rate reduction and extension of the tenor for loan repayment. The CERC has considered the aforesaid issue in great detail in para 111 of its order dated 12.04.2019, in Petition No. 374/MP/2018.

- 15.29. With regard to the suggestion of using domestic coal is concerned the findings of NTPC (technical consultant to the Working Group Committee Report) Report, state that the power plant of Respondent No.1 cannot be operated on domestic coal. The CERC has considered the aforesaid issue in great detail *in para 113 of its order dated 12.04.2019, passed in Petition No. 374/MP/2018 and held with regard to use of domestic coal is not feasible.*
- 15.30. The issue of increase of normative availability has been adequately dealt with by the HPC and correspondingly dealt with in Supplemental PPAs. The Supplemental PPAs state that the generator would be giving the benefit of higher availability to the procurer as the procurer would not have to pay capacity charges for availability beyond the normative availability of 80%. Further, the supplemental PPAs clearly state that the provisions of the subsisting PPAs would continue to apply with regard to determining both incentives and penalty. This is in furtherance of the mandate of the rehabilitation package which is to ensure that the generators do not incur further losses while also ensuring that the generators do not make any profit on account of the recommendations. Moreover, since the capacity charges are already being reduced by 20 paise, the normative availability has been kept at 80% only, with no incentive being given to the generator up till 85%. At the same time, the Petitioner reiterates that individual components of the rehabilitation package should not be looked at in isolation to the others since the same may lead to distorted results. The CERC has considered the aforesaid issue in great detail *in para 75 and 76 of its order dated 12.04.2019, passed in Petition No. 374/MP/2018.*
- 15.31. With regard to the extension of the PPA term is concerned the same has been considered by the HPC and it has been recommended in the HPC Report that the PPA tenure may be extended by 10 years, with the option being available to the procurers. The same has been included in the supplemental PPAs under Article 3.5 thereto, which states that the procurer shall have the right, but not the obligation to extend the term of the PPA by 10 years.

- 15.32. With regard to the contentions of consumer groups that the tariff for the extended period of the PPAs shall be either the capacity charge of the previous year of the PPA term or the R&M costs etc. is concerned, the same has been considered by the HPC and accordingly in the Supplemental PPAs the capacity charges for the extended term of the PPAs is considered as last year capacity charges. Additionally, R&M expenses are allowed to the extent required, which are also allowed subject to the approval of the Commission based on the prevailing regulations at that point of time. The CERC has considered the aforesaid issue in great detail in para 107 & 108 of its order dated 12.04.2019, passed in Petition No. 374/MP/2018.
- 15.33. As far as the aspect of utilization of residual value is concerned, it is respectfully submitted that the tenure of the PPA is already being increased by 10 years at the discretion of the Petitioner and there is further, scope of extension of PPA if mutually agreed by the parties. Therefore, the issue related to residual value does not arise.
- 15.34. The CERC has considered the aforesaid issue in great detail in para 114 and 115 of its order dated 12.04.2019, passed in Petition No. 374/MP/2018.
- 15.35. The return on equity of the project in question has already been written off. With respect to the submission of the consumer groups qua contribution of and sacrifice by the promoter, is concerned, the promoters have already incurred significant losses in mitigating the hardships being faced by the said projects. Moreover, the past losses are also being absorbed by the generators. Further, as per the rehabilitation package, the promoters are contributing or sacrificing the following:
- i. Offer of additional capacity at the same tariff thereby foregoing higher tariff for the said additional capacity. It is important to point out that in the recent bids, the capacity charges discovered are in the range of Rs.2 as against the average capacity charge of approximately Rs.1 under the Supplemental PPAs;
 - ii. Extension of PPA term at the same tariff thereby foregoing the opportunity to earn more revenue;

- iii. Discount of 20 paise in capacity charge for the balance term after servicing the debt;
- iv. Increase in availability from 80% to 90% without any additional burden to consumers.

- 15.36. The Ld. CERC has considered the aforesaid issue in great detail in para 116 and 117 of its order dated 12.04.2019, passed in Petition No. 374/MP/2018.
- 15.37. This aspect was specifically brought to the notice of the Hon'ble Supreme Court in the M.A. Nos. 2705-06 of 2018 filed in Civil Appeal Nos.5399-5400 of 2016. The Hon'ble Supreme Court, after looking at the HPC report, gave its go-ahead for the route of amendments of the PPA as against IBC route. In any case, the HPC Report has considered and evaluated the option of approaching the National Company Law Tribunal ("NCLT") for resolution of the present issue. In its analysis, HPC has relied upon the findings of the Standing Committee on Energy in its 37th and 40th Report and concluded that revival of the projects at this stage itself would prove to be more fruitful, as opposed to referring them to NCLT. The Government of Gujarat has issued the Policy GR after duly considering the merits of the recommendations of the HPC Report. As such, the entire rehabilitation scheme as provided therein should be looked at in totality.
- 15.38. The Commission while approving the amendments to Section 63 PPAs, is to see if the same is in public interest and if the public interest involved in making the amendments is being implemented through a policy decision, the same should not be interfered with by this Hon'ble Commission.
- 15.39. The CERC has considered the aforesaid issue in great detail in para 69 and 70 of its order dated 12.04.2019, passed in Petition No. 374/MP/2018.
- 15.40. At the outset, it is submitted that the Petitioner is not allowing anything to the Generator except the actual cost of imported coal or the cost determined as per Supplemental Agreement, whichever is lower. The main thrust of the Policy GR of the Government of Gujarat read along with the HPC recommendations is to find out a sustainable

solution keeping in view the larger public interest. The suggestive terms of reference of the HPC, as laid down in the policy GR dated 03.07.2018 and the Preamble to HPC Report, include consideration of any other relevant issues which the Committee would like to discuss and to suggest any other method to reduce the overall cost of generation of power in the interest of consumers. Thus, the scope of the HPC was not restricted to merely analysing the impact of increase in the price of Indonesian Coal, but to provide a sustainable and equitable solution to mitigate the hardship of the generators while ensuring that consumer interest is safeguarded.

- 15.41. Prayas is confusing issue of PPA amendment based on the Government of Gujarat Policy Resolution dated 01.12.2018 with earlier GR/ HPC Report. Taking into account the recommendations of HPC Report, GoG has framed Resolutions under GR dated 01.12.2018 to consider various components/aspects related to tariff amendment and directed the Petitioner to execute the Supplemental PPAs and obtain approval of Appropriate Commission. Therefore, even if it is assumed that the HPC recommendations are beyond the scope given to it, the GoG vide its Policy GR dated 01.12.2018 has accepted those recommendations and regularized them. Under the circumstances, the argument that HPC expanded the scope is completely misplaced.
- 15.42. In any case, the tariff quoted by Respondent No.1 has no breakup of Ocean Freight and Port Handling Charges. Therefore, while FOB is linked to the benchmark HBA index, the other components Ocean Freight, Port Handling Charges are benchmarked to CGPL tariff which was finalized by PFC after negotiations at the time of Bidding. Even in these parameters, the consumer interest is safeguarded since the ocean freight payable as per the Supplemental PPAs is less than the Ocean Freight which was allowed by the Commission in the earlier proceedings. The CERC has considered the aforesaid issue in great detail in para 98 and 99 of the CERC order dated 12.04.2019, passed in Petition No. 374/MP/2018.
- 15.43. The amendment of a PPA where tariff has been determined in terms of Section 63 is not barred in terms of the Act. The judgment of the Hon'ble Supreme Court in the matter of All India Power Engineer Federation and Ors. Vs. Sasan Power Ltd and

Ors.,(2017) 1 SCC 487, makes this position abundantly clear. Further, the Commission in its order dated 21.02.2018, passed in the matter of KSK Mahanadi Power Co. Ltd. vs TANGEDCO & Ors., Pet. No. 21/MP/2018 approved the amendment of the PPAs. A clear analogy can be drawn in this case from the said order of the Commission in so far as in the said case the amendment of the PPA was being sought in furtherance of the SHAKTI policy issued by the Union Ministry of Coal, similarly in this case Government of Gujarat has issued the Policy GR pursuant to which the Petitioner is seeking approval of the present amendments. The contention of consumer groups that the FERV will be at the risk of seller as per Clause 4.3 of the competitive bidding guidelines dated 19.01.2005 is erroneous in so far as the said competitive bidding guidelines are applicable at the time of bidding.

15.44. The CERC has considered the aforesaid issue in great detail in para 47 of the CERC order dated 12.04.2019, passed in Petition No. 374/MP/2018.

15.45. The PPA being under Case I, only capacity charges and energy charges are quoted and it is not based on net SHR as recommended by the HPC, Supplemental PPAs provide for SHR and auxiliary consumption to be the lower of the actual or normative parameters as provided in the tariff regulations. As such, the Petitioner has taken due care to ensure that the lowest possible normative parameters are considered so as to protect consumer interest. In any case, the approach of the consumer groups by singling out different aspects of a complete package and questioning the same in isolations to others, is impermissible in law. While the Tariff Policy and the new Standard Bidding Documents provides for additional relief towards operating parameters with the age of the Plant, in the Supplemental PPAs such facility was not extended to the Respondent No. 1 and the operating parameters are fixed as per 2009 Regulations which were in vogue at the time of commissioning. The CERC has considered the aforesaid issue in great detail in para 81 of the CERC order dated 12.04.2019, passed in Petition No. 374/MP/2018.

15.46. Based on above submissions, it is submitted that the Commission may allow the petition.

16. The Respondent No.1 (Essar Power Limited) in its submission stated that the Petition was filed by the Petitioner for approval of supplemental PPA dated 01.03.2019 executed between the parties with a view to redress inequitable situation that arose due to the change in the Indonesian regulation affected to the different power projects of the State of Gujarat who later on constituted a High Power Committee for finding solutions with a view to that the power supply from the power projects which were affected due to Indonesian Regulation be feasible or not and to find out the solution for the same. After examining and analysing all relevant documents and information submitted by the parties the committee has submitted its report with certain recommendation to the Government of Gujarat for approval and implementation.
- 16.1. The Government of Gujarat after considering the provisions made in the HPC report accepted certain recommendation with modification and passed G.R. dated 01.12.2018 issuing policy directives to the Petitioner to execute the supplemental PPA with the Respondent No.1 and get approved from the Commission.
- 16.2. Prior to signing the supplemental PPA the clarification was obtained from the Hon'ble Supreme Court of India with regards to its Judgement dated 11.04.2017 in case of Energy Watch Dog Vs. Adani Power Limited and others will not affect to the parties. The Hon'ble Supreme Court allowed to amend the PPA as per law and get approved from the Commission.
- 16.3. The submissions made by the Petitioner are adopted by the Respondent No.1.
- 16.4. The objections made by the Objectors with an ulterior motive to delay in grant of approval of supplemental PPA by the Commission.
- 16.5. The objectors have not raised any objections to deprive the Petitioner from the benefit of the Order dated 12.04.2019 passed by the CERC granting benefits which are prayed in the present petition where the issued involved in the present petition, in facts and circumstances which are materially and substantially identical.

- 16.6. The allegations levelled against the Respondent No.1.with regard to over invoicing of imported coal and equipment are false, baseless and reckless allegations need to be rejected.
- 16.7. The Respondent No.1 has withdrawn all its claim pending proceeding against the Petitioner in respect of past losses incurred period prior to 15.10.2018, thereby complied with the stipulation made in G.R. dated 01.12.2018 and addendum dated 23.01.2020. The Respondent has also prayed as under:
- (i) The tariff as per the PPA dated 26.02.2007 for the domestically procured imported coal during the period 21.04.2019 to 19.08.2019 by applying Change in Law as decided by this Hon'ble Commission in Petition No.1680 of 2017, vide Order dated 23.12.2019 as per the Affidavit dated 19.12.2019 filed by the Petitioner before this Hon'ble Commission, and
 - (ii) To allow the Petitioner to avail rebate in respect of the Energy Charge component of Provisional Bill or Monthly Bill, as the case may be, at the request of the Respondent No.1 for the purpose, as per the provisions of the Article 11.3.6 of the PPA dated 26.02.2007 in pursuance of the Affidavit dated 16.03.2020 filed by the Respondent No.1 before this Hon'ble Commission.
17. Shri Bharatkumar T. Gohil on behalf of Utility Users' Welfare Association (UUWA) Objector No. 2 submitted that the present petition is not admissible and maintainable and the Petitioner and the Respondent M/s. Essar Power Gujarat Ltd. have not replied to the objections of UUWA.
- 17.1. The GUVNL is not qualified as affected party in terms of the provisions of the GERC (Conduct of Business) Regulations, 2004 notified by the Commission as it is a procurer/licensee and it cannot be qualified as affected person stated in the provisions of the GERC (Conduct of Business) Regulations, 2004.

- 17.2. The Petition is filed under Section 86 (1) (b) for amendment of PPA which was approved by the Commission before more than 10 years' period. Hence, after passing the order the Commission is functus officio and it cannot pass any amendment of that Order. Thus, the proposed amendment in the PPA is not permissible as per the provisions of law.
- 17.3. The act of Petitioner is review of Order dated 20.12.2007 passed by the Commission after period of more than 10 years. Moreover, no ingredient of review of Order is fulfilled in the present petition. Hence, the same is not permissible.
- 17.4. The proposed amendment is barred by limitation as per the provisions of Limitation Act.
- 17.5. The present petition is also barred by the principle of Res-judicata defined under the Act as the issue involved in the present petition has been dealt by the Commission between the same parties and decided about the PPA. Hence, it is not permissible to allow present petition.
- 17.6. The Commission has earlier decided that financial hardships is not a ground for amendment of PPA executed between the parties. The aforesaid principle was decided by the Hon'ble Supreme Court in number of judgements including the judgement pronounced in the case of Energy Watchdog V/s. Adani power Ltd. & Others.
- 17.7. In Order No. 4 of 2007 dated 20.12.2007 by this Commission, at para no. 6.40 it has been decided in exhaustive manner with regard to the approval of PPA signed between the Petitioner and Respondent No. 1 who was selected as successful bidder in the competitive bidding process. It is not open to the Commission to review the said Order and the PPA executed between the Petitioner and the Respondent No. 1.
- 17.8. The UUWA has referred the Judgement of Hon'ble Supreme Court dated 29.10.2018, in MCA No. 2705-2706 of 2018 in Civil Appeal No. 5399- 5400 of 2016 with Civil Appeal No. 5347-5348 of 2016. He has referred Para 22, 23, 24 and prayer (b) of the said

application and submitted that in the aforesaid submission the applicant has requested to the Hon'ble Supreme Court to issue the directions to concerned Regulatory Commission to expeditiously dispose of applications seeking the amendment of PPA sought by the Petitioner.

- 17.9. UUWA has further referred the Order dated 29.10.2018 and submitted that after hearing the parties the Hon'ble Supreme Court has held that in its Order that it is open to the applicant to approach to the Central Electricity Regulatory Commission (CERC) for approval of proposed amendments to be made to the Power Purchase Agreements (PPAs) in question. Moreover, Hon'ble Supreme Court has also held that the consumer groups who had appeared before it will be heard on all objections and also allowed to make their objections on proposed amendments on PPA thereafter it will be open for the CERC to decide the matter in accordance with law. It is also held by Hon'ble Supreme Court that the CERC should decide the matter expeditiously as possible preferably within period of 8 weeks from the date of Order.
- 17.10. From the above it is clear that the matter was decided by the Supreme Court where the applicant has prayed that the Supreme Court may allow to decide the amendments in the PPA as per the recommendation of HPC by the appropriate Commission. However, while deciding the matter the Hon'ble Supreme Court has decided that the same matter be referred to CERC and not any appropriate Commission including GERC. Thus, it is not open to decide the matter by this Commission that is GERC as Hon'ble Supreme Court has held that the jurisdiction to decide the amendment in the PPA is with CERC and not GERC. Thus, the appropriate Commission in this case is CERC and not GERC as per the Hon'ble Court Order dated 29.10.2018. Therefore, this Commission has no jurisdiction to decide this matter. From reading of the Order of Hon'ble Supreme Court it is clear that in the eyes of law the jurisdiction to decide the matter is with CERC and not GERC.
- 17.11. Alternatively if the Petitioner desire that the present petition be heard by this Commission and this Commission has jurisdiction only it is essential that they have to approach to Hon'ble Supreme Court for amendment/ review/ clarification on the issue

that the jurisdiction to decide the amendment in the PPA by way of supplementary PPA between Petitioner and Respondent No. 1 Essar Power Gujarat Ltd. falls within the jurisdiction of GERC till that time no proceedings may be carried out by the Commission and decide the matter. If the GERC ignores the aforesaid facts and continue to hearing and decide the matters though it is not having the jurisdiction as per decision of Hon'ble Supreme Court, then it qualifies as contempt of Court.

- 17.12. The present Commission consist of two Members who are possessing the qualifications of engineering and having technical knowledge and experience thus there is no Member who is having knowledge of finance or law. Thus in absence Judicial Member who is possessing knowledge of law and also absence of finance by the existing two Members there is lack of knowledge on the various issues pertaining to finance and law. The issue involved in the present Petition having financial implication also therefore it is desirable that the third Member who may have the knowledge of the financial aspect may be appointed till that time the Commission may wait in the subject matter. Moreover, the Constitution of present Coram is also against the Section 5 of the Gujarat Industry Reorganization and Restructuring Act, 2003 on this ground also the present Coram is not empowered to decide the matter.
- 17.13. It is further contended that there are only two Members and if there is difference of the view reflected in the Order or the both Members are having different decision on the subject matter may require to decide the view of third Member which is not existing at present hence in such a situation it is desirable that the Commission may wait for the appointment of the third Member in the Commission. In support of aforesaid submission, he relied on decision dated 30.03.2017 of Hon'ble APTEL in Appeal No. 121 of 2016.
- 17.14. The Petitioner GUVNL is not an aggrieved and affected party as per Regulation 23 of the Conduct of Business Regulations, 2004 notified by the Commission. The affected or aggrieved party may be Respondent No. 1. Hence in absence of the Petition filed by the aggrieved party or affected party, the present petition is not maintainable. Moreover the argument of the Petitioner and the Respondent No. 1 that the

supplemental PPA are in public interest is not correct and valid in support of aforesaid submission the objector has referred the litigation between the Petitioner and some of the bidders namely Jindal Power Ltd. and Others who had filed SCA No. 2186 of 2007 and 3154 of 2007 with Civil Application No. 10265 to 10257 of 2007 for the same bids that is bid No.1 Bid No. 2 and Bid No.3, in which the Petitioner has signed the PPAs with M/s Adani Enterprise Ltd. and Essar Power Ltd. and Others. The challenge in the said matters Hon'ble High Court of Gujarat has held that there is additional burden on the consumers due to the procurement of power from the Adani Power Ltd. The Hon'ble High Court of Gujarat dealt with the issue of public interest in the said matter needs to be referred by the Commission and thereafter decide about the issue of public interest.

- 17.15. The Petitioner has filed the present petition under the guise of the Public Interest Litigation taking the shelter of Hon'ble Supreme Court decision. The question is to whether any public interest involved in the present case needs to be determined and decided by the Commission with consideration of overall impact on different entities as well as the consumers and based on it requires to be decided that whether there is any public interest involved in the approval of Supplementary PPA or not.
- 17.16. The incremental cost of tariff will be passed on to the consumers of the State and the same will not be borne by the Petitioner as it is revenue neutral. Moreover, the burden of increase in tariff proposed by the HPC and reflected in the Supplemental PPA be borne by the consumers of the State. Hence the increase in tariff proposed in the Supplemental PPA affect the consumers at large. Hence the same is not in the public interest. Therefore, the contention of the Petitioner and Respondent No. 1 that the present petition is in the interest of the Public interest is not legal and valid and it deserves to be quashed and set aside.
- 17.17. One of the Member of the High-Power Committee was the Chairperson of the Central Electricity Regulatory Commission. As a Chairperson of CERC he has issued Statutory Advice to Ministry of Power, Government of India vide D.O. No. 2/8/Policy (Statutory Advice/ 2009-CERC) dated 16.09.2010 regarding timeframe for tariff based

competitive bidding. In the said letter he has stated that the price determined under the Cost-plus basis are higher than the levelized tariff discovered under the Competitive bidding process. Moreover, such difference is significant. The tariff in cost plus basis is fully passed on to the consumers. The advice given to the Central Government that it should not defer the date of completing transition to tariff based competitive bidding for all future procurement of electricity and also transmission services, thus he himself has advised to the Ministry of Power to follow the competitive bidding process. In such situation the same person who is Member of High-Power Committee differ and take different stand ignoring its earlier advice as a Chairperson of CERC.

- 17.18. The Commission has earlier in Order No. 04 of 2007 dated 20.12.2007 decided and approved the PPA dated 26.02.2007 after utilizing adjudicatory, financial and Regulatory powers and decided the matter. Hence it is now not open to revisit and recall the said Order by way of the change in the discovered tariff stated in the PPA dated 26.02.2007 approved by the Commission. Thus, the Regulatory power are exhausted by the Commission and therefore the present petition is not maintainable.
- 17.19. The HPC report dealt with the PPA executed between the Petitioner and the Respondent No. 1 Essar Power Gujarat Ltd., (2) Adani Power Ltd., (3) Costal Gujarat Power Ltd. So far as the amendment of the PPA between Adani Power Ltd. and the Petitioner is concerned the Petitioner has filed earlier petition before the CERC where CERC has approved the supplemental PPAs. Thereafter, Hon'ble Supreme Court has passed an Order in one of the Civil Appeal and decided that the decision of this Hon'ble Commission in Petition No. 1000 of 2010 and decision of Hon'ble APTEL in Appeal No. 184 of 2012 are quashed and set aside and decided that the PPA for supply of 1000 MW by the Adani Power Ltd. to Petitioner GUVNL was legally terminated as claimed by the Adani Power Ltd. Thereafter the Petitioner has filed the Petition before the CERC to recall its Order dated 12.04.2019 in Petition No. 374 /MP / 2018 and the said Petition is pending. In such situation the HPC report for Adani Power Ltd. is in question as for one PPA there is no applicability of HPC report and in case of other PPA the Petitioner himself has approached to CERC to recall its earlier Order.

- 17.20. In case of the PPA between the Petitioner and the Costal Gujarat Power Ltd. the Petitioner has not filed any Petition for approval of compensatory tariff to Tata Power Ltd. based on HPC report on which basis the present petition has been filed by the Petitioner. Moreover, the other States who are beneficiaries of the CGPL has also not filed any petition or adopted the recommendation of HPC report and increase in tariff as proposed by the HPC. Thus, the HPC report are not followed completely in case of the PPAs between Petitioner and the Adani Power Ltd. as well as CGPL. Thus, it is the recommendations of the HPC report are partially followed by the Petitioner so it is not maintainable.
- 17.21. The Hon'ble Supreme Court in its decision dated 29.10.2019 decided and directed that the CERC may decide the matter in accordance with law. It proves that it is the duty of the Commission to verify and determine and decide the tariff and not the Government or Committee constituted by it namely High-Power Committee as the tariff is the subject matter fall in decision of the Commission. Therefore, the recommendation of the HPC and based on it the decision of the State Government to sign the Supplemental PPA for tariff recommended by HPC is not legal and valid and the same is not permissible. It is the duty of the Commission to verify and determine the tariff.
- 17.22. The Respondent No. 1 Essar Power Gujarat Ltd. has not supplied the power to the Petitioner and the Petitioner suffer the loss by way of high procurement price paid by it to meet out the power requirement. Such cost must be required to be recovered from the Respondent No.1 and the same may be passed on to the consumers who borne the higher tariff burden due to non-supply of power by the Respondent No.1 as per the agreed terms of PPA.
- 17.23. The HPC recommendation is not binding to the Commission, it has to decide the matter in accordance with law as decided by the Hon'ble Supreme Court in various Judgements. The HPC report is not Statutory in nature and the same is not binding to the Commission.

17.24. The supplemental PPA amendment in the PPA dated 26.02.2007 is creating bad precedents by way of overriding on contract signed between two parties by the State Government relying on the HPC report. As per the provision of the Electricity Act, 2003 the State Government is not empowered to issue policy directives to the distribution licensees to sign the supplemental agreement by amending the approved or adopted tariff in the PPA by the State Commission. If the State Government desires to issue any policy directives the same may be issued to the State Commission that is GERC and not the Petitioner GUVNL. The policy directives given to GUVNL is not binding to the Commission. The Commission shall require to take decision as per the provision of the Electricity Act, 2003. The Hon'ble Supreme Court as well as APTEL in various judgements held that in the tariff matters concerning to public interest for within jurisdiction of the State Commission and the Government has no role and power in such matter. In support of aforesaid submission, the Objectors relied on the following judgements of the Hon'ble Supreme Court as well as APTEL.

- i. The Judgements of Hon'ble APTEL in Appeal No. 41, 42, 43 of 2010 dated 31.01.2011.
- ii. Appeal No. 188 of 2015 TPL V/s. UPERC. The Judgement of APTEL in aforesaid judgement is challenged in Hon'ble Supreme Court and the same is pending. No stay has been granted.

17.25. Reopening of PPA is not permissible as per the provision of law by the State Commission. The Supreme Court has not given any decision on the impact of signing of Supplemental PPA in guise of Article 18.1 of the PPA as per the provision of the Contract Act, it cannot be permissible to over write or re-write the existing contract between the party.

17.26. The Government of Gujarat has framed the policy and declared the sick industries status to SAL Steel, Shaifali Steel and Other such companies and recommended to give subsidy of Rs. 2 per unit to sick industries in the tariff by the Commission. The aforesaid entities have filed Petition No. 1716 of 2016 and 1717 of 2016 before the Commission for reduction of tariff as per the policy which has been rejected by the

Commission on the ground that it is not a policy directive under Section 108 of the Act and it is not binding to the Commission.

- 17.27. Further, some of the industries have approached the Commission for allowing the rebate or reduction in tariff to the textile industries as per the Govt. of Gujarat policy which is also rejected by the Commission stating that it is not the policy directives under Section 108 of the Act and same is not permissible as per the provisions of the Act. On the same ground the present petition is not maintainable.
- 17.28. The para 5.1 of the tariff policy provides that the distribution licensee shall procure the power following Competitive bidding process. The said policy is statutory policy is as per the provision of the Electricity Act, 2003. Further, it is not permissible to determine and decide the tariff discovered under Section 63 to tariff determined under Section 62 of the Act.
- 17.29. The issue involved in the present petition reflect that the affected persons may be the lenders who had taken the business risk of lending the money to the project of the Respondent No.1 without verifying various aspects effecting to the risk of the projects, why the lenders have not verified the fuel supply agreement based on which the Respondent No.1 now stating that the project is not viable. The consumers are not in any way benefited by way of the HPC recommendation for increase in tariff. So, the proposed change in tariff by way of Supplemental PPA is not in public interest.
- 17.30. The penetration of renewable energy generation has increased in the State of Gujarat where the cost of such energy is quite lower than the proposed change in the tariff in the supplemental PPA. In such situation it is also seen that there are no buyers for such energy. Hence, the Petitioner has to explore such situation to procure the power at lower rate than the proposed change in rate by way of supplemental PPA.
- 17.31. As per the bidding process carried out by the Petitioner it is not mandatory to procure the coal from Indonesia by the Respondent No. 1. Hence, prior to quote the tariff by the Respondent No. 1, had to verify the various options for procurement of such coal

and the same may be loaded in the tariff quoted by it. Any negligence is not a ground to argue the hardship and seek the amendment in the tariff. The same is not permissible in law on that ground the amendment by way of supplemental PPA may not be permitted.

- 17.32. The coal price in international market are reduced drastically and the same is lower than the price prevailing while the Respondent No. 1 and the other bidders have bided in the bidding process initiated by the Petitioner. In such a situation, prior to allowing the petition it is required to verify the rates prevailing in the international market and to that extent the tariff is required to be reduced. Moreover, the impact if any which is legally not permissible is limited to impact of the promulgation of Indonesian Regulations which may affect the price of coal and no other parameters be permissible to change or amend while evaluating the impact of tariff.
- 17.33. The Respondent No. 1 who had filed Petition No. 1389 of 2013 for compensatory tariff on the ground of increase in coal price and other reasons was withdrawn, hence the Respondent No. 1 is not eligible to obtain the same relief by way of supplemental PPA and the present petition.
- 17.34. The Respondent No.1 has not submitted any documents like the Power Purchase Orders of equipment's like boiler turbine etc. from OEM technical brochures, performance test of the plant, SHR, auxiliary consumption, etc. which are essential for determining the tariff particularly energy charge as well as to verify the procurement of the plant and machinery by the Respondent No.1. In absence of aforesaid details, it is not possible to determine the tariff under Section 62 as proposed by the HPC. Hence, prior to determine the tariff under Section 62 it is necessary that for the relevant documents for deciding the fixed cost as well as energy charge the documents must be produced on record by the Respondent No.1.
- 17.35. Objector raised the issue that in the original bidding process there are number of bidders who have submitted their bids considering the risk involved in the project and after factoring the risk and the other parameters they had quoted higher tariff than the

tariff quoted by the Respondent No.1. The tariff quoted by such bidder may be lower than the tariff proposed by way of amendment in PPA dated 26.02.2007 by the Petitioner and the Respondent No.1 based on the HPC report as well as Government G.R. In such situation it is necessary to give an opportunity to such bidders that as to whether they agreed to supply the power at quoted rate or lower rate which is proposed by the way of amendment by the parties. Moreover, the aforesaid bidders are also requiring to join party respondent. In absence of joining them as party who are necessary and proper party any amendment in PPA dated 26.02.2007 if made is not legal and valid and permissible as per law.

- 17.36. Based on aforesaid submission UUWA submitted that the present Petition is not admissible and maintainable.
18. Enormous number of issues were raised by UUWA stating that there are mixed issues of law and facts need to be decided by the Commission with reasoned Order so that the objectors can challenge the same before an appropriate forum. The following issues which are relevant in the matter and within the scope of jurisdiction of the Commission, are being narrated here as under:
- 18.1. The government of Gujarat G.R dated 03.07.2018 and 01.12.2018 are neither statutory policy decision nor economic policy decision and not binding to the GERC. Though it is the statutory policy or economic policy, is this Commission bound by such policy decision where the issue involved is of tariff determination or change in tariff discovered under the competitive bidding process by way of back door procedures.
- 18.2. Is it not mandatory for the petitioner to allow such fair chance to the all original bidders who had participated in the original biddings process of Bid No. 3 of 03/LTPP/2006 for giving an equal treatment that they may supply power at which price with consideration of relaxation which are provided to the respondent no-1 by the petitioner on the recommendation of HPC?

- 18.3. Whether the Government of Gujarat, HPC, lenders of the respondent no.1 M/s Essar Power Ltd. and the Discoms who are Distribution Licensee are not essential and necessary party to the present petition?
- 18.4. What is the impact of the outcome of the present decision on the Industrial, Commercial, Agricultural, BPL consumer in their tariff? What is the impact of the tariff from the date of the signing of the PPA by the petitioner and respondent No.1 from 01.03.2019 to December 2019 on monthly basis be declared in the petition? If answer is “yes” please indicate? If answer is “no” please explain why such details not being asked or submitted by the petitioner and the respondent No.1.
- 18.5. What is the impact of power procurement as per the HPC recommended tariff for the respondent No.1 project during the different years? How much impact of it come in the consumer existence tariff?
- 18.6. Whether the role of the State Government, High Power Committee and this Hon'ble Commission in the Electricity Act, 2003 is to protect the interest of the consumers or to protect the interest of lenders including the financial institution and its officials who had failed in performing their duties of proper verification, investigation, analysis, study and to verify the risk associated with project, obtain collateral security amount and to verify to availability fuel, its price quantum etc. and finance to the respondent Essar Power Ltd. which lead to creation of failure of repayment of loan interest etc. as recorded by HPC.
- 18.7. Whether the increase of consumer tariff is not against the public interest which is result of the present petition?
- 18.8. Whether the Hon'ble Commission which is a statutory body and not a body or institutional personal who after retirement from the statutory authority and who are not accountable and responsible for act like the members of the High Power Committee, can take contradictory and different decisions in different cases with utilization of the statutory functions of failure of protection of consumer's interest?

- 18.9. Whether the HPC consist of the any statutory authority and responsible for their Act or decision which is against the provisions of the Electricity Act?
- 18.10. Are the HPC report and Govt. of Gujarat G.R. not against the Public interest? If the Commission decide or wants to declare in the public interest prior to it the Commission decide these issues with reasons UUWA wants to challenge the same.
- 18.11. Whether the present Petition fall within the jurisdiction of this Commission or the Central Commission as per the decision of Hon'ble Supreme Court dated 29.10.2018 in MCA No. 2705-2706 of 2018 in CA No. 5399-5400 of 2016?
- 18.12. Whether the present Coram of the Commission consists of two technical Members and not having the Law Member is not in accordance with the decision of the Hon'ble Supreme Court and the provision of the Gujarat Reorganization and Restructuring of Electricity Industries Act, 2003 is in accordance of the provision of Act or there is some lacuna in it and the Coram is capable to decide the issue involved in the present petition?
- 18.13. What is the status of the fuel supply agreement executed between the fuel supplier and the respondent No. 1 based on the PPA signed between the Petitioner and the Respondent No. 1? What are the terms and conditions of that fuel Supply agreement between fuel supplier as well as the Respondent No.1? Is that FSA being not essential to verify by this Commission prior to allow any changes in the cost of fuel that is coal?
- 18.14. Whether the respondent No. 1 or the Petitioner have provided all financial & technical details proving from the documents on record based on which this Commission is competent to decide the fixed charge and energy charge?
19. Shri R.J.Tillan submitted that there are various projects, which have approached to the different Commission for compensatory tariff due to change in Indonesian regulation affecting the coal price in the country. In that situation it is better that a comprehensive view or decision may be taken by the Central Commission as it affects to the different

projects in the country so that a common approach may be applied to also such projects and the variance in the decision on same problem may be avoided. While deciding such issues the CERC may consider all issues as per the provisions of law.

- 19.1. He referred the reports of CUTS International on sustainability of business versus sanctity of contract and submitted that it is required to give an importance to the sanctity of contracts and the hardships is not a ground for amendment of the contracts. The PPA needs to interpret by the court as per the provisions of the Contract Act. The Government has no role in interpretation of contract or amendment of the Contract executed between the parties.
- 19.2. The CERC who has earlier advised to the Central government for the implementation of the competitive bidding process for procurement of power. How can it differ from its earlier stand? Any cost plus approach tariff it is essential to verify and decide the technical parameters like boiler efficiency, turbine heat rate, SHR of the plant, Auxiliary consumption, Capital Cost of the project and different technical commercial agreement executed between the project developers as well as supplier and also the various test carried out as a part of commissioning of the project prior to allow the technical and financial parameters for determination of cost plus tariff. The regulators should require to update the guaranteed parameters by the OEM with the parameters allowed for determination of tariff.
- 19.3. The penetration of the wind and solar energy is increasing in the State in such situation it is necessary to consider the effect of such penetration of renewable energy with the existing conventional energy sources.
20. We note that the present petition is filed by the GUVNL under the Section 86 (1) (b) and (f) of the Act. Thereafter, the Petitioner has also filed a letter dated 01.03.2020 for dropping its reliance on Section 86 (1) (f) in the Petition. We note that the present petition is filed by the Petitioner seeking approval of the supplemental PPA dated 01.03.2019 in the Bid 03 of the PPA. Hence, the present petition is for approval of supplemental PPA. The Petitioner (GUVNL) vide email dated 02.04.2020 has

submitted additional submission along with copy of second addendum to the supplemental PPA dated 01.03.2019 initiated by both GUVNL and Essar Power Gujarat Limited and copy of letter from EPGL agreeing to the modifications. Further, the Petitioner has requested that due to the prevailing lock down condition in the State, GUVNL is not able to submit the additional submission on affidavit and has submitted scanned copy by email. The original submission on affidavit shall be submitted upon lifting of the lock down.

20.1. The Petitioner has submitted that in the supplemental PPA, it is stated that for working of energy charges, FOB price of imported coal shall be considered as lower of:

20.1.1. Actual FOB (Free on Board) price of consignment.

20.1.2. HBA price worked as per formula for billed GCV plus maximum 10% tolerance on HBA price.

20.1.3. HBA price worked out on proportionate basis with reference to HBA index for 6322 GCV coal.

20.2. The Petitioner has submitted that upon analyzing the market trend of the Indonesian coal price and the index as published by leading International Price Reporting Agencies it is observed that the coal price as per the market trend consistently remains around/ lower than the HBA derived price (HPB price) for the quality of coal worked out for each month since October 2018 onwards.

20.3. The Petitioner has submitted that under the circumstances, both the parties have decided to amend the provisions related to FOB cost of coal in Article 3.2.4 (I) of SPPA and remove the provision related to allowing tolerance of up to 10% above HBA index derived price as provided in the SPPA effective from 15.10.2018 so as to ensure that no additional burden towards coal is put on the consumers of the State. Copy of the Second Addendum dated 01.04.2020 to the Supplemental PPA dated 01.03.2019 with appropriate modifications in the provision related to FOB cost of coal in Article 3.2.4 (I) is attached. (Annexure – 4)

Commission's Analysis and Decision:

21. We have heard the parties and gone through their submissions. We have given enough opportunity and adequate time to all the parties during the hearings and through written submissions. We have invited views from all the stakeholders including public through Public notice and had conducted a public hearing and other hearings so as to give a reasoned and fair order balancing the interest of all the stakeholders. Before we finally decide the matter, it has become necessary to first deliberate on number of issues which have come before us and are within the scope and jurisdiction of this Commission.

21.1. Following major issues have emerged for the decision of the Commission:

- 1) Whether the Petitioner(GUVNL) has the *locus standi* to file the present petition being a holding company of the distribution licensees of the State of Gujarat and which is involved in the activity of bulk purchase and supply of the electricity for its Discoms/subsidiaries but does not supply power directly to the consumers?
- 2) Whether the appropriate Commission in this case is GERC and not CERC as per the Hon'ble Supreme Court's Order dated 29.10.2018 in M.A. No. 2705-2706 of 2018 in Civil Appeal No. 5399-5400 of 2016?
- 3) Whether this Commission is competent to adjudicate and decide the present case in absence of a judicial member in view of the decision of the Hon'ble Supreme Court in Civil Appeal No. 14697 of 2015?
- 4) Whether the present petition is a review petition seeking review of Commission's order approving the original PPA dated 26.02.2007 and if so whether it is permissible to admit such petition after a lapse of 10 years?
- 5) Whether the amendments in the original PPA dated 26.02.2007 by way of Supplemental PPA dated 01.03.2019 executed between GUVNL & EPGL, which

leads to revision of tariff and other terms and conditions are permissible under Section 63 and bidding process carried out by the Petitioner as per competitive bidding guidelines, 2005 issued by Government of India? If yes, whether the Commission has the powers to approve such amendments in the approved PPAs.?

- 6) Whether this Commission is empowered to convert tariff adopted under Section 63 to determine the tariff under Section 62 of the Electricity Act on cost plus basis and determine the fixed and the variable cost?
- 7) Whether the Fuel Supply Agreement is compulsory and necessary prior to approving the Supplementary PPA dated 01.03.2019 executed between the parties? Is the Commission empowered to know the status of the Fuel Supply Agreement?
- 8) Whether the action of Government of Gujarat intervening in the matter and setting up High Power Committee and its recommendations is in public interest? Whether the recommendations of High Power Committee issued vide G.R. dated 03.07.2018 and 01.12.2018 leading to change in terms and conditions of the PPA executed between the parties by way of supplemental PPA are binding to the GUVNL and to the Commission?
- 9) Whether it is not mandatory for the petitioner to allow those bidders, who had participated in the bidding process of Bid No. 3 of 03/LTPP/2006 for giving an equal treatment?
- 10) Whether the Government of Gujarat and lenders of the respondent no.1 M/s Essar Power Ltd. and Distribution Licensees are not essential and necessary party to the present petition?

22. Now we shall deal with all the issues as stated above and other relevant issues as raised by the objectors in the ensuing paragraphs.

22.1. **Issue No. 1**

Whether the Petitioner(GUVNL) has the *locus standi* to file the present petition being a holding company of the distribution licensees of the State of Gujarat and which is involved in the activity of bulk purchase and supply of the electricity for its Discoms/subsidiaries but does not supply power directly to the consumers?

- 22.1.1. We shall discuss the first issue whether GUVNL as a holding company is eligible for filing this petition. The present petition is filed by the Petitioner GUVNL, which is a holding company of the distribution licensees namely, Paschim Gujarat Vij Company Limited (PGVCL), Uttar Gujarat Vij Company Limited (UGVCL), Dakshin Gujarat Vij Company Limited (DGVCL) and Madhya Gujarat Vij Company Limited (MGVCL). The Petitioner purchases electricity in bulk and supply in bulk on behalf of the aforesaid distribution licensees in the State of Gujarat. It is also a deemed trading licensee as per the provisions of Electricity Act, 2003.
- 22.1.2. The Government of India has pronounced the Competitive bidding guidelines for procurement of power through competitive bidding process. The standard bid documents were also published under the aforesaid guidelines by the Government of India. The aforesaid guidelines provide that if there are any deviations from the provisions of the standard bid documents it requires approval of the appropriate Commission. The said guidelines and bid documents provides that any person/company on behalf of the multiple procurer would be able to carry out the bidding process on behalf of more than one distribution licensee.
- 22.1.3. The Petitioner has filed the present Petition under Section 86 (1)(b) of the Electricity Act, 2003 for seeking approval of the Supplemental Power Purchase Agreement dated 01.03.2019 (the "Supplemental PPA") to the Power Purchase Agreement dated 26.02.2007 (the "PPA"), both made between the Petitioner and Respondent No.1, for supply of 1000 MW of electricity on long term basis.
- 22.1.4. The Petitioner had followed the bidding process in the aforesaid bids after publishing the public notice inviting the bids, selection of bidders through bid evaluation

committee and also filed a Petition for adoption of tariff before the Commission based on the bid evaluation committee reports. In the aforesaid bidding process, the bid No.3 which pertains to procurement of power through competitive bidding process of 1000 MW carried out by the Petitioner where the Essar Power Limited, which is a holding company of Respondent No.1, Essar Power Gujarat Limited was selected as successful bidder.

- 22.1.5. The Petitioner and the Respondent No.1 have signed the power purchase agreement dated 26.02.2007. The Petitioner had filed application before the Commission for adoption of the tariff discovered under the aforesaid bidding process and the Commission had adopted the said tariff discovered under the bidding process based on the recommendation of the bid evaluation committee and approved the PPA dated 26.02.2007 vide its Order No. 4 of 2007 dated 20.12.2007. The bidding process, also includes approval of deviations in the bid documents i.e. RFP, RFQ and PPA. When the Petitioner is the original party to the PPA and has also maintained the petition seeking our approval to adoption of the tariff under section 63 it is thus the appropriate party to maintain the present petition seeking amendment. A party to the contract can seek its amendment as per law. As such, the Petitioner has the *locus standi* and is competent to file the present petition as it is a holding company of the distribution licensees of the State of Gujarat involved in bulk purchase and supply of the electricity on behalf of the distribution licensees for supply of power to the consumers.
- 22.1.6. Further with regard to objector's contention that whether the Petitioner GUVNL is affected party or not, as stated above, a party to the contract i.e. the Petitioner can only seek its amendment as per law.
- 22.1.7. We also note that the supplemental PPA has been executed by the parties by invoking Article 18.1 of the PPA which reads as under:

*“ARTICLE 18: MISCELLANEOUS PROVISIONS
18.1 Amendment*

*This Agreement may only be amended or supplemented by a **written agreement between the Parties** and after duly obtaining the approval of the Appropriate Commission, where necessary.”*

{Emphasis added}

As per aforesaid Article it is clear that the agreement signed between the parties may be amended by the parties after obtaining an approval of the appropriate Commission as stated in earlier para of this Order. Hence, the Petitioner has *locus standi* to file the present petition. Therefore, we decide that the Petitioner has *locus standi* to file the present petition for approval of Supplemental PPA. On the aforesaid reasons the contentions of the objectors are hereby rejected.

22.2. **Issue No. 2**

Whether the appropriate Commission in this case is GERC and not CERC as per the Hon’ble Supreme Court’s Order dated 29.10.2018 in M.A. No. 2705-2706 of 2018 in Civil Appeal No. 5399-5400 of 2016?

22.2.1. Now we shall discuss whether this Commission is appropriate Commission to decide this matter. We have considered the submissions made by the parties. The objectors have relied upon the decision of Hon’ble Supreme Court in Misc. Civil Appeal No. 2705-2706 of 2018 in Civil Appeal No. 5399-5400 of 2016 for raising the contention that GERC is not the appropriate Commission to approve the amendment to the PPA.

22.2.2. Before, we delve into the contentions raised by the Objectors, we would like to refer to the following Judgements: -

- I. In *Tata Power Co. Ltd. v. Reliance Energy Ltd.*, (2009) 16 SCC, the Hon’ble Supreme Court inter alia held thus: -

“Section 86 — Functions of the Commission

105. Section 86 provides for the functions of the State Commission, clause (a) of sub-section (1) whereof empowers it to determine the tariff for generation, supply, transmission and wheeling of electricity. Clause (b) empowers it to regulate electricity purchase and procurement process of distribution licensees. Inevitably it speaks of PPA. PPA may provide for short-term plan, a mid-term plan or a long-term plan. Depending upon the tenure of the plan, the requirement of the distribution licensee vis-à-vis its consumers, the nature of supply and all other

relevant considerations, approval thereof can be granted or refused. While exercising the said function necessarily the provisions of Section 23 may not be brought within its purview. While even exercising the said power the State Commission must be aware of the limitations thereto as also the purport and object of the 2003 Act. It has to take into consideration that PPA will have to be dealt with only in the manner provided therefor.”

{Emphasis added}

- II. The Hon’ble Appellate Tribunal for Electricity in BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission Vinimak Bhawan, 2010 SCC Online APTEL 23: [2010] APTEL 23, interalia held thus: -

16. In terms of Section 86(1)(b), the regulation of electricity purchase and procurement process to distribution licensee including the price at which electricity shall be procured from generating companies through agreements for purchase of power for distribution and supply between the State is within the **sole domain of the concerned State Commissions**. Admittedly, there is no provision in the Act which overrides or restricts the said powers of the State Commission.”

{Emphasis added}

22.2.3. The Objectors in the present petition have raised the following issues:

- a. The jurisdiction to decide the dispute/approval of PPA is with CERC and not GERC.
- b. The Application before the Hon’ble Supreme Court specifically prayed that the Hon’ble Supreme Court may pass direction that the Appropriate Commission expeditiously disposed the application seeking amendment of PPA to which the Hon’ble Supreme Court considered CERC as appropriate Commission. Hence, the present petition is not maintainable before this Commission.
- c. If the Petitioner desires to continue the present petition prior to that it is the duty of the Petitioner to get amendment or review of Order dated 29.10.2018 in Misc. Application No. 2705-2706 of 2018 in C.A. No. 5399-5400 of 2016, from Hon’ble Supreme Court, without it, it is not permissible.
- d. In absence of the aforesaid, i.e. amendment in the Order or review of order dated 29.10.2018 by the Hon’ble Supreme Court any Order passed by the Commission is void-ab-initio.

- 22.2.4. At the outset, we must mention that Respondent No. 1 was neither a party to Misc. Application No. 2705-2706 of 2018 in C.A. No. 5399-5400 of 2016 or a party in C.A. No. 5399-5400 of 2016. Hence, Hon'ble Supreme Court's Order dated 29.10.2018 in Misc. Application No. 2705-2706 of 2018 in C.A. No. 5399-5400 of 2016 does not get attracted in the present petition seeking approval to amendment of PPA between the Petitioner and Respondent No. 1.
- 22.2.5. Without prejudice to the foregoing, Hon'ble Supreme Court in its Order dated 29.10.2018 in Misc. Application No. 2705-2706 of 2018 in C.A. No. 5399-5400 of 2016 clarified that it will be open to the applicants to approach the Central Electricity Regulatory Commission (CERC) for approval of the proposed amendments to be made to the Power Purchase Agreements (PPAs) in question.
- 22.2.6. Hence, in the present Petition the GERC being the appropriate Commission, application seeking amendment to PPA in view of the conclusions of the High Power Committee Report, have been validly made by the Petitioner.
- 22.2.7. Therefore, question of review of Hon'ble Supreme Court's Order dated 29.10.2018 in Misc. Application No. 2705-2706 of 2018 in C.A. No. 5399-5400 of 2016, does not arise.
- 22.2.8. Further, the term "Appropriate Commission" is defined in the PPA dated 26.02.2007 as under

*".... **Appropriate Commission**" means the Gujarat Electricity Regulatory Commission constituted under the Gujarat Electricity Industry (Regulations and Reorganization) Act, 2003 or such other succeeding Authority or Commission as may be notified by Government of Gujarat from time to time;"*
 {Emphasis added}

From the above it is clear that as per aforesaid definition agreed between the parties for the purpose of PPA dated 26.02.2007 is Gujarat Electricity Regulatory Commission only. We also note that the PPA dated 26.02.2007 was approved by this Commission that is GERC and not CERC hence the jurisdiction of the subject matter is with GERC and not CERC. Hence, from this angle also, it is the GERC which is the appropriate Commission.

It is also necessary to refer Section 86 (1) (b) of the Act reads as under:

“Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -

(a) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources **through agreements for purchase of power** for distribution and supply within the State;”

{Emphasis added}

As per aforesaid provisions it is the statutory function of the Commission to regulate the power procurement of the distribution licensee consisting of the quantum of power, its price, and period. Therefore, the contention that the Petitioner, which purchases electricity in bulk on behalf of distribution licensee cannot invoke Section 86(1)(b) to seek an amendment to the PPA is not valid and the GERC is the appropriate Commission and not the CERC since power supply under the PPA is intra-state and not under composite scheme.

22.2.9. We have also referred to Hon’ble Supreme Court’s judgement *Tata Power Co. Ltd. v. Reliance Energy Ltd.*, (2009) 16 SCC and Hon’ble Appellate Tribunal’s judgement in *BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission Vinimak Bhawan*, 2010 SCC On Line APTEL 23 : [2010] APTEL 23, confirming the jurisdiction of the State Commission to exercise its powers under section 86(1)(b) of the 2003 Act.

22.2.10. In view of the above, the contentions raised by the Objector/s disputing the jurisdiction of the GERC are hereby rejected.

22.3. **Issue No. 3**

Whether this Commission is competent to adjudicate and decide the present case in absence of a judicial member in view of the decision of the Hon’ble Supreme Court in Civil Appeal No. 14697 of 2015?

22.3.1. The Objector UUWA contended that in the absence of a Judicial Member as part of Coram of the Commission it is not permissible to adjudicate the dispute between the

Petitioner which is a distribution licensee and the respondent No. 1 which is a generating company in view of the law laid down in the Judgement dated 12.04.2018 of the Hon'ble Supreme Court of India in Civil Appeal No. 14937 of 2015. It is further submitted that there are two technical Members (Chairperson and One Member of the Commission) and one Member Finance is against the provision of the Gujarat Electricity Industry (Reorganisation and Regulations) Act, 2003. Thus, the Coram of the Commission is not in accordance with the aforesaid Act.

22.3.2. Per contra, the Petitioner and the Respondent No.1 submitted that the Commission has power to adjudicate the dispute between the licensees and the generating company when it has no person of law as a member of the Commission possessing professional qualification and substantial experience for the practise of law for being appointed as a Judge of the High Court or a District Judge as stipulated in Section 84 (2) of the Gujarat Electricity Industry (Reorganisation and Regulations) Act, 2003. The Commission can perform and/ or continue to perform its adjudicatory function under the Electricity Act, 2003 notwithstanding that it has no Judicial Member till the vacancy of the Member is filled up.

22.3.3. We note that Utility Users Welfare Association has raised the preliminary issue that in absence of legal member, it is not permissible to decide the present Petition. The issue of adjudication of dispute between the Petitioner and Respondent No.1 as per the judgment dated 12.04.2018 of the Hon'ble Supreme Court in the case of State of Gujarat Vs. Utility Users Welfare Association in Civil Appeal No. 14697 of 2015, the Objector UUWA has relied on the judgement dated 12.04.2018 of the Hon'ble Supreme Court, it is necessary to refer the relevant para of the aforementioned judgement which is reproduced below:

"..... Conclusion:

114. In view of our observations above, we conclude as under:

- i. Section 84(2) of the said Act is only an enabling provision to appoint a High Court Judge as a Chairperson of the State Commission of the said Act and it is not mandatory to do so.*
- ii. It is mandatory that there should be a person of law as a Member of the Commission, which requires a person, who is, or has been holding a judicial office or is a person possessing professional qualifications with*

substantial experience in the practice of law, who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge.

- iii. *That in any adjudicatory function of the State Commission, it is mandatory for a member having the aforesaid legal expertise to be a member of the Bench.*
- iv. *The challenge to the appointment of the Chairman and Member of the Tamil Nadu State Commission is rejected as also the suo moto proceedings carried out by the Commission.*
- v. *Our judgment will apply prospectively and would not affect the orders already passed by the Commission from time to time.*
- vi. *In case there is no member from law as a member of the Commission as required aforesaid in para 2 of our conclusion, the next vacancy arising in every State Commission shall be filled in by a Member of law in terms of clause (ii) above.”*

22.3.4. Hon'ble Supreme Court held in *State of Gujarat v. Utility Users' Welfare Assn.*, (2018) 6 SCC 21 that in any adjudicatory function of the State Commission, it is mandatory for a member having legal expertise to be a member of the Bench. It is mandatory that there should be a person of law as a Member of the Commission, which requires a person, who is, or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law, who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge.

22.3.5. In our view, firstly, the present petition is not for adjudication of any dispute or difference between the Petitioner and Respondent No. 1. In fact, there is no such dispute which calls for adjudication under Section 86(1)(f) of the 2003 Act. The Petitioner has also filed a letter dated 01.03.2020 for dropping its reliance on Section 86 (1) (f) in the Petition, a written submission in this regard was made by its counsel dated 16.03.2020. In fact, the present petition is filed by the Petitioner seeking approval of the supplemental PPA dated 01.03.2019 in the Bid 03 of the PPA. Moreover, the Respondent No. 1 has substantially adopted all arguments of the Petitioner. This is in the nature of a consensual petition.

22.3.6. Secondly, the present petition was filed by the Petitioner on 28.03.2019 for approval of supplemental PPA i.e. subsequent to Supreme Court's judgement in *Users Utility Supra*. The composition at the time when the petition was filed was full strength of

the Commission comprising of Chairperson and two Members. The petition was heard by the full strength of the Commission until the Member (Finance) demitted office on 27.12.2019 on account of his retirement. Judgement was reserved in the matter on 9th March, 2020 i.e. after Member (Finance) demitted office. Till date, the vacancy continues. However, doctrine of necessity requires us to dispose of the matter.

- 22.3.7. The contours of the doctrine of necessity stand tellingly underscored, in the following passage from Election Commission of India v. Dr. Subramaniam Swami (1996) 4 SCC 104, on which the Constitution Bench of the Supreme Court has, in its decision in Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal (2019 SCC Online SC 1459), placed reliance:

“99. We must have a clear conception of the doctrine. It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated differently, the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or Judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit there from. Take the case of a certain taxing statute which taxes certain perquisites allowed to Judges. If the validity of such a provision is challenged who but the members of the judiciary must decide it. If all the Judges are disqualified on the plea that striking down of such a legislation would benefit them, a stalemate situation may develop. In such cases the doctrine of necessity comes into play. If the choice is between allowing a biased person to act or to stifle the action altogether, the choice must fall in favor of the former as it is the only way to promote decision-making. In the present case also if the two Election Commissioners are able to reach a unanimous decision, there is no need for the Chief Election Commissioner to participate, if not the doctrine of necessity may have to be invoked.”

22.3.8. Hence, adopting the *doctrine of necessity*, the decision is being rendered by the remaining Member and Chairperson so that power supply to the public could begin from the power plant of Respondent No. 1 without requiring the entire case being re-heard as and when the vacancy is filled by the Judicial / Legal member.

22.3.9. It had been also held in *State of Gujarat v. Utility Users' Welfare Assn.*, (2018) 6 SCC 21 that “ 125.6. In case there is no member from law as a member of the Commission as required aforesaid in para 125.2 of our conclusion, the **next vacancy arising in every State Commission shall be filled in by a Member of law** in terms of para 125.2 above.”

{Emphasis added}

22.3.10. Now, we shall also deal with the issue raised by the Objectors that the present Commission of only two Members cannot decide this petition in the event they are in disagreement with each other in so far as the decision in the case. The aforesaid contention of the Objectors has no merit. The Conduct of Business, Regulations notified by the Commission vide Notification No. 02 of 2004 addresses this issue.

22.3.11. Regulation 16 to 19 of the said Regulations are reproduced below:-

“

Quorum and Conduct of Meetings

16. **Quorum for the proceedings before the Commission shall be two.**

18. *All questions which come up before any meeting of the Commission shall be decided by a majority of votes of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a **second or casting vote.***

19. *Save as otherwise provided in Clause 18 above, every Member shall have one vote.*

.....”

{Emphasis added}

22.3.12. As per clause 16 of the aforesaid notification it is specifically provided that quorum for the proceedings before the Commission shall be “two”. Thus, two Members including Chairperson may hear and decide cases. Clause 18 provides that in the event of equality of votes the Chairperson or the person who preside over the meeting has second or casting vote.

22.3.13. It is also necessary to refer Section 93 of the 2003 Act reproduced below.

“..... 93. Vacancies etc. not to invalidate proceedings – No act or proceeding of the Appropriate Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Appropriate Commission.....”

From the above provisions it is clear that vacancy does not invalidate the proceedings before the Commission.

It is also necessary to refer Section 92 (2) & (3) of the Act, 2003 which are relevant in the present case are reproduced below;

“Section 92. (Proceedings of Appropriate Commission):

(2) The Chairperson, or if he is unable to attend a meeting of the Appropriate Commission, any other Member nominated by the Chairperson in this behalf and, in the absence of such nomination or where there is no Chairperson, any Member chosen by the Members present from amongst themselves, shall preside at the meeting.

(3) All questions which come up before any meeting of the Appropriate Commission shall be decided by a majority of votes of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.”

22.3.14. In view of the above, we do not find any merit in the objections raised by the Objectors.

22.4. **Issue No. 4**

Whether the present petition is a review petition seeking review of Commission’s order approving the original PPA dated 26.02.2007 and if so whether it is permissible to admit such petition after a lapse of 10 years?

22.4.1. The objectors have raised the issue that the present petition is a review of earlier order No. 4 of 2007 dated 20.12.2007 after more than 10 years. Hence, the same is not permissible to review as there are no ingredient of the review in the petition. Moreover, no ground has been advanced in the Petition by the Petitioner. The objectors have submitted that the approval is required within period of three years. However, the Petitioner has not obtained an approval till the date of filing of the

Petition. Hence, it is barred by the period of limitation and such Petition is not admissible and maintainable.

- 22.4.2. We note that as stated above the present petition filed by the Petitioner is for amendment of the PPA dated 26.02.2007 by signing of supplemental PPA dated 01.03.2019. The Petition was filed by the Petitioner on 28.03.2019, i.e. within period of one month from the date of signing of the supplemental PPA. Moreover, as recorded in earlier para the present petition is filed by the Petitioner under Article 18.1 for amendment of the approved PPA dated 26.02.2007.
- 22.4.3. The order No. 4 of 2007 dated 20.12.2007 was for adoption of tariff discovered in bid 03/LTPP/2006 by GUVNL under competitive bidding process and does not pertain to amendment of PPA. Hence, the present petition which raises an entirely different cause of action is certainly not a Review Petition.
- 22.4.4. The aforesaid amendment in the PPA was carried out by the Petitioner and the Respondent No.1, based on the Government of Gujarat G.R. dated 01.12.2018. The reasons for seeking amendment to the PPA are based on events that occurred subsequent to the adoption of the PPA under our original order dated 20.12.2007. Seeking amendment to the PPA in the given circumstances cannot be equated with or construed as a review petition. The PPA was entered into based on certain understanding between the parties, which was approved and the tariff therein adopted by us. Now when the understanding is to change by way of amendment to the PPA, one cannot term the petition seeking approval to the amendments as a petition seeking review of the order passed by us earlier approving the PPA and adopting the tariff therein. Hence, the contention of the objectors is not acceptable and the same is rejected.

22.5. **Issue No. 5**

Whether the amendments in the original PPA dated 26.02.2007 by way of Supplemental PPA dated 01.03.2019 executed between GUVNL & EPGL, which leads to revision of tariff and other terms and conditions are permissible under Section 63 and bidding process carried out by the Petitioner as per competitive

bidding guidelines, 2005 issued by Government of India? If yes, whether the Commission has the powers to approve such amendments in the approved PPAs.?

- 22.5.1. Let us first consider the object behind the proposed amendments to the PPA. The amendment proposed in the supplemental agreement dated 01.03.2019 agreed between the parties are based on the recommendation by the High Power Committee (HPC) constituted by the Government of Gujarat to rehabilitate the three power projects which were selected as successful bidders in the competitive bidding carried out by the Petitioner by Bid no. 01/LTPP/2006, 02/LTPP/2006 and 03/LTPP/2006. However, due to regulation on coal prices by Indonesian Government, the selected bidders faced financial problems and were unable to supply the electricity in requisite quantum at the agreed price. In such a situation the Petitioner had to procure remaining power from the open market at a higher rate which in turn affected the consumer's tariff. This all resulted in affecting finances to the lenders, Petitioner, Distribution Licensees as well as high cost to consumers at large. Finally, to overcome this, a High Power Committee was constituted by the Government of Gujarat vide GR No. CGP-12-2018-166-K dated 03.07.2018. The said High Power Committee had submitted its recommendation to the Government of Gujarat based on which the Government of Gujarat issued the Government Resolution No. CGP-12-2018-166-K dated 01.12.2018 accepting the Report of the High Power Committee with certain conditions. In the aforesaid resolution dated 01.12.2018, Government of Gujarat directed the Petitioner to ensure adequate and efficient supply of energy at economic tariff and maintain its source of energy mix in a manner so as to address reliable power generation and optimum utilization of existing resources, by allowing revival and rehabilitation package for the financially-stressed and economically-unviable imported coal based power projects through consequential amendment(s) in the existing PPA(s) in larger public interest and submit before the appropriate Regulatory Commission for its approval.
- 22.5.2. Thus, Government of Gujarat Resolution No. CGP-12-2018-166-K dated 01.12.2018 is a policy direction by the Government of Gujarat to the Petitioner in a larger public

interest and in the interest of all the stakeholders for inter alia submitting amendments to the PPA.

- 22.5.3. Article 18.1 of the PPA recognizes that the parties can amend the said PPA if they mutually agree subject to the approval of the appropriate Commission. The amendments to the PPA dated 26.02.2007 are carried out with the consent of both the procurer and suppliers in accordance with the above. The Petitioner relying on Sections 61, 62 and 63 has submitted that the proposed amendments in the supplemental PPA dated 01.03.2019 is in the interest of the consumers, generating company as well as the distribution licensees. The Commission has the power to approve such amendments in the PPAs in the larger public interest even in cases where tariff is arrived by conducting bidding process in accordance with guidelines issued by the Ministry of Power, Government of India of 2005 under Section 63 of the Act itself. The Petitioner relied on the decision of Central Commission and some of the State Commissions who have approved amendments to the PPAs executed between procurer and supplier under competitive bidding process carried out under Section 63 in pursuance to policy decision of Union Ministry of Coal while implementing the SHAKTI (Scheme for Harnessing and Allocation of Koyala (coal) Transparently in India) Scheme. The Petitioner has submitted that the present case is for implementation of economic policy of the Govt. of Gujarat and not a policy directive to the Commission under Section 107 or 108 of the Act. The Petitioner has also relied on the Order dated 29.10.2018 in Miscellaneous Application Nos. 2705-2706 of 2018 in Civil Appeal No. 5399-5400 of 2016 and submitted that all questions regarding the jurisdiction and power of the Commission to approve the amendments in the PPA has been clarified by the Hon'ble Supreme Court.
- 22.5.4. Per contra, Respondent No. 2 has contended that the Commission does not have power to approve the amendments in supplemental PPA dated 01.03.2019 as it impacts on tariff discovered under section 63 bidding process and the PPA dated 26.02.2007 executed between the parties, on following grounds:

- (i) The contention of the Petitioner is that the Hon'ble Supreme Court in its Order dated 29.10.2018 has directed the Commission to consider and allow the amendments sought by the Petitioner based on the HPC report. However, the Hon'ble Supreme Court has in the aforesaid decision only clarified that the decision of Hon'ble Supreme Court dated 11.04.2017 in case of Energy Watchdog Vs. Adani Power Limited and others in C.A. No. 5399-5400 of 2016 will not come in way of deciding the issue with regard to maintainability of Misc. application pertaining to amendment in the PPA. The Hon'ble Supreme Court has not decided the aforesaid Misc. application on its merits, HPC report or any recommendations thereunder.

- (ii) The Hon'ble Supreme Court had in C.A. No. 5399-5400 of 2016 in case of Energy Watchdog Vs. Adani Power Limited specifically decided that the power project developers are not entitled to any relief under the exercise of general regulatory powers to grant compensatory tariff by the Commission, force majeure specified under Article 12 of the PPA and change in law under Article 13 of the PPA, based on which the relief was sought by the project developer under the consequence of Indonesian Regulations determining minimum price of imported coal. The Hon'ble Supreme Court held that the relief for mitigation of impact of Indonesian Regulations sought by the project developers are not permissible on aforesaid reasons and therefore, the same is not permissible through amendment of the PPAs. The rejection of rights under the PPA and exercise of regulatory power by the Commission for revision of tariff are relevant to consider in the present case while deciding the present petition.

- (iii) The provisions provided under Section 63 of the Electricity Act, 2003 is for discovery of price/tariff for supply of electricity by the generating company by following the competitive bidding process initiated under the competitive bidding guidelines. Thus, the discovered tariff under the aforesaid process is sacrosanct and needs to be a guiding factor.

- (iv) It is not permissible to amend the discovered tariff under the competitive bidding process followed in a transparent manner and convert the tariff discovered under the competitive bidding process under Section 63 of the Electricity Act, 2003 into actual cost determination. Such proposed amendment through supplemental PPA amounts to converting the tariff discovered under Section 63 into a tariff under Section 62 which is not permissible.
- (v) The competitive bidding guidelines issued under Section 63 of the Act are statutory in nature and have force of law. The tariff discovered under the competitive bidding guidelines incorporated in the PPA is part of contract and to that extent such contract are statutory contract and the same cannot be permitted to be amended against the provisions of the statute.
- (vi) The tariff discovered under the transparent process under Competitive Bidding Guidelines specified under Section 63 of the Act, requires to be adopted by the Appropriate Commission as provided in the said guidelines. Thus, the tariff discovered under the competitive bidding process cannot be amended or re-adopted by the Commission.

22.5.5. We also note that in the case of All India Power Engineer Federation & Oths Vs Sasan Power Ltd & Oths. the Hon'ble Supreme Court in its judgement dated 08.12.2016 held as under:

29. A perusal of the CERC tariff adoption order in the present case dated 17.10.2007 makes it clear that the tariff is adopted by the Commission only because the competitive bidding process which has been undertaken is in accordance with the guidelines so issued.

*30. All this would make it clear that even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act. This is for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with Guidelines issued. **If at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the***

Commission alone can accept such amended tariff as it would impact consumer interest and therefore public interest.

*The above findings make it clear that even in case of tariff determined through competitive bidding pursuant to the Guidelines and Section 63 of the Act, the Appropriate Commission has to be approached to approve the increased tariff which is outside the PPA and that such Commission alone has the power to approve such amended tariff. **It also flows from this judgment that the Commission has the power to approve amendment of the PPA including tariff, and that such amendment would have “to pass muster of the Commission under Sections 61 to 63 of the Electricity Act.” Accordingly, there can be no doubt that the power of the Commission to approve amendments to the PPAs extends to the power to amend the tariff provisions of the PPAs also. It is also to be noted that such power to amend the tariff could be “outside the four corners of the PPA”.***

{Emphasis added}

- 22.5.6. The aforesaid finding of the Hon'ble Supreme Court recognized that in so far as the tariff discovered under the competitive bidding process pursuant to guidelines under Section 63 of the Act the appropriate Commission has power to amend the tariff if any, which increase is outside the four corners of the PPA.
- 22.5.7. The Hon'ble Supreme Court has in its judgment in case of Energy Watchdog V/s. M/s Adani Power Ltd & Others made it clear that this Commission can exercise powers to regulate tariff under Section 79(1)(b), even where the tariff has been determined under Section 63 of the Act, subject to the condition that such power is exercised consistently with the Guidelines. The relevant portions of the said judgment are extracted below:

“19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to “regulate” tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must

be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission’s general regulatory powers under Section 79(1)(b) can then be used.”

- 22.5.8. In the light of the above judgments, it emerges that the PPA in question including the powers to approve amendments thereto contained in Article 18.1 of the respective PPA flow from and are consistent with the GOI Guidelines and Section 63 of the Act. Without prejudice to the above power flowing from Article 18.1 of PPA, the Commission can exercise its powers to regulate tariff under Section 86 (1) (b) of the Act in a scenario where it is not covered by any of the provisions of the Guidelines or where no Guidelines are framed at all or Guidelines do not deal with a given situation, as clearly stipulated in the judgment in Energy Watchdog Case extracted above. Therefore, not only does the Commission have the statutory powers to allow amendments pursuant to Article 18.1 of the respective PPA, but also has the statutory / regulatory power under Section 86 (1) (b) of the Act in the absence of any Guidelines or specific provisions in the Guidelines with regard to amendment of the PPA to either approve the proposed amendment or reject the same.

22.5.9. In the present case as stated above the provision in the bid documents RFP, RFQ and PPA were approved by GERC. Further, the discovered tariff under the bid no 03/LTPP/2006 was also adopted by the Commission in accordance with the guidelines issued under section 63 of the Act. Thus the PPA dated 26.02.2007 has the statutory sanction.

22.5.10. We also note that the Petitioner has submitted that the Central Commission as well as State Commission have exercised the power and approved the amendments in PPAs executed under Section 63 of the Act pursuant to policy decisions under the SHAKTI Scheme of the Govt. of India. We refer to the Order dated 21.02.2018 passed by the Central Commission in Petition No. 21/MP/2018 in the case of KSK Mahanadi Power Co. Ltd. vs. TANGEDCO & Ors. exercised its power and amended the tariff to factor the discount offered under the SHAKTI scheme. The relevant paras of the said Order are reproduced below:

“ 23. The Petitioner has sought approval of the amendments to the PPAs entered into between the Petitioner and the Respondent Nos. 1 to 8 for passing on the discount in tariff to the Procurers in terms of clause (B)(ii)(b) of the —SHAKTI schemell of the GOI dated 22.5.2017 and the LOIs issued by CIL. The relevant portions of Clause (B) of the Policy guidelines for allocation of Coal linkages to Power Sector under —SHAKTI scheme” are extracted under:

(B) The following shall be considered under a New More Transparent Coal Allocation Policy for Power Sector, 2017-SHAKTI (Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India):

- (i) CIL/SCCL may grant Coal linkages for Central Government and State Government Gencos at the notified price of CIL/SCCL. Similarly, coal linkages may be granted for JVs formed between or within CPSUs and State Govt/PSUs. The recommendations shall be made by Ministry of Power.*
- (ii) CIL/SCCL may grant coal linkages on notified price on auction basis for power producers/IPPs having already concluded long term PPAs (both under Section 62 and Section 63 of The Electricity Act, 2003) based on domestic coal. Power producers/ IPPs, participating in auction will bid for discount on the tariff (in paise/unit). Bid Evaluation Criteria shall be the non-zero Levelized Value of the discount (applying a pre-notified discount rate) quoted by the bidders on the existing tariff for each year of the balance period of the PPA. Ministry of Coal may, in consultation with Ministry of Power, work out a methodology on normative basis to be used in the bidding process for allocation of coal linkages to IPPs with PPAs.*

(a) *The discount by generating companies would be adjusted from the gross amount of bill at the time of billing, i.e., the original bill shall be raised as per the terms and conditions of the PPA and the discount would be reduced from the gross amount of the bill. The discount shall be computed with reference to scheduled generation from linkage coal supplied under this auction. This would be applicable to both the PPAs contracted under Section 62 as well as Section 63 of the Electricity Act, 2003.*

(b) *Accordingly, PPA may be amended or supplemented mutually between the developer and the procurer to pass on the discount to the procurer and the approval of the Appropriate Commission obtained, as per the provisions of the PPA or Regulations.*

(c) *FSA shall be signed with the successful bidders after the terms and conditions for signing of FSA are met and the Appropriate Commission has approved the amendment or supplement to the PPA.*

(iii) *CIL/SCCL may grant future coal linkages on auction basis for power producers/ IPPs without PPAs that are either commissioned or to be commissioned. All such power producers/IPP's may participate in this auction and bid for premium above the notified price of the coal company. The methodology for bidding of linkages shall be similar to the bidding methodology in the policy on auction of linkages of Non-Regulated Sector dated 15.02.2016. Coal drawl will be permitted only against valid long term and medium term PPA with Discoms/State Designated Agencies (SDAs), which the successful bidder shall be required to procure and submit within two years of completion of auction process.*

32. Considering the fact that the amended/supplementary PPAs provides for the methodology for adjustment of the discount in the monthly bills to the Procurers in terms of the —SHAKTI schemell, the amendments to the PPAs between the Petitioner and Respondents Nos. 1 to 8 as stated above are approved. Issues, if any, arising out of such adjustment shall be mutually settled by the parties.”

22.5.11. The aforesaid decision proves that the Petitioner KSK Mahanadi Power Co. Ltd. who had signed the agreement with TANGEDCO on long term basis participated in the bidding process based on domestic coal offered discount in the existing tariff for the balance period of PPA signed between the parties. In the aforesaid process the grant of coal linkage based on the notified price from each source based on the discount offered by the power producer on the existing tariff for balance period of the PPA the discount would be computed with reference to linkage coal supplied and received under the SHAKTI scheme. In the aforesaid scheme the discount offered by the generating companies is required to be adjusted from the gross amount of the

monthly bill raised in terms of the PPA and accordingly the directions were issued by the Central Commission.

22.5.12. We note that the High Power Committee constituted by the Govt. of Gujarat vide GR dated 03.07.2018 has studied issues involved in the stressed imported coal based power project including their assets and given its recommendations in their report dated 03.10.2018. After considering the said report, the Govt. of Gujarat issued GR No. CGP-12-2018-166-K dated 01.12.2018. The relevant portion of the said resolution in this case is reproduced in earlier paras.

22.5.13. On verification of the aforesaid resolution, it is clear that the Petitioner GUVNL was directed to ensure adequate and efficient supply of energy at economical tariff and maintain its respective energy basket in a manner that has mix of power sources, where the utilization of existing resources and installed generating capacity by allowing revival and rehabilitation package to the financially stressed and economically unviable imported coal based power project through consequential amendment/modification in the existing PPA in larger public interest. It also directed to the Petitioner to submit the amended PPA before the Commission for its approval. Thus, the aforesaid directives to the GUVNL are the policy directives by the Govt. of Gujarat for which the Petitioner has filed the present Petition for approval of this Petition which needs to be considered if it is in the public interest.

22.5.14. It is also necessary to refer Section 86 (1) (b) of the Act which is relevant in the present case is reproduced below.

“Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -

.....

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;”

.....

As per the aforesaid provision, the State Commission is required to regulate the power procurement of the distribution licensee, which includes quantum of power, its price

and period. Thus in the present case the supplemental PPA which was executed between the parties leads to amendments in the quantum, price and period approved in the PPA dated 26.02.2007 by the Commission. Thus the Commission has jurisdiction to decide the present case in light of the aforesaid provisions read with the decision of Hon'ble Supreme Court in case of All India Power Engineer Federation & Ors. Vs.Sasan Power Ltd. & Ors., in case of Energy Watchdog vs. Adani Power Ltd. Orders passed by the CERC as well as this Commission in case of SHAKTI Scheme pronounced by the GOI read with Article 18.1 of the PPA as well as from the provisions of the competitive bidding guidelines and pursuant to the Provisions of Section 63 of the Act. With this, the present issue about the power of the Commission is settled and the objections are rejected.

22.6. **Issue No. 6**

Whether this Commission is empowered to convert tariff adopted under Section 63 to determine the tariff under Section 62 of the Electricity Act on cost plus basis and determine the fixed and the variable cost?

- 22.6.1. As discussed in earlier paras the Electricity Regulatory Commission including this Commission has the power under Section 63 of the Act to approve the PPA executed between the parties under the competitive bidding guidelines of Central Government dated 19.01.2005.
- 22.6.2. The amendment by way of supplemental PPA dated 01.03.2019 as per the policy direction of the Government of Gujarat was executed under the provision of Article 18.1 of the PPA dated 26.02.2007 allowing the parties to amend the PPA with the approval of the Commission.
- 22.6.3. The said amendments to the PPA doesn't mean converting entire PPA tariff adopted by this Commission vide Order dated 20.12.2007 as per Section 63 of the Act into tariff freshly to be determined under Section 62 of the Act, but approving the relevant changes in the fuel cost and fixed cost as a result of settlement between the parties due to the difficulties faced by them and resolved by way of policy decision by the Government of Gujarat vide G.R. dated 03.07.2018 and 01.12.2018. Hence, it is not

the case of converting tariff discovered under Section 63 to tariff determine under Section 62.

- 22.6.4. Now, we deal with the impact of the supplemental PPA on the power purchase tariff and retail tariff of the consumers.
- 22.6.5. Lenders shall bear the burden of Rs. 0.20 per kWh by way of reduction in capacity charge.
- 22.6.6. Increased availability from 80% to 90% without payment of any additional capacity charge, which will make additional 10% power available only at the fuel cost, resulting in lower average power purchase cost for the Petitioner.
- 22.6.7. Fuel cost shall be pass through on actual basis subject to ceiling of imported coal cost of 110 US\$/MT. The generators shall carry the price risk beyond the capped ceiling and such capped ceiling shall be reviewed after five years. Hence, it will be only the actual fuel cost within the ceiling that will be approved by the Petitioner. Details for different elements of cost are discussed as per supplementary PPA in the subsequent paras of this Order.
- 22.6.8. PPA tenure can be extended for further period of 10 years based on mutual acceptance, which will make the availability of cheaper power in future at the competitive rates since as the time passes the project cost goes on increasing trend. Even the present averaged capacity charges are about Rs. 2.00 per kWh against which the Petitioner can avail power from this project which has approximate capacity charge of less than Rs. 1.00 per kWh, which in turn will lead to lessen the burden of fixed charge for power procurement.
- 22.6.9. From the above, it transpires that it is not that entire tariff is converted under Section 62 as that discovered under Section 63 of the Act and also the impact on the power purchase shall be minimal in a given long term scenario for the Petitioner and ultimately for the retail tariff of consumers at large for the State.

Thus, the petition is not for converting Tariff discovered through Bid process conducted by the Petitioner under section 63 to that of Tariff fixation under Section 62, but it is for the approval of the policy decision taken by the Government and its implementation by way supplemental PPA. So, it is neither case of section 63 or section 62 but approving the amendments in PPA by the Commission as per provision 18.1 and powers vested with the commission to approve it.

22.7. **Issue No. 7**

Whether the Fuel Supply Agreement is compulsory and necessary prior to approving the Supplementary PPA dated 01.03.2019 executed between the parties? Is the Commission empowered to know the status of the Fuel Supply Agreement?

- 22.7.1. We note that as per the original bid documents it is the duty of the generator/seller to tie up for fuel supply on long term basis and get its approval. In the present case the aforesaid provision still continues and there is no change. The consumer organisations have vehemently submitted that the fuel supply agreement must be submitted to the Commission with the Petition by the Petitioner and the consumer who are burdened of such coal supply must be given an opportunity to comment on it.
- 22.7.2. We note that the energy charge is dependent on the quantity, quality of the coal, its price, period for supply of such coal etc. by the fuel suppliers. Hence, it is essential that the seller shall tie up the fuel supply with supplier for a long term basis to assure the procurer of the availability of coal, its quantum, quality and price so that as the fuel cost is pass through the competitiveness of such fuel supply must be ensured by the seller/generator. We also note that it is agreed between the parties that the procurement be carried out by the seller/generator following competitive bidding process with approval of the tender documents from the procurer and also approve the rate from the procurer. As per the original bid documents it is the duty of the generator/seller to tie up for fuel supply on long term basis and the Procurer to approve the same. In the present case the aforesaid provision is still continued and

there is no change. Accordingly, the Commission is of the view that a robust, fair and transparent procedure should be enforced so that economical price is paid for fuel purchase and an agreement is required to be placed before the Commission prior to payment of revised tariff. Further, under the agreement since the fuel cost is pass through unlike the original PPA, it is the duty of the procurer/Petitioner to verify the fuel availability and quality. Hence, while approving the monthly energy bills of Respondent No.1 the Petitioner shall verify the fuel details as per details/documents listed in Annexure - 5.

22.8. **Issue No. 8**

Whether the action of Government of Gujarat intervening in the matter and setting up High Power Committee and its recommendations is in public interest? Whether the recommendations of High Power Committee issued vide G.R. dated 01.12.2018 leading to change in terms and conditions of the PPA executed between the parties by way of supplemental PPA are binding to the GUVNL and to the Commission?

22.8.1. Now we deal with the issue that whether the intervention by the State Government by way of setting up High Power Committee (HPC) and issuing policy direction in the matter to the Petitioner is in the public interest.

22.8.2. The Consumer Groups have argued that the stand taken by the Petitioner and the Project Developer in regard to the Policy Directive of the Government of Gujarat being binding on the Commission is misconceived, patently erroneous and is liable to be rejected for several reasons. Firstly, as per the Statement of Objects and Reasons of the Act, the objective of the Act is to distance the regulatory responsibilities in Electricity Sector from the Government to the Regulatory Commissions. Secondly, the functions of the State Commission under section 86 of the Act have not been vested in any manner to be exercised by the State Government. Thirdly, Section 108 of the Act vests the powers to issue Policy Directives to the State Commission with the State Government. Fourthly, in matters of tariff, the Act envisages that the Policy Directive should not interfere with the tariff determination even by the State as is evident from Section 65 of the Act where the

State Government can grant subsidy but cannot direct State Commission to subsidise. Thus, the domain of tariff of the electricity utilities is entirely with the Appropriate Commission and not with the Appropriate Government. The very objective of distancing the Government from the tariff determination process will be rendered redundant if the interpretation in regard to the Policy Directive of the Government of Gujarat being binding on this Commission is accepted. Even otherwise, the Policy Directive issued by the State Government to the State Commissions in the matter of tariff are not binding. In support of aforesaid submissions, the Consumer groups have relied upon the decision of the Appellate Tribunal in *Polyplex Corporation Limited v Uttarakhand Electricity Regulatory Commission and Others* [(2011) ELR APTEL 195].

22.8.3. The Petitioner has submitted that rehabilitation scheme of the Government of Gujarat in being implemented in larger public interest. If the project is revived, then the sourcing of power from the alternative expensive sources is to be avoided. The contention of the petitioner is also that a policy directive in the Govt. GR dated 01.12.2018 needs to be ascertained by the Commission that whether the proposed amendment is in public interest or not. The rehabilitation package is implemented through the policy decision of the Government of Gujarat taken in larger public interest, the Commission should approve the proposed amendments to the PPAs dated 06.02.2007 and 02.02.2007 as have been allowed in the cases of SHAKTI scheme.

22.8.4. The following judgements of Hon'ble Supreme Court laid down the principle of adjudication and scope for interference by a court of law in policy decision of the Government in larger public interest have been relied upon by the Petitioner in support of its submission that there is public interest involved in the policy decision/directives of the Govt. of Gujarat in GR Dated 01.12.2018.

- i Netai Bag and Ors -v- State of West Bengal and Ors (2000) 8 SCC 262;
- ii Sachidanand Pandey and Anr -v- State of West Bengal and Ors (1987) 2 SCC 295;
- iii Krishnan Kakkanth -v- Government of Kerala & Ors (1997) 9 SCC 495;

- iv Arun Kumar Agarwal -v- Union of India & Ors (2013) 7 SCC 1; and
- v Delhi Science Forum & Ors -v- Union of India and Anr (1996) 2 SCC 405.

22.8.5. Based on above submission and relying on aforesaid judgements of Hon'ble Supreme Court the Petitioner submitted that the Government is entitled to take policy decision with consideration of prevalent & peculiar situation in larger public interest as it is the duty of the courts that while arriving on decision in a subject matter before it, where the policy decision taken by the Government needs to be considered and it cannot be struck down merely because an alternate decision would have been fair and wise or more logical and scientific. Unless it is arbitrary and proved capricious and not informed by any reason what so ever or creating a discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down.

22.8.6. The contention of the Respondent consumer groups in their reply and in the arguments before the Commission with regard to questioning merits of some of the aspects of the policy decision in isolation is not a correct and proper approach and they are devoid of merits. It is settled law that a policy document needs to be read as a whole as various components of a policy are interlinked and balanced. It is not permitted to read each provisions of the policy in isolation because it may lead to distort the final result. The HPC has considered the interest of all the stakeholders which include generator, lenders, procurer licensee and consumer at large and tried to finally balance the interest of all the above stake holders and given their recommendation with intention of resolving the financial and cash flow miss-match issues being faced by the project in sustainable manner and avoiding the requirement of purchasing expensive power from alternative sources. The policy decision of the Govt. of Gujarat in GR. Dated 01.12.2018 envisages that the proposed restructuring will result in making the project financially self-sustainable in its operation as it also provides the developer to absorb all its past accumulated losses and also take financial haircuts in the future operations of the project. The policy decision of the Govt. of Gujarat are based on the recommendation of HPC is in the larger public interest.

- 22.8.7. The Petitioner has also brought to the notice of the Commission that the proposed amendment is in the interest of the consumers because non availability of power from the Respondent no. 1 in past period when this plant was shut off due to increase in coal price by the Respondent No.1, the Petitioner was compelled to procure power from the market as an alternative arrangement to meet out the demand of the consumers of the State and maintain 24X7 power and avoided any kind of load shedding. It is necessary to see that uninterrupted power supply with reliability must be available to the consumer which requires continuous availability of requisite quantum of power from the defined source of power. In absence of certainty of availability of continuous power, the licensee is to arrange such power from alternate source which is uncertain and chances are that it may be available at higher cost is definitely not in public interest.
- 22.8.8. The Respondent No. 1 also submitted that the Supplemental PPAs are aimed to sub serve the interest of consumers for several reasons. Firstly, they ensure that the risks are equitably balanced by having minimal impact on the tariff, with accumulated losses to the account of power producers. Secondly, they allow consumers to avail the benefit of cheap power even beyond the initial contracted period of the PPA. There is no dispute that power from the project is amongst the cheapest for the procurer within its basket of power procurement sources. Thirdly, they facilitate a financially stressed asset to become financially viable, preventing bank loans from turning NPA and resulting in availability of cheap and reliable supply of electricity to the consumers. Fourthly, they ensure that GUVNL need not incur higher cost for replacement of its power, thereby burdening the consumers. Fifthly, they enable GUVNL to provide uninterrupted power supply to the consumers, considering the uncertainty regarding the availability of such quantity of power from alternate sources. There is equitable sharing of the financial burden. While fuel cost pass-through is a mitigation against hardship arising from the increase in coal price, consumer's interests have been safeguarded through financial re-structuring of the Project. As per the new Standard Bidding Documents, fuel cost is now made a pass through for all future power procurements under Competitive bidding, keeping in view the risk associated with fuel. Availability of power from the Respondent No. 1 will

benefit consumers immediately since the capacity charge of the project is competitive and in addition, a discount of 20 Paise/unit is now applicable. The proposed scheme takes consumer interests fully into consideration and therefore meets the test as laid down in the judgment in the Sasan Power Case of the Hon'ble Supreme Court.

22.8.9. The Consumer Groups have also submitted that the various judgments relied on by the Petitioner are distinguishable and have no relevance at all to the present case. These judgments deal with the decisions made by Government and Government Authorities when they have the authority to take such decision and judicial review of such decisions by the Hon'ble High Courts in exercise of writ jurisdiction. These decisions cannot apply to situations where the decision making authority is the Regulatory Commission and the Government is giving directions to the Commission to decide the matter in a particular manner. The Consumer Groups have submitted that the issue whether the amendment should or should not be allowed to the PPAs as sought for by the Petitioner and supported by the Project Developer is entirely within the scope and functions of this Commission and need to be exercised by the Commission in accordance with the settled principles of law.

22.8.10. We have considered the submissions of the Petitioner, Essar power ltd. and Consumer Groups. We have concluded that this Commission has the power and authority under law to decide whether the proposed amendments to the PPAs meet the overall test of public interest i.e. consumer interest and decide whether the proposed amendments should be accepted or not. This is abundantly clear from the judgment of the Hon'ble Supreme Court in the Sasan Case. The relevant portion from para 30 of the said judgment is extracted below:

“30.... if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act..... The legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact consumer interest and therefore, public interest.”

22.8.11. The Public Interest involved in the present Petition is vehemently opposed by the Consumer Groups stating that there is no element of public interest as argued by the Petitioner. The interest involved is limited to few entities and not in the interest of consumers at large. The retail tariff of the consumers which are in large would increase as per the proposed amendment which is against the consumer interest. The benefit of the HPC recommendation and Government GR is available only to lenders of the project and project developers who have failed to perform their duties and also defaulted in the task taken by the them. Such beneficiaries who are benefited from the outcome of the present petition involving HPC report recommendation and Government Resolution are few entities, i.e. the lenders and project developers.

22.8.12. As the issue pertaining to the Public Interest involved in the present petition it is necessary to consider the concept of public interest and what is the meaning by "Public Interest" in judicial parlance and in general terms. Public interest meaning in general term is "the welfare or well-being of the general public" and society. In a Federal Court Freedom of Information case, justice Brian Tamberlin wrote:

"The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides".

22.8.13. The Hon'ble Supreme Court has in the case of Onkar Lal Bajaj Vs Union of India [(2003) 2 SCC 673] has held with regard to public interest as under:

35. The expression 'public interest' or 'probity in governance' cannot be put in a strait jacket. 'Public interest' takes into its fold several factors. There cannot be any hard and fast rule to determine what is public interest. The circumstance in each case would determine whether Government action was taken is in public interest or was taken to uphold probity in governance.

In the aforesaid Judgement Hon'ble Supreme Court has held that there is no hard and fast rule which can determine the Public interest it depends on the circumstances of each case where the action of the Govt. taken is as to whether in the public interest or not be verified and declare. Thus there is no specific or expressly method which strait way apply to the Public Interest.

22.8.14. We also note that the Supreme Court has dealt with the basic elements of the Public Interest which needs to be considered while deciding the commercial contract. In the case of Raunaq International Limited Vs I.V.R Construction Limited reported in [(1999) 1 SCC 492]. The Relevant portion of the said judgement is reproduced below:

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work — thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

22.8.15. Hon'ble Supreme Court has in the case of Bihar Public Service Commission Vs Saiyad Hussain Abbas Rizwi reported in (2012) 13 SCC 61, held that public interest would mean the general welfare of the public that warrants recommendations and protection. It is something in which public as a whole has a stake. The relevant portion of the said judgement is reproduced below:

“.....22 The expression “Public Interest has to be under stood in its two connotation so as to give complete meaning to the relevant provisions of the act. The expression “Public Interest) must be viewed in its strict sense with all it exceptions so as to justify denial of statutory exemption in terms of the Act. In this common parlance the expression “Public Interest” like “Public Purpose”, is not capable of any precise definition. It does not have a rigid meaning is elastic and takes its colours from the statute in which it occurs, the concept varying with time and state of society and it needs. It also means the general welfare of the public that warrants recognition and protection: Something in which the public as a whole has a stake.....”

22.8.16. We note that the Electricity Act 2003 also provides certain provisions which state about the protection of the various entities that is generation, transmission, distribution as well as consumers at large. The preamble of the Act also envisages that the interest of the consumer may be protected. The tariff policy also provides for

consideration of Public Interest with consideration of different aspects. Section 61 of the Act envisages about Tariff Regulations where the various aspects which needs to be considered as guiding factor while framing the Tariff Regulations as it affects largely to public associated with the electricity sector. The relevant Sections 61 (b), (c), (d), (g) of the Electricity Act, 2003 are reproduced below:

“..... Section 61 (Tariff regulations):

The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

.....

(b) *the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*

(c) *the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*

(d) *safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*

.....

(g) *that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission....”*

The aforesaid provisions provide that the appropriate Commission while framing the regulations shall be guided with consideration that the generation, transmission, distribution and supply of electricity be conducted on commercial principles. Moreover, the competition, efficiency, economical use of resources, good performance and optimum investment factors are to be considered. Further, it is necessary to safeguard the consumers interest as well as the recovery of the cost of electricity in a reasonable manner. The tariff progressively reflects the cost of supply of electricity and cross subsidisation may be reduced as specified by the Commission.

(ii) It is also necessary to refer the relevant provisions of the Tariff Policy which are reproduced below:

“-----1.3 It is therefore essential to attract adequate investments in the power sector by providing appropriate return on investment as budgetary resources of the Central and State Governments are incapable of providing

the requisite funds. It is equally necessary to ensure availability of electricity to different categories of consumers at reasonable rates for achieving the objectives of rapid economic development of the country and improvement in the living standards of the people.

1.4 Balancing the requirement of attracting adequate investments to the sector and that of ensuring reasonability of user charges for the consumers is the critical challenge for the regulatory process. Accelerated development of the power sector and its ability to attract necessary investments calls for, inter alia, consistent regulatory approach across the country. Consistency in approach becomes all the more necessary considering the large number of States and the diversities involved.

4.0 OBJECTIVES OF THE POLICY

The objectives of this tariff policy are to:

- (a) Ensure availability of electricity to consumers at reasonable and competitive rates;*
- (b) Ensure financial viability of the sector and attract investments;
.....”*

22.8.17. The aforesaid provisions of the Act and Tariff Policy emphasise on the competition, efficiency, economic use of resources and optimum investment. The aforesaid provision recognise that it is necessary to balance the interest of the consumer and the generator as well as licensee. It also provides that the electricity is available to the consumers at reasonable and competitive rate. It is difficult to define the Public Interest and evaluate the same with consideration of the issues involved in isolation. Therefore, while deciding the Public Interest it is essential to consider all the relevant factors and its effect on the various entities who are associated with such issues. It is incorrect to consider the effect of the decision on particular issue like in the present case. The impact of the tariff applicable to the consumers in case of proposed amendments recommended by the HPC and the Government policy decision on it.

22.8.18. The Petitioner has relied on the judgement dated 28th September 2015 of Hon'ble Appellate Tribunal in Appeal No. 198 of 2014. The relevant portion of the said judgement is reproduced below:

“.....48. It was contended by Mr. Ramachandran, learned counsel for the Appellant that the Electricity Act focuses attention on consumer interest. It is the consumer who has to be looked after. The State Commission and this Tribunal have to ensure that consumer interest is protected as that is of prime importance. While it is true that consumer interest should always be protected, we are unable to agree with Mr. Ramachandran that consumer interest will always override all other considerations or interest of other stakeholders. After all, the power sector functions on the joint efforts of all stakeholders and health of all stakeholders should be the concern of the regulator though as far as possible primacy must be given to consumer interest. The policies of the State lay great emphasis on renewable energy sources. The State has recognized that those who generate renewable energy must be encouraged to enable them to remain in the power sector and flourish. Such encouragement undoubtedly cannot be at the cost of consumers. It is for the regulator to find ways to strike a balance. It is pertinent to note that Section 61 states what factors the Appropriate Commission has to take into consideration while specifying the terms and conditions for the determination of tariff. The promotion of cogeneration and generation of electricity from renewable sources of energy is one of those factors as set out in sub-clause (h). Under sub-clause (d), the Appropriate Commission has to safeguard consumer interest and at the same time take into account the recovery of cost of electricity in a reasonable manner.

..... It is, therefore, not possible to hold that the regulator has to only take the consumer interest into account. At the cost of repetition, it must be stated that balance has to be struck between the two. Some of the judgments to which we have made a reference make this position clear.....”

22.8.19. The aforesaid judgement of the Hon'ble APTEL held that the power sector is functioning on the joint effort of all the stake holders involved in it. The Regulators are required to balance the interest of all the stakeholders. It is also provided that while safeguarding the interest of the consumers, it is necessary to allow the recovery of the cost of electricity in a reasonable manner by the Commission.

22.8.20. We are therefore of the view that as a Regulator of electricity sector the Commission needs to balance the interest of the consumer and the project developers in a long run and in sustainable manner. The policy decision taken by the Government of Gujarat vide GR Dated 01.12.2018 directing the Petitioner to rehabilitate the stressed imported coal based power projects in public interest and such policy decision should not be interfered with.

22.8.21. Now we deal with the various judgements relied upon by the petitioner in support of aforesaid issue in the light of the legal principles laid down in the judgments. The Judgements relied upon by Petitioner are referred below:

- (a) In *Netai Bag v. State of W.B.* [(2000) 8 Supreme Court Case 262], Hon'ble Supreme Court has made the following observations:

"-----19. Though the State cannot escape its liability to show its actions to be fair, reasonable and in accordance with law, yet whenever challenge is thrown to any of such action, initial burden of showing the prima facie existence of violation of the mandate of the Constitution lies upon the person approaching the court. We have found in this case, that the appellants have miserably failed to place on record or to point out to any alleged constitutional vice or illegality. Neither the High Court nor this Court would have ventured to make a roving inquiry particularly in a writ petition filed at the instance of the erstwhile owners of the land, whose main object appeared to get the land back by any means as, admittedly, with the passage of time and development of the area, the value of the land had appreciated manifold. It may be noticed that in the area 1961 the erstwhile owners were paid about Rs. 5.5 lakhs and the State Government assessed the market value of the property which was paid by Respondent 5 at Rs. 71,59,820. The appellants have themselves stated that the value of the land roundabout the time, when it was leased to Respondents 5 was about Rs. 11 crores. There cannot be any dispute with the proposition that generally when any State land is intended to be transferred or the State largesse decided to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people. That would be a sure method of guaranteeing compliance with the mandate of Article 14 of the Constitution. Non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner. Making an exception to the general rule could be justified by the State executive, if challenged in appropriate proceedings. The constitutional courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality nor the courts can substitute their opinion for the bona fide opinion of the State executive. The courts are not concerned with the ultimate decision but only with the fairness of the decision-making process.

*20. The Government is entitled to make pragmatic adjustments and policy decisions which may be necessary or called for under the prevalent peculiar circumstances. The court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or wiser or more scientific or logical. In *State of M.P. v. Nandlal Jaiswal* it was held that the policy decision can be interfered with by the court only if such decision is shown to be patently arbitrary, discriminatory or mala fide. In the matter of different modes, under the rule of general*

application made under the M.P. Excise Act, the Court found that the four different modes, namely tender, auction, fixed license fee or such other manner were alternative to one another and any one of them could be resorted to. In Sachidanad Pandey v. State of W.B. it was held that as regards the question of propriety of private negotiation with an individual or corporation, it should be borne in mind that State-owned or public-owned Certain precepts and principles have to be observed, public interest being the paramount consideration. One of the methods of securing the public interest when it is considered necessary to dispose of the property is to sell the property by public auction or by inviting tenders. But such a rule is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule. As and when a departure is made from the general rule, it must be shown that such an action was rational and not suggestive of discrimination. In that case on facts the Court found that on the commercial and financial aspect, the lease granted in favor of a group of hoteliers, not arbitrary as the method of "net sales" was held to be fairly well-known method adopted in similar situations. To the same effect is the judgement in G.D. Zalani v. Union of India. In Kasturi Lal Lakshmi Reddy v. State of J&K this Court, after referring to various judgements, including the Judgement in Ramana Dayaram Shetty case held: (SSC pp. 13-14. Para 14)

"It is imperative in a democracy governed by the rule of law that governmental action must be kept within the limits of the law and if there is any transgression, the court must be ready to condemn it. It is a matter of historical experience that there is a tendency in every Government to assume more and more powers and since it is not an uncommon phenomenon in some countries that the legislative check is getting diluted, it is left to the court as the only reviewing authority under the Constitution to be increasingly vigilant, namely, that the governmental action is unreasonable or lacking in the quality of public interest, is different from that of mala fides though it may, in a given case, furnish evidence of mala fides."

In the aforesaid petition the issue is pertaining to Public Interest litigation filed with regard to land matter. In the said judgement Hon'ble Supreme Court has said that it is the duty casted upon the State that they required to show that it's actions are fair, reasonable and in accordance with law. The initial burden to prove existence of violation of mandate lies upon the person, who challenge the action of the State. The Govt. is entitled to make pragmatic adjustment and policy decision which may be either odd under the prevalent peculiar circumstances. The court cannot strike down a policy decision taken by the Govt. merely because it feels that another decision would have been fair or wise or more scientific or logical. There may be situation when there are compelling reasons necessitating to depart from the rules

however, when departure from the rules is made from the general rule it must be shown that such an action was rational and not suggestive of discrimination.

(b) In Sachidanand Pandey v. State of West Bengal [(1987) 2 SCC 295], Hon'ble Supreme Court has held as under:

".....37. In Kasturi Lal Lakshmi Reddy v. State of J & K. Bhajwati J. (as he then was) again, speaking for the court reiterated what he had said earlier in R.D. Shetty v. International Airport Authority". He proceeded to say : (SCC p. 13, para 14)

The Government, therefore, cannot, for example, give a contract or sell or lease out its property, for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. Such considerations may be that some directive principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the persons who has offered a higher consideration is not otherwise fit to be given the contract or the property. We have referred to these considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various consideration, that the court would have to decide whether the action of the Government is reasonable and in public interest. But one basic principle which must guide the court in arriving at its determination on this question is that there is always a presumption that the Governmental action is reasonable and in a public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and therefore the court would not strike down Governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the court under the Constitution to invalidate the governmental action.

With reference to the particular facts of the case, it was stated: (SSC pp. 17-18, para 19)

The argument of the petitioners was that at the auctions held in December 1978, January 1979 and April 1979, the price of resin realised was as much as Rs. 484, Rs. 520 and Rs. 700 per quintal respectively and

when the market price was so high, it was improper and contrary to public interest on the part of the State to sell resin to the second respondents at the rate of Rs. 320 per quintal under the impugned Order. This argument, plausible though it may seem, is fallacious because it does not take into account the policy of the State not to allow export of resin outside its territories but to allot it only for use in factories set up within the State. It is obvious that, in view of this policy, no resin would be auctioned by the State and there would be no questions of sale of resin in the open market and in this situation, it would be no question of sale of resin in the open market. In this situation, it would be totally irrelevant to import the concept of market price with reference to which the adequacy of the price charged by the State to the second respondents could be judged. If the State were simply selling resin, there can be no doubt that the State must endeavor to obtain the highest price subject, of course to any other overriding considerations of public interest and in that event, its action in giving resin to a private individual at a lesser price would be arbitrary and contrary to public interest. But, where the State has, as a matter of policy, stopped selling resin to outsiders and decided to allot it only to industries set up within the State for the purpose of encouraging industrialization, there can be no scope for complaint that the State is giving resin at a lesser price than that which could be obtained in the open market. The yardstick of price in the open market would be wholly inept, because in view of the State policy, there would be no question of any resin being sold in the open market. The object of the State in such a case is not to earn revenue from sale of resin, but to promote the setting up of industries within the State.

And again : (SC . 20, para 22)

If the State were given tapping contract simpliciter there can be no doubt that the State would have to auction or invite tenders for securing the highest price, subject of course to any other relevant overriding considerations of public weal and interest, but in a case like this where the State is allocating resources such as water, power, raw materials etc. for the purpose of encouraging setting up of industries within the State, we do not think the State is bound to advertise and tell the people that it wants a particular industry to be set up within the State and invite those interested to come up with proposals for the purpose. The State may choose to do so, if it thinks fit and in a given situation, it may even turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to set up an industry, the State would not be committing breach of any constitutional or legal obligation if it negotiates with such party and agrees to provide resources and other facilities for the purpose of setting up the industry.

The observation of the court in the light of the facts therein appear to fully justify the action of the West Bengal Government in the present case not inviting tenders or not holding public auction.....”

In the aforesaid judgement Hon'ble Supreme Court held that the Government shall be required to give the contract or sell the property or lease the same at the highest price otherwise there must be other consideration which render it reasonable and in public interest. There are variety of situation and actions which needs to be considered by the Government as reasonable and in public interest. It is also held that the basic principle which needs to be considered is that whenever any question come before the consideration of the case with regards to action of the Government on the subject matter there is always presumption that the Government action is reasonable and in public interest. The court cannot lightly assume that the action taken by the Government is unreasonable and without public interest because while taking the decision large numbers of policy consideration must necessarily be taken into consideration by the Government.

(c) In Krishnan Kakkanth v. Government of Kerala [(1997) 9 SCC 495], Hon'ble Supreme Court has held as under:

".....36. To ascertain unreasonableness and arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise for finding out the wisdom in the policy decision of the State Government. It is immaterial whether a better or more comprehensive policy decision could have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason what so ever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down. It should be borne in mind that except for the limited purpose of testing a public policy in the context of illegality and unconstitutionality, courts should avoid "embarking on uncharted ocean of public policy"

37. The contention that the impugned circular suffers from hostile discrimination meted out to the farmers in the northern region of the State covered by the financial assistance under the governmental schemes, by fastening such assistance with an obligation to purchase pumpsets only from the two approved dealers, cannot be accepted in the facts of the case. The reasons for fastening the farmers of northern region with the obligation to purchase pumpsets from the said two dealers have been indicated by Mr. Bhat and Mr. Gupta and, in our view, it cannot be held that such reasoning suffers from lack of objectivity. The law is well settled that even in the matter of grant of largesse, award norms set down by it, in favor of a particular group of persons by subjecting such persons with different standard of

norm, if such departure is not arbitrary but based in some valid principle which in itself is not irrational, unreasonable or discriminatory (Dayaram Shetty case)

In the aforesaid decision the Hon'ble Supreme Court has held that to ascertain about the unreasonable and arbitrariness in context to Article 14 of the constitution it is not necessary to enter in to the wisdom in the policy decision of the State Government. It is also immaterial that a better comprehensive policy decision could be possible. It is also immaterial that the policy decision is unwise and likely to defeat the purpose for which the decision has been taken. Unless it proves that the policy decision is capricious or arbitrarily and does not specify the reasons whatsoever or it suffers from the discrimination or infringes any statute or provisions of the constitution, the policy decision cannot be struck down.

(d) In Villianur Iyarkkai Padukappu Maiyam v. Union of India (SCC p. 605, para 169), Hon'ble Supreme Court held as under:

*169. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to —trial and error as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts.
.....”*

In the aforesaid the Hon'ble Supreme Court held that it is not within the domain of the court to inquire as to whether particular public policy is wise or whether better policy can be evolved. The court cannot strike down the policy urged by the person stating that the different policy would have been fairer or wiser or more logical. The economic policy is not ordinarily amenable to judicial review.

(e) In the case of Arun Kumar Agarwal V Union of India & Ors.- dt. 9.5.2013 reported in (2013) 7 SCC 1 @ paras, 36, 37, 39, 40, 41 & 42, the Hon'ble Supreme Court has held as under:

“36. We notice the decision taken by the ONGC not to exercise its RoFR was taken after an elaborate and due deliberations. The report of SBI Caps, after making a detailed financial analysis also supported the decision taken by the ONGC. The decision to grant no objection to the transfer of shares of CEIL Page 29 29 from Cairn to Vedanta was also on the basis that the proposed share price of share was at Rs.355 per share, was well in excess of its intrinsic value as were evaluated by SBI Caps. SBI Caps report evaluated each share of CEIL at Rs.291 with the highest production profile under normal circumstances. It was concluded that even considering various other scenario makes possible value at Rs.331 per share.

37. The Union of India also endorsed the decision taken by the ONGC after due deliberations. The matter was finally placed before the Cabinet Committee of Economic Affairs, which placed the matter before the Group of Ministers and Group of Ministers on 27.5.2011 granted its approval, based on certain conditions. The same was conveyed to the parties and the Vedanta Resources conveyed its acceptance to the conditions imposed by CCEA. Cairn also indicated to ONGC that CEIL Board had also accepted the conditions imposed upon it and that the cess arbitration, which had been initiated by Cairn against ONGC was also withdrawn.

39. Matters relating to economic issues, have always an element of trial and error, so long as a trial and error are bona fide and with best intentions, such decisions cannot be Page 31 31 questioned as arbitrary, capricious or illegal. This Court in *State of M.P. and others v. Nandlal Jaiswal and others* (1986) 4 SCC 566 referring to the Judgment of *Frankfurter J. in Morey vs. Dond* 354 US 457 held that “we must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call “trial and error method” and, therefore, its validity cannot be tested on any rigid “a priori” considerations or on the application of any straight jacket formula.” In *Metropolis Theatre Co. v. State of Chicago* 57 L Ed 730 the Supreme Court of the United States held as follows:

“The problem of government are practical ones and may justify, if they do not require, rough accommodation, illogical, if may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void.”

In Life Insurance Corporation of India v. Escorts Ltd. and others (1986) 1 SCC 264 this Court held

“that the Court will not debate academic matters or concern itself with intricacies or trade and commerce. The Court held that when the State or its instrumentalities of the State ventures into corporate world and purchases the shares of the company, it assumes to itself the ordinary role of shareholder, and dons the robes of a shareholder, with all the rights

available to such a shareholders and there is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management by a resolution of the company, like any other shareholder.”

In Liberty Oil Mills and others v. Union of India and others (1984) 3 SCC 465, this Court held that expertise in public and political, national and international economy is necessary, when one may engages in the making or in the criticism of an import policy. Obviously, courts do not possess the expertise and are consequently, incompetent to pass judgments on the appropriateness or the adequacy of a particular import policy.

In Villianur Iyarkkai Padukappu Maiyam v. Union of India (2009) 7 SCC 561, this Court held as follows:

“It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to “trial and error” as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts.”

In Bajaj Hindustan Limited v. Sir Shadi Lal Enterprises Limited And Another (2011) 1 SCC 640, this Court held “that economic and fiscal regulatory measures are a field where Judges should encroach upon very wearily as Judges are not expert in those matters”.

This Court in Bhavesh D. Parish and Others v. Union of India and Another (2005) 5 SCC 471, took the view that, in the context of the changed economic scenario, the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have largescale ramifications and can put the clock back for a number of years. The process of rationalisation of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all. In Centre for Public Interest Litigation and Another v. Union of India and Others (2000) 8 SCC 606, this Court held as follows:

“20. It is clear from the above observations of this Court that it will be very difficult for the courts to visualise the various factors like

commercial/technical aspects of the contract, prevailing market conditions, both national and international and immediate needs of the country etc. which will have to be taken note of while accepting the bid offer. In such a case, unless the court is satisfied that the allegations levelled are unassailable and there could be no doubt as to the unreasonableness, mala fide, collateral consideration alleged, it will not be possible for the courts to come to the conclusion that such a contract can be prima facie or otherwise held to be vitiated so as to call for an independent investigation, as prayed for by the appellants.....”

40. The MoPNG on 26.7.2011 conveyed to Cairns UK and its affiliates and Vedanta UK that the Government of India was pleased to grant its consent for the Cairn -Vedanta -- subject to fulfilment of the certain conditions i.e. they had to give an undertaking that in the royalty paid in the ONGC was cost recoverable by ONGC as contract cost and to withdraw the arbitration case relating to cess. The dispute on royalty and cess was bothering ONGC for quite some time and ONGC was facing a claim running into several million US Dollars in an arbitration proceeding in London. Union of India and ONGC, in their wisdom could make Cairn agree to those conditions, it gave an undertaking that in the royalty paid in the ONGC would cost recoverable by ONGC as contract cost and to withdraw the arbitration case relating to cess. Union of India and ONGC, in their wisdom could make Cairn agree to those conditions which was clearly a business commercial decision taken with good intention, since the fate of the arbitration proceedings could not be predicted. ONGC also in its business prudence decided not to go for shares in CEIL, first of all it was equated at a very high premium, secondly it guaranteed no return either in the way of dividend or any other profits. Further, it might lead to huge liability of investment and with a minimum work programme and the remaining PSC's help by CEIL which involved exploitation operations with no guarantee of any commercial discovery. The result of CEIL and its affiliates agreeing to treat royalty paid by ONGC as cost recoverable by ONGC as contract cost, and ONGC has derived benefits to the tune of US \$ 970,881,838 towards royalty paid by till June 2012 and would continue to derive similar benefits till the currency of the contract i.e. till June 2020.

41. Consequent to the agreement dated 30.11.2011, ONGC received Rs.5000 crores approximately towards CEIL and CEHL's share of royalty for the period from 29.8.2009 to 30.7.2012 besides CAIRN and Vedanta agreeing to pay their share of royalty and cess in future involving huge financial implications.

(f) In the case of Delhi Science Forum & Ors. V Union of India & Anr. Reported in (1996) 2 SCC 405 @ Para 7, the Hon'ble Supreme Court has held as under:

“7. What has been said in respect of legislations is applicable even in respect of policies which have been adopted by Parliament. They cannot be tested in Court of Law. The courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not. There may be views and views, opinions and opinions which may be shared and believed by citizens of the country including the representatives of the people in Parliament. But that has to be sorted out in Parliament which has to approve such policies. Privatisation is a fundamental concept underlying the questions about the power to make economic decisions. What should be the role of the State in the economic development of the nation? How the resources of the country shall be used? How the goals fixed shall be attained? What are to be the safeguards to prevent the abuse of the economic power? What is the mechanism of accountability to ensure that the decision regarding privatisation is in public interest? All these questions have to be answered by a vigilant Parliament. Courts have their limitations — because these issues rest with the policy-makers for the nation. No direction can be given or is expected from the courts unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provision. The new Telecom policy was placed before Parliament and it shall be deemed that Parliament has approved the same. This Court cannot review and examine as to whether the said policy should have been adopted. Of course, whether there is any legal or constitutional bar in adopting such policy can certainly be examined by the Court.”

(g) Pushpendra Surana V Central Electricity Regulatory Commission, APTEL Order dated 10.03.2014 in IA No. 7 and 8 of 2014 in DFR No. 2675-2676 of 2013 @ paras 22 onwards, Hon’ble APTEL has held as under:

“22. Even according to the Applicant, the Applicant is the resident of Ghaziabad (UP). The Applicant is neither a consumer of any of the procurers, the Respondents, in IA NO.7 OF 2014 IN DFR No.2675 of 2013 AND IA NO.8 OF 2014 IN DFR No.2676 OF 2013 terms of Section 2 (15) of the Electricity Act, nor he is receiving supply of electricity from the Respondents through any of the procurers. Therefore, it cannot be said that the Applicant is an aggrieved person who has suffered any legal grievance or injury.

23. It has not been demonstrated by the Applicant before this Tribunal that due to the Impugned Orders he has been deprived or denied of the same under which it would have otherwise been entitled to.

24. In fact, we have asked the learned Counsel for the Applicant/Appellant as to how he could distinguish the judgment of Bharat Jhunjunwala Vs UP Commission from the present Application. But, the Applicant failed to distinguish the said decision.

25. It is settled law as laid down in various decisions referred to above that a person filing the Appeal, will have to demonstrate as to how the Impugned Order under challenge has made an impact on him.

26. According to the Applicant, the term "public" used under Section 64 of the Electricity Act would mean any member of the public and he need not be a consumer and as such he is entitled to file Appeal. This contention is misconceived.

IA NO.7 OF 2014 IN DFR No.2675 of 2013 AND IA NO.8 OF 2014 IN DFR No.2676 OF 2013

27. The term "public" as appearing in Section 64 of the Electricity Act, 2003 has to be read in the context of Section 61 (d) of the Electricity Act. This provision mandates that Appropriate Commission to ensure that the rights of the consumers are protected while the tariff is being determined by it. Therefore, the term "public" as contained in Section 64 have to be read in the context of the term "consumer" and not to any person as a member of the public, as sought to be interpreted by the Applicant.

28. Furthermore, Section 111 of the Electricity Act which vests Appellate jurisdiction in this Tribunal specifically provides that an aggrieved person alone can file an Appeal before this Tribunal against the Order passed by the appropriate Commission. This means the right to file an Appeal has been granted only to the persons who are aggrieved by the order of the Appropriate Commission and not to any members of the public irrespective of the fact that whether he participated in the proceedings before the appropriate Commission or not.

29. As indicated above, the Applicant himself admitted in his Affidavit that he is neither a consumer of the Respondent Utilities nor has he received any supply of electricity from the procurers or the Respondent Companies who are concerned IA NO.7 OF 2014 IN DFR No.2675 of 2013 AND IA NO.8 OF 2014 IN DFR No.2676 OF 2013 in the proceedings. Probably, this was the reason as to why he has not participated in the proceedings.

30. As pointed out by the Respondents, the relief sought for by the Respondents before the Central Commission would pertain to the contractual relief available to it with reference to the PPA entered into between the parties. No relief was sought for by the Respondents against the Applicant who is not a party to the PPA. The Applicant has no role to play in the adjudication upon the claims for offset of adverse impact of PPA with regard to commercial impracticability.

31. Therefore, viewed from any angle, it cannot be claimed that the Applicant is a person aggrieved over the Impugned Orders and as such, he has got a locus-standi to file this Appeal.

32. To Sum-UP "In view of the above discussion, these Applications seeking for leave to file the Appeals as against the Impugned Orders dated 2.4.2013 and 15.4.2013 are not maintainable as the Applicant is not a person aggrieved".

IA NO.7 OF 2014 IN DFR No.2675 of 2013 AND IA NO.8 OF 2014 IN DFR No.2676 OF 2013

33. Hence, these Applications are dismissed.

34. Consequently, the Appeals are also rejected."

22.8.22. Considering the aforesaid decision of Hon'ble Supreme Court and Hon'ble APTEL, various aspects needs to be considered are as follows:-

- a. Whenever any person challenges the actions of the Government on policy decision, the burden of proof lies upon such person to prove that the action is unconstitutional or against the provisions of Statue.
- b. The Government take pragmatic adjustment while taking policy decisions in prevalent peculiar circumstances.
- c. The Court cannot strike down policy decision taken by the Government merely on the face that another decision would have been fairer or wiser or scientific or logical.
- d. The Court may interfere with the Government decision if such decision seems to be patently arbitrary, discriminatory or mala-fide.
- e. There may be infinite variety of consideration which might be taken in consideration by the Government while formulating its policy. Therefore, while taking any decision on such policy it is necessary to verify and consideration which have been weighted by the Government while taking particular decision.
- f. Whenever any question comes before the court with regards to policy decision of the Government there must be presumption that the Government action is reasonable and is in public interest. The court cannot strike down the Government action as invalid on the ground unless it is clearly satisfied that the action is unreasonable or not in public interest.
- g. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason or its suffers from discrimination or infringes any statue or provisions of the constitutions, the policy decision cannot be struck down.

22.8.23. In view of above, we are of view that the policy decision taken by the Government of Gujarat vide its GR dated 01.12.2018 should not be interfered with consideration of aforesaid aspects of the decision of the APEX Court.

22.8.24. We note that the Petitioner (GUVNL) which is successor of erstwhile GEB is a Government company carrying out the purchase of power in bulk on behalf of the distribution companies namely PGVCL, UGVCL, MGVCL and DGVCL. The

aforesaid companies are required to carry out the function of power procurement through GUVNL, at reasonable rate in requisite quantum with consideration of reliability of uninterrupted power supply to the consumers. It is observed by the HPC that the Petitioner is procuring about 45% of its power requirement through the power projects of Adani Power Ltd., Respondent No. 1 Essar Power Ltd. and CGPL. It is also recorded that the aforesaid plants are utilising the imported coal. The major coal supply received by this power plants is from Indonesia, hence any change in the price of coal imported from Indonesia affect the cost of energy produced from of the said plants. It is also recorded that there is increase in coal prices from Indonesia due to certain policy changes of the said country and it hampered the procurement cost of coal by aforesaid plants and Therefore, increase in the cost of the coal from Indonesia badly affected the aforesaid companies financially and it became unviable to supply power from the said plants at the discovered competitive bid price quoted by the bidders i.e. the generators of the aforesaid plants. Due the supply from the said plants was affected, the Petitioner needs to procure power from alternate sources at higher cost and which is also not certain. The Govt. of Gujarat therefore took initiative for rehabilitation of the aforesaid power plants in consultation with the lenders and GOI and constituted HPC.

22.8.25. The HPC has considered various aspects which are put up before them affecting to the stakeholders and after analysing the same has given the recommendations to the Government of Gujarat. The GoG has considered some of the recommendations and accepted it with required modification. The Government has resolved in GR dated 01.12.2018 and issued policy directives to the Petitioner with regard to signing of supplemental PPA with the Respondent No. 1 and to get approval from the Commission. From the above it is clear that the policy decision dated 01.12.2018 was taken by the Govt. of Gujarat with consideration of the interest of stakeholders i.e. consumers, project developers, licensee and directed to the Petitioner to sign the supplemental PPA with the Respondent No. 1.

22.8.26. The HPC report consist of various chapters on different subject matter. The committee has specifically incorporated Chapter VII regarding public/consumer

interest involved in salvaging the project. The committee has deliberated upon the following issues:

- a. The importance of the projects with regard to quantum of energy price reliability etc.
- b. The impact of shut down of the Power Projects and its impact on the distribution licensees and the consumers.
- c. The impact of shut down of the projects on financial institutions, lenders, the consumers, the transmission system, and the distribution licenses etc.

22.8.27. The recommendations of High Power Committee are based on the analysis of various submissions of the stakeholders before it. It is also proved that the recommendations suggested by the HPC are not completely accepted by the Government of Gujarat and certain modifications are made in it or rejected by the Govt. with consideration of various stakeholder's interest. We note that as the Respondent power plant is one of those projects who supplies 45% of total requirement of power supply to the GUVNL on long term basis, the certainty of such power supply is essential for the consistent power supply to consumer following its merit order purchase of power. Any uncertainty about quantum of power supply and its price dissertation affects the power supply management and its overall cost. Therefore, the proposed amendments in supplemental PPA by way of acceptance of certain recommendation of HPC report by the Govt. of Gujarat in its Policy decision dated 01.12.2018 is in the interest of public at large.

22.8.28. In order to substantiate whether the Government of Gujarat policy direction is in the public interest or not and is valid, we have tried to discuss relevant portion of HPC Report i.e. chapter 7 and 8, which are reproduced below:

7.3 Importance of the three Projects

7.3.1 CGPPL, APL, and EPGL have implemented 4150 MW, 4620 MW and 1200 MW coal based power plants respectively. They have tied up majority of the capacity through competitive bidding with the States of Gujarat, Maharashtra, Haryana, Rajasthan and Punjab. These Projects are critical and are of national importance and the same becomes evident from the fact that these five States together contribute to 44% of the country's total peak demand and 36% of the total

requirement of power. The details of peak demand (MW) and energy requirement (Mus) is captured in the table below:

States	Peak Demand (MW)	Energy Requirement
Gujarat	16,590	1,09,985
Maharashtra	22,542	1,49,760
Rajasthan	11,722	71,193
Punjab	11,705	54,812
Haryana	9,671	50,775
Total	72,230	436,525
NR	60,749	371,934
WR	50,477	368,404
SR	47,385	320,248
ER	20,794	136,522
NER	2,629	16,217
Total Country	1,82,034	12,13,325

7.3.2 Additionally, the criticality of the Project is also evident from the following facts: Total installed capacity of the three Projects is 9970 MW which is almost double the installed capacity of State Generating Company in Gujarat which stands at 5516 MW

As informed by GUVNL in the meeting, these Projects contribute to approximately 45% requirement of GUVNL. The average variable charge is Rs 1.74 per kwh against overall average variable charge of about Rs 2.59 per kwh. (i.e. 50% higher variable cost); and

APL and BPL fulfil about 22% requirement of the Haryana Utilities. Additionally, CGPL also caters to States of Rajasthan, Maharashtra and Punjab.

7.3.3 It becomes evident from a perusal of the aforesaid facts that these Projects are extremely critical for the five States under consideration as well as for the country as a whole. Discontinuance of these Projects will have greater ramifications on the overall power supply situation and therefore, the resolution of these three Projects becomes important from the strategic perspective

7.4 Price competitiveness of power produced from these Projects & Reliability

7.4.1 These Projects are undoubtedly cheaper sources of electricity as compared to certain sources from which Discoms have been procuring power. An analysis has been carried out to ascertain the importance of these Projects and their position in the MOD of the respective States.

7.4.2 GUVNL – As per the data provided by GUVNL, the position of the Projects in the MOD has been provided as below:

Plant	PPA Variable Cost (Rs./kWh)	% Dispatched	Tariff actual Pass Through (Rs./kWh)	after Cost	% Dispatched
FY 2018-19					
CGPL	1.60	48.4%	2.37		54.3%
APL – Phase III	1.62	48.4%	2.58		61.5%
APL – Phase I & II	1.85	51.6%	2.67		68.2%
EPGL	1.99	51.6%	2.70		75.7%
FY 2017-18					
CGPL	1.65	51.2%	2.27		52.9%
APL – Phase III	1.57	36.2%	2.47		63.4%
APL – Phase I & II	1.96	63.3%	2.56		70.9%
EPGL	1.92	57.8%	2.59		77.5%
FY 2016-17					
CGPL	1.28	29.8%	1.81		46.2%
APL – Phase III	1.55	51.6%	2.00		63.9%
APL – Phase I & II	1.88	66.4%	2.07		71.5%
EPGL	1.93	73.7%	2.07		77.1%

(Reference data provided by GUVNL)

.....Therefore, there is no question of lack of competitiveness of these Projects in future on account of pass through of increased energy charge. The Procurers and Consumers Representatives have also expressed similar views during the meetings of the HPC. It was also pointed out by one of the Consumer Representatives that the capacity charge under these PPAs is very competitive and therefore, the Discoms should not lose these PPAs.

7.5 Impact of Shutting Down of these Projects on Discoms/ End Consumers

7.5.1 These Projects fulfil almost 16-18% power requirement of the five States and it is not possible to replace such a high contribution spread-over entire Western Region by other alternatives. Even power exchange and other short-term markets put together are incapable of replacing these capacities. CGPL's TPP and Phase III & IV of APL's TPP are based on the supercritical technology and are more efficient. Even otherwise, these Projects are more

efficient as compared to the older units installed by the State Generating Companies with SHR being lower by about 369 kcal/kwh and auxiliary consumption being lowered by 5.51%. Collectively, there is a saving of almost 18.5% in fuel cost of electricity is generated from these Projects.

7.5.2 Further, an analysis of the prices discovered under the recent Case 1 bidding process as well as the short term market shows substantially higher prices.

- Average tariff discovered under recent Case 1 long-term biddings is about Rs. 4.50 per unit.

7.5.3 It is to be noted that if these capacities are to be replaced from alternative sources, prices will further go up in view of clear co-relation between demand and supply. Further, it is not possible to replace the entire capacity with the existing capacity available in the market and the Discoms have to resort to eventualities such as load shedding which is highly undesirable. Considering that it is stated goal of the Central Government that all endeavours should be made to ensure supply of 24x7 power to each and every household including the houses given connectivity under the 'Subhagya Scheme' at affordable price, it is imperative that the possibility of load shedding is reduced to the maximum possible extent.

7.5.4 It is also observed that when these Projects are not available or are partly available due to the grave financial stress being faced by them, GUVNL bought replacement power from the spot market for fulfilling its demand for electricity. During the four months from March to June 2018, GUVNL had to purchase 6,749 MUs from high cost sources like power exchange, bilateral and spot LNG to fulfil their demand. The average cost for this procurement was Rs. 4.30/unit.

.....

7.5.7 Further, replacement with new capacity is also not feasible since end consumers are going to pay higher tariff in view of following:

- New projects will have substantially higher capital cost as compared to the capital cost of these Projects. Analysis of recently commissioned projects shows capital cost ranging between Rs. 6.32 crore to Rs. 8.50 crore per MW. It is also relevant to highlight that addition of any new capacity by way of setting up new projects would have a gestation period of around 4-5 years.

7.5.8 A comparison of the average project cost of the above projects with average project cost of the Projects under consideration clearly demonstrates an increase of about 40%. Therefore, procurement of power from the new projects will entail approximately 40% higher capacity charge. Additionally, on account of the changes made in the new SBDs, there is complete pass through of fuel costs, which would result in higher variable charge and consequently result in higher tariff. Further, in

view of higher gestation period for the new projects of around 4 to 5 years, and these new projects would not be readily available to cater the demand in short term unlike the Projects under consideration.

7.6 Impact of Shutting Down of these Project on the Lenders

- *In case of Projects become stranded, the lenders are going to be affected severely:*
- *Huge public money is involved as more that 70% of the cost is funded by the lenders i.e. by public at large which will remain unpaid leading to increase in sector level credit margins and hence, increased NPAs; and*
- *Lenders have very high exposure in the power sector and closure of these Projects may trigger and increased number of NPSs in respect of other stressed thermal power projects, which would impact their profitability severely and also the overall economy of the Country.*

7.7 Impact on the State Government

- *Loss to exchequer in case of load shedding in form of electricity duty etc.;*
- *Unquantifiable impact on investment climate in the State and its Gross Domestic Product;*
- *Will adversely impact the long-term vision of the State to provide Electricity to all; and*
- *More than 11000 job losses in case of shutdown of these Projects.*

7.8 Impact on Generators

- *Projects developed with an investment of more than Rs. 50,000 crores will get stranded.*
- *Due to the issues associated with fuel cost, Developers have already lost about Rs. 24,000 crores and have no capacity left to bear further losses amounting to more than Rs. 5,000 crores per annum by these Projects. The Developers of these Projects have made losses substantially higher than the liquidated damages payable by them for termination under the respective PPAs; and*
- *EPGL has already become NPA. There is no possibility of saving the other two projects from becoming NPS's in near future with the status quo.*

7.9 Impact on Transmission System

- *Since these Projects cater to the base load requirement and are located near the load center (injection and drawl points both in Western Region), it has been*

contributing to reduction of the overall transmission losses in the Country. On the contrary, replacement of injection points from remote locations, will have a negative impact on the overall transmission losses and charges.

- *In addition, severe transmission constraints may arise since load center remains Western Region and interregional capacity is also constant; and it may also require augmentation of the transmission capacity putting additional burden on end consumers.*

7.10 Other relevant Considerations

In addition to the above, the following objective aspects which have a bearing on the recommendations and its impact on the stakeholders are also considered:

- *Objective of the Electricity Act;*
- *Development of electricity industry as a whole duly safeguarding consumer and public interest and simultaneously ensuring recovery of cost of power at reasonable tariffs;*
- *Recognition by MoP in revised SBDs that issues related to fuel and unprecedented increase cannot be borne by the generators.*
- *Resolution to help all stakeholders rather than being bound by technicalities;*
- *Resolution is limited to the fuel cost/energy charge – no increase in the capacity charge;*
- *Should not result in profiteering to Generators – restricted to actual cost;*
- *Any resolution plan to be approved by concerned Regulatory Commission; and*
- *Usage of imported coal plant in existing projects versus hinterland projects.*

7.11 Broad Conclusions

7.11.1 In light of the above, it can be concluded that shutting down of these Projects will have severe ramifications on all the stakeholders, including the consumers. Further, the almost unanimous consensus, including from most of the consumer representative groups that made oral and written presentations, is that these projects need to be salvaged and with reasonable efforts, be allowed to rehabilitated and continue operations. The consequences of the alternative option of allowing these projects to shut down and be scrapped, has very significant adverse financial and economic consequences. All the stakeholders, including consumers, will be severely impacted and consequences will range from unavailability of power to an unaffordable increase in tariffs. It is also widely recognized, including by the Procurers and consumer representative that these

Projects are highly efficient as most of the units are designed on supercritical technology and therefore, are cost and environmentally beneficial. Further, an analysis of the operational parameters affirms that these Projects offer at least a 18.5% saving in coal utilization, compared to the other existing State generating plants that are of older vintage.

7.11.2 Additionally, with regard to the way forward, the common suggestions of the Stakeholders are – (i) Providing increase in variable charge; (ii) Offer increased availability and tenure under the PPAs; (iii) Sharing of some burden by the lenders; (iv) Sale of untied capacity of the Projects to the Procurers; and (v) Sharing of profits generated by the captive coal mines. Needless to state, the solutions have to be within the framework and principles established by the Supreme Court in the Energy Watchdog Judgement.....

22.8.29. The aforesaid report clearly shows that the HPC has considered various nuances and parameters primarily on the touchstone of consumer interest for the purpose of making recommendations on the resolution package which in essence ensures that all the stakeholders share the burden of resolution appropriately. It is also clear that the HPC has considered the importance of the Respondent 1 project for the Petitioner, lenders and also consumers at large with consideration of the price of the energy and its quantum. The committee has considered the impact of shutdown of the projects on the distribution licensees, generators, lenders, State Government, transmission system, and end consumers. The committee has also discussed hardship faced by project developers, lenders and stated about proposal for resolution of the aforesaid hardship with consideration of change in energy tariff, extension of PPA tenure, tie up free capacity, sharing of profit from Indonesian mines, sharing of lender by way of discount the debt, lender sacrifice, promoters sacrifice, sharing of burden that is stakeholders and the benefit which will arise from the above actions to the stakeholders, procurers/ consumers. The committee has also considered the options which include procurement from alternate sources. The committee has after considering the aforesaid aspects carried out analysis and made its recommendation where it is recorded that the interest of various stakeholders including consumers is protected..

22.8.30. Based on the above, the HPC has made conclusion and recommendation which are recorded in chapter 10 of the said report. The relevant portion is reproduced below:

Conclusions and recommendations

- 10.2 *On the touchstone of 'consumer interest', it can be safely concluded that these Projects need to be salvaged. Sustainable operation of these Projects is of critical importance, essentially due to the fact that these Projects are instrumental in fulfilling the increasing demand of the procurer States. Consumer interest thus lies in ensuring that reliable and relatively inexpensive power is secured in a sustainable manner to meet current and future demand projections. This in turn would also ensure that the economic growth of the procurer States is not vitiated.*
- 10.3 *In contrast, if these Projects are not salvaged, consumer interest will be adversely affected on account of various reasons, gist of which are set out below:*
- (i) the capacities from these Projects will have to be replaced from alternative sources and therefore, prices will further go up in view of the clear co-relation between demand and supply:*
 - (ii) the cost of replacement power at today's market price would be higher.*
 - (iii) setting up new projects in any event will be more expensive and will take another 4-5 years to commence supply:*
 - (iv) Increase in cost on account of procurement of power from in-efficient and old plants which would also have reliability issue:*
 - (v) resorting to load shedding on account of difficulties associated with complete replacement of power from these Projects; and*
 - (vi) any insolvency or liquidation of these Projects would hardly address the issues of power supply.*
- 10.4 *Therefore, ensuring sustainable operation of these Projects would only be possible by making them economically viable. It is however evident that the economic viability of these Projects has been severely impacted due to the promulgation of Indonesian Regulations 2010, which led to an unprecedented rise in the price of coal. This situation has further been exacerbated in view of the fact that the Generators could not pass the uncontrollable increase in the fuel prices on the Procurers under the PPAs.*
- 10.5 *In light of the findings as given by the Hon'ble Supreme Court in the Energy Watchdog Judgment, this HPC has sought to recommend solutions to mitigate the hardships being faced by the Generators only on the basis of consumer interest' which has been discussed at length in Chapter VII. This primarily entails undertaking financial and commercial re-structuring which is based on the premise that the burden of hardships will have to borne by all the stakeholders. The details of financial and commercial restructuring be followed in terms of Chapter VIII which primarily envisaged the following.*

- i) *Reduction of capacity charge on account of sacrifice by lenders.*
- ii) *Past losses to be borne by Developer and the financial resolution plan being applicable from a prospective cut-off date of 15 October 2018.*
- iii) *Option for extension of PPA tenure by another period of 10 years after the completion of the PPA tenure of 25 years.*
- iv) *Offer for tie-up of free capacity; and*
- v) *Sharing of profit from the Indonesian mines.*

10.6 *The financial and commercial resolution package that is accepted by the procurer State Government will need to be incorporated as revised contractual provisions into the PPAs and such amendments to the PPA will need to be approved by the Appropriate Commission.*

10.7 *The option recommended for amending the PPAS are discussed in detail in Chapter IX The HPC accordingly recommends the implementation of the said option. Though the steps to be taken under this option are set out in detail at Section 9.10 of this Report, is imperative to mention that as part of this option, a directive may be issued by the State Government(s) to their Discoms. The said directive would primarily state the Discoms have to ensure adequate supply of energy on the Least possible tariff and while doing so, they should consider whether the same can be achieved by facilitating and promoting the revival and rehabilitation of existing thermal capacities already installed in the State, that may have, for diverse reasons, become financially stressed and economically invisible to be operated in a sustainable basis.*

10.8 *A Draft Supplemental PPA for effecting Amendment to the PPAS*

10.8.1 *The HPC recognises that the economic, financial and commercial components of the recommendations of this PC, as set out hereinabove, may be susceptible to conducting interpretation Accordingly, to ensure effective and accurate implementation of the HPC's recommendations, the HPC has crafted a model draft of the supplemental PPA for amending the PPAs of the Projects, incorporating the rehabilitation package in detailed legal and contractual language, It is re iterated that this model Supplemental PPA incorporates the intention and detailed application of the HPC recommendations for the rehabilitation of the concerned Projects.*

10.8.2 *With the above premise, the HPC stipulates that the model draft of the supplemental PPA for amending the PPAs of the Projects, which is annexed hereto as Annexure – VI shall be taken as an integral part of this HPC report and shall be applied for interpreting the true intent, meaning and application of the detailed terms of this HPC Report.*

22.8.31. The HPC has while recommending considered the various aspects on financial commercial terms and recommended the solutions for restructuring which is based on the premise that the burden of hardship which seems during the analysis to be borne by all the stakeholders that is licensee, generator, lenders and consumers. The reduction in capacity charges by the lenders is the sacrifice of the lenders which is at the rate of 20 paise/kWh to be reduced to the extent of Normative Availability of 80%.

22.8.32. The HPC has also considered the alternative options for meeting out the requirement of power by the Petitioner during the hardships faced by the Respondent No. 1 and similarly other power projects. It was found that the cost of such power procurement from such alternative sources and considered the tariff at which it was purchased from different sources i.e. bilateral, through energy exchanges. It is observed that the Average Power Procurement Cost by the Petitioner during the December 2017 to May 2018 through bilateral transactions was at the rate of Rs. 3.80 paisa per unit while the procurement of energy through Indian Energy Exchange at the rate of Rs. 4.30 per unit and PXIL at an average rate of Rs. 3.63 per unit. The aforesaid price is quite higher than the tariff rate payable as per the discovered tariff under the competitive bidding of the Respondent No.1.

22.8.33. We also note that the HPC has also considered the prices discovered under competitive bidding process carried out during bidding process from 25.06.2015 to 26.07.2016 is also quite higher and the same is in the range of Rs. 4.2 per unit to Rs. 5.06 per unit as reflected in para 7.5.2 of the report.

22.8.34. The HPC has also considered that the project cost to set up the power plant is increased substantially than the existing power projects whose assets are stressed. The Committee has analysed the cost of different power projects set up having the cost in the range of Rs. 6.20 Cr. per MW to Rs. 8.50 Cr. per MW which is substantially higher. Moreover, the gestation period of new plant would be about 4 to 5 years. Thus, it proves that the replacement of existing projects of the Respondent No.1 and

similarly situated power projects who are considered by HPC are having substantial lower cost with consideration of reduced capacity charges payable by the Petitioner and also the plant is in running condition.

22.8.35. We also note that the HPC has considered that the projects under consideration of the committee are having lower energy charge and fall in merit order for scheduling and they are contributing approximately 45% of requirement of the Petitioner. The average variable cost is Rs. 1.74 per unit which consists of the energy charge/variable charge of Rs. 1.99 per unit of the Respondent no.1 plant. The aforesaid energy charges are quite lower in comparison to overall energy charge/variable charge which works out to Rs. 2.59 per kWh. It is also analysed by the HPC that if the proposed amendment is permitted by way of allowing the energy charges with consideration of different technical parameters and coal price, the power projects of the Respondent no.1 will qualify in merit order despatch due to lower rate of energy charges and the benefit of it available to the Petitioner and the consumers. If the project is not salvaged in that situation the alternate source required to be identified by way of short-term, medium-term or long-term power procurement which have its own merit as well as demerit. So far as short term power procurement is concerned, the same is uncertain about the quantity as well as price. As far as long term power procurement in the prevailing conditions is concerned it seems that the cost is higher than the proposed amendment. Further, it requires 4 to 5 years gestation period for setting up the power projects. In such situation, the proposed amendment seems to be in interest of the licensee as well as consumers.

22.8.36. We note that the recommendations of HPC are considered by the Govt. of Gujarat and based on it the Govt. has after deliberation passed Resolution in GR No. CGP-12-2018-166-K dated 01.12.2018 as Policy Directive for revival and rehabilitation and stressed imported coal based power project in consumer interest. The relevant portion of the said projects are reproduced below:

“.....Thereafter, the government deliberated on all recommendations of the HPC in detail against the background of the existing and emerging power scenarios in Gujarat:

- *Gujarat has a share of 4805 MW from these three projects in question, which contribute around 45% of its total energy requirement. Having the highest share of power from these projects Gujarat is the most affected State. The State grid is already facing low voltage issues in the Saurashtra and Kutch areas and the discontinuation of supply from these projects located in Kutch area would have further adverse ramifications on the quality of power and the power supply position.*
- *These projects are based on advanced technology, are efficient in operation and have a higher priority in the Merit Order scheduling.*
- *In case these projects were shut down, replacing such huge capacity with alternate sources from market would not be feasible as the short term market prices are not only much higher and volatile, the availability of power is uncertain.*
- *In the recent Case I, long term bids invited by other States like Andhra Pradesh, Uttar Pradesh, Telangana etc. the tariff was discovered in range of Rs. 3.94-6.31/unit.*
- *In the recent bids invited by M/s PTC on medium term basis, the rate of Rs.4.24/unit was discovered at the Generator bus bar which works out to Rs.4.75/unit at the Gujarat periphery.*
- *Since the State had surplus power due to sustained availability of power from these projects, the State did not plan new capacity addition except at Wanakbori 8 (800 MW). Further, this surplus capacity also includes Gas based stations of 3300 MW for which gas at economical rate is available only to operate 300 MW. Operating these gas based projects on costlier Re-gasified Liquefied Natural Gas has significantly higher generation cost and would further increase the Fuel Surcharge on consumers.*
- *Establishing new imported/indigenous coal based power plants would have significantly higher fixed and variable costs and the gestation period would be about 5 years and hence, would not offer any solution to immediate power requirement.*
- *To meet the generation loss due to non-availability of power from these projects, Gujarat Urja Vikas Nigam Ltd. (GUVNL) has purchased substantial quantum of power at an average rate of Rs.4.66/unit during FY 2018-19 (up to October) from power exchanges and under bilateral arrangement. New projects are not expected to get commissioned in the near future and hence the rate at the power exchange would remain higher. Had GUVNL not purchased such quantum of power, it would have led to the undesirable situation of load shedding in the State.*

- *The thermal power projects across the country with long-term linkages are already facing critical coal stock situation in addition to issues related to availability of adequate infrastructure for transportation of coal through railways and high freight cost. Therefore, optimum utilization of generation capacity of these plants, based on imported coal, located in the coastal areas, merits consideration.*

It is pertinent to note that the HPC's recommendations are premised on serving the consumer interest and the HPC while undertaking the analysis and making the recommendations in the Report has the 'consumer interest' paramount and this has been the focal point of the approach of the HPC.

The government took note of the conclusions drawn by the HPC and concurs therewith in essence:

"10.2 On the touchstone of 'consumer interest', it can be safely concluded that these projects need to be salvaged. Sustainable operation of these projects is of critical importance, essentially due to the fact that these projects are instrumental in fulfilling the increasing demand of the procurer states. Consumer interest thus lies in ensuring that reliable and relatively inexpensive power is secured in a sustainable manner to meet current and future demand projections. This in turn would also ensure that the economic growth of the procurer states is not vitiated.

10.3 In contrast, if these projects are not salvaged, consumer interest will be adversely affected on account of various reasons, gist of which are set out below:

- (i) The capacities from these projects will have to be replaced from alternative sources and therefore, prices will further go up in view of the clear co-relation between demand and supply;*
- (ii) The cost of replacement power at today's market price would be higher;*
- (iii) Setting up new projects in any event will be more expensive and will take another 4-5 years to commence supply;*
- (iv) Increase in cost on account of procurement of power from inefficient and old plants which would also have reliability issue,*
- (v) Resorting to load shedding on account of difficulties associated with complete replacement of power from these projects; and*
- (vi) Any insolvency or liquidation of these projects would hardly address the issues of power supply. "*

In view of the above, the matter in respect of taking decisions for accepting the recommendations of the HPC, fully or partially and subsequent changes/ modifications/ amendments to the PPA(s) was under active consideration of the Government.

22.8.37. We note that the HPC has analyzed the issues with consideration of different aspects. The committee has relied on the finding given by the working group committee constituted by the Government for the aforesaid issues involved. The committee has recommended that there are two options available for resolving the issue emerged in the three projects ;

(1) to follow the procedure specified in the insolvency route by approaching National Company Law Tribunal.

(2) Acquisition of the project by the Government and amendment in PPA.

The amendment in the PPA may be after change in ownership or without change in ownership. The working group committee has recommended that it is preferable to avoid the procedure of approaching NCLT by following IBC procedure. As the change in ownership may also not workout to run the project unless the energy charges are revised, as it affects the working of the project. The alternative route is also not viable as the price of energy available in the market is quite higher than the tariff anticipated from this project. Moreover, the cost of the new project is also higher. The energy cost of the project is quite low and qualified for the merit order. Therefore, the recommendation of the working group is that the commercial solution should be arrived to resolve the issues faced by the generator/project developers by way of amendment in the PPA. The cost benefit analysis of the project has been carried out by the working group and it was found that in case of shut down of the project the procurer i.e. the Petitioner has to incur much higher cost to purchase electricity from other sources to replace the power available from the shut-down projects. Thus, the working group which was constituted by the Ministry of Power has analyzed the aforesaid issue and it is not in favor of following the NCLT route. The aforesaid recommendation has been considered by the HPC and thereafter it has been concluded that revival of the project is beneficial for all the stakeholders and the Government has considered the same and accordingly issued policy GR dated 01.12.2018.

22.8.38. We note that the procedure to be followed for IBC and NCLT may lead to hamper the operation of the plant. It may also affect the availability of power, its quantum, and the price at which the same is available. Any delay in the aforesaid proceeding will also affect the Petitioner/Procurer to procure the power from the market at higher rate than the tariff discovered under the PPA or the proposed amendment in the present petition for revival of the Project. As a consequence of the same the consumers may also be affected. Therefore, merely stating that the IBC procedure through NCLT should be followed is not the solution in the present case. Therefore, the policy decision taken by the Government of Gujarat by its GR dated 01.12.2018 for salvaging the projects by way of amendments in the PPA is equitable solution. Para 5.7.6 of the HPC report also state that the lenders of the projects are also not willing to follow IBC procedures on multiple reasons and avoid the stressed assets to become NPA and desire to resolve the issue through amending the PPA.

22.8.39. The various Judgements as referred above relied upon by the Petitioner not to interfere in the policy decision of Government of Gujarat, which are in larger public interest with consideration of economic aspects seems legal and valid.

22.8.40. Considering the above, we are of the view that the decision taken by the Government of Gujarat vide GR dated 01.12.2018 is in the public interest which include the lenders, generators, procurer, licensee and consumer at large and any objections on this issue are hereby rejected. Further, as discussed above, it is binding to the Petitioner (GUVNL) to follow the policy guidelines as per above G.R. and hence, it has filed the present petition for approval of the Commission. The policy G.R. is not binding upon the Commission in discharge of its functions but the Commission upon receipt of the said Petition from GUVNL has the powers to deal with it in accordance with the law, Electricity Act, and applicable regulations thereof.

22.9. **Issue No. 9**

Whether it is not mandatory for the petitioner to allow those bidders, who had participated in the bidding process of Bid No. 3 of 03/LTPP/2006 for giving an equal treatment?

22.9.1. We are of the opinion that the objection raised is misconceived. This is not a re-bidding where the original bid has been scrapped. There is no re-tender process after bidding involved in the present matter. There is no cancellation and re-invitation of tenders. The present matter is with regard to amendment to the PPA on recommendation of HPC and direction by GoG through Policy GR dated 01.03.2019. Once the PPA has been signed on selection of the Respondent No. 1, the other bidders have no privity of contract. No objection has even been raised by the bidders who participated in the CBP u/s. 63.

22.9.2. While exercising judicial review in the matter of government contracts, the primary concern of the court is to see whether there is any infirmity in the decision-making process or whether it is vitiated by mala fides, unreasonableness or arbitrariness. It cannot be said that there are any mala fides or want of bona fides in the decision to amend the PPA. There is allegation proven or otherwise, that amendment to PPA is exercised for any collateral purpose.

In State of Jharkhand v. CWE-SOMA Consortium, (2016) 14 SCC 172, it was held thus:-

“22. The Government must have freedom of contract. In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. [Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd., (2005) 6 SCC 138] , SCC in para 12 this Court held as under: (SCC p. 147)”

“12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala

fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the Report, SCC para 94.)”

22.9.3. There is no incidence of cancellation of the tender and floating of a fresh tender.

22.9.4. In light thereof, the objection raised has no merit and is accordingly rejected.

22.10. **Issue No.10**

Whether the Government of Gujarat, lenders of the respondent no.1 M/s Essar Power Ltd. and Distribution Licensees are not essential and necessary party to the present petition?

22.10.1. UUWA submitted before the Commission that Government and lenders who were part of the HPC recommendation proceeding should be essential and necessary party to this matter. Before considering this objection, let us deliberate on CPC provisions first and examine this aspect. As per Order 1- Rule 10, a necessary party is one without whom no order can be made effective and a proper/essential party is one in whose absence, an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. The addition of parties is generally not a question of initial jurisdiction of the court but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case. A necessary party is a person who ought to have joined as a party and in whose absence no effective decree could be passed at all by the court. If a necessary party is not impleaded, the suit itself is liable to be dismissed. A proper party is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff.

22.10.2. Now in the present matter, we are dealing with a PPA wherein the licensee is having an agreement with power supplier to fix a revised price and get Commission's approval under section 86(1) (b). Let us see section 86 (1) (b):

Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: ----(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State.

22.10.3. Prior to approval of the Power Procurement of the distribution licensee, the petition for the approval of the PPA signed by the distribution licensee with the generators/ supplier of the energy is admitted by the Commission and notices are issued to the respective Generator with whom the Agreement is to be made. Since this proceeding determines price of power purchase, the consumer tariff is also affected. Accordingly, a public notice is issued in accordance with Commission's Conduct of Business Regulations and the Commission carries out public hearing.. The Commission issued notices to all objectors who sent their objection to the public notice published in the newspapers including the Government of Gujarat (Energy and Petrochemical Power Department). It is the job of Power seller or project developer to deal with lenders and lenders role is not so important in the proceedings of the commission. Finance by the lenders to the project developers is an independent exercise than the power procurement by the distribution licensee. We do not find any merit in the objector's suggestion that lender is also a necessary party without whom we cannot pass an order in accordance with the provisions of the Electricity Act 2003 .. The Commission carries out its functions within the framework of its regulations and provision of Electricity Act. Our function is to see if any agreement executed by the distribution licensee affects the consumer's tariff, then views of general public/consumers is taken and we give our decision thereafter to balance the interest of power supplier and purchaser keeping in view the interest of consumers. The above exercise is done in the present case by the Commission too. Accordingly, we do not find any merit in making Lender a

necessary and a proper party in the case. Moreover, no lender to the project of the Respondent No. 1 has raised this objection of impleading it as a party respondent neither has any lender filed any intervention application.

22.10.4. Further, Lenders were part of the discussion with GOI in its meeting held by MoP on 20.06.2017 and were part of the working group formed for resolution of the issue. The lead lender SBI was appointed as convener and the group suggested to Gol on 17.01.2018 to form HPC by the Govt. of Gujarat for resolution of the issue. Thus lenders were part of the process of resolving this issue and their views were considered at all stages.

22.10.5. In light of the above discussion, we are of the view that Government of Gujarat has taken a policy decision through a package deal to rehabilitate the imported coal based stressed power projects located in the State in the larger public interest. The Government in its policy direction to its Distribution company also required them to approach the Commission for its approval. Now, the Commission's role is to see that the Amendments in the Power Purchase Agreement are in accordance with law, and also protects the interest of all stakeholders including the interest of consumers.

22.11. **Other Issues**

22.11.1. **Right of waiver without infringing any public right**

Respondent No. 3 Prayas has submitted that amendment to the PPA must be construed as a waiver to the effect that GUVNL relinquished or waived its right of opposing revision to the quoted tariffs.

In the present matter, amendments to the PPA dated 26.02.2007 are being carried out with the consent of both the procurer and suppliers who had signed the agreement earlier. Article 18.1 of the PPA recognizes that parties can amend the said PPA if they are mutually agreed with the approval of the appropriate Commission. The Petitioner relying on Sections 61, 62 and 63 submitted that the proposed amendment in the supplemental PPA dated 01.03.2019 is in the interest of the consumers, generating company as well as the distribution licensees. The Commission has the power to approve such amendments in the PPAs in the larger

public interest even in cases of adoption of tariff by the Commission arrived at under the bidding process in accordance with guidelines issued by the Ministry of Power, Government of India. The Petitioner relied on the decision of Central Commission and some of the State Commissions who have approved amendments to the PPAs executed between procurer and supplier under competitive bidding process carried out under Section 63 in pursuance to policy decision of Union Ministry of Coal while implementing the SHAKTI (Scheme for Harnessing and Allocation of Koyala (coal) Transparently in India) Scheme. The Petitioner has submitted that the present case is for implementation of economic policy of the Govt. of Gujarat and not a policy directive to the Commission under Section 107 or 108 of the Act. The Petitioner has also relied on the Order dated 29.10.2018 in Miscellaneous Application Nos. 2705-2706 of 2018 in Civil Appeal No. 5399-5400 of 2016 and submitted that all questions regarding the jurisdiction and power of the Commission to approve the amendments in the PPA has been clarified by the Hon'ble Supreme Court.

The law of waiver as has been laid down by the Hon'ble Appellate Tribunal following the law laid down by the Hon'ble Supreme Court and has been followed in the recent decision dated 2nd December, 2014 in Appeal Nos.4, 5, 6, 7, 8 and 66 of 2014 in M/s Salasar Steel & Power Ltd. vs. Chhattisgarh State Power Trading Company Limited, and Anr., and batch. As held by the Hon'ble Appellate Tribunal in view of the aforesaid judgments of the Supreme Court, whenever waiver is pleaded, it is for the party claiming a waiver to establish that an agreement waiving the right in consideration of some compromise came into being. However, in the present case the Objectors have not established that GUVNL had voluntarily surrendered their rights with a mutual consent. The mere fact that the quoted tariffs are to be revised cannot be construed to be a waiver.

Without prejudice to the foregoing even if there is a waiver in the form of an amendment to the power purchase agreement the same is in the public interest noting the fact that the power plant of the respondent No. 1 has been shut for more than one year as recorded in the report of the high power committee. And during this time no power was being scheduled from the said power plant to the petitioner. If this continues then it will not only be detrimental to the public but will also jeopardise the

interest of the consumers in the state of Gujarat. In view of the above, no question arises on the part of the Commission to consider the issue of waiver on the part of GUVNL.

22.11.2. Pendency of appeal in regard to the GUVNL versus Adani power

The objectors have also argued that before the appellate tribunal for electricity the amendment of the power purchase agreement approved by the Central Commission in the case of the GUVNL vs Adani Power is pending and hence this Commission should not have entertained the present petition during the pendency of the said matter. This contention once again is entirely misconceived in view of the settled position of law that mere pendency of an appeal does not act as a stay. Accordingly, all connected contentions that the present petition has been admitted in contravention of the Conduct of Business regulations of this Commission is completely devoid of any merit and hence rejected.

22.11.3. The requirement of notice to the consumers

The objectors have relied on the requirement on giving notice prior to amendment of the power purchase agreement. We do not find any substance in this argument because the consumer representatives have been duly given all opportunities as possible in the in the proceedings before this Commission.

22.11.4. Objections on the constitution of the high power committee

The objectors have raised arguments against the constitution of the high power committee as well as the extent of the powers that could be exercised by such a committee. We are of the opinion that the report of the high power committee is a material which this Commission could consider while deciding the matter relating to amendment of the power purchase agreement. It is not for this Commission to exercise its jurisdiction over the constitution of such a committee. Insofar as the arguments made against the government resolution, we are once again of the

opinion that it is not for us to decide the legality or validity of the resolution passed by the government based on its examination of the high power committee. We are of the view that these are materials before us which we have taken into consideration while exercising our powers for approving the amendment to the power purchase agreement in accordance with the statutory provisions under the electricity act 2003.

Analysis and Decision

23. In light of the findings on each of the above issues, we are of the view that the matter requires to be examined on merit. Therefore, we have examined the Petition, subsequent filings by the Petitioners and Objectors and gone into the proceedings during the hearing. Further, we have examined the Supplemental PPA dated 01.03.2019 keeping in view the original PPA dated 26.02.2007, HPC recommendations; Government Resolution; and requirement of law and public policy.

23.1. We have examined the clauses/articles of the supplemental PPA for which specific objections have been raised by the Respondent consumer groups. These Articles of the SPPA are important in nature and have a bearing on the Consumer's tariff. We have also examined the articles of the SPPA dated 01.03.2019 and its further addendums dated 23.01.2020 & 01.04.2020.

23.2. Effective date of implementation of Supplemental PPA

Now we deal with the issue pertaining to effective date of the SPPA which as per the recommendation of HPC is 15 October 2018. Further, the Government of Gujarat has notified Resolution Dated 01.12.2018 in terms whereof the effective date is as under:

“It is decided to accept the recommendation of the HPC about the effective date of implementation as 15.10.2018.”

From the above it is clear that the effective date of the supplemental PPA as proposed and agreed upon is 15.10.2018. The Petitioner and the respondent No. 1 also agreed in the PPA that the amendment effective date of the PPA in Article 3.1 (ii) as under;

“Amendment Effective Date” shall be October 15, 2018, i.e. the date with effect from which, this Supplemental Agreement shall become effective and binding upon the Parties.

- 23.3. Further, the Petitioner vide its submission dated 19.12.2019 has submitted that since the Respondent No.1 has already supplied power generated using domestically procured imported coal and assured that it will not claim energy charge as per the supplemental PPA for the power supply during the period up to 19.08.2019 but as per the PPA dated 26.02.2007 and further to reimburse the GST compensation cess and IGST on the domestically procured imported coal as per Order of the Hon'ble Commission in Petition No. 1680 of 2017. The Respondent No.1 vide letter dated 19.08.2019 has conveyed that power will be generated using direct imported coal with effect from 20.08.2019 and has intimated the anticipated energy charge for merit order purpose with effect from 20.08.2019. Copies of the letters has been submitted.
- 23.4. In view of the above, the Petitioner has further submitted that though the effective date of Supplemental PPA shall remain 15.10.2018, the revised energy charge shall be payable as per supplemental PPA only from 20.08.2019, i.e. the date as informed and as agreed by the Respondent No.1. The Petitioner has submitted above to the Commission and allow the dates accordingly.
- 23.5. As per the recommendation of the HPC, which were accepted by the Government the losses prior to supplemental PPA required to be borne by the generator which in the present case is EPGL. The effective date is crucial and critical in the present case with regard to implementation of the rehabilitation scheme proposed by the HPC and Resolution by Government of Gujarat. Accordingly, the “Amendment Effective Date” shall be October 15, 2018, i.e. the date with effect from which, this Supplemental Agreement shall become effective and binding upon the Parties.
- 23.6. As per the submission of the Petitioner in above paras for payment of energy charge for coal directly imported from Indonesia by the Respondent No.1, it has conveyed that since the PPA is based on the Indonesian coal, power will be generated using

direct imported coal with effect from 20.08.2019 only. In view of the above, we allow that the revised energy charges shall be payable as per supplemental PPA only from 20.08.2019 or from the date the coal is directly procured from Indonesia, whichever is later. Prior to this rates of energy charges shall be as per the PPA dated 26.02.2007 and any other payment approved as per change in law by this Commission. For all other purposes, the effective date of the supplemental PPA shall be 15.10.2018.

23.7. **Rebate in Capacity Charge**

Now we deal with the issue with regards 20 paise/kWh in capacity charge raised by the Respondent consumer groups where they have raised the issues on rebate on capacity charge. It is necessary to refer to the rebate in capacity charge stated in clause 3.2.2 of the PPA below:

“Capacity Charge for each Month shall be the Quoted Capacity Charge (sum of quoted non escalable capacity charge and quoted escalable capacity charge) mentioned at Schedule 10 of PPA dated 26.02.2007 less 20 paise/kWh applicable up to Normative Availability of 80%. The Monthly Capacity Charge payment shall be made in accordance with Schedule 6 of the PPA dated 26.02.2007. This Capacity Charge shall be subject to reduction towards penalty for declaration of Availability lower than 90% as per Clause No. 3.2.5 of this Supplemental Agreement in addition to the contract year penalty for Availability below 75% as per PPA dated 26.02.2007.”

We note that in para 10.5 of the Report of the HPC it is recorded that the primary object of the exercise entails undertaking financial and commercial restructuring which is based on the premise that the burden of hardships will have to be borne by all the stakeholders. It is recorded that the lenders have to sacrifice by way of reduction in capacity charge as a part of financial commercial restructuring. The Government of Gujarat has in its GR dated 01.12.2018 decided that on account of the sacrifice by the lenders, the fixed cost @ 20 paise/kWh is to be reduced to the extent of normative availability of 80%. Since this provision relating to rebate has been agreed to between the Petitioner and Respondent No. 1 and shall pass on to the consumers and reduce the burden of additional energy charges, the Commission does not have any objection to the same.

23.8. Normative Availability of Plant

The objectors have also raised the issue pertaining to availability of the plant as well as incentive payable/receivable as a part of supplemental PPA stating that increase in normative plant availability from 80% to 90% in all respect must be effected so as to reduce the quoted capacity charges by spreading it over higher availability and thereby reduced per unit capacity charges. It is also stated that higher availability should be applicable for all purposes specified in the PPA i.e. for recovery of capacity charges as well as for determination of incentives and disincentives. The Petitioner has submitted that issue of increase of normative availability has been dealt by the HPC and the same is incorporated in the supplemental PPA. It is necessary to refer to clause 3.2.5 which pertains to availability is reproduced below:

“Availability: The Parties agree that the payment of Capacity Charges linked to Availability shall be modified, as specified below, in order to provide the Procurer, the benefit of higher Availability up to 90%, beyond the Normative Availability of 80% as specified in the PPA, without Procurer having to pay Capacity Charge for such higher Availability. The Parties agree that the Seller shall maximize the utilization of the generation capacity from the Project, in the manner specified below:

(a) The Seller shall declare availability up to 90% in a Contract Year. However, the Capacity Charge shall continue to be paid corresponding to Normative Availability of 80%, as specified in the PPA on achievement of cumulative Availability of 80% in a Contract Year. Further, in the event the cumulative Availability in any Contract Year is less than 80%, then the provisions of the PPA shall apply in respect of determination of the Capacity Charge payable to the Seller in addition to the reduction specified in sub clause (b) below.

(b) In the event the cumulative Availability in any Contract Year is less than 90%, the Capacity Charge payable to the Seller, shall be reduced by 10% of Capacity

Charges otherwise payable to the Seller. This is explained by way of illustration below:

Illustration for computing additional penalty below 90% Availability declaration:

Particular	Actual DC 82%	Actual DC 76%
PPA Capacity	1,000 MW	1,000 MW
Normative Availability	80%	80%
Capacity Charges	1.00 Rs/kWh	1.00 Rs/kWh
Normative Units	7008 Mus	7008 Mus
Actual Availability	82%	76%
Actual Units	7183 Mus	6658 Mus
Shortfall in availability compared to revised 90%	8% (701 MUs)	14% (1226 MUs)
Penalty for shortfall in 90% (10% of Capacity Charges)	Rs 0.10 / kWh (1 Rs x 10%)	Rs 0.10 / kWh (1 Rs x 10%)
Penalty Amount	Rs 7.01 crore	Rs 12.26 crore
Yearly Capacity Charges	Rs 700.8crore (7008 MUs x 1 Rs)	Rs 665.8 crore (6658 MUs x 1 Rs)
Less: Penalty	Rs. 7.01 Crore	Rs. 12.26 Crore
Net of Penalty Payment	Rs. 693.79 Crore	Rs. 653.54 Crore

For avoidance of doubt, it is clarified that for all other purposes including passing on of the discount of 20 paise/kwh, the Normative Availability shall continue to be 80%, as specified in the PPA. It is further clarified that for the purposes of determining the Incentives under the PPA on account of Schedule being higher than Normative Availability, the Normative Availability shall continue to be reckoned at 80% as per existing PPA. Conversely, provisions relating to penalty for lower Availability below Minimum Off take Guarantee for relevant period shall also continue to apply in accordance with the provisions of existing PPA.

With reference to the query of Prayas, GUVNL in its affidavit dated 02.01.2019 has explained the working of penalty in respect of Bid-02 PPA at the actual availability of 88% and 70%.

The aforesaid provisions provide that the generator would be giving the benefit of higher availability to the procurer as the procurer would not have to pay capacity charges for availability beyond the normative availability of 80%. Moreover, the provisions of the subsisting PPA would continue to apply with regard to determining both incentives and penalty. The mandate of the rehabilitation package which is to ensure that the generators do not incur further losses. The capacity charges are already being reduced by 20 paise per kWh, the normative availability has been kept at 80% only while ensuring that cheaper power, beyond the availability of 80% becomes available to the procurers. Further, no incentive is being given to the generator up to the availability of 85% as per Bid 03 PPA dated 26.02.2007.

We note that the proposed amendment provides for reduction of capacity charges by 20 paise/kWh. The payment of capacity charge is associated with an achievement of 80% of target availability. The availability if increased from 80% to 90% in that case no liability for additional capacity charge would arise. However, if the cumulative availability during the year is less than 90% in that case the generator would be required to pay penalty as per the provisions of the PPA at the rate of 10% of the capacity charge over and above the penalty provisions in the PPA dated 26.02.2007. The scheme seeks to balance the interest of consumer's vis-a-vis the Project Developer as the Petitioner gets availability above 80% and up to 90% without having to pay additional capacity charge for such higher availability whereas in case of availability being lower than 90%, the Project Developer is required to pay the penalty at the rate of 10% of the capacity charge. We are of the considered view that normative plant availability at 80% as decided in the GR of 01.12.2018 and incorporated in the Supplemental PPAs, being part of the complete rehabilitation package through commercial and financial restructuring of the power project of the Respondent No.1, is reasonable and is in consumer interest as well. Accordingly, we do not have any objection to this provision. We also note that the amended PPA provides that incentive for availability in excess of 85% and provisions for penalty

below 75% are in accordance with the PPA dated 26.02.2007. On the incentive, we are of the opinion that since Respondent no.1 is to schedule at 90% availability as per SPPA, therefore the incentive shall be allowed for the availability above 90% instead 85% as mentioned in the PPA dated 26.02.2007.

23.9. **Energy Charge**

The energy charge agreed between the parties stated in supplemental PPA as clause 3.2.3 is one of the most important clauses of the supplemental PPA, which have effect on generator, procurer and on the consumers. The same is reproduced below:

3.2.3 *Energy Charge shall be determined for each Month, as under:
(Energy Charge Rate in Rs./kWh) X {Scheduled energy (ex-bus) for the Month in kWh}*

Energy Charge Rate (ECR) in Rupees per kWh on ex-power plant basis shall be determined to four decimal places in accordance with the following formulae:

$$ECR = \{GHR \times LPPF / CVPF\} \times 100 / (100 - AUX)$$

Where:

AUX = Lower of actual or normative auxiliary energy consumption as specified in the Tariff Regulations as defined i.e. 6.50%.

CVPF (as received basis) = Weighted Average Gross calorific value of coal in Kcal/Kg on as billed basis minus lower of (i) actual difference between GCV at loading port and unloading port or (ii) 72 Kcal/Kg towards loss of heat during transportation as per ISO 1928 (dated 1.6.2009)

ECR = Energy Charge Rate, in Rupees per kWh sent out.

GHR = Lower of actual or Gross station heat rate of 2333 in kCal per kWh as specified in the Tariff Regulations as defined herein.

LPPF = Weighted average landed price at the plant site of coal as primary fuel (which for the avoidance of doubt shall include all taxes on the sale, transportation & import of coal and inland transportation costs for transporting and delivering coal to the plant site), in Rupees per kg, during the relevant Month, LPPF shall be worked out as per table in Clause 3.2.4 of this Supplemental Agreement.

The operational parameters viz. "AUX" and "GHR" considered for computation of energy charge rate shall be aligned as per CERC approval in Petition No. 374/MP/2018.

The Energy Charge determined under Article 3.2.3 of the Supplemental PPAs are subject to such conditions as general principles of landed price of coal at the plant site (LPPF), specific conditions for LPPF, methodology for merit order scheduling and billing, and pass through of mining profits by the Project Developer.

In the formula for calculation of energy charge, Gross Station Heat Rate (GSHR) of 2333 kCal/kWh or actual whichever is lower has been considered. As regards Aux. Consumption @ 6.5% or actual whichever is lower has been considered.

The consumer groups have submitted that the SHR and Aux Consumption considered are on the higher side and should be as considered in the bid or as per the tariff regulations as applicable at present or actual whichever is lower.

The Petitioner has submitted that the PPA being under Case I, only capacity charges and energy charges are quoted and it is not based on net SHR. The Supplemental PPAs provide for SHR and auxiliary consumption to be the lower of the actual or normative parameters as provided in the Tariff Regulations of the Commission. As such, the Petitioner has taken due care to ensure that the lowest possible normative parameters are considered so as to protect consumers interest. The Petitioner has submitted that the approach of the consumer groups by singling out different aspects of a complete package and questioning the same in isolation is impermissible.

From the provisions of SHR and Aux Consumption in Supplemental PPA, we observe that lower of the actual and the normative SHR has been proposed with reference to the actual and normative Aux Consumption as specified in the CERC Tariff Regulations, 2009 for purposes of determination of energy charge rate. In the absence of any data, the Supplemental PPAs introduced this formulation for calculation of energy charge by taking lower of the actual or normative GHR and lower of the actual or normative Aux Consumption as per the CERC Tariff Regulations, 2009, since energy charge is being made a pass through. In any event, the procurer is adequately protected by capping the GSHR as actual or 2333 kCal/kWh to the normative GSHR contained in the CERC Tariff

Regulations, 2009, whichever is lower. Similarly, in case of auxiliary consumption the same is 6.50% or actual, whichever is lower.

As far as GHR is concerned, we cannot ignore the Original agreement and what we decided earlier on the same subject. The issue of GHR has already been settled by the Commission vide its order dated 03.08.2015 in Petition No.1296 wherein the Commission, based on the detailed technical analysis has fixed GHR as 2262 Kcal/Kwh. Accordingly, GHR shall be as follows: -

GHR = Lower of actual or Gross station heat rate of 2262 in kCal per kWh

The petitioner shall accordingly amend article 3.2.3.

- 23.10. We note that as per the original bid documents it is the duty of the generator/seller to tie up for fuel supply on long term basis and get it approved. The consumer organisations have vehemently submitted that the fuel supply agreement must be submitted to the Commission with the Petition by the Petitioner and the consumer who are burdened of such coal supply must be given an opportunity to comment on it. We note that the energy charge is dependent on the quantity, quality of the coal, its price, period for supply of such coal etc. by the fuel suppliers. Hence, it is essential that the seller shall tie up the fuel supply with supplier for a long term/medium term basis to assure the availability of coal, its quantum, quality and price so that as the fuel cost is now pass through, the competitiveness of such fuel supply must be ensured prior to start of the sale by the seller/generator. We also note that it is agreed between the parties that the procurement be carried out by the seller/generator following competitive bidding process with the approval of tender documents from the procurer and also approve the rate from the procurer.
- 23.11. We note that the energy charge which are dependent on the quality of coal, its price and technical parameters of plant like, SHR, Auxiliary consumption etc. and the cost of such energy charge be borne by the consumers of the State as any cost on energy charge is passed through the from the distribution licensee to the end consumers. It is the duty of the Commission to ensure that the price of the energy charge must be reasonable and competitive and therefore it is essential to ensure that the quality of

coal and price at which it is procured by the generator must be transparent and competitive.

23.12. We therefore, decide and direct the Respondent No.1 and the Petitioner that the procurement of coal be carried out by the Respondent No.1 by following international competitive bidding process. We also decide that such procurement of coal also be carried out on long term/medium term basis i.e. for the period of PPA to ensure the availability of coal, its price, and also to ensure that the declaration of availability of the plant by the Respondent No.1 must be based on the actual coal availability and its price. We also decide that as agreed between the parties the Respondent No. 1 shall require to get the approval of tender documents from the procurer. Moreover, the price which is discovered under competitive bidding process shall also be got approved from the procurer as well as from the Commission. In absence of the above, the procurement of coal shall not qualify for energy charges payable under the supplemental PPA.

23.13. **General Principles for determination of LPPF**

Now, we deal with the issue pertaining to Energy Charge payable by the procurer based on the imported coal for Petitioner plant. We note that in the Supplemental PPA, the energy charge stated are dependent on the condition of LPPF. LPPF consists of FoB cost of coal and transportation and other costs. Relevant provisions are extracted as under:

FOB Cost of Coal	<p><u>FOB Price for Imported Coal:</u> Shall be the lower of actual price or the HBA Price (as defined hereinafter) determined in Indian Rupees at Exchange Rate. In case of change in pricing framework in Indonesia or change in source of coal to other country, HBA Price will be replaced with relevant coal indices as mutually agreed.</p> <p>—HBA Index shall mean the FOB Price of Indonesian imported coal having 6322 kcal/kg Gross Calorific Value in USD/ MT notified by Government of Indonesia on monthly basis.</p> <p>—HBA Price shall mean the HBA Index FOB price of Indonesian imported coal published by Government of Indonesia from time to time for coal quality of 6322 Kcal/Kg, as adjusted for GCV (as billed) of coal consignment consumed in the Project as per the formula as stated in Annexure-A. Further, tolerance of maximum 10% over HBA price derived for a quality of coal shall be allowed. HBA price + maximum 10% tolerance</p>
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	<p>shall not be higher than HBA coal price worked out on proportionate basis with reference to HBA Index. This tolerance of 10% of HBA price shall not be allowed for coal procured from mines owned by Seller/ its Affiliates.</p> <p>The actual FOB price of coal shall always be subject to an upper ceiling limit of HBA Index of USD 110/MT for 6322 Kcal/Kg ascertained on a monthly basis, adjusted for quality of coal (GCV as billed) in the Project and as revised from time to time in accordance with this Supplemental Agreement (the —Ceiling Price). This has been explained in greater detail in sub para (II) Specific Conditions herein below.</p> <p>Illustrations: For determination of equivalent Coal Price for working out Landed Cost of imported coal for the Month: The lower of following for the month shall be considered:</p> <ul style="list-style-type: none"> (a) Actual FOB price of consignment (b) HBA Price worked as per formula for billed GCV plus maximum 10% tolerance on HBA Price (10% tolerance not allowed for coal procured from mines owned by Seller/ its Affiliate) (c) HBA Price worked out on proportionate basis with reference with HBA Index for 6322 GCV coal <p>Note: HBA Price for billed GCV shall be worked out (on proportionate basis and as per formula) considering ceiling of HBA Index of USD 110/MT or as revised as per sub para (II) Specific Conditions of this Supplemental Agreement.</p>
Transportation and other costs	<p><u>Ocean Freight & Insurance</u></p> <p>The Ocean Freight and Insurance shall be lower of actual or as stated in Annexure- B and calculated in Indian Rupees, at Exchange Rate(Column (c) & (d) in Table I& II respectively of Annexure – B).</p> <p><u>Port/ Fuel Handling Charges:</u> The Port/ Fuel Handling Charges shall be lower of actual or as stated in Annexure – B (Column (e) & (f) in Table I)</p> <p><u>Transit Losses:</u> Actual or 0.2%, whichever is lower</p> <p><u>Other Charges (Sampling, Inspection, Customs clearance and Forwarding Agency Charge):</u> Actual or 3% of CIF, whichever is lower- Seller to tie up services (Sampling, Inspection, Customs clearance and Forwarding Agency Charge) through competitive bidding with approval of tender documents from Procurer & seek approval of discovered rate from Procurer.</p>

- 23.14. The aforesaid provisions state with regard to price of imported coal on FOB price for month be derived by comparison of (i) actual FOB price of the consignment; (ii) HBA price worked out as per formula for billed GCV plus maximum 10% tolerance on HBA price and (iii) HBA Price worked out on proportionate basis with reference to HBA Index for 6322 GCV coal considering ceiling of HBA Index of USD 110/MT or specific conditions at sub-para (II) and determined in Indian Rupees at Exchange rate. It is also provided that if there is change in pricing framework in Indonesia or change in source of coal to other country HBA price will be replaced with relevant coal indices as mutually agreed between the parties. In this regard we also agree that the Petitioner should be careful and agree upon the best or lower of indices available in the country of origin from where coal is being imported.
- 23.15. The consumer organisations have opposed tolerance of 10% over and above HBA price indices for a derived GCV of the coal stating that it is not justified since the relief is essential for coal procured from Indonesia and not from other country. Therefore, such relief is not valid and permissible. The HPC report does not have any provision for tolerance limit. It is also submitted that to minimize the burden on the consumers the ceiling should be computed as per HBA formula only and no 10% mark-up be allowed.
- 23.16. In reply to aforesaid submission initially Petitioner stated that the tolerance of 10% over HBA price derived with consideration of GCV of the coal and adjustment on account of moisture, ash and Sulphur. The trade of coal is taking place with premium over HBA indices duly adjusted for quality of coal, moisture, Ash and Sulphur. The HBA price as per the supplemental PPA shall always be equal to or less than HBA price worked out on proportionate basis with reference to GCV. Since the procurer is involved at every stage of procurement of imported coal through tendering process, the apprehension of the consumer group is without any basis and does not deserve consideration. However, on 01.04.2020, the petitioner has proposed to the Commission by filing a mutually agreed Addendum to SPPA that 10% tolerance will now be removed. In this regard petitioner has submitted second addendum to third supplemental agreement dated 01.04.2020 wherein it has explained the following:
- a) Actual FOB price of Consignment*

(b) HBA Price worked out as per the Formula stated in Ann-A of SPPPA dated 01.03.2019 for billed GCV.

(c) HBA price worked out on proportionate basis with reference to HBA index for 6322 GCV Coal.

- 23.17. It is necessary to see that the supplemental PPA signed between the parties must be in accordance with the Government of Gujarat G.R. dated 01.12.2018. We, therefore, decide to compare the provisions of the recommendations of the High Power Committee with Government G.R and the provisions made in the supplemental PPA.
- 23.18. From this exercise it seems that the provisions with regard to 10% tolerance made in the supplemental PPA with regard to FOB price for imported coal is not in consonance with either HPC Recommendation or Government of Gujarat GR No. CGP-12-2018-166-K dated 01.12.2018. Subsequently, the Petitioner filed an affidavit to the Commission on 01/04/2020 that upon analysing the market trend of the Indonesian coal price and the index as published by leading international price reporting agencies they have observed that coal price as per market trend consistently remain around or lower than the HBA derived price (HPB Price) for the quality of coal worked out for each month since October 2018 onward. Under these circumstances both the parties have decided to amend the provision related to FOB price in Article 3.2.4 (i) of Supplemental PPA and remove the provision related to allowing tolerance of up to 10% above HBA index derived as provided in the Supplemental PPA effective from 15.10.2018 so as to ensure that no additional burden towards coal is put on the consumers of the State. The Commission appreciates the initiative taken by the petitioner in order to protect the interest of the consumers and therefore we also decide the earlier additions of tolerance of 10% above HBA index in the supplemental PPA dated 01.03.2019 as not permissible on the ground that they are neither part of HPC report nor part of the Govt. GR and also not in interest of the public, Accordingly, we approve the second addendum dated 01.04.2020 agreed between the Petitioner and the Respondent No. 1 modifying the supplemental PPA without tolerance of 10% on HBA index.

- 23.19. Now we deal with the issue pertaining to energy charge which is also linked with various parameters like auxiliary consumption, SHR/GHR, weighted average landed price of coal at plant, weighted average gross calorific value in Kcal/Kg, FOB price of imported coal, transportation and other cost including ocean freight and insurance, port/fuel handling charge, transit losses, specific condition etc. It is covered in Article 3.2.3 and 3.2.4 of the supplemental PPA dated 01.03.2019. It is also necessary to refer the HPC recommendation for the aforesaid provisions prior to allowing the above parameters. Further, the supplemental PPA executed between the Petitioner and the Respondent No.1 is based on the Government of Gujarat resolution No. CGP-12-2018-166-K dated 01.12.2018 as policy directives for revival and rehabilitation of stressed imported coal based power projects in the consumer interest. It consists of various provisions with regards to the pricing of coal linked with ceiling of HBA index of 110 \$ per MT for 6322 Kcal/kg. It is also provided that if the price of the coal increases, the payment will be capped at 110 \$ per MT and generator shall bear the differential cost to continue the supply of power. It is also provided that the ceiling price be reviewed every five years as per HPC recommendations.
- 23.20. The consumer organisations have also raised the issue with regards to ocean freight and Port/Fuel Handling which has been considered as per lower of actuals or rates at Annexure B of Supplemental PPAs and there has been no consideration of the parameters assumed by the Project Developer. Moreover, it is also contended that there is no rationale for additional other charges i.e. sampling, inspection etc. which are part of port/fuel handling charges.
- 23.21. In response to above, the Petitioner contended that tariff quoted by the Respondent No.1 did not have the breakup of Ocean Freight and Port Handling Charges in the PPA dated 26.02.2007. Therefore, while FOB is linked to the benchmark index, the other components Ocean Freight and Port Handling Charges are benchmarked to CGPL tariff which was finalized by PFC after negotiations at the time of Bidding. It is further contended that the consumer interest has been protected on the aforesaid parameters in the Supplemental PPA with regards to the Ocean Freight payable.

23.22. We have considered the submissions of parties. The consumer groups have objected with regards to sampling, inspection charges etc. which are part of fuel handling charges. The aforesaid parameters are earlier included in the quoted tariff and were based on the assumptions of the project developer which was never disclosed. However, in the supplemental PPA the specific provisions are afresh made by incorporating following clauses:

Other Charges (Sampling, Inspection, Customs Clearance and Forwarding Agency Charge):

Actual or 3% of CIF, whichever is lower- Seller to tie up services (Sampling, Inspection, Customs clearance and Forwarding Agency Charge) through competitive bidding with approval of tender documents from Procurer & seek approval of discovered rate from Procurer.

23.23. We note that certain provisions made in the supplemental PPA are neither part of the HPC report nor it is a part of the Government G.R. dated 01.12.2018. Moreover, there is addition of provisions which lead to the generator asking higher charges of energy on the ground of higher cost of the coal price paid by it which is linked with HBA index suggested by the HPC.

23.24. We also note that the provisions made in the HPC report with regards to transportation and other cost is concerned, it is stated that the same is as specified in the PPA or actual whichever is lower. Further, in case of Adani Power Limited the specific formula and methodology is provided for Ocean freight and escalation formula as well as port handling charge. There is no provision made with regards to transit loss stating as actual or 0.2% whichever is lower. The aforesaid provisions are not provided in the resolutions of Government of Gujarat dated 01.12.2018. Thus, it is in addition to the provisions made in the HPC report read with the Government G.R. dated 01.12.2018. We are of the view that aforesaid additions made by the Petitioner as well as the Respondent which has no approval of the Government of Gujarat vide its policy directives nor it is as per the recommendation of the HPC. Similarly, HPC recommendation does not allow other charges. Hence, we decide the aforesaid provision stated in the supplemental PPA dated 01.03.2019 are neither permissible nor allowed. Accordingly, transportation and fuel handling charges shall be permitted

as per the PPA dated 26.02.2007 which act as a ceiling and beyond which no other charges shall be allowed. The petitioner's approach as explained in Table-B of the SPPA is also permissible as it is done scientifically after conducting competitive bidding of CGPL by the Petitioner in order to further control the cost.

- 23.25. Accordingly, the Ocean Freight and Insurance shall be lower of actual or as stated in Annexure- B and calculated in Indian Rupees, at Exchange Rate (Column (c) & (d) in Table I & II respectively of Annexure – B) and Port/ Fuel Handling Charges shall be lower of actual or as stated in Annexure – B (Column (e) & (f) in Table I). However, the Commission is not allowing transit loss and other charges as part of SPPA as explained above. Petitioner is required to amend SPPA accordingly.
- 23.26. Now we deal with the issue with regard to the linkage of imported coal price with HBA price index, published by FOB price of Indonesian coal from time to time for coal quality of 6322 Kcal/kg. As adjusted for actual quality of coal consumed in the project, we note that the GCV of coal considered by the Commission on the submissions of the Respondent No.1 on the affidavit in various Petition before the Commission i.e. Petition No. 1389 of 2014 and Petition No. 1296 of 2013 where the Respondent No.1 himself agreed and submitted on the affidavit the GCV of coal utilized in the project is designed parameters of 5500 Kcal/Kg. Thus, it is admitted by the Respondent No.1 that the coal utilized in the plant is having GCV of 5500 Kcal/Kg. Hence, the FOB price of imported coal considered in HPC report as well as the Government of Gujarat G.R. dated 01.12.2018 with consideration of GCV of coal 6322 Kcal/kg price as per HBA index.
- 23.27. The ceiling price of the coal linked with HBA Index considered by the HPC and the Government of Gujarat in GR dated 01.12.2018. The said price is decided by the HPC with consideration of the prevailing coal price during the period March 2009 to January 2017. From the analysis part of the HPC it seems that the price of the international coal was quite lower in comparison to price of Australian as well as South African coal. Moreover, the price increase took place from Sep 2010 and reached highest in the December 2010 or January 2011. Thereafter it seems that the price was gradually reduced up to June 2016 and thereafter the same was increased during

Sep to Dec 2016 and thereafter it was reduced from the prevailing price during Dec 2016 in March 2017 as well as June 2017. The data from the HBA index available from March 2016 to March 2020 is also relevant for consideration by the Commission prior to allow the ceiling price of the coal linkage considered by HPC and made in its recommendation. The HBA index is also to be reviewed every 5 years and the effect of the same may be given by the parties as per the methodology provided in the HPC report as well as in the Government GR dated 01.12.2018.

23.28. We are of the view that prior to allowing the coal price linkage with HBA price with a ceiling to 110 dollars per MT, it is necessary for the Commission to validate the trend of HBA price index of the coal of 6322 Kcal per Kg during the period from March 2015 to March 2020 (5 years) or March 2016 to March 2020 (4 years) or March 2017 to March 2020 (3 years). The details obtained by the Commission were examined. We are of the view that the upper cap of HBA index of USD 110/MT can be relooked into as per the present global market. As per the records available with the Commission imported coal - HBA index varies in year 2020 from 65.93 to 67.08 USD/MT while last year in 2019, the average HBA was 66.30/MT only. Similarly, in year 2018 the average rate was USD 92.51/MT. If we consider last 6 years average from 2012 to 2017 it was USD 76.47/MT. Therefore, keeping in view the reasonable energy cost as comparable with efficient thermal plants in Gujarat, the Commission approves the upper cap of HBA index to USD 90/MT. This is also confirmed by the petitioner vide its affidavit dated 01/04/2020 that upon analysing the market trend of the Indonesian coal price and the index as published by leading international price reporting agencies they have observed that coal price as per market trend consistently remain around or lower than the HBA derived price (HPB Price) for the quality of coal worked out for each month since October 2018 onward. The revision of cap is also necessary in view of highly volatile foreign exchange in the present global market.

23.29. It is also to be seen that this plant at efficient price should come within the merit order so as to give reasonably priced electricity in the State. Since it is a higher capacity plant its operation will also facilitate the system operator in time of variability of Renewable generation. As decided in the G.R, the Commission is also open to review

this ceiling as and when market conditions are not favorable and there is a need to procure power to maintain 24 x7 supply to consumers of the State. Similarly, procurer shall also use a cautious approach at time when FE is not favorable in respect of coal prices. Accordingly, the Petitioner is directed to modify 3.2.4 para (1) to the extent as stated above i.e. cap of USD 90/MT.

23.30. **Specific Conditions with regard to Energy Charge**

The specific conditions for computation of FOB price of coal in the Supplemental PPAs are as under :

(II) *Specific Conditions*

(a) The Ceiling Price for HBA Index will be fixed for 5 years at a time, with the first 5 year period commencing from the Amendment Effective Date and the last such 5 year period ending on the Expiry Date even if the last period is less than 5 years. The Ceiling Price will be reset and recalibrated for the next five year period, as per the following methodology:

(i) If the HBA Price at any time during the relevant 5 year period, exceeds the Ceiling Price specified for the said relevant 5 year period, then the Ceiling Price for the subsequent 5 year period will be increased by a percentage factor equivalent to the percentage increase in domestic CIL coal price (FOR) for linkage coal (Average price of G-7 to G-14 grade of coal used for power generation), during the corresponding 5 year period. The principle is that the imported coal Ceiling Price should move in tandem with domestic coal price increase.

(ii) If the HBA Price does not at any time during the relevant 5 year period, exceed the Ceiling Price specified for the said relevant 5 year period, however, if the average HBA Price during the relevant five year period is higher than the average HBA Price during the immediately preceding five year period, the Ceiling Price for the relevant 5 year period shall be increased by a percentage factor equivalent to the lower of:

.....
(x) the percentage increase in domestic CIL coal price (FOR) for linkage coal (Average price of G-7 to G-14 grade of coal used for power generation), during the 5 year period corresponding with the relevant 5 year period; or

(y) escalation in the HBA Index over the relevant 5 year period

For the avoidance of doubt, for the first 5 year period commencing from the Amendment Effective Date, the aforesaid comparison of average HBA Price shall be done for the immediately preceding five year period prior to the Amendment Effective Date. If during the relevant 5 year period, none of the conditions specified in paragraphs (i) to (ii) above are attracted, then the Ceiling Price for the subsequent 5 year period shall remain unchanged.

(b) Seller agrees that in case HBA Index of Indonesian coal exceeds 110 USD/MT or Revised Ceiling Price as determined every 5 years, Seller shall bear the differential cost and continue to supply power under the PPA & Supplemental Agreement.

(c) Seller shall procure imported coal only through competitive bidding process after seeking approval of Procurer for Tender document and shall also seek approval of rate discovered from Procurer.

23.31. The consumer organisations have raised the issue that the ceiling price of imported coal be linked with the domestic coal price. It is further submitted that during last five years from October 2013 to September 2018, the increase in domestic price is around 35%. The reset of ceiling price in aforesaid situation works out to about \$ 160 approximately which is absolutely excessive. It seems there is no logic and justifications for keeping such provisions for allowing reset of ceiling price. Further, domestic coal prices in India are deregulated and do not reflect international coal prices and thus, have no direct connection with prices of imported coal. The Commission should not allow any resetting of ceiling price for at least 10 years from the date of Supplementary PPA becoming effective. If any formula required to consider for resetting of coal price the same may be after 10-year period, with consideration of realistic data.

23.32. The Commission has allowed the upper ceiling of HBA index at USD 90/MT. As regard to specific conditions mentioned above, the Commission is not inclined to go into the merit at this stage and shall review the same as and when the Petitioner shall approach the Commission to amend the ceiling. The petitioner shall take Commission's prior approval for changing any tariff or its index. The Commission shall

take a final view in deciding ceiling values whenever review of HBA index is filed before it.

23.33. ***Foreign Exchange Rate Variation***

In the Supplemental PPAs, it has been mentioned that the FOB Price for Imported Coal shall be the lower of actual price or the HBA Price determined in Indian Rupees at Exchange Rate. Accordingly, Foreign Exchange Rate Variation has been factored in the energy charge as part of the package deal between the Petitioner and the Respondent No.1.

23.34. The consumer organisations have contended that as per Clause 4.3 of the competitive bidding guidelines issued by the Ministry of Power, Government of India under Section 63 of the Act provides that exchange rate fluctuation is to be on account of the seller/generator. It is further submitted that as per para 20 of the Judgment of Hon'ble Supreme Court in case of Energy Watchdog Vs. CERC and others held that guidelines vis-à-vis the power of the Commission in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation in that case the Commission has general regulatory power under Section 79 (1) (b) of the Act. Therefore, it is not permissible to allow any amendment to the PPA contrary to term specified in the statutory guidelines. The consumer organisation in support of aforesaid submission also relied on the decision of Hon'ble Supreme Court in Case (i) Numaligarh Refinery Ltd. Vs Daelim Industrial Co. Ltd. [(2007)8 SCC] and (ii) Alopi Prasad Vs Union of India [AIR 1960 SC 588]. Based on above, the Respondents have submitted that the Foreign Exchange Rate Variation cannot be a ground for granting any relief.

23.35. Further, it is also contended by the consumer organisations that Hon'ble High Courts in Commissioner of Income Tax Vs Priyanka Gems [(2014) 367 ITR 575 (Guj) at para 32] and Cairn UK Holdings Limited Vs Director of Income Tax [(2013) 359 ITR 268 (Delhi) at Para 29 have also dealt with the importance of prudence in hedging the foreign exchange risks.

23.36. It is also contended that any foreign exchange rate variation allowed to the project developer in the supplemental PPA has the implication of allowing increase in tariff is not legal and is liable to be rejected as being contrary to law. In support of the same they relied on the judgments in case of (i) India Thermal Power Ltd. Vs State of MP [(2000) 3 SCC 379], (ii) Adani Power Ltd. Vs Gujarat Electricity Regulatory Commission [(2016) 15 SCC 665] and (iii) BSS Projects (P) Ltd. Vs Government of India [2011 SCC Online AP 826].

23.37. We have considered the submissions as noted above. The consumer organisations have relied on Clause 4.3 of the Competitive bidding guidelines which is relevant in this case is reproduced below:

“Tariffs shall be designated in Indian Rupees only. Foreign exchange risks, if any, shall be borne by the supplier. Transmission charges in all cases shall be borne by the procurer.

Provided that the foreign exchange rate variation would be permitted in the payment of energy charges [in the manner stipulated in para 4.11(iii)] if the procurer mandates use of imported fuel for coastal power station in case-2.

Provided further that the foreign exchange rate variation would also be permitted in the payment of energy charges [stipulated in para 4.11 (iii)] if the bidder chooses to supply power using domestic gas or RLNG or both or imported coal for long term procurement under Case-1”

23.38. Further para 4.11(iii) is also being reproduced:

In cases where the procurer mandates use of imported fuel for use in a coastal power station in case-2 procurement query or where the bidder chooses to supply from a power station using imported fuel under case-1, the bids may be invited for base energy charge for the first year to be escalated as per the indices identified in the RFP.

Such energy charge would have following three components: (a) Imported fuel component in US Dollars/unit. (b) Transportation of fuel component in US Dollars/unit. (c) Inland fuel handling component in Indian Rupees/unit Para 4.11(iii):

23.39. As per aforesaid clause any exchange rate fluctuation on account of energy charges is permissible. Even the PPA dated 26.02.2007 also provides for Energy rate in USD/Kwh. In the supplemental PPA, FERV is defined as Exchange Rate in the supplemental PPA.

The Exchange Rate is used in the calculation of landed price of primary fuel (LPPF) which is the imported Indonesian coal in the present context. Therefore, the Exchange Rate is used in the context of determination of LPPF. In this connection, it is relevant to refer to paragraph 8.4.4 of the HPC report, which clearly states as under:

..... the fuel cost will be made fully pass through on landed cost basis and these Projects will not have any margin/loss on account of fuel prices.

Further, in the GR dated 01.12.2018, Resolution (ii) clearly states as under:

.....it is decided that the tariff will be adjusted considering actual fuel cost based on the superior of actual parameters or normative parameters as per the Regulation of the Appropriate Commission subject to ceiling of HBA Index of 110 USD/MT for 6322 Kcal/Kg coal on monthly basis.

- 23.40. We note that in the present case, which is filed by the Petitioner based on the policy directives of the Government of Gujarat vide GR dated 01.12.2018 where it was directed to sign the supplemental agreement between the Petitioner and the Respondent No. 1 as rehabilitation of the stressed assets of the three projects. In the said matter the HPC had after considering the interest of lenders, project developers, licensees, and consumers directed to sign the supplemental PPA with consideration of various recommendation which include the exchange rate to be incorporated as a part of the rehabilitation scheme. The Government of Gujarat has also considered the recommendation of HPC to incorporate the exchange rate as part of supplemental PPA. The objective of the rehabilitation package is to ensure that the fuel cost of imported coal is a pass through and that the generators are reimbursed the actual landed cost paid by them and nothing more or less than such actual landed cost. The Exchange Rate is required to be used for calculation of such actual landed cost of Indonesian imported coal to ensure that no margin/loss accrues to the generators. The Government of Gujarat policy GR dated 01.12.2018 makes it clear that while the procurers are assuming the risk on fuel cost, such pass through is not unfettered, as the fuel cost pass through is subject to a cap. Certain residual risk remains with the generators in case the actual fuel price exceeds the prescribed cap. To enforce this obligation, the Exchange Rate has been used to ensure that the procurer does not

pay higher than the actual landed cost of fuel and the generators are reimbursed the actual cost they incur subject to the cap on procurement of fuel.

23.41. We also note that the formula specified in clause 3.2.4 of the supplemental PPA stated that FOB price for imported coal will be the lower of actual price or HBA price determined in Indian Rupees at Exchange Rate. Since the reimbursement of LPPF is to be made by the procurer in Indian Rupees at actual and on landed cost, it is logical that foreign currency charges are converted into Indian Rupees. We also note that it was decided that imported coal price will be reimbursed in Indian Rupee and that is on actual basis. The seller/generator does not make any margin or loss on account of fuel price. The conversion/exchange rate is provided for converting the currency from foreign to Indian Rupees.

23.42. The inclusion of exchange rate will bring the clarity, predictability and also helpful to avoid the possible future disputes with regards to the fuel price payable to the generator in Indian rupees. On the aforesaid ground we are of the view that the contention of the consumer groups is not sustainable and therefore the same is rejected.

23.43. Once it is accepted that the fuel price of imported coal will be paid to the generators on actual basis, in such case the generator does not make any margin or loss on account of fuel price. It is also provided that the price of the coal will have to be paid in Indian rupees, hence the apprehension of the consumer groups is not sustainable and the same is rejected.

23.44. **Untied Capacity offered to the Procurer**

Now we deal with the issue raised by the objectors with regards to untied capacity offered to the procurer by the generator. Whether it is in the interest of the consumers or not. The objectors have contended that it is against the interest of the consumers. The objectors have contended that the additional capacity offered by the generator should be at the same terms and conditions as with the tied up capacity of 1000 MW. Moreover, it is also necessary to evaluate in terms of the overall requirement of power by the Petitioner with consideration of the demand of such power. It is necessary to

take holistic view while carrying out the rehabilitation plan for the Petitioner power project with consideration of public interest at large.

23.45. The Respondent No.1 submitted that the market rate for the power are quite higher than the rates considered in the HPC report. The Respondent is forgoing its right to sell the excess capacity of power at higher rate in the market. The procurement of power at the rates decided in the HPC report for additional capacity is beneficial to the Petitioner GUVNL for 100 MW.

23.46. It is necessary to refer Article 3.4 of the supplemental PPA which state about 100 MW capacity of the plant which is untied and shall be offered to the procurer for the same period of the approval of the supplemental PPA for the period up to 25th year of the COD of Unit No. 2.

The energy charge payable for additional untied up capacity in accordance with clause 3.5.3 of the supplemental PPA i.e. equivalent to energy charge applicable to tied up capacity of 1000 MW with the Petitioner. Further, we note that the capacity charge for additional capacity shall not be payable beyond the limit prescribed as per supplemental PPA.

23.47. We also note that HPC has dealt the issue in para 7.4.7 of its report whic states that the cost of procurement of power from the entire power project get scheduled with consideration of the price of the energy. Moreover, it is also competitive. The aforesaid report also says that the representation of the consumers as well as procurer were considered by the HPC. We, therefore, decide that the additional capacity tied up by the Petitioner as per Article 3.4 of the PPA do not require any change except the provision as already decided in Article 3.2.3 and 3.2.4. Hence, the contentions of the consumer organisation are rejected.

23.48. **Extension of the term of the PPAs**

The consumer organisations have submitted that the terms of the PPA should be extended up to 40 years and tariff for the same period be extended on the basis of either the same capacity charges as on the last year of the 25th year of the PPA dated

26.02.2007 or on the basis of R&M, capital expenditure service during the extended period with O&M expenses, interest on working capital etc. is applicable as per tariff Regulations of the Commission. Further incentive and penalty are linked with target availability of 90%.

- 23.49. Per contra, the Petitioner submitted that the recommendation of the HPC stated that the PPA tenure may be extended by 10 years. The first right of refusal is with the Petitioner/Procurer. It is also stated that so far as capacity charge for the extended period is concerned the same may be as per the last year capacity charges. The additional R&M expenses shall be allowed to the extent of requirement for the plant and also subject to approval of the Commission.
- 23.50. We have considered the submissions made by the parties. As the issue is pertaining to extension of terms of the PPA which is stated in the Article 3.5 of the supplemental PPA, it needs to refer the same and the same is reproduced below:

3.5 Extension of Term of the PPA

3.5.1 The Procurer shall have the right, but not the obligation, to extend the Term of the PPA by ten (10) years for the Contracted Capacity ("Extension Period"), such extension to be effected by issue of a notice by the Procurer to the Seller, stating its decision to extend the PPA for the Contracted Capacity for such period of ten years, and such notice shall be issued not later than five (5) years prior to the Expiry Date of the PPA. For the avoidance of doubt, any extension for a period other than 10 years, as above, shall be with the mutual consent of the Parties.

3.5.2 The Parties agree that the extension of the PPA as aforesaid, shall be on the same terms and conditions as contained in the PPA, subject to the following conditions in relation to the Extension Period

*3.5.3 For the Extension Period, the Tariff shall be determined as follows:
"Extended Term Tariff" shall mean the sum total of Energy Charge & Capacity Charge as worked out for the Extended Term*

Where:

"Capacity Charge for Extended Term" shall mean the Quoted Capacity Charge as specified in the PPA, as applicable for the last Contract Year (falling prior to the Expiry Date). Furthermore, such Quoted Capacity Charge applicable for the last Contract Year as above, shall be increased to factor for additional

costs, if any, incurred or to be incurred by the Seller for renovation and modernization of the Project, and also for the consequential increase in O&M expenses. Such increase in Quoted Capacity Charge shall be determined & approved by Appropriate Commission in accordance with the applicable CERC (Terms and Conditions of Tariff) Regulations prevailing then; and

"Energy Charge for Extended Term" shall be determined for each Month of the Extension Period, as under:

Energy Charge payable to the Seller for a Month shall be:

(Energy charge rate in Rs.lkWh) x {Scheduled energy (ex-bus) for the Month in kWh.}

Energy charge rate (ECR) in Rupees per kWh on ex-power plant basis shall be determined to four decimal places in accordance with the following formulae:

$$ECR = \{GHR \times LPPF / CVPF\} \times 100 / (100 - AUX)$$

Where:

AUX = Lower of actual or normative auxiliary energy consumption of 9% as specified in the Tariff Regulations as defined herein.

CVPF (as received basis) = Weighted Average Gross calorific value of coal in Kcal / Kg on as billed basis minus lower of (i) actual difference between GCV at loading port and unloading port or (ii) 72 Kcal / Kg towards loss of heat during transportation as per ISO 1928 (dated 01.06.2009)

ECR = Energy charge rate, in Rupees per kWh sent out.

GHR = Lower of actual or Gross station heat rate of 2340 in kCal per kWh as specified in the Tariff Regulations as defined herein.

LPPF = Weighted average landed price at the plant site of coal as primary fuel (which for the avoidance of doubt shall include all taxes on the sale, transportation & import of coal and inland transportation costs for transporting and delivering coal to the plant site), in Rupees per kg, during the relevant Month. LPPF shall be worked out as per table in Clause 3.2.4 of this Supplemental Agreement.

For the avoidance of doubt, the Capacity Charge for Extended Term shall not be subject to adjustment towards Rs. 0.20 / Kwh and Energy Charge for Extended Term shall not have discount for pass through of the Mining Profits as specified in Clause 3.3 of this Supplemental Agreement.

- 3.6 *Notwithstanding anything to the contrary contained in the PPA, it is agreed between Parties that in the 10th Contract Year from the date of signing of this Supplemental Agreement, if Seller's Energy Charges for respective Contracted Capacity under this Supplemental Agreement is higher than marginal coal based thermal power stations having 50% schedule or immediate below, as the case may be, during the previous Contract Year under Merit Order of Procurer, Procurer shall have a right to terminate the PPA & Supplemental Agreement for the Contracted Capacity and / or Additional Contracted Capacity as defined above. In the event of termination pursuant to this clause, neither Party shall be liable for any damages or penalty of any kind to the other Party.*
- 3.7 *It is clarified that the provisions dealing with Change in Law under the PPA dated 26.02.2007 shall continue to apply including in respect of Additional Contracted Capacity. The impact of additional expenditure to be incurred towards compliance of the Ministry of Environment, Forest & Climate Change Notification dated 7.12.2015 are not included in the tariff as per this Supplemental Agreement and any impact thereof on tariff and operational parameters shall be considered pursuant to approval of Appropriate Commission.*

23.51. As per the aforesaid provisions the first right is provided to the Procurer/Petitioner to take the benefit of extended PPA for period of 10 years for the contracted capacity. It is not obligatory on part of the procurer to extend the PPA for 10 years. It is also provided that procurer shall require to issue a notice not later than 5 years prior to expiry of the PPA, with the mutual consent of the parties. The capacity charges payable for the extension period shall be the capacity charge of the 25th year of the PPA dated 26.02.2007 plus R&M cost which shall be required to get approved from the Commission. Thus, the R&M cost if any incurred is required to be approved by the Commission after following transparent process and in fair manner. As the procurer has first right of refusal for extension, we did not find any infirmity in the proposed amendment. As regards the extension proposed by the consumer organisation for the period up to 40 years is concerned, we are of the view that such provision is already provided in Article 3.5.1 where it is stated that the PPA may be extended beyond 10 years with mutual consent of the parties and approval of the commission. Thus, the extension provided in the PPA for 40 years, where from 25th to 35th year is at the discretion of the Procurer/Petitioner and from 36th year to 40th year, it shall be with the mutual consent of the parties. The aforesaid provisions provide flexibility to the parties to reassess and reevaluate the situation prevailing at

the relevant time. Considering the above, we are of the view that the objections raised by the consumer organisation are not sustainable and the same are rejected. However, the Petitioner shall amend the provision in SPPA as already decided at Article 3.2.3 and 3.2.4.

23.52. **Change in law**

It is also necessary to refer Article 3.2.4 (III), (vi), where both the Petitioner and the Respondent agreed that the seller shall not be entitled to any payment towards change in law for the energy charge from the date of approval of supplemental PPA by the appropriate Commission. Moreover, any payment received by the seller (Respondent No.1) towards approved change in law for the energy charge component for the period between amendment effective date and the date of approval by the appropriate Commission shall be adjusted in the differential amount. However, the Petitioner vide additional submission dated 27.12.2019 submitted that power will be generated using direct imported coal with effect from 20.08.2019 and intimated that the anticipated energy charge for merit order purpose will be effective from 20.08.2019. It is further submitted that the confirmation is given by the Respondent No.1 to the Petitioner through letter dated 05.03.2019 and 24.04.2019 that, though the effective date of the Supplemental PPA shall remain 15.10.2018, the revised energy charge shall be payable as per Supplementary PPA from 20.08.2019.

In view of this submission by the Petitioner the payment of energy charges prior to 20.08.2019 shall be as per PPA dated 26.02.2007 and hence, the change in law as allowed in Order dated 23.12.2019 in Petition No 1680/2017 shall be applicable till 19.08.2019 for the payment of energy charge or till the coal is procured directly from Indonesia, whichever is later. The computation of energy charge shall be as per supplementary PPA from 20.08.2019 or from the date coal is procured directly from Indonesia, whichever is later. The supplemental PPA allows pass through of actual coal cost, hence, it covers the cost approved under change in law order dated 23.12.2019 of this Commission. Further, any change in law taking place after approval of this order, the Petitioner has to approach the Commission for its approval.

23.53. **Rebate**

Now we deal with the issue of rebate in respect of the Energy Charge component of Provisional Bill or Monthly Bill, as the case may be, at the request of the Respondent No.1 for the purpose, as per the provisions of the Article 11.3.6 of the PPA dated 26.02.2007 in pursuance of the Affidavit dated 16.03.2020 filed by the Respondent No.1.

- 23.54. As per aforesaid affidavit it is admitted by the Respondent No.1 that they have agreed to allow the rebate to the Petitioner on the earlier payment if any made by the Petitioner against the bill amount as per Article 11.3.6 reads as under:

“11.3.6 For payment of any Bill before Due Date, the following rebate shall be paid by the Seller to the Procurer in the following manner.

- a) *Provisional Bill will be raised by the Seller on the last working day of the Month where the Capacity Charges shall be based on the Declared Capacity for the full Month and the Energy Charges shall be based on the final implemented Scheduled Energy up to 25th day of the Month. Rebate shall be payable at the rate of two point two five percent (2.25%) of the amount (which shall be the Full amount due under the provisional Bill) credited to Seller’s account on first day of the Month and rebate amount shall reduce at the rate of zero point zero five percent (0.05%) for each day, up to fifth (5th) day of the Month.*
- b) *Applicable rate of rebate at (a) above shall be based on the date on which payment has been actually credited to the Seller's account. Any delay in transfer of money to the Seller's account, on account of public holiday, bank holiday or any other reasons shall be to the account of the procurer.*
- c) *Two percent (2%) rebate for credit to Sellers account made within one (1) Business Day of the presentation of Monthly Bill for the Month for which the Provisional Bill was raised earlier.*
- d) *For credit to Seller's account made on other days the rebate shall be as under:*

<i>Number of days before Due Date on Monthly Bill</i>	<i>Rates of Rebate applicable</i>
29	<i>Two point two five percent (2.25%)</i>
28	<i>Two point two zero percent (2.20%)</i>
27	<i>Two Point one five percent (2.15%)</i>
26	<i>Two Point one zero percent (2.10%)</i>
25	<i>Two point zero five percent (2.05%)</i>
24	<i>Two percent (2.00%)</i>

23 and each day thereafter up to the Due Date	2% less [0.033% x {24 less number of days before Due Date when the payment is made by the Procurer}]
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In case of presentation of Monthly Bill beyond the sixth (day of the Month, two percent (2%) rebate will be applicable only on the day of presentation of Monthly Bill and beyond that rebate will be applicable as per the table above.

- e) *Rebate of two point two five percent (2.25%) to two point zero five percent (2.05%) will be available only in case the Procurer credits one hundred percent (100%) of the Provisional Bill within first five (5) days of the Month to Seller's account/designated account and balance amount, if any, based on Monthly Bill (as per REA) within the Month.*
- f) *In the event only part amount of Provisional Bill is credited to Seller's account, within first five (5) days and the balance amount is credited to Sellers account during other days of the Month, rebate will be paid on such part amount at the rate of two percent (2%) plus zero point zero three three percent (0.033%) per day of the number of days earlier than the 6th day when the part amount is credited to Seller's account;*
- g) *The above rebate will be allowed only incase the Procurer credits to Seller's account the full Monthly Bill.*
- h) *No rebate shall be payable on the bills raised on account of Change in Law relating to taxes, duties and cess;*
- i) *If the Provisional Bill has not been paid by the date of receipt of the Monthly Bill then such Provisional Bill shall not be payable, provided in case the Provisional Bill has already been paid, then only the difference between the Monthly Bill and Provisional Bill shall be payable."*

23.55. As per aforesaid provisions it is agreed between the parties in the main PPA dated 26.02.2007 that for the payment of any bill before due date by the procurer to the seller the procurer is eligible for the rebate agreed between the parties. It is also agreed between the parties that the methodology for payment of the bills issued by the seller, i.e. Respondent No.1 to the Petitioner.

23.56. We note that in Article 3.2.4 (III), (v), of the supplemental PPA, it was also agreed between the parties that no rebate shall be available on energy charge component while the rebate shall be available on capacity charge to the procurer. As per

aforesaid Article it was admittedly agreed between the parties that the procurer is not eligible for any rebate as per the supplemental PPA on energy charge.

The Government of Gujarat has in para in Clause (ix) of the resolution dated 01.12.2018 resolved that no rebate shall be applicable on energy charge for the balance life in terms of the PPA. From the above, it is clear that it was agreed between the parties that no rebate on energy charge shall be receivable by the Petitioner and the Government of Gujarat in its Resolution dated 01.12.2018 resolved the same. However, Respondent No.1 vide its affidavit dated 16.03.2019 has proposed this change in the supplemental PPA to offer rebate in energy charges as well to which the petitioner reply is not filed. Hence, in the absence of any agreement between the parties on this aspect, at this stage, we are not able to accede to the said proposal.

23.57. Final Decision on the Supplemental PPA

The Commission has in the preceding paragraphs dealt with all the diverse objections, suggestions and comments from the Consumer Groups on major articles of the SPPA.

23.58. As discussed above, in the Order while addressing various issues which came during the deliberation on the subject matter, the Commission, now concludes its final decision on each provision of the SPPA executed between the Petitioner and the Respondent No.1 affecting to the power purchase cost of the Petitioner as a procurer and the same is reflected in the consumer tariff. The same are now being approved by the Commission and allow the parties to implement the same subject to the condition that changes/amendments as decided shall be incorporated by the petitioner. Accordingly, we now discuss each and every provision of the supplemental PPA as under:

Article/Clause 1&2 of the Supplemental PPA

23.59. As regards the recital of the PPA and Article 1 and 2 are concerned, they are general in nature and based on facts hence, the same are approved.

Article/Clause 3.1 of the Supplemental PPA

- 23.60. Article 3.1 state about the definitions of (i) “Affiliate”, (ii) “Amendment Effective Date”, and (iii) “Tariff Regulations” the same are approved. We find that the Affiliate is added as per the provisions of Companies Act. While the Amendment Effective Date is as per the recommendation of the High Power Committee and also as per the G.R. dated 01.12.2018 of the Government of Gujarat. The tariff regulations are the tariff regulations notified by the Commission as per the provisions of Section 61 read with 181 of the Act. Hence, the same are approved. However, the payment of energy charges prior to 20.08.2019 or from the date the coal is directly procured from Indonesia whichever is later, shall be as per PPA dated 26.02.2007 as explained at para 23.6.

Article/Clause 3.2 of the Supplemental PPA

- 23.61. Article 3.2 state about the determination of capacity charge and energy charge, substituted with the provisions made in Article 3.2.1, 3.2.2, 3.2.3, 3.2.4 and 3.2.5. Now we deal them one by one:

Article/Clause 3.2.1 of the Supplemental PPA

- 23.62. These provisions state that the Respondent No. 1 seller is entitled to receive the tariff as per revised tariff determined in accordance with the provisions of sale and supply of electricity in terms of the PPA. It consists of the definition of the revised tariff, capacity charge, energy charge, as well as exchange rate. The same are approved subject to the changes/amendment made in the methodology stated in the earlier part of this Order.

Article/Clause 3.2.2 of the Supplemental PPA

- 23.63. Article 3.2.2 state that capacity charge payable for each month shall be quoted Capacity Charges (as per the Schedule 10 of the PPA dated 26.02.2007) less 20 paisa/unit. Penalty and Availability provisions for each capacity shall be as per Article 3.2.5 of the PPA dated 01.03.2019 and PPA dated 26.02.2007 seems valid. Accordingly, the Commission allows the Petitioner’s proposal.

Article/Clause 3.2.3 of the Supplemental PPA

23.64. The aforesaid Article state about determination of energy charge for each month which is discussed in detail at para 23.9 in the order.

As already explained, the Commission is of considered view that the determination of energy charge shall be based on the Gross Station Heat Rate as lower of actual Gross Heat Rate or 2262 Kcal/kWh. Accordingly, the Petitioner and the Respondent are required to make amendment/change in the PPA and work out the energy charge for the same. Remaining provisions of 3.2.3 are approved.

The following provisions made in the aforesaid Article pertaining to energy charge receivable by Adani Power Limited whose PPA with the Petitioner was subject matter of Petition No. 372/MP/2018 is having no relevance. Hence, the same are not approved and deleted from the PPA as the energy charge of the Respondent No.1 plant are different and distinct and has no relevance.

Article/Clause 3.2.4 of the Supplemental PPA

23.65. The aforesaid Article state that the energy charge stated in earlier Articles shall be subject to the following different conditions:

1. General Principle for determination of LPPF
2. Specific conditions
3. Methodology for merit order, scheduling and billing

The Commission in earlier part of this Order have already dealt with the above clauses in detail and observed that the some of the provisions of the supplemental PPA are not in consonance with the provisions of HPC report as well as Government of Gujarat Resolutions. Accordingly, the Commission is making modifications in the aforesaid provisions.

Article/Clause 3.2.4-i of the Supplemental PPA

23.66. The Commission is allowing actual cost of coal or the HBA index whichever is lower, there is no reason to allow any further tolerance of 10%. Even HPC or GR has no intent to do the same. The Commission has gone through actual records of similar plants in Gujarat and find that there is no merit in allowing such tolerance over and above the index. Subsequently, GUVNL has also informed us vide its affidavit dated

01.04.2020 that 10% margin is now disallowed to which Respondent No. 1 has also agreed.

- 23.67. As regard the upper cap of HBA index of USD 110/MT, the Commission is of the view that this cap seems to be quite high in the present global market. As per the records available with the Commission imported coal - HBA index varies in year 2020 from 65.93 to 67 .08 USD/MT while last year in 2019, the average HBA was 66.30/MT only. Similarly, in year 2018 the average rate was USD92.51/MT. If we consider last 6 years average from 2012 to 2017 it was USD 76.47/MT. Therefore, keeping in view the reasonable energy cost comparable with efficient thermal plants in Gujarat, the Commission allow it at USD 90/MT. This is also being done in view of uncertain foreign exchange variation in the present global market. However, as decided in the G.R, the Commission is also open to review this ceiling as and when market conditions are not favorable and there is a need to procure power to maintain 24 x7 supply to consumers of the State. Accordingly, the Petitioner is directed to modify 3.2.4 para (1) to the extent as stated above i.e. cap of US 90/MT and there will be no provision for tolerance of 10%.
- 23.68. The transportation and fuel handling charges shall be permitted as per the PPA dated 26.02.2007 which act as a ceiling and beyond which no other charges shall be allowed. The Ocean Freight and Insurance shall be lower of actual or as stated in Annexure- B and calculated in Indian Rupees, at Exchange Rate (Column (c) & (d) in Table I& II respectively of Annexure – B) and Port/ Fuel Handling Charges shall be lower of actual or as stated in Annexure – B (Column (e) & (f) in Table I).
24. However, the Commission is not allowing transit loss and other charges as part of SPPA as explained at above at para 23.21 onwards. Petitioner is required to amend SPPA accordingly.

Article/Clause 3.2.4-ii of the Supplemental PPA

- 24.1. With regards to the aforesaid provision made in the supplemental PPA, the Commission decides to allow the same provision with the remark that GUVNL shall ensure that procedure of purchase of imported coal shall be absolutely transparent

and wholly competitive to get best available rates. Quarterly Report of such procurement and price should be regularly conveyed to the Commission. The Commission has no objection to review the ceiling, however it will only be applicable after taking approval of this Commission.

Article/Clause 3.2.4-iii of the Supplemental PPA

Methodology for Merit Order Scheduling and Billing

- 24.2. Aforesaid Article state about the methodology for merit order, scheduling and billing carried out for the project of the Respondent No. 1. The Seller will, on the last working day of each month, submit to the Procurer the anticipated Energy Charges for the subsequent Month. The anticipated Energy Charge will be based on the estimated cost of Indonesian imported coal procurement for subsequent Month.

We find that there is no infirmity with regards to the procedures specified in it.

Article/Clause 3.2.5 of the Supplemental PPA

Availability

- 24.3. The aforesaid Article state about the availability of plant and in the case of failure to achieve the agreed availability and the consequence thereof. Hence, we allow this provision. However, incentive shall be allowed for the availability above 90% instead 85% as mentioned in the PPA dated 26.02.2007.

Article/Clause 3.4 of the Supplemental PPA

Untied capacity offered

- 24.4. The aforesaid Article state that the seller is having 100 MW untied capacity available from both units of the generating station and agreed to tie up with the procurer by way of the aforesaid Article of the supplemental PPA. We allow this provision at same SHR and energy charges as per SPPA Article 3.2.3 and 3.2.4.

Article/Clause 3.5 of the Supplemental PPA

Extension of term of the PPA

- 24.5. We decide to approve the extension of terms of PPA stated in Article 3.5 of the PPA with regards to capacity charge stated in the said Article. So far as energy charge is concerned the same is as per earlier approved charges in Article 3.2.3 and 3.2.4 of

SPPA as per GERC and not CERC Regulations. We also decide that the parties shall obtain the approval of the same prior to start of the extended period from this Commission.

Article/Clause 3.6 of the Supplemental PPA

24.6. We allow this Article.

Article/Clause 3.7 of the Supplemental PPA

24.7. We allow this provision. However, approval of the change in law and environmental cost is to be taken separately as per the PPA dated 26.02.2007 & GERC Regulation and with the prior approval of the Commission.

24.8. The objectors have also raised the issue that GUVNL has filed a petition No. 250/MP/2019 under section 79 (1) (b) & (f) for recalling of CERC order dated 12.04.2019 granting permission to the supplemental agreement dated 05.12.2018. The similar agreement has been submitted before this Commission for grant of approval of supplemental PPA done under Government Resolution No. No: CGP-12-2018-166-K dated 01.12.18. Thus, the PPA for approval under this Petition as well as under the challenge before the CERC as recall of Order dated 12.04.2019 in aforesaid Petition are based on the same HPC report as well as the Government of Gujarat G.R. dated 01.12.2018. Therefore, the Commission is of the opinion that the outcome of CERC order in the above said matter may affect the present Petition. Therefore, the Petitioner is directed to approach this Commission after passing of order passed by CERC for review of the present order, if required so. The Commission shall consider the same and take appropriate action in accordance with law.

Article/Clause 3.8 of the Supplemental PPA

24.9. The aforesaid Article agreed between the parties by way of addendum dated 23.01.2020 to third supplemental agreement dated 1.03.2019. The said article/clause state as under:

“Clause 3.8

Seller shall bear the losses for prior period i.e. before 15.10.2018. Further, seller shall not raise any claim/dispute with regards to past period items before any Forum/Court in the future....”

- 24.10. In the said clause, it was agreed by the seller i.e. Respondent No.1 that they will bear all the losses prior to period 15.10.2018. It is also agreed by the Respondent No.1 that they shall not raise any claim/dispute with regards to past period items before any Forum/Court in future. The aforesaid provisions added as a part of supplemental PPA recognized that the seller shall forgo all its losses prior to 15.10.2018. Hence, it seems in consonance with the provisions of HPC recommendation and it will also settle down the disputes as prevailing between the parties with regards to the PPA by way of aforesaid provisions. Hence, we decide to approve the aforesaid provisions as a part of supplemental PPA dated 1.03.2019.

Article/Clause 3.9 of the Supplemental PPA

- 24.11. In the aforesaid Article it was agreed between the parties that the seller i.e. Respondent No.1 agreed to withdraw all pending cases/litigations/waive its claims against GUVNL other than change in law in India before various forum. While the cases filed by GUVNL which are under adjudication shall be considered upon the decision of the appropriate forum/court. The said Clause/Article is reproduced below:

Clause 3.9

“Seller shall unconditionally withdraw all pending cases/litigations/waive claims against GUVNL (other than Change in Law in India) before various Forums in lieu of the relief granted vide Govt. of Gujarat G.R. dated 01.12.2018 towards pass through of actual fuel cost w.e.f. 15.10.2018. Only the cases/litigations filed by GUVNL which are under adjudication shall be considered upon decision by appropriate forum/Court to extent of GUVNL’s prayer in the matter.”

- 24.12. The aforesaid provisions provide that the seller i.e. Respondent No.1 withdraws all its pending cases against the Petitioner in various legal forums/Commission, except case for Change in Law in lieu of relief granted vide Govt. of Gujarat G.R. dated 01.12.2018 towards pass through of actual fuel cost. Further, it was also agreed that pending cases filed by the GUVNL for adjudication shall be continued and GUVNL shall claim its due as per the orders of various forums.

25. In view of above observations, we decide that the present petition succeeds. We decide that the supplemental PPA signed between the parties dated 01.03.2019 be modified as per aforesaid decision of the Commission with regard to review of the coal price, ceiling price of coal, SHR, Auxiliary Consumption, incentive in excess of 90% etc. for determination of energy charge and other conditions as decided and directed by the Commission in earlier part of this Order. The Petitioner and the Respondent No.1 are directed to modify the supplemental PPA 01.03.2019 as per the aforesaid decision of the Commission and submit the modified supplemental PPA to the Commission.
- 25.1. We further decide that this approval with modifications is being granted to the proposed Supplementary PPA dated 01.03.2019 along with the Addendum no. 1 and 2 subsequently filed by the Petitioner and any change in the ownership of the Responder No. 1's Power plant shall only be done with the prior intimation of any such move and approval of the Government of Gujarat and this Commission.
- 25.2. The change in law as allowed in Order dated 23.12.2019 in Petition No 1680/2017 shall be applicable till 19.08.2019 for the payment of energy charge or till the coal is procured directly from Indonesia, whichever is later. The computation of energy charge shall be as per supplementary PPA from 20.08.2019 or from the date coal is procured directly from Indonesia, whichever is later. The supplemental PPA allows pass through of actual coal cost, hence, it covers the cost approved under change in law order dated 23.12.2019 of this Commission. Further, any change in law taking place after approval of this order, the Petitioner has to approach the Commission for its approval.
- 25.3. The Respondent No.1 shall start raising the bills as per the aforesaid decision with terms of PPAs from the date of this order. However, for the past period the Petitioner shall submit details such as , invoices raised and Energy supplied by the Respondent No.1 and recovery/Payment due as per the terms of SPPA and clarification as at para 23.6 and submit to the Commission for its approval.

26. We order accordingly.

27. With this order present petition stands disposed of.

Sd/-
(P.J. THAKKAR)
MEMBER

Sd/-
(ANAND KUMAR)
CHAIRMAN

Place: Gandhinagar

Date: 27/04/2020

Annexure-1

Policy directive for revival and rehabilitation of stressed imported coal based power projects in consumer interest.

Government of Gujarat
Resolution No.CGP-12-2018-166-K
Energy and Petrochemicals Department
Sachivalaya, Gandhinagar.
Dated the 1st December, 2018.

Read: -

- (1) Energy and Petrochemicals Department's Government Resolution of even number dated 03.07.2018.
- (2) Recommendations of the Report dated 03.10.2018 of the High Power Committee for achieving sustainable resolution of the financial stress being faced by imported coal based power projects located in the State of Gujarat and to alleviate the consequential financial burden on consumers of the procurer states of Gujarat, Haryana, Maharashtra, Punjab and Rajasthan.

Preamble:

Vide GR referred to at Sr. No. (1) above, a High Power Committee (HPC) comprising Justice Mr. R. K. Agrawal (former Justice, Hon'ble Supreme Court of India), Shri S. S. Mundra (former Deputy Governor, RBI) and Dr. Pramod Deo (former Chairman, CERC) was constituted to make recommendations with regard to resolution of the issues of the imported coal based power projects located in Gujarat, viz. Coastal Gujarat Power Ltd. (CGPL), Adani Power Ltd. (APL) and Essar Power Gujarat Ltd. (EPGL). As per the terms of reference, the HPC was expected to examine and analyze all the relevant documents related to the projects, analyze and ascertain the hardship faced by these projects as well as by the procurer States and mode and manner for mitigating the hardship faced by the projects on account of Indonesian Regulations and subsequent orders/judgments, call relevant parties for submission of details /clarification as required by the committee, contribution by each Stakeholders viz. Banks, Project Developers & Procurers by way of concessions for mitigating hardship, any other relevant issues which committee would like to discuss and study, suggest sustainable solution(s) for resolving the issue and any other measure for overall reduction in the cost of generation of power in the interest of the consumers.

The HPC submitted its report containing recommendations to the Government of Gujarat on 03.10.2018. Prior to taking the HPC's recommendations

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into consideration, as the matter of the imported coal based projects was earlier examined by Hon'ble Supreme Court of India in case of Prayas (Energy Group) vide its order dated 11.04.2017, the Government of Gujarat decided first to make a reference to Hon'ble Supreme Court to seek clarification that the judgment of Hon'ble Supreme Court in Civil Appeal Nos. 5399-5400 of 2016 does not impinge upon accepting the recommendations of the HPC and amending the PPAs suitably.

Hon'ble Supreme Court of India vide order dated 29.10.2018 decided:

"We are of the view that, having perused the High Power Committee's report, which was given after our judgment dated 11th April, 2017, it will be open to the applicants to approach the Central Electricity Regulatory Commission (C.E.R.C.) for approval of the proposed amendments to be made to the Power Purchase Agreements (PPAs) in question.

We make it clear that our judgment will not stand in the way of maintaining such applications. We also make it clear that each of the consumer groups, who had appeared before us and who have appeared before us today, will be heard on all objections that they may make to the proposed amendments to the PPA, after which, it will be open to the C.E.R.C. to decide the matter in accordance with law. Given the conclusions in the High Power Committee report, we are of the view that the C.E.R.C. should decide this matter as expeditiously as possible, and definitely within a period of eight weeks from today."

Thereafter, the government deliberated on all recommendations of the HPC in detail against the background of the existing and emerging power scenarios in Gujarat:

- Gujarat has a share of 4805 MW from these three projects in question, which contribute around 45% of its total energy requirement. Having the highest share of power from these projects Gujarat is the most affected State. The State grid is already facing low voltage issues in the Saurashtra and Kutch areas and the discontinuation of supply from these projects located in Kutch area would have further adverse ramifications on the quality of power and the power supply position.
- These projects are based on advanced technology, are efficient in operation and have a higher priority in the Merit Order scheduling.
- In case these projects were shut down, replacing such huge capacity with alternate sources from market would not be feasible as the short term market

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prices are not only much higher and volatile, the availability of power is uncertain.

- In the recent Case I, long term bids invited by other States like Andhra Pradesh, Uttar Pradesh, Telangana etc. the tariff was discovered in range of Rs. 3.94-6.31/unit.
- In the recent bids invited by M/s PTC on medium term basis, the rate of Rs.4.24/unit was discovered at the Generator bus bar which works out to Rs.4.75/unit at the Gujarat periphery.
- Since the State had surplus power due to sustained availability of power from these projects, the State did not plan new capacity addition except at Wanakbori 8 (800 MW). Further, this surplus capacity also includes Gas based stations of 3300 MW for which gas at economical rate is available only to operate 300 MW. Operating these gas based projects on costlier Regasified Liquefied Natural Gas has significantly higher generation cost and would further increase the Fuel Surcharge on consumers.
- Establishing new imported/indigenous coal based power plants would have significantly higher fixed and variable costs and the gestation period would be about 5 years and hence, would not offer any solution to immediate power requirement.
- To meet the generation loss due to non-availability of power from these projects, Gujarat Urja Vikas Nigam Ltd. (GUVNL) has purchased substantial quantum of power at an average rate of Rs.4.66/unit during FY 2018-19 (up to October) from power exchanges and under bilateral arrangement. New projects are not expected to get commissioned in the near future and hence the rate at the power exchange would remain higher. Had GUVNL not purchased such quantum of power, it would have led to the undesirable situation of load shedding in the State.
- The thermal power projects across the country with long-term linkages are already facing critical coal stock situation in addition to issues related to availability of adequate infrastructure for transportation of coal through railways and high freight cost. Therefore, optimum utilization of generation capacity of these plants, based on imported coal, located in the coastal areas, merits consideration.

It is pertinent to note that the HPC's recommendations are premised on serving the consumer interest and the HPC while undertaking the analysis and

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making the recommendations in the Report has the 'consumer interest' paramount and this has been the focal point of the approach of the HPC.

The government took note of the conclusions drawn by the HPC and concurs therewith in essence:

"10.2 On the touchstone of 'consumer interest', it can be safely concluded that these projects need to be salvaged. Sustainable operation of these projects is of critical importance, essentially due to the fact that these projects are instrumental in fulfilling the increasing demand of the procurer states. Consumer interest thus lies in ensuring that reliable and relatively inexpensive power is secured in a sustainable manner to meet current and future demand projections. This in turn would also ensure that the economic growth of the procurer states is not vitiated.

10.3 In contrast, if these projects are not salvaged, consumer interest will be adversely affected on account of various reasons, gist of which are set out below:

- (i) The capacities from these projects will have to be replaced from alternative sources and therefore, prices will further go up in view of the clear co-relation between demand and supply;*
- (ii) The cost of replacement power at today's market price would be higher;*
- (iii) Setting up new projects in any event will be more expensive and will take another 4-5 years to commence supply;*
- (iv) Increase in cost on account of procurement of power from in-efficient and old plants which would also have reliability issue;*
- (v) Resorting to load shedding on account of difficulties associated with complete replacement of power from these projects ; and*
- (vi) Any insolvency or liquidation of these projects would hardly address the issues of power supply."*

In view of the above, the matter in respect of taking decisions for accepting the recommendations of the HPC, fully or partially and subsequent changes/modifications/amendments to the PPA(s) was under active consideration of the Government.

Resolution:

In view of the above, after careful consideration, the Government of Gujarat has decided to accept all recommendations of the HPC except those mentioned as not accepted hereinbelow, and has modified certain recommendations as mentioned below, and has further taken certain policy decisions as mentioned below in this context and hereby resolves as follows :

- i. It is decided to accept the recommendation of the HPC about the effective date of implementation as 15.10.2018.

- ii. In respect of the recommendation of the HPC about adjustment in variable cost, it is decided that the tariff will be adjusted considering actual fuel cost based on the superior of actual parameters or normative parameters as per the Regulation of the Appropriate Commission subject to ceiling of HBA Index of 110 USD / MT for 6322 Kcal / Kg coal on monthly basis. In case the HBA Index of coal exceeds 110 USD / MT, the payment will be capped at 110 USD/ MT and the generator shall bear the differential cost and continue to supply power. Further, it is decided to review the ceiling price every 5 years as per the HPC's recommendations.
- iii. As per the recommendation of the HPC about sacrifice by the bankers, it is decided that the fixed cost @ 20 paise / kWh is to be reduced to extent of normative availability of 80%.
- iv. In respect of the recommendation of the HPC for sharing of mining profit, it is decided that 100% mining profit towards coal utilized at respective projects stipulated from their coal mines shall be shared. However, in case the coal from stipulated mines is not transferred or less transferred to the power plants and is sold outside, the profit is to be shared equivalent to energy supplied under PPA considering coal supplied to power plant as well as coal sold outside. In any case, the mining profit will be minimum 5 paise/kWh in case of APL and 15 paise/kWh in case of CGPL. In case of EPGL, no mining profit will be shared.
- v. As regards the recommendation of HPC for tying up of free capacity, it is decided that the procurers may tie up the untied up capacity of 550 MW available with APL and 100 MW with EPGL. The free capacity from APL will be offered to Gujarat and Haryana in proportion of 83:17. The tariff for such capacity shall be as per revised variable cost (no mining profit to be adjusted) and fixed cost (levelised for balance term of PPA). It is decided that the untied capacity from the projects be tied up by GUVNL from the identified units under existing PPA i.e. unit 1 to 6 of APL and unit 1 & 2 of EPGL. As GUVNL has no share from unit # 7, 8 & 9 of M/s. APL and these units have different fuel sources and tariff structure, taking free capacity (22 MW) does not come in question here.
- vi. With reference to the recommendation of the HPC about increase in plant availability, it is decided to accept the recommendation of the HPC that the project developer shall increase the availability up to 90% without procurer having to pay capacity charge beyond 80% while penalty shall be applicable at 10% of capacity charges for availability below 90% to the extent of short availability. Moreover, penalty and incentive shall continue to apply in accordance with existing provisions of PPA.

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- vii. As far as the recommendation of the HPC about the extension of the PPA tenure is concerned, it is decided that procurers will have the option for extending the PPA for 10 years after the existing tenure of 25 years.
- viii. As against the recommendation of the HPC in respect of waiver/refund of penalty, it is decided that the penalty shall not be waived/refunded.
- ix. It is decided that no rebate shall be applicable on Energy Charge for the balance term of the PPA. However, rebate on payment of capacity charges shall be applicable. Further, delay payment charge provision is retained as per the existing PPA.
- x. In respect of freight, port and coal handling charges, it is decided as follows:-
- In case of Adani (APMuL), the port charges and transportation charges are not quoted in the bid separately therefore the Port & Coal handling charges shall be considered lower of actual or charges as per the Agreement of M/s CGPL (Tata) with M/s Adani Port which was negotiated by M/s Power Finance Corporation, Govt. of India before inviting the competitive bids. As regard to the ocean freight & insurance for transportation of coal, the escalation for the same shall be considered by linking it with the index notified by the CERC or the actual Ocean Freight paid by Project Developer, whichever is lower.
 - In case of CGPL (UMPP), port and coal handling shall be actual or as per the quoted charges in bid and escalated as per the PPA, whichever is lower. The ocean freight and insurance shall be lower of the actual or the freight worked out as per the CERC index from time to time subject to a maximum of quoted charges in bid and escalated as per the PPA, if any.
 - In case of EPGL, port and coal handling shall be actual or as per the quoted charges in bid and escalated as per the PPA, whichever is lower. The ocean freight and insurance shall be lower of the actual or the freight worked out as per the CERC index from time to time subject to a maximum of the quoted charges in bid and escalated as per the PPA, if any.
- xi. It is decided that in the 10th year from the date of signing of the supplemental PPA, if energy charges of these respective projects under the PPA(s) is higher than marginal coal based thermal power stations having 50 % schedule or immediate below, as the case may be, during the previous financial year under merit order of GUVNL, GUVNL shall have a right to terminate the PPA. In the event of termination pursuant to this decision,

neither party shall be liable for any damages or penalty of any kind to the other party.

- xii. It is decided to execute amendments in PPA(s) of for Adani Power Ltd. (Unit 1 – 6) and Essar Power Gujarat Ltd. and approach appropriate Regulatory Commission for approval of the same immediately. In case of amendment in PPA of Coastal Gujarat Power Ltd., since the PPA for Mundra UMPP is a joint contract wherein four other States (i.e. Maharashtra, Rajasthan, Punjab and Haryana) are also having allocation, the amendments in the PPA shall be carried out and presented to the CERC along with the consent and supplemental PPA jointly signed also by the other four states in question.

In view of the aforesaid, it is also resolved to direct GUVNL to ensure adequate and efficient supply of energy at economical tariff and maintain its respective energy basket in a manner that has a mix of power sources that addresses all issues including availability of reliable base load power generation, optimum utilization of existing resources and installed generation capacities etc. by allowing revival and rehabilitation package to the financially stressed and economically unviable imported coal based power projects through consequential amendment(s)/modification(s) in existing PPA(s), in larger public interest. Accordingly, GUVNL is directed to submit the amended/modified PPA(s) before appropriate Regulatory Commission for allowing the aforesaid consequential changes/modifications/amendments and for the purpose, it is further resolved that the Board of Directors of GUVNL is authorized for taking decisions in respect of any incidental issues while carrying out the amendments to PPA(s).

This issues with the concurrence of the Finance Department on this department's file of even number, dated 01.12.2018.

By order and in the name of the Governor of Gujarat,



(K. L. Bachani)

Officer on Special Duty (Power)
Energy and Petrochemicals Department.

Copy forwarded with compliments to:

- (1) The Principal Secretary to the Governor of Gujarat, Raj Bhavan, Gandhinagar.
- (2) The Chief Principal Secretary to the Hon'ble C.M., "SS-I", Gandhinagar.
- (3) The Principal Secretary to Hon'ble CM, "SS-I", Gandhinagar.
- (4) The ACS to Govt., Finance Department, Sachivalaya, Gandhinagar.
- (5) The Secretary to GoI, Ministry of Power, New Delhi.
- (6) The Secretary, Central Electricity Regulatory Commission, New Delhi.
- (7) The Secretary, Gujarat Electricity Regulatory Commission, Gandhinagar.
- (8) The PPS to Hon'ble Deputy CM, "SS-I", Gandhinagar.

- (9) The PS to the Hon'ble Minister (Energy), "SS-1", Gandhinagar.
- (10) The PS to the Hon'ble MoS (Energy), "SS-II", Gandhinagar.
- (11) The DS to the Chief Secretary, O/o the Chief Secretary, Sachivalaya, Gandhinagar.
- (12) The Additional Chief Secretary to Govt. (Power), Power Department, Govt. of Punjab, Secretariat, Chandigarh.
- (13) The Principal Secretary to Govt. (Power), Govt. of Maharashtra, Secretariat, Mumbai.
- (14) The Principal Secretary to Govt. (Power), Energy Department, Govt. of Rajasthan, Mantralaya, Jaipur, Rajasthan.
- (15) The Principal Secretary to Govt. (Power), Govt. of Haryana, Chandigarh.
- (16) The Managing Director, Gujarat Urja Vikas Nigam Limited, Vadodara.
- (17) The Select file.

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Annexure - 2

गुजरात गुजरात GUJARAT

BP 262591

सं. सं. नं. 2/507 रु. 100 दि. 19/2/2019
 नाम: Essar Power Gujarat Limited
 ठेका: Channi Road, Vadodra
 हस्ते: Rajen
 र. वे. नीलही: शुभ
 शाह जसदीलाल पुजाराई न्यायमंटीर
 ला. नं. 26/60 ला. 29-90-60
 जी-43, विधाविहार सोसायटी, वाघोडीया रोड, वडोदरा-१९.

Supplemental Agreement

THIS THIRD SUPPLEMENTAL POWER PURCHASE AGREEMENT hereinafter called the "Supplemental Agreement" is entered into at Vadodara on the 1st day of March, Two Thousand And Nineteen by and

BETWEEN

M/s Essar Power Gujarat Ltd. (EPGL), a Company incorporated under the Companies Act, 2013 having its registered office at 44 KM Milestone, Jamnagar - Okha Highway, Khambhaliya, Devbhumi Dwarka (hereinafter referred to as

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'Seller' or "EPGL" which expression shall unless repugnant to the context or meaning thereof include its successors and assigns) as Party of the first part;

AND

M/s Gujarat Urja Vikas Nigam Limited, (GUVNL) a Government of Gujarat Undertaking and a Company incorporated under the Companies Act, 1956 having its registered office at Sardar Patel Vidyut Bhavan, Vadodara (hereinafter referred to as 'Procurer' which expression shall unless repugnant to the context or meaning thereof include its successors and assigns) as Party of the second part

Each of the "Procurer" and "the "Seller" are individually referred to as "Party" and collectively as the "Parties"

Whereas:

- A. The Seller and the Procurer had executed a Power Purchase Agreement dated 26.2.2007, as amended by Assignment Agreement dated 25.11.2008 and Supplemental Power Purchase Agreement dated 16.10.2009 (hereinafter referred to as the "PPA"), for the sale and purchase of electricity in accordance with the terms and conditions contained therein;
- B. The promulgation of Indonesian regulations relating to the pricing mechanism of coal and resultant financial implication of the same on cost of generation of power by the power projects based on imported Indonesian coal, led to the inability of the power generators, including the Seller herein, to continue to operate their power generation projects on a sustainable basis. As a consequence of the inability of the Seller to generate and supply power on a sustainable basis, the Procurer State, faced power shortage and was required to procure power from alternate sources at higher cost/rates. Thus, due to the prevailing conditions the consumers of the State are put to pay much higher cost of power. In this background and consequent to the diverse background facts and events, as more particularly described in the Government of Gujarat Resolution No. CGP-12-2018-166-K dated 03-07-2018 (hereinafter referred to as "the GR"), the imported Indonesian coal based power generation projects encountered financial stress and losses and were unable to sustain power generation from the projects;
- C. In order to resolve these issues, the Government of Gujarat, vide Government Resolution No. CGP-12-2018-166-K dated 3.07.2018 constituted a High Power



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Committee to, inter alia, suggest sustainable solutions for reviving the power generation projects based in the state of Gujarat and based on imported Indonesian coal as fuel;

- D. The High Power Committee submitted its Report on 3.10.2018 making certain recommendations for resolving the said issues;
- E. The Government of the State of Gujarat accepted the recommendations of the High Power Committee with certain modifications and decided to implement the same, and consequently, issued its policy directions contained in Resolution No. CGP-12-2018-166-K dated 1.12.2018 (Hereinafter referred to as "the Implementation Policy");
- F. The implementation of the said policy directions contained in the Implementation Policy require, inter alia, carrying out certain amendments to the PPA, and obtaining necessary approvals for these amendments, from the Appropriate Commission;
- G. Article 18.1 of the PPA enables the Parties to amend the provisions of the PPA by written agreement and subject to the approval of the Appropriate Commission.

NOW THEREFORE, in consideration of the premises, mutual agreements, covenants and conditions set forth in this Supplemental Agreement, it is hereby agreed by and between the Parties as follows:

1. All capitalized terms, unless specifically defined in this Supplemental Agreement, shall have the meanings ascribed to them in the PPA.
2. With the execution of this Supplemental Agreement, all relevant Articles of the Power Purchase Agreement in respect of the matters covered in this Supplemental Agreement, shall stand amended, modified and/or replaced to the extent provided in this Supplemental Agreement and in the event of any conflict in the interpretation between the clauses of the PPA and this Supplemental Agreement, or in the application of any provision of the PPA or this Supplemental Agreement, then the provisions of this Supplemental Agreement shall prevail. Except as amended, modified and/or replaced



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hereunder, all other terms and conditions of the PPA shall continue to apply and shall remain unchanged.

3. The Parties agree as follows:

3.1 The following definitions shall be added:

(i) Article 1.1 of the PPA shall be amended as follows:

"Affiliate" with respect to any specified person shall mean any other person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified person and, in relation to a natural person, includes any "Relative" (as such expression is defined in the Companies Act, 2013) of such natural person. The expression "control" shall have the meaning ascribed to the term in the Companies Act, 2013 and the terms "controlling" and "controlled" shall be construed accordingly.

(ii) **"Amendment Effective Date"** shall be October 15, 2018, i.e. the date with effect from which, this Supplemental Agreement shall become effective and binding upon the Parties.

(iii) **"Tariff Regulations"** shall mean the regulations of the Gujarat Electricity Regulatory Commission specifying the terms and conditions for determination of tariff, as applicable at the time of COD of the Project.

3.2 All provisions in the PPA relating to determination of Capacity Charge & Energy Charge, shall be replaced and substituted with the following provisions.

3.2.1 Notwithstanding anything to the contrary contained in the PPA, the Seller shall, with effect from the Amendment Effective Date, be entitled to receive, and the Procurer shall be liable to pay, Revised Tariff determined in accordance with the provisions hereinafter contained, with respect to the sale and supply of electricity under and in terms of the PPA.

"Revised Tariff" shall mean the sum total of Energy Charge and Capacity Charge.

"Capacity Charge" shall mean the Capacity Charge determined in accordance with Clause 3.2.2 of this Supplemental Agreement



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"Energy Charge" shall mean the energy charge determined in accordance with clause 3.2.3 of this Supplemental Agreement.

"Exchange Rate" shall mean the simple average of State Bank of India TT Selling rate for last 15 days prior to 1st day of the Month of power supply.

3.2.2 Capacity Charge for each Month shall be the Quoted Capacity Charge (Sum of Quoted Non Escalable Capacity Charge and Quoted Escalable Capacity Charge) mentioned at Schedule 10 of PPA dated 26.02.2007 less 20 paise/kwh applicable upto Normative Availability of 80%. The Monthly Capacity Charge payment shall be made in accordance with Schedule 6 of PPA dated 26.02.2007. This Capacity Charge shall be subject to reduction towards penalty for declaration of Availability lower than 90% as per Clause No. 3.2.5 of this Supplemental Agreement in addition to the Contract Year Penalty for Availability below 75%. as per PPA dated 26.02.2007.

3.2.3 Energy Charge shall be determined for each Month, as under:

(Energy charge rate in Rs./kWh) x {Scheduled energy (ex-bus) for the Month in kWh.}

Energy charge rate (ECR) in Rupees per kWh on ex-power plant basis shall be determined to four decimal places in accordance with the following formulae:

$$ECR = \{GHR \times LPPF / CVPF\} \times 100 / (100 - AUX)$$

Where:

AUX = Lower of actual or normative auxiliary energy consumption as specified in the Tariff Regulations as defined herein i.e. 6.50%

CVPF (as received basis) = Weighted Average Gross calorific value of coal in Kcal / Kg on as billed basis minus lower of (i) actual difference between GCV at loading port and unloading port or (ii) 72 Kcal / Kg towards loss of heat during transportation as per ISO 1928 (dated 01.06.2009)

ECR = Energy charge rate, in Rupees per kWh sent out.



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GHR = Lower of actual or Gross station heat rate of 2333 in kCal per kWh as specified in the Tariff Regulations as defined herein.

LPPF = Weighted average landed price at the plant site of coal as primary fuel (which for the avoidance of doubt shall include all taxes on the sale, transportation & import of coal and inland transportation costs for transporting and delivering coal to the plant site), in Rupees per kg, during the relevant Month. LPPF shall be worked out as per table in Clause 3.2.4 of this Supplemental Agreement.

The operational parameters viz. "AUX" & "GHR" considered for computation of Energy Charge Rate shall be aligned as per CERC approval in Petition No. 374/MP/2018.

3.2.4 The Energy Charge determined as above, shall be subject to the following conditions:

(I) General Principles for determination of LPPF:

FOB cost of Coal	<p><u>FOB Price for Imported Coal:</u></p> <p>Shall be the lower of actual price or the HBA Price (as defined hereinafter) determined in Indian Rupees at Exchange Rate. In case of change in pricing framework in Indonesia or change in source of coal to other country, HBA Price will be replaced with relevant coal indices as mutually agreed.</p> <p>"HBA Index" shall mean the FOB Price of Indonesian imported coal having 6322 kcal/kg Gross Calorific Value in USD / MT notified by Govt of Indonesia on monthly basis</p> <p>"HBA Price" shall mean the HBA Index FOB price of Indonesian imported coal published by Govt of Indonesia from time to time for coal quality of 6322 Kcal/Kg, as adjusted for GCV (as billed) of coal consignment consumed in the Project as per the formula as stated in Annexure-A. Further, tolerance of maximum 10% over HBA price</p>
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	<p>derived for a quality of coal shall be allowed. HBA price + maximum 10% tolerance shall not be higher than HBA coal price worked out on proportionate basis with reference to HBA Index. This tolerance of 10% of HBA price shall not be allowed for coal procured from mines owned by Seller / its Affiliates.</p> <p>The actual FOB price of coal shall always be subject to an upper ceiling limit of HBA Index of USD 110/MT for 6322 Kcal / Kg ascertained on a monthly basis, adjusted for quality of coal (GCV as billed) in the Project and as revised from time to time in accordance with this Supplemental Agreement (the "Ceiling Price"). This has been explained in greater detail in sub para (II) Specific Conditions herein below.</p> <p>Illustration: For determination of equivalent Coal Price for working out Landed Cost of imported coal for the Month:</p> <p>The lower of following for the month shall be considered:</p> <ul style="list-style-type: none"> (a) Actual FOB price of consignment (b) HBA price worked as per formula for billed GCV plus maximum 10% tolerance on HBA price (10% tolerance not allowed for coal procured from mines owned by Seller / its Affiliate) (c) HBA price worked out on proportionate basis with reference to HBA Index for 6322 GCV coal <p>Note: HBA price for billed GCV shall be worked out (on proportionate basis and as per formula) considering ceiling of HBA Index of USD 110 / MT or as revised as per sub para (II) Specific Conditions of this Supplemental Agreement</p>
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Transportation and other costs	<p>Ocean Freight & Insurance</p> <p>The ocean freight and insurance shall be lower of actual or as stated in Annexure – B and calculated in Indian Rupees, at Exchange Rate. (Column (c) & (d) in Table I & II respectively of Annexure-B)</p> <p>Port / Fuel Handling Charges:</p> <p>The Port / Fuel Handling charges shall be lower of actual or as stated in Annexure – B (Column (e) & (f) in Table I)</p> <p>Transit Losses:</p> <p>Actual or 0.2%, whichever is lower</p> <p>Other Charges (Sampling, Inspection, Customs clearance and Forwarding Agency charge):</p> <p>Actual or 3% of CIF, whichever is lower – Seller to tie up services (Sampling, Inspection, Customs clearance and Forwarding Agency charge) through competitive bidding with approval of tender documents from Procurer & seek approval of discovered rate from Procurer</p>
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(II) Specific Conditions

- (a) The Ceiling Price for HBA Index will be fixed for 5 years at a time, with the first 5 year period commencing from the Amendment Effective Date and the last such 5 year period ending on the Expiry Date even if the last period is less than 5 years. The Ceiling Price will be reset and recalibrated for the next five year period, as per the following methodology:
- (i) If the HBA Price at any time during the relevant 5 year period, exceeds the Ceiling Price specified for the said relevant 5 year period, then the Ceiling Price for the subsequent 5 year period will be increased by a percentage factor equivalent to the percentage increase in domestic CIL coal price (FOR) for linkage coal (Average price of G – 7 to G – 14 grade of coal used for power generation), during the corresponding 5 year period. The principle is that the imported coal Ceiling Price should move in tandem with domestic coal price increase.



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- (ii) If the HBA Price does not at any time during the relevant 5 year period, exceed the Ceiling Price specified for the said relevant 5 year period, however, if the average HBA Price during the relevant five year period is higher than the average HBA Price during the immediately preceding five year period, the Ceiling Price for the relevant 5 year period shall be increased by a percentage factor equivalent to the lower of:
- (x) the percentage increase in domestic CIL coal price (FOR) for linkage coal (Average price of G – 7 to G – 14 grade of coal used for power generation), during the 5 year period corresponding with the relevant 5 year period; or
 - (y) escalation in the HBA Index over the relevant 5 year period

For the avoidance of doubt, for the first 5 year period commencing from the Amendment Effective Date, the aforesaid comparison of average HBA Price shall be done for the immediately preceding five year period prior to the Amendment Effective Date.

If during the relevant 5 year period, none of the conditions specified in paragraphs (i) or (ii) above are attracted, then the Ceiling Price for the subsequent 5 year period shall remain unchanged

- (b) Seller agrees that in case HBA Index of Indonesian coal exceeds 110 USD/MT or Revised Ceiling Price as determined every 5 years, Seller shall bear the differential cost and continue to supply power under the PPA & Supplemental Agreement
- (c) Seller shall procure imported coal only through competitive bidding process after seeking approval of Procurer for Tender document and shall also seek approval of rate discovered from Procurer.

(III) Methodology for Merit Order Scheduling & Billing

- (i) The Seller will, on the last working day of each Month, submit to the Procurer the anticipated Energy Charges for the subsequent Month. The anticipated Energy Charge will be based on the estimated cost of Indonesian imported coal procurement for subsequent Month.

- (ii) Deleted



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- (iii) At the end of each Month, the Bills by the Seller will be based on the Capacity Charge and Energy Charge respectively determined as per paragraphs 3.2.2 and 3.2.3 above.

The Seller has to provide the following documents along with the monthly bill:

1. Auditors certificate for each shipment in terms of value and quantity for coal received, consumed for the previous month,
 2. Invoices of fuel supplier, ocean freight and insurance, port / fuel handling charges and other charges.
 3. Copy of Bill of Entry and bank challians regarding payment of cess, taxes and duties.
 4. GCV certificate of loading and unloading port
 5. Certificate for actual parameters GHR & Auxiliary consumption for the month
- (iv) The payment of the Monthly Bill and Supplementary Bill shall be as per the Tariff specified under PPA dated 26.02.2007 until the approval of the Supplemental Agreement by Appropriate Commission. Differential amount towards Revised Tariff shall be payable after approval of Appropriate Commission without any interest / carrying cost / delay payment surcharge.
- (v) For the Monthly Bills, no rebate shall be available on Energy Charge component while rebate shall be available to Procurer for Capacity Charge component as per the existing provisions of the PPA. It is to clarify that this clause shall be effective for the Monthly Bills submitted after the approval of Appropriate Commission. Further, the Delay Payment Surcharge shall continue to apply as per provisions of PPA dated 26.02.2007.
- (vi) Further, the Seller shall not be entitled to any payment towards approved Change in Law for the Energy Charge from the date of approval of Supplemental Agreement by Appropriate Commission. Any payment received by the Seller towards approved Change in Law for the Energy Charge component for the period between Amendment Effective Date and the date of approval by the Appropriate Commission shall be adjusted in the differential amount stated at Para (iv) above.



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3.2.5 Availability: The Parties agree that the payment of Capacity Charges linked to Availability shall be modified, as specified below, in order to provide the Procurer the benefit of higher Availability upto 90%, beyond the Normative Availability of 80% as specified in the PPA, without Procurer having to pay Capacity Charge for such higher Availability. The Parties agree that the Seller shall maximize the utilization of the generation capacity from the Project, in the manner specified below:

- (a) The Seller shall declare availability up to 90% in a Contract Year. However, the Capacity Charge shall continue to be paid corresponding to Normative Availability of 80%, as specified in the PPA on achievement of cumulative Availability of 80% in a Contract Year. Further, in the event the cumulative Availability in any Contract Year is less than 80%, then the provisions of the PPA shall apply in respect of determination of the Capacity Charge payable to the Seller in addition to the reduction specified in sub clause (b) below.
- (b) In the event the cumulative Availability in any Contract Year is less than 90%, the Capacity Charge payable to the Seller, shall be reduced by 10% of Capacity Charges otherwise payable to the Seller. This is explained by way of illustration below:

Illustration for computing additional penalty below 90% Availability declaration

	Actual DC 82%	Actual DC 76%
PPA Capacity	1,000 MW	1,000 MW
Normative Availability	80%	80%
Capacity Charges	1.00 Rs/kWh	1.00 Rs/kWh
Normative Units	7008 Mus	7008 Mus
Actual Availability	82%	76%
Actual Units	7183 Mus	6658 Mus
Shortfall in availability compared to revised 90%	8% (701 MUs)	14% (1226 MUs)
Penalty for shortfall in 90% (10% of Capacity Charges)	Rs 0.10 / kWh (1 Rs x 10%)	Rs 0.10 / kWh (1 Rs x 10%)
Penalty Amount	Rs 7.01 crore	Rs 12.26 crore
Yearly Capacity Charges	Rs 700.8crore	Rs 665.8 crore
	(7008 MUs x 1 Rs)	(6658 MUs x 1 Rs)
Less: Penalty	Rs. 7.01 Crore	Rs. 12.26 Crore
Net of Penalty Payment	Rs. 693.79 Crore	Rs. 653.54 Crore



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For avoidance of doubt, it is clarified that for all other purposes, the Normative Availability shall continue to be 80%, as specified in the PPA. It is further clarified that for the purposes of determining the Incentives under the PPA on account of Schedule being higher than Normative Availability, the Normative Availability shall continue to be reckoned at 80% as per existing PPA. It is further clarified that the Incentives for availability in excess of 85% and provisions relating to penalty for declaration of Availability below 75% during Contract Year shall also continue to apply in accordance with the provisions of existing PPA

3.3 Deleted:

3.4 **Untied Capacity offered to Procurer**

3.4.1 The Seller is having 100 MW untied capacity (hereinafter referred to as "**Additional Contracted Capacity**") from Units 1-2 (each of 600 MW) and Seller is willing to supply the same to the Procurer and the Procurer agrees to purchase the same for the period from the date of approval of this Supplemental Agreement by the Appropriate Commission to the 25th Anniversary of the Commercial Operation Date of Unit No. 2 and the Contracted Capacity under the PPA shall stand increased by such Additional Contracted Capacity.

3.4.2 The tariff applicable for the Additional Contracted Capacity shall be worked out as under:

"**Tariff for Additional Contracted Capacity**" shall mean the sum total of Energy Charge for Additional Contracted Capacity and Capacity Charge for Additional Contracted Capacity.

"**Energy Charge for Additional Contracted Capacity**" shall mean the energy charge determined in accordance with Clause 3.5.3 of this Supplemental Agreement.

"**Capacity Charge for Additional Contracted Capacity**" shall be Rs. 0.9017 / Kwh being the levelised Capacity Charge for the balance Term of PPA dated 26.02.2007.



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For the avoidance of doubt, the Capacity Charge for Additional Contracted Capacity shall not be subject to discount of Rs 0.20/Kwh as specified in Clause 3.3 of this Agreement.

- 3.4.3 Seller shall be required to declare single Availability for the Project (Unit 1-2) complying with Article 8 & 9 of the PPA dated 26.02.2007. SLDC, Gujarat shall allocate such Availability on proportionate basis between the Contracted Capacity of 1000 MW, Additional Contracted Capacity of 100 MW & 22 MW merchant capacity. SLDC Gujarat shall schedule Energy from the Project from above respective Capacity by adhering to Merit Order Protocol. SLDC, Gujarat shall separately certify the Availability as well as Scheduled Energy from the above Capacity. Seller shall have to ensure establishment of Proportionate Availability as per Article 9.4 of PPA dated 26.02.2007 and in case of failure, shall be subject to penalty as per Article 9.4.
- 3.4.4 Procurer shall make payment to the Seller for the Additional Contracted Capacity as per the provision of PPA dated 26.02.2007 read together with this Supplemental Agreement.
- 3.4.5 For the Additional Contracted Capacity, all other terms & conditions shall be applicable as per PPA dated 26.02.2007.

3.5 Extension of Term of the PPA

- 3.5.1 The Procurer shall have the right, but not the obligation, to extend the Term of the PPA by ten (10) years for the Contracted Capacity ("Extension Period"), such extension to be effected by issue of a notice by the Procurer to the Seller, stating its decision to extend the PPA for the Contracted Capacity for such period of ten years, and such notice shall be issued not later than five (5) years prior to the Expiry Date of the PPA. For the avoidance of doubt, any extension for a period other than 10 years, as above, shall be with the mutual consent of the Parties.
- 3.5.2 The Parties agree that the extension of the PPA as aforesaid, shall be on the same terms and conditions as contained in the PPA, subject to the following conditions in relation to the Extension Period



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3.5.3 For the Extension Period, the Tariff shall be determined as follows:

"Extended Term Tariff" shall mean the sum total of Energy Charge & Capacity Charge as worked out for the Extended Term

Where :

"Capacity Charge for Extended Term" shall mean the Quoted Capacity Charge as specified in the PPA, as applicable for the last Contract Year (falling prior to the Expiry Date). Furthermore, such Quoted Capacity Charge applicable for the last Contract Year as above, shall be increased to factor for additional costs, if any, incurred or to be incurred by the Seller for renovation and modernisation of the Project, and also for the consequential increase in O&M expenses. Such increase in Quoted Capacity Charge shall be determined & approved by GERC in accordance with the applicable GERC Tariff Regulations prevailing then; and

"Energy Charge for Extended Term" shall be determined for each Month of the Extension Period, as under:

Energy Charge payable to the Seller for a Month shall be:

(Energy charge rate in Rs./kWh) x {Scheduled energy (ex-bus) for the Month in kWh.}

Energy charge rate (ECR) in Rupees per kWh on ex-power plant basis shall be determined to four decimal places in accordance with the following formulae:

$$ECR = \{GHR \times LPPF / CVPF\} \times 100 / (100 - AUX)$$

Where :

AUX = Lower of actual or normative auxiliary energy consumption as specified in the Tariff Regulations as defined herein.i.e. 6.50%

CVPF (as received basis) = Weighted Average Gross calorific value of coal in Kcal / Kg on as billed basis minus lower of (i) actual difference between GCV



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at loading port and unloading port or (ii) 72 Kcal / Kg towards loss of heat during transportation as per ISO 1928 (dated 01.06.2009)

ECR = Energy charge rate, in Rupees per kWh sent out.

GHR = Lower of actual or Gross station heat rate of 2333 in kCal per kWh as specified in the Tariff Regulations as defined herein.

LPPF = Weighted average landed price at the plant site of coal as primary fuel (which for the avoidance of doubt shall include all taxes on the sale, transportation & import of coal and inland transportation costs for transporting and delivering coal to the plant site), in Rupees per kg, during the relevant Month, LPPF shall be worked out as per table in Clause 3.2.4 of this Supplemental Agreement.

The operational parameters viz. "AUX" & "GHR" considered for computation of Energy Charge Rate shall be aligned as per CERC approval in Petition No. 374/MP/2018.

For the avoidance of doubt, the Capacity Charge for Extended Term shall not be subject to adjustment towards Rs 0.20 / Kwh as specified in Clause 3.3 of this Supplemental Agreement.

3.6 Notwithstanding anything to the contrary contained in the PPA, it is agreed between Parties that in the 10th Contract Year from the date of signing of this Supplemental Agreement, if Seller's Energy Charges for respective Contracted Capacity under this Supplemental Agreement is higher than marginal coal based thermal power stations having 50% schedule or immediate below, as the case may be, during the previous Contract Year under Merit Order of Procurer, Procurer shall have a right to terminate the PPA & Supplemental Agreement for the Contracted Capacity and / or Additional Contracted Capacity as defined above. In the event of termination pursuant to this clause, neither Party shall be liable for any damages or penalty of any kind to the other Party.

3.7 It is clarified that the provisions dealing with Change in Law under the PPA dated 26.02.2007 shall continue to apply including in respect of Additional Contracted Capacity. The impact of additional expenditure to be incurred towards compliance of the Ministry of Environment, Forest & Climate Change



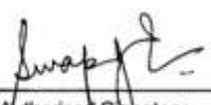
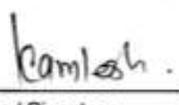
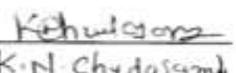
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Notification dated 7.12.2015 are not included in the tariff as per this Supplemental Agreement and any impact thereof on tariff and operational parameters shall be considered pursuant to approval of Appropriate Commission.

In Witness Whereof the Parties have executed this Third Supplemental Agreement to the Power Purchase Agreement on the date mentioned hereinabove through their duly authorized representatives.

<p>FOR AND ON BEHALF OF M/s Essar Power Gujarat Ltd. (EPGL)</p> <p> Authorised Signatory SWAPNIL JAIN</p> <p>WITNESSES</p> <p>1.  (SANDEEP SAHAY)</p> <p>2.  (ASHISH MEHTA)</p>	<p>FOR AND ON BEHALF OF M/s Gujarat Urja Vikas Nigam Ltd.</p> <p> Authorised Signatory</p> <p>WITNESSES</p> <p>1.  (S.K. Naik)</p> <p>2.  (K.N. Chudasama)</p>
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Annexure – 3

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ADDENDUM TO THIRD SUPPLEMENTAL AGREEMENT DATED
01.03.2019

THIS ADDENDUM to THIRD SUPPLEMENTAL POWER PURCHASE AGREEMENT hereinafter called the "Addendum Supplemental Agreement" is entered into at Vadodara on the 23rd day of January, Two Thousand And Twenty by and

BETWEEN

M/s Essar Power Gujarat Ltd. (EPGL), a Company incorporated under the Companies Act, 2013 having its registered office at 44 KM Milestone, Jamnagar – Okha Highway, Khambhaliya, Devbhumi Dwarka (hereinafter referred to as "Seller" or "EPGL" which expression shall unless repugnant to the context or meaning thereof include its successors and assigns) as Party of the first part;

AND

M/s Gujarat Urja Vikas Nigam Limited, (GUVNL) a Government of Gujarat Undertaking and a Company incorporated under the Companies Act, 1956 having its registered office at Sardar Patel Vidyut Bhavan, Vadodara (hereinafter referred to as "Procurer" which expression shall unless repugnant to the context or meaning thereof include its successors and assigns) as Party of the second part

Each of the "Procurer" and "the "Seller" are individually referred to as "Party" and collectively as the "Parties"



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Whereas:

- A. The Seller and the Procurer had executed a Power Purchase Agreement dated 26.2.2007, as amended by Assignment Agreement dated 25.11.2008 and Supplemental Power Purchase Agreement dated 16.10.2009 (hereinafter referred to as the "PPA"), for the sale and purchase of electricity in accordance with the terms and conditions contained therein;
- B. The promulgation of Indonesian regulations relating to the pricing mechanism of coal and resultant financial implication of the same on cost of generation of power by the power projects based on imported Indonesian coal, led to the inability of the power generators, including the Seller herein, to continue to operate their power generation projects on a sustainable basis. As a consequence of the inability of the Seller to generate and supply power on a sustainable basis, the Procurer State, faced power shortage and was required to procure power from alternate sources at higher cost/rates. Thus, due to the prevailing conditions the consumers of the State are put to pay much higher cost of power. In this background and consequent to the diverse background facts and events, as more particularly described in the Government of Gujarat Resolution No. CGP-12-2018-166-K dated 03-07-2018 (hereinafter referred to as "the GR"), the imported Indonesian coal based power generation projects encountered financial stress and losses and were unable to sustain power generation from the projects;

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- C. In order to resolve these issues, the Government of Gujarat, vide Government Resolution No. CGP-12-2018-166-K dated 3.07.2018 constituted a High Power Committee to, inter alia, suggest sustainable solutions for reviving the power generation projects based in the state of Gujarat and based on imported Indonesian coal as fuel;
- D. The High Power Committee submitted its Report on 3.10.2018 making certain recommendations for resolving the said issues;
- E. The Government of the State of Gujarat accepted the recommendations of the High Power Committee with certain modifications and decided to implement the same, and consequently, issued its policy directions contained in Resolution No. CGP-12-2018-166-K dated 1.12.2018 (Hereinafter referred to as "the Implementation Policy");
- F. The implementation of the said policy directions contained in the Implementation Policy require, inter alia, carrying out certain amendments to the PPA, and obtaining necessary approvals for these amendments, from the Appropriate Commission;
- G. Article 18.1 of the PPA enables the Parties to amend the provisions of the PPA by written agreement and subject to the approval of the Appropriate Commission.

Page #3



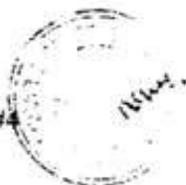
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- H. The Seller and the Procurer had executed a Third Supplemental Power Purchase Agreement dated 1.03.2019 to the Power Purchase Agreement dated 26.02.2007 setting out the terms and conditions for implementation of the Govt of Gujarat Policy Directive through G.R. dated 1.12.2018.
- I. As per the recommendations of High Power Committee accepted by Govt. of Gujarat through G.R. dated 1.12.2018, one of the primary conditions for allowing fuel cost as a pass through w.e.f. 15.10.2018 is that the Seller shall bear all the losses for the past period, prior to 15.10.2018. Accordingly, this addendum to the third supplemental PPA dated 1.03.2019 is signed to provide clarifications and modifications in this regard.
- J. The seller has also agreed to this clarifications and modifications as detailed herein under:

NOW THEREFORE, in consideration of the premises, mutual agreements, covenants and conditions set forth in this Addendum Supplemental Agreement, it is hereby agreed by and between the Parties as follows:

1. All capitalized terms, unless specifically defined in this Supplemental Agreement, shall have the meanings ascribed to them in the PPA.

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2. The Parties agree as follows:

The following Clause No. 3.8 and 3.9 shall be added after Clause 3.7 of the Third Supplemental Agreement dated 1.03.2019:

Clause 3.8:

Seller shall bear the losses for prior period i.e. before 15.10.2018. Further, Seller shall not raise any claim / dispute with regard to past period items before any Forum / Court in the future.

Clause 3.9:

Seller shall unconditionally withdraw all pending cases / litigations / waive claims against GUVNL (other than Change in Law in India) before various Forums in lieu of the relief granted vide Govt. of Gujarat G.R. dated 1.12.2018 towards pass through of actual fuel cost w.e.f. 15.10.2018. Only the cases / litigations filed by GUVNL which are under adjudication shall be considered upon decision by appropriate forum / Court to extent of GUVNL's prayer in the matter.

The above Clauses 3.8 and 3.9 shall be read as part and partial of Third Supplemental PPA dated 1.03.2019. It is clarified that all other terms



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and conditions of the Third Supplemental Agreement dated 1.03.2019 shall remain unchanged.

In Witness Whereof the Parties have executed this Addendum to the Third Supplemental Agreement to the Power Purchase Agreement on the date mentioned hereinabove through their duly authorized representatives.

<p>FOR AND ON BEHALF OF M/s Essar Power Gujarat Ltd. (EPGL)</p> <p><u>Ashish Mehta</u> (ASHISH MEHTA) Authorized Signatory</p> <p>WITNESSES</p> <p>1. <u>Rahul Singh</u> (Rahul Singh)</p> <p>2. <u>Kalpesh Muske</u> (Kalpesh Muske)</p>	<p>FOR AND ON BEHALF OF M/s Gujarat Urja Vikas Nigam Ltd.</p> <p><u>Sanjay Mathur</u> Authorized Signatory</p> <p>WITNESSES</p> <p>1. <u>Sanjay Mathur</u> (SANJAY MATHUR)</p> <p>2. <u>S.K. Nair</u> (S.K. NAIR)</p>
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Annexure – 4

Annex - A

SECOND ADDENDUM TO THIRD SUPPLEMENTAL AGREEMENTDATED 01.03.2019

THIS SECOND ADDENDUM to THIRD SUPPLEMENTAL POWER PURCHASE AGREEMENT hereinafter called the "Addendum Supplemental Agreement" is entered into at Mumbai on the First day of April, Two Thousand And Twenty by and

BETWEEN

M/s Essar Power Gujarat Ltd. (EPGL), a Company incorporated under the Companies Act, 2013 having its registered office at 44 KM Milestone, Jamnagar – Okha Highway, Khambhaliya, Devbhumi Dwarka (hereinafter referred to as "Seller" or "EPGL" which expression shall unless repugnant to the context or meaning thereof include its successors and assigns) as Party of the first part;

AND

M/s Gujarat Urja Vikas Nigam Limited, (GUVNL) a Government of Gujarat Undertaking and a Company incorporated under the Companies Act, 1956 having its registered office at Sardar Patel Vidyut Bhavan, Vadodara (hereinafter referred to as "Procurer" which expression shall unless repugnant to the context or meaning thereof include its successors and assigns) as Party of the second part

Each of the "Procurer" and "the "Seller" are individually referred to as "Party" and collectively as the "Parties"

Whereas:



- A. The Seller and the Procurer have executed a Power Purchase Agreement dated 26.2.2007, as amended by Assignment Agreement dated 25.11.2008 and Supplemental Power Purchase Agreement dated 16.10.2009 (hereinafter referred to as the "PPA"), for the sale and purchase of electricity in accordance with the terms and conditions contained therein;
- B. The promulgation of Indonesian regulations relating to the pricing mechanism of coal and resultant financial implication of the same on cost of generation of power by the power projects based on imported Indonesian coal, led to the inability of the power generators, including the Seller herein, to continue to operate their power generation projects on a sustainable basis.
- C. As a consequence of the inability of the Seller to generate and supply power on a sustainable basis, the Procurer State, faced power shortage and was required to procure power from alternate sources at higher cost/rates.
- D. Due to the prevailing conditions the consumers of the State are put to pay much higher cost of power. In this background and consequent to the diverse background facts and events, as more particularly described in the Government of Gujarat Resolution No. CGP-12-2018-166-K dated 03-07-2018 (hereinafter referred to as "the GR"), the imported Indonesian coal based power generation projects encountered financial stress and losses and were unable to sustain power generation from the projects;



- E. In order to resolve these issues, the Government of Gujarat, vide Government Resolution No. CGP-12-2018-166-K dated 3.07.2018 constituted a High Power Committee to, inter alia, suggest sustainable solutions for reviving the power generation projects based in the state of Gujarat and based on imported Indonesian coal as fuel;
- F. The High Power Committee submitted its Report on 3.10.2018 making certain recommendations for resolving the said issues;
- G. The Government of the State of Gujarat accepted the recommendations of the High Power Committee with certain modifications and decided to implement the same, and consequently, issued its policy directions contained in Resolution No. CGP-12-2018-166-K dated 1.12.2018 (Hereinafter referred to as "the Implementation Policy");
- H. The implementation of the said policy directions contained in the Implementation Policy require, inter alia, carrying out certain amendments to the PPA, and obtaining necessary approvals for these amendments, from the Appropriate Commission;
- I. Article 18.1 of the PPA enables the Parties to amend the provisions of the PPA by written agreement and subject to the approval of the Appropriate Commission.
- J. The Seller and the Procurer had executed a Third Supplemental Power Purchase Agreement dated 1.03.2019 to the Power



Purchase Agreement dated 26.02.2007 setting out the terms and conditions for implementation of the Govt of Gujarat Policy Directive through G.R. dated 1.12.2018.

- K. The Seller and the Procurer have executed a First Addendum dated 23.01.2020 to the Third Supplemental Power Purchase Agreement dated 1.03.2019 in order to ensure that (i) Seller shall bear the losses for prior period i.e. before 15.10.2018. Further, Seller shall not raise any claim / dispute with regard to past period items before any Forum / Court in the future. (ii) Seller shall unconditionally withdraw all pending cases / litigations / waive claims against GUVNL (other than Change in Law in India) before various Forums in lieu of the relief granted vide Govt. of Gujarat G.R. dated 1.12.2018 towards pass through of actual fuel cost w.e.f. 15.10.2018. Only the cases / litigations filed by GUVNL which are under adjudication shall be considered upon decision by appropriate forum / Court to extent of GUVNL's prayer in the matter.
- L. Seller and Procurer have further mutually agreed to modify the provision related to FOB cost of coal under Clause No. 3.2.4 (I) and withdraw the maximum tolerance of 10% allowed above HBA price. Accordingly, this Second Addendum to the Supplemental PPA dated 1.03.2019 is signed to make the modification in Clause No. 3.2.4 (I).

NOW THEREFORE, in consideration of the premises, mutual agreements, covenants and conditions set forth in this Addendum



Supplemental Agreement, it is hereby agreed by and between the Parties as follows:

1. All capitalized terms, unless specifically defined in this Supplemental Agreement, shall have the meanings ascribed to them in the PPA.
2. The Parties agree as follows:

The modified substituted and restated clause 3.2.4 (I) regarding FOB cost of coal will be as follows:

FOB cost of Coal	FOB Price for Imported Coal:
	<p>Shall be the lower of actual price or the HBA Price (as defined hereinafter) determined in Indian Rupees at Exchange Rate. In case of change in pricing framework in Indonesia or change in source of coal to other country, HBA Price will be replaced with relevant coal indices as mutually agreed.</p>
	<p>"HBA Index" shall mean the FOB Price of Indonesian imported coal having 6322 kcal/kg Gross Calorific Value in USD / MT notified by Govt of Indonesia on monthly basis</p>
	<p>"HBA Price" shall mean the HBA Index FOB price of Indonesian imported coal published by Govt of Indonesia from time to time for coal quality of 6322 Kcal/Kg, as adjusted for GCV (as billed) of coal consignment consumed in the Project as per the formula as stated in Annexure-A.</p>
	<p>"HBA Price" shall not be higher than HBA coal price worked out on proportionate basis with reference to HBA Index.</p>
	<p>The actual FOB price of coal shall always be subject to an upper ceiling limit of HBA Index of USD 110/MT for 6322 Kcal / Kg ascertained on a monthly basis, adjusted for quality of coal (GCV as billed) in the Project and as revised from time</p>

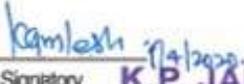
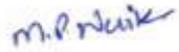
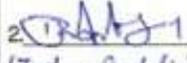


	<p>to time in accordance with this Supplemental Agreement (the "Ceiling Price"). This has been explained in greater detail in sub para (II) Specific Conditions herein below.</p> <p>Illustration: For determination of equivalent Coal Price for working out Landed Cost of imported coal for the Month:</p> <p>The lower of following for the month shall be considered:</p> <p>(a) Actual FOB price of consignment</p> <p>(b) "HBA Price" worked as per the formula stated in Annexure-A of SPPA dated 1.03.2019 for billed GCV</p> <p>(c) HBA price worked out on proportionate basis with reference to HBA Index for 6322 GCV coal</p> <p>Note: HBA price for billed GCV shall be worked out (on proportionate basis and as per formula) considering ceiling of HBA Index of USD 110 / MT or as revised as per sub para (II) Specific Conditions of this Supplemental Agreement</p>
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The above modification to FOB Cost of coal under Clause 3.2.4 (I) shall be read as part and parcel of Third Supplemental PPA dated 01.03.2019 and shall be effective from the effective date of the Third Supplemental Agreement. It is clarified that all other terms and conditions of the Third Supplemental Agreement dated 01.03.2019 and First Addendum dated 23.01.2020 shall remain unchanged.



In Witness Whereof the Parties have executed this Second Addendum to the Third Supplemental Agreement to the Power Purchase Agreement on the date mentioned hereinabove through their duly authorized representatives.

<p>FOR AND ON BEHALF OF M/s Essar Power Gujarat Ltd. (EPGL)</p> <p> Mr. Kush (Director)</p> <p>_____ Authorized Signatory</p> <p>WITNESSES</p> <p>1.  _____ (Ashish Mehta)</p> <p>2.  _____ (Rahul Singh)</p>	<p>FOR AND ON BEHALF OF M/s Gujarat Urja Vikas Nigam Ltd.</p> <p> Authorized Signatory K.P. JANGID General Manager (Com) Gujarat Urja Vikas Nigam Limited Race Course, BARODA-390007.</p> <p>WITNESSES</p> <p>1.  _____ (Mitul P. Naik)</p> <p>2.  _____ (Tushar Rautdija)</p>
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Date: 1st April 2020



Essar Power Gujarat Limited

Essar House
11 K.K. Marg
Mahalaxmi,
Mumbai – 400 034
India

Corporate Identity Number
U74900GJ200079LCO96279

T +91 22 6660 1100
F +91 22 2354 0450
www.essar.com

To,

Shri K P Jangid
General Manager (Commercial)
Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara – 390 007

Subject: Second Addendum to Third Supplemental Agreement dated 01.03.2019

Dear Sir,

We are in receipt of second addendum to the third supplemental agreement dated 01.03.2019 and we hereby agree to the terms and conditions laid in there.

However, due to the lockdown situation in the country during the COVID-19 we are unable to submit the duly notarized affidavit to you. Hence, we hereby submit the signed scanned copy of the affidavit and shall arrange to submit the duly notarized hard copy as soon as the lockdown situation is normalized.

Please accept the same and we request you to kindly expedite the SPPA approval from GERC at the earliest.

Thanking You,

Authorized Signatory

Kush

Essar Power Gujarat Limited

Regd Office: Soliya Administrative Building, 44 km, Jamnagar Okha Highway, Post Box No.7, At Post Khambaliya, T +91 2633 241444 F+91 2632 241518
Dist Devbhumi Dwarka 361305, Gujarat, India

STEEL | ENERGY | INFRASTRUCTURE | SERVICES

Annexure – 5**Annexure - 5**

Sr. No	Documents
1	Details of Coal Cost
2	Coal Invoice (CIF basis)
3	Invoice for other charges
4	Certificate of Sampling and Analysis for Load Port & Discharge Port
5	Invoice for Port Handling Charges
6	Bill of Entry & Challan – Custom
7	Copy of Contract for Coal Procurement
8	Auditor Certificate for vessel wise Coal Running account / Transit loss
9	Auditor Certificate for vessel wise Coal Consumption & Cost of Coal during the month
10	Certified Energy Auditors' Certification of SHR & Auxiliary Consumption
11	Certificate of Production and Sales for mine in Indonesia
12	Bank Statements showing payment to Fuel Supplier and LC details
13	Certificate of Plant/ Station Head for Monthly Generation Report (MGR) and Coal Consumption
14	Certificate of Plant/ Station Head for Station Heat Rate (SHR) Performance Report
15	Certificate of Plant/ Station Head for Owner's / Affiliated mine Coal Consumption
16	HBA Index notified by Govt. of Indonesia
17	Letter of SBI regarding SBT TT selling rate
18	Letter regarding Anticipated Energy Charges

Annexure-C (colly)

Government of Gujarat
Resolution No.: CGP-12-2018-166-K
Energy and Petrochemicals Department
Sachivalaya, Gandhinagar.

Dated 12 JUN 2020

Read:

- (1) Energy and Petrochemicals Department's G.R. of even number dated 03.07.2018.
- (2) Energy and Petrochemicals Department's G.R. of even number dated 01.12.2018.

Preamble:

The GR dated 1.12.2018 was issued for rehabilitation of the three imported coal based power projects located in Gujarat with whom GUVNL was having four PPAs i.e. one PPA with Coastal Gujarat Power Limited (CGPL)-1805 MW, one PPA with Essar Power Gujarat Limited (EPGL)-1000 MW and two PPAs with Adani Power (Mundra) Limited (APMuL) -1000 MW each. Out of four PPAs:-

- The supplemental PPA with M/s Coastal Gujarat Power Ltd. has not materialized so far,
- The Hon'ble Gujarat Electricity Regulatory Commission (GERC) vide order dated 27.04.2020 has approved the Supplemental PPA with EPGL with modifications.
- Whereas in case of APMuL, out of two PPAs, one PPA is sub-judice in Hon'ble Supreme Court in a curative petition filed by GUVNL and for other PPA, Petition has been filed by GUVNL for recall of approval of the Supplemental PPA due to violation of the fundamental premise and primary condition of GR dated 1.12.2018 that the past period losses has to be borne by the Project Developer.

Further, as per the market trend of coal in Indonesia and the prices reflected in indices of repute, the coal is traded at below HBA Index derived price in Indonesia. Thus, in the changed scenario, the ceiling of HBA Index derived price for FOB price of imported coal is not reflecting the true price of coal.

Thus, the G.R. dated 1.12.2018 is not achieving the objective and purpose for which it was resolved. Therefore it is necessary to rectify the situation in order to safeguard the public interest.

In view of the above, the matter was under active consideration of the Government.

Resolution:

In view of above mentioned subsequent developments and changed scenario, after careful consideration, Government of Gujarat has decided to revoke GR dated 1.12.2018 for all intent and purposes.

This issues with the concurrence of the Finance Department on this department's file of even number dated 10.06.2020.

By order and in the name of the Governor of Gujarat.

Shalini
12.06.2020
(Shalini Duhan)

Officer on Special Duty (Power)
Energy and Petrochemicals Department

Copy forwarded with complements to:-

- 1) The Principal Secretary to the Governor of Gujarat, Raj Bhavan, Gandhinagar.
- 2) The Chief Principal Secretary to the Hon'ble CM, SS-I, Gandhinagar.
- 3) The Principal Secretary to the Hon'ble CM, SS-I, Gandhinagar.
- 4) The ACS to Govt., Finance Department, Sachivalaya, Gandhinagar.
- 5) The Secretary to GoI, Ministry of Power, New Delhi.
- 6) The Secretary, Central Electricity Regulatory Commission, New Delhi.
- 7) The Secretary, Gujarat Electricity Regulatory Commission, Gandhinagar.
- 8) The PPS to Hon'ble Deputy CM, SS-I, Gandhinagar.
- 9) The PS to the Hon'ble Minister (Energy), SS-I, Gandhinagar.
- 10) The PS to the Hon'ble MoS (Energy), SS-II, Gandhinagar.
- 11) The JS to the Chief Secretary, O/o of the Chief Secretary, Sachivalaya, Gandhinagar.
- 12) The Additional Chief Secretary to Govt. (Power), Power Department, Govt. of Punjab, Secretariat, Chandigarh.
- 13) The Principal Secretary to Govt. (Power), Govt. of Maharashtra, Secretariat, Mumbai.
- 14) The Principal Secretary to Govt. (Power), Energy Department, Govt. of Rajasthan, Mantralaya, Jaipur, Rajasthan.
- 15) The Principal Secretary to Govt. (Power), Govt. of Haryana, Chandigarh.
- 16) The Managing Director, Gujarat Urja Vikas Nigam Limited, Vadodara.
- 17) The Select file.



સત્યમેવ જયતે
ગુજરાત સરકાર

Shalini Duhan, I.A.S.
Officer on Special Duty (Power)

No. CGP-12-2018-166-K
Government of Gujarat,
Energy and Petrochemicals Department,
Block No. 5, 5th Floor, Sardar Bhavan,
Phone No. 079-23250786
Fax No. 079-23250797
Sachivalaya, Gandhinagar.
Dated the **12 JUN 2020**

To,
The Managing Director,
Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara.

Subject:- Resolution of issue of imported coal based power projects located in Gujarat – Modification of provisions under Supplemental PPA for uniform implementation.

Ref:- (1) GUVNL's letter No GUVNL:CFM (Comm): 283 dated 21.04.2020
(2) GUVNL's letter No GUVNL:CFM (Comm): 287 dated 24.04.2020
(3) GUVNL's letter No GUVNL: 298 dated 02.05.2020

Madam,

I am directed to refer to the above cited subject and state that the issue related to uniform implementation of Supplemental PPAs with imported coal based power projects located in Gujarat State, has been carefully examined by State Government.

2. In this regard, after careful consideration, State Government has decided, as follows:

- (i) To revoke the GR dated 1.12.2018 for all intent and purposes.
- (ii) The matter of signing of supplemental PPA(s) with EPGL and CGPL shall be decided on case to case basis by the Government and as per terms & conditions decided hereafter:
 - a. Supplemental PPA with EPGL shall be signed with modified terms and conditions as per the GERC order dated 27.04.2020 and as per terms & conditions decided hereunder at para 2(iii) of this letter.
 - b. GUVNL shall submit the draft Supplemental PPA with CGPL separately for approval of State Government. All the modifications made in Supplemental PPA with M/s. EPGL shall be appropriately incorporated in the Supplemental PPA with M/s. CGPL and shall be submitted to the Government for approval before signing. However, in no case, supply of power to State of Gujarat by CGPL shall be at higher tariff than the tariff charged to other procurer states. Moreover, the supplemental PPA shall be effective from the date of order of CERC approving supplemental PPA. CGPL shall share 100%

of mining profit towards coal utilisation at power project. However, in case the coal from stipulated mines is not transferred or less transferred to the power plant and is sold outside, the profit is to be shared equivalent to energy supplied under PPA considering coal supplied to power plant as well as coal sold outside. In any case, the mining profit will be minimum 15 paise/unit. Further, fixed cost shall be reduced by 20 paise/unit to extent of normative availability of 80% towards lenders contribution as recommended in HPC report.

- (iii) For the payment of actual fuel cost in energy charges, the FOB price of coal to be considered as lower of (i) Actual (ii) HBA Index derived price as per formula given by Indonesian Government for quality of coal consumed (iii) Index published by Argus / Coalindo as applicable for quality of coal consumed (iv) Index published by S&P Global Platts as applicable for quality of coal consumed (v) Lowest Index of the country of origin as applicable for quality of coal consumed.

The ceiling of HBA Index of 110 USD per Metric ton as recommended in HPC report is reduced to 90 USD per Metric ton.

Further, project developers shall procure coal through competitive bidding to ensure fair price discovery in line with market trend and also make available the invoices for the actual cost at which the imported coal is purchased from mining Company from the country of origin of coal.

For the payment of actual fuel cost in energy charges, other charges shall be allowed as under:

- a. In case of CGPL – port and coal handling shall be actual or as per the quoted charges in the bid and escalated as per PPA, whichever is lower. The ocean freight & insurance shall be lower of the actual or the freight worked out as per the CERC index from time to time subject to a maximum of quoted charges in bid and escalated as per PPA, if any.
 - b. Whereas in case of EPGL these charges shall be lower of actual or as per Annexure-I.
- (iv) The above decision shall be effective notwithstanding any pending proceedings before the Hon'ble CERC or GERC.
- (v) In the case of Adani, a recall petition filed by GUVNL before Hon'ble CERC seeking cancellation of the relief allowed under the earlier GR dated 01.12.2018 is pending. Accordingly, the decision taken here above in so far as Adani Power is concerned shall be without prejudice to the claims of GUVNL in the pending matter before the Hon'ble CERC. Pending the decision in the proceedings, as at present, the energy charges in respect of Adani will be considered on provisional basis, only as per the decision as mentioned above and parameters appropriately applied in line with the GERC order dated 27.04.2020 in case of EPGL and further Other Charges - Ocean Freight & Insurance and Port & Coal

Handling Charges as applicable to CGPL (since these charges are not separately quoted in the Bid by Adani). Such energy charges to Adani shall be further affected as;

- a. After adjustment of 100% share of mining profit towards coal utilisation at power project. However, in case the coal from stipulated mines is not transferred or less transferred to the power plant and is sold outside, the profit is to be shared equivalent to energy supplied under PPA considering coal supplied to power plant as well as coal sold outside. In any case, the mining profit will be minimum 5 paise/unit;
- b. Fixed cost shall be reduced by 20 paise/unit to extent of normative availability of 80% towards lenders contribution as recommended in HPC report.

The energy charge amount so paid shall be without compromising on the rights of GUVNL in the pending recall petition and subject to the adjustment as per the decision of CERC.

3. Accordingly, GUVNL is hereby directed to draft the Supplemental PPAs with EPGL & CGPL consistent with the above decision and the same shall be sent to State Government for approval on case to case basis.
4. Further, GUVNL is directed to submit above decision of Government of Gujarat through affidavit before CERC in pending proceeding in the recall petition.
5. In view of above, as directed, I am, to request you to take appropriate action in the matter under intimation to this Department.

Yours faithfully,

Shalini
12.06.2020
(Shalini Dahan)

Officer on Special Duty (Power)
Energy and Petrochemicals Department

Copy forwarded with compliments to:

- 1) The CPS to Hon. Chief Minister, Swarnim Sankul-1, Gandhinagar.
- 2) The PS to Hon. Chief Minister, Swarnim Sankul-1, Gandhinagar.
- 3) The PS to Hon. Dy. Chief Minister, Swarnim Sankul-1, Gandhinagar.
- 4) The PS to Hon. Minister (Energy), Swarnim Sankul-1, Gandhinagar.
- 5) The PS to Hon. Minister of State (Energy), Swarnim Sankul-II, Gandhinagar.
- 6) The JS to Chief Secretary, Sachivalaya, Gandhinagar.
- 7) The ACS, Finance Department, Sachivalaya, Gandhinagar.
- 8) The Select File.

Annexure-I

Reference Rates for Ocean Freight, Insurance & other Transportation / Handling charges as per Clause 3.2.4 of this Agreement

Lower of following charges shall be considered (i) Worked out as per Table-I or (ii) Worked out as per Table-II

Table-I:

Following is worked out from Schedule 10 of EPGL's PPA dated 26.02.2007:

Contract Year	Commencement Date of Contract Year	Quoted Non Escalable Overseas Transportation Charges	Quoted Escalable Overseas Transportation Charges	Quoted Non Escalable Port / Fuel Handling Charges	Quoted Escalable Port / Fuel Handling Charges
		USD/MT	USD/MT	Rs/MT	Rs/MT
(a)	(b)	(c)	(d)	(e)	(f)
7	Oct-18	16.5098	0	274.65	0
8	01-Apr-19	16.5098	Same as above	277.51	Same as above
9	01-Apr-20	16.5098		280.60	
10	01-Apr-21	16.5098		283.47	
11	01-Apr-22	16.5098		286.55	
12	01-Apr-23	16.5098		289.64	
13	01-Apr-24	16.5098		292.72	
14	01-Apr-25	16.5098		295.81	
15	01-Apr-26	16.5098		298.90	
16	01-Apr-27	16.5098		302.20	
17	01-Apr-28	16.5098		305.51	
18	01-Apr-29	16.5098		308.59	
19	01-Apr-30	16.5098		311.90	
20	01-Apr-31	16.5098		315.43	
21	01-Apr-32	16.5098		318.73	
22	01-Apr-33	16.5098		322.04	
23	01-Apr-34	16.5098		325.57	
24	01-Apr-35	16.5098		329.09	
25	01-Apr-36	16.5098		332.62	
26	01-Apr-37	16.5098		335.71	

Shalini
12.06.2020

Table-II:

Contract Year	Commencement Date of Contract Year	Quoted Escalable Overseas Transportation Charges	Non	Quoted Escalable Overseas Transportation Charges
		USD/MT		USD/MT
(a)	(b)	(c)		(d)
7	Oct-18	7.0845		3.1122
8	01-Apr-19	7.0597		To be escalated as per CERC index for Transportation Charges
9	01-Apr-20	7.0597		
10	01-Apr-21	7.0597		
11	01-Apr-22	7.0597		
12	01-Apr-23	7.1094		
13	01-Apr-24	7.1342		
14	01-Apr-25	7.1342		
15	01-Apr-26	7.1342		
16	01-Apr-27	7.1591		
17	01-Apr-28	7.1342		
18	01-Apr-29	7.1342		
19	01-Apr-30	7.1342		
20	01-Apr-31	7.1342		
21	01-Apr-32	7.1342		
22	01-Apr-33	7.1839		
23	01-Apr-34	7.2088		
24	01-Apr-35	7.2088		
25	01-Apr-36	7.2088		
26	01-Apr-37	6.9851		

The above per Metric Ton rates have been benchmarked considering the CGPL's bid Methodology for Escalation Index shall be as per Schedule 9 of PPA dated 22.04.2007.

Shalini
12.06.2020



Date: 25th January 2021

To,
Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhawan,
Race Course, Baroda
Gujarat – 390 007

Essar Power Gujarat Limited
Essar House
11 K. K. Marg
Mahalaxmi
Mumbai - 400 034
India

Corporate Identity Number :
U74900GJ2007PLC066273

T +91 22 66601100 / 4001 1100
F +91 22 2354 0450
www.essar.com

Kind Attn: Mr K P Jangid, General Manager (Commercial)

Sub: Request for modifications in draft Supplemental Agreement

Dear Sir,

We are in receipt of the draft Supplemental Agreement for amendment to PPA dated 26.02.2007 and have perused the same. In essence, we are in agreement to most terms of the draft Supplemental Agreement and are willing to execute the same. However, some of the other terms may pose certain challenges in implementation of the Supplemental Agreement and therefore, we seek your support in resolving these challenges.

You would appreciate that with the introduction of the new indices for procurement of coal, it is legally impossible for EPGL to implement those conditions retrospectively. Hence, we request you to make this Supplemental Agreement effective from the date of approval by the Hon'ble GERC.

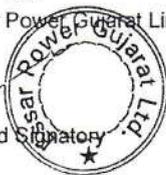
Thus, we are willing to execute the draft of SPPA with two suggested modifications, as below with respect to:

1. Effective date of the SPPA being the date on which GERC approves the SPPA
2. Untied power offered to Procurer shall be increased from 100 MW to 122 MW ("Additional Contracted Capacity").

We request you to incorporate the above changes in the draft SPPA, so that we can execute the SPPA at the earliest.

Thanking You
For Essar Power Gujarat Limited

Authorized Signatory



CC:

1. Shri Anil Mukim, IAS, Chief Secretary, Government of Gujarat
2. Smt Sunaina Tomar, IAS, Additional Chief Secretary, Energy & Petrochemicals Department, Government of Gujarat
3. Smt. Shahmeena Husain, IAS, Managing Director, GUVNL

Essar Power Gujarat Limited
Registered Office : Salaya Administrative Building, 44 km, Jamnagar-Okha Highway, Post Box 7, At Post Khambhaliya,
Dist. Devbhumi Dwarka 361 305, Gujarat, India.

T +91 2833 241444 F +91 2833 241818

ENERGY | INFRASTRUCTURE | METALS & MINING | SERVICES & TECHNOLOGY

Signing of Supplemental PPA
between Gujarat Urja Vikas
Nigam Limited (GUVNL) and
Essar Power Gujarat Ltd (EPGL).

Government of Gujarat
Resolution No. EPG-12-2019-15-K
Energy and Petrochemicals Department
Sachivalaya, Gandhinagar.
Dated - 5 JUN 2021

Read:

- (1) Energy and Petrochemicals Department's GR No. CGP-12-2018-166-K dated 01.12.2018.
- (2) Energy and Petrochemicals Department's GR No. CGP-12-2018-166-K dated 12.06.2020
- (3) Energy and Petrochemicals Department's Letter No. CGP-12-2018-166-K dated 12.06.2020
- (4) Gujarat Urja Vikas Nigam Limited's Letter No. GUVNL/GM (Comm.)/122 dated 30.01.2021.
- (5) Gujarat Urja Vikas Nigam Limited's Letter No. GUVNL/GM (Comm.)/226 dated 15.02.2021.
- (6) Gujarat Urja Vikas Nigam Limited's Letter No. GUVNL/GM (Comm.)/292 dated 01.03.2021.
- (7) Gujarat Urja Vikas Nigam Limited's Letter No. GUVNL/GM (Comm.)/372 dated 22.03.2021.
- (8) GAD's Letter No. MPB-10-2021(45)-KU dated 05.06.2021.

Preamble:

Vide letter referred to at Sr. No. (3) above, Govt. of Gujarat has issued Guidelines for signing of Supplemental Power Purchase Agreement (SPPA) with Essar Power Gujarat Limited (EPGL) & Coastal Gujarat Power Limited (CGPL) and terms thereof in accordance with the modifications suggested by Gujarat Electricity Regulatory Commission's order dated 27.04.2020 while approving the Supplemental PPA with EPGL.

As per approval of Cabinet, the Govt. has decided that the matter of signing SPPA with EPGL and CGPL to be decided on case to case basis by the Government. Further, it is also decided that SPPA with EPGL shall be signed with modified terms and conditions as per the GERC order dated 27.04.2020 and as decided in the Guidelines, as referred to at Sr. No. (3) above.

Vide GUVNL's letter referred to at Sr. No. (4) above, GUVNL has requested Government to convey decision with regard to sign SPPA in accordance with the modifications as per the GERC order and Govt. Guidelines and two modifications suggested by EPGL regarding (1) Effective date of SPPA being date on which GERC approves SPPA and (2) Offering untied capacity of 122 MW to GUVNL for tie up instead of 100 MW.

In view of the above, the matter was under active consideration of the Government.

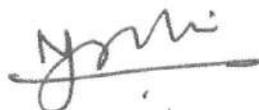
Resolution:

After careful consideration of the proposal of GUVNL as narrated in the preamble, the Government of Gujarat is pleased to accord an approval to sign SPPA between GUVNL and EPGL in accordance with the GERC order dated 27.04.2020 and Govt. Guidelines dated 12.06.2020, with the following modifications:-

- i. The Effective Date of Supplemental PPA (SPPA) with EPGL shall be from the date of approval of revised SPPA by GERC and the revised SPPA shall be signed incorporating the terms & conditions mentioned in Govt. of Gujarat Guidelines dated 12.06.2020 & GERC order dated 27.04.2020.
- ii. In order to limit the impact of coal price on tariff in the interest of consumers, it was decided that HBA Index Ceiling Price under SPPA of USD 90/MT (HBA Indonesian Index) shall not be subject to further revision without prior approval of State Government and GERC.
- iii. 122 MW untied capacity from EPGL project shall be tied up under SPPA by GUVNL.

This issues with the concurrence of the Finance Department on this Department's file of even number dated 02.06.2021.

By order and in the name of the Governor of Gujarat,



(Dr. Nisarg Joshi)

Officer on Special Duty (Power)
Energy and Petrochemicals Department

Copy to:-

- 1) The Principal Secretary to the Governor of Gujarat, Raj Bhavan, Gandhinagar.
- 2) The Chief Principal Secretary to the Hon'ble CM, SS-I, Gandhinagar.
- 3) The Principal Secretary to the Hon'ble CM, SS-I, Gandhinagar.
- 4) The ACS to Govt., Finance Department, Sachivalaya, Gandhinagar.
- 5) The Secretary, Gujarat Electricity Regulatory Commission, Gandhinagar.
- 6) The PPS to Hon'ble Deputy CM, SS-I, Gandhinagar.
- 7) The PS to Hon. Minister (Energy), SS-I, Gandhinagar.
- 8) The PS to Hon. Minister of State (Energy), SS-II, Gandhinagar.
- 9) The Joint Secretary to Chief Secretary, Sachivalaya, Gandhinagar.
- 10) The Managing Director, GUVNL, Vadodara... with a request to take appropriate action, in this regard.
- 11) The Deputy Secretary (Cabinet), General Administration Department, Sachivalaya, Gandhinagar.
- 12) Select File.

Ref : EPGL/GUVNL/210714

Date: 14 July 2021

To,
General Manager(Commercial),
Gujarat Urja Vikas Nigam Limited (GUVNL),
Sardar Patel Vidyut Bhavan,
Racecourse, Vadodara-390007.

Essar Power Gujarat Limited
44 KM Milestone
Jamnagar - Okha Highway
P. O. Box No 07
Khambhalia P. O.
Dist. Devbhumi Dwarka - 361 305
Gujarat, India
T +91 2833 663 030
F +91 2833 663 382
www.essar.com

Kind Attn: Mr KPJangid

Sub: Signing of Supplemental PPA for amendment to PPA dated 26.02.2007

Ref:

- (i) GUVNL letter to EPGL on the subject matter dated 14.06.2021
- (ii) EPGL letter to GUVNL dated 17.06.2021
- (iii) EPGL letter to GUVNL dated 21.06.2021

Sir,

Kindly refer to our letter dated 21.06.2021 wherein we had informed about our request at Hon'ble APTEL for urgent hearing in the matter for withdrawal of appeal no 108 of 2020 and 90 of .

We would like to inform that the appeal no 108 of 2020 and appeal no 90 of 2016 were listed and has been disposed off by the the Hon'ble APTEL on 25th June 2021. As compliance to the SPPA requirement the matter stands withdrawn.

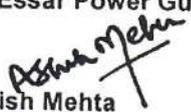
Further, we request for expeditious execution of the duly approved SPPA. As SPPA once executed will need to be approved by GERC before it becomes effective and EPGL will only be able to start supply of power to GUVNL thereafter. Execution of SPPA is also critical for completion of debt restructuring process of EPGL and very critical for its ongoing operations.

We therefore urge you to kindly nominate a date for execution of SPPA at the earliest.

Thanking you,

Yours truly,

For Essar Power Gujarat Limited,


Ashish Mehta

(Authorized Signatory)

Encl.

1. APTEL Order in appeal 108 of 2020 dated 25/06/2021
2. APTEL Order in appeal 90 of 2016 dated 25/06/2021

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

COURT-II

(VACATION BENCH)

**IA NO. 924 OF 2021 IN
APPEAL NO. 108 OF 2020 &
IA NOS. 570, 645, 1261, 838 & 1419 OF 2020**

Dated: 25th June, 2021

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

Essar Power Gujarat Ltd.

.... Appellant (s)

Vs.

Gujarat Electricity Regulatory Commission & Anr.

.... Respondent(s)

Counsel for the Appellant (s) : Mr. Mahesh Agarwal
Mr. Nishant Rao

Counsel for the Respondent (s) : Mr. Arijit Maitra for R-1
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal for R-2

ORDER

This matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

IA NO. 924 OF 2021

[For Urgent Listing]

The matter having been listed before us, the application filed by the appellant having served its purpose stands disposed of.

IA NO. 1419 OF 2020

[For Withdrawal of Appeal]

The appellant has filed an appeal, being no. 108 of 2020, and have now filed an application bearing IA no. 1419 of 2020 to seek permission of this Tribunal to withdraw this appeal (A.No. 108 of 2020). In this appeal, the appellant has submitted that:

- (a) Subsequent to the filing of the present appeal, Government of Gujarat by way of Government Resolution dated 12.06.2020 (the "2020 GR") has revoked the earlier Government Resolution dated 01.02.2018 based on which the Supplemental PPA dated 01.03.2019 was entered into. The Government of Gujarat, in its letter dated 12.06.2020 accompanying the 2020 GR has directed that a

Supplemental PPA with EPGL shall be signed with modified terms and conditions as per the Ld. Commission's Order dated 27.04.2020 and as per terms and conditions laid down in the said letter.

- (b) The appellant is in the process of entering into a new Supplemental PPA with Gujarat Urja Vikas Nigam Limited ("GUVNL"), respondent no. 2 herein, as per the 2020 GR.

In view of these developments, the issue raised in the appeal do not exist for adjudication and, therefore, the appeal needs to be withdrawn. Accordingly, the appellant has sought permission of this Tribunal to withdraw this appeal.

The application is allowed and disposed of accordingly.

APPEAL NO. 108 OF 2020

The appeal is dismissed as withdrawn. All other pending applications are rendered infructuous and disposed of accordingly.

Dusti is permitted.

No order as to costs.

(Justice R.K. Gauba)
Judicial Member
vt

(Ravindra Kumar Verma)
Technical Member

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)
COURT-II

(VACATION BENCH)

IA NO. 932 OF 2021 IN
APPEAL NO. 90 OF 2016 &
IA NO. 143 OF 2020

Dated: 25th June, 2021

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

Essar Power Gujarat Ltd.

.... Appellant (s)

Vs.

Gujarat Electricity Regulatory Commission & Anr.

.... Respondent(s)

Counsel for the Appellant (s) : Mr. Atul Shanker Mathur
 Ms. Priya Singh
 Mr. Prabal Mehrotra

Counsel for the Respondent (s) : Ms. Suparna Srivastava for R-1
 Ms. Ranjitha Ramachandran
 Ms. Poorva Saigal for R-2

ORDER

This matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

IA NO. 932 OF 2021

[For Urgent Listing]

The matter having been listed before us, the application filed by the appellant having served its purpose stands disposed of.

IA NO. 143 OF 2020

[For Withdrawal of Appeal]

The appellant has filed an appeal, being no. 90 of 2016, and have now filed an application bearing IA no. 143 of 2020 to seek permission of this Tribunal to withdraw this appeal (A.No. 90 of 2016). In this appeal, the appellant has submitted that:

- (a) Subsequent to the filing of the present appeal, s Supplemental Power Purchase Agreement ("Supplemental PPA") dated 01.03.2019 has been entered into between the parties concerned as per which the Bid-03 PPA stands amended.
- (b) The Gujarat Urja Vikas Limited has filed a Petition before the Gujarat Electricity Regulatory Commission at Gandhinagar to approve the

Supplemental PPA and the proceedings in the matter are now pending.

- (c) The present appeal involves two questions for determination by this Tribunal:
- (i) Whether the heat rate fixed by the GERC for computation of tariff to give effect to change in taxes and duties as amounting to "Change in Law" is proper and correct?
 - (ii) Whether change in the Minimum Alternate Tax ("MAT") constitutes "Change in Law as defined in the PPA?
- (d) The above questions are in relation to the business conducted by the appellant/applicant during the period prior to 15.10.2018. That one of the terms contained in the recommendations made by the HPC and accepted by the Government of Gujarat for implementation under the Implementation Policy dated 01.12.2018 and for implementing which, the Supplemental PPA has been entered into between the respondent no.2 and the appellant/applicant, is that the appellant/applicant shall bear all its past losses, that is to say, losses incurred by it for the period prior to 15.10.2018. That the claims of the appellant/applicant against the respondent no.2 involved in the present appeal are a part of past losses of the appellant/applicant and accordingly, the appellant/applicant cannot hold the respondent no.2 liable to bear the same or any part thereof. In view of the same it has, therefore, become necessary for the appellant/applicant to withdraw the present appeal. Hence, the present application.

In view of the above submission, the application is allowed and disposed of accordingly.

APPEAL NO. 90 OF 2016

The appeal is dismissed as withdrawn. All other pending applications are rendered infructuous and disposed of accordingly.

Dusti is permitted.

No order as to costs.

(Justice R.K. Gauba)
Judicial Member

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(Ravindra Kumar Verma)
Technical Member



सत्यमेव जयते

INDIA NON JUDICIAL
Government of Gujarat
Certificate of Stamp Duty

Certificate No. : IN-GJ82176611953423T
Certificate Issued Date : 15-Jul-2021 12:42 PM
Account Reference : CSCACC (GV)/ gjcsceg07/ GJ-BAZAH0633/ GJ-BA
Unique Doc. Reference : SUBIN-GJGJCSCEG0799732438944988T
Purchased by : MONIL K PARIKH
Description of Document : Article 5(h) Agreement (not otherwise provided for)
Description : AGREEMENT
Consideration Price (Rs.) : 300
 (Three Hundred only)
First Party : ESSAR POWER GUJARAT LIMITED
Second Party : GUJARAT URJA VIKAS NIGAM LIMITED
Stamp Duty Paid By : ESSAR POWER GUJARAT LIMITED
Stamp Duty Amount(Rs.) : 300
 (Three Hundred only)



LB 0021283201

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Statutory Alert:

1. The authenticity of this Stamp certificate should be verified at 'www.shoilestamp.com' or using e-Stamp Mobile App of Stock Holding. Any discrepancy in the details on this Certificate and as available on the website / Mobile App renders it invalid.
2. The onus of checking the legitimacy is on the users of the certificate
3. In case of any discrepancy please inform the Competent Authority.

Supplemental Agreement

THIS FOURTH SUPPLEMENTAL POWER PURCHASE AGREEMENT hereinafter called the “**Supplemental Agreement**” is entered into at Vadodara on the **12th** day of **August, Two Thousand And Twenty One** by and

BETWEEN

M/s Essar Power Gujarat Ltd. (EPGL), a Company incorporated under the Companies Act, 2013 having its registered office at 44 KM Milestone, Jamnagar – Okha Highway, Khambhaliya, Devbhumi Dwarka (hereinafter referred to as “**Seller**” or “**EPGL**” which expression shall unless repugnant to the context or meaning thereof include its successors and assigns) as Party of the first part;

AND

M/s Gujarat Urja Vikas Nigam Limited, (GUVNL) a Government of Gujarat Undertaking and a Company incorporated under the Companies Act, 1956 having its registered office at Sardar Patel Vidyut Bhavan, Vadodara (hereinafter referred to as “**Procurer**” or “**GUVNL**” which expression shall unless repugnant to the context or meaning thereof include its successors and assigns) as Party of the second part

Each of the "Procurer" and "the "Seller" are individually referred to as "Party" and collectively as the "Parties"

Whereas:

- A. The Seller and the Procurer had executed a Power Purchase Agreement dated 26.2.2007, which was amended by Assignment Agreement dated 25.11.2008 and Supplemental Power Purchase Agreement dated 16.10.2009 (hereinafter collectively referred to as the “**PPA**”), for the sale and purchase of electricity in accordance with the terms and conditions contained therein;
- B. The Government of Gujarat, vide Government Resolution No. CGP-12-2018-166-K dated 3.07.2018 constituted a High Power Committee to, inter alia, suggest sustainable solutions for facilitating the power generation projects located in the state of Gujarat and based on imported Indonesian coal as fuel including the Seller herein, on account of representations made by such power generation projects as to the viability of their continued operation after the decision of the Hon’ble Supreme Court in Energy Watchdog Vs Central Electricity Regulatory Commission (2017)14 SCC 80 that no relief is admissible to such projects under the terms of the PPA entered into by Procurer with such projects;



- C. The High Power Committee submitted its Report on 3.10.2018 making certain recommendations for resolving the said issues;
- D. The Government of the State of Gujarat accepted the recommendations of the High Power Committee with certain modifications and, issued its policy directions contained in Resolution No. CGP-12-2018-166-K dated 1.12.2018 (Hereinafter referred to as "the Implementation Policy");
- E. The implementation of the said policy directions contained in the Implementation Policy required, inter alia, carrying out certain amendments to the PPA, and obtaining necessary approvals for these amendments, from the Appropriate Commission;
- F. Article 18.1 of the PPA enabled the Parties to amend the provisions of the PPA by written agreement however subject to the condition that any such supplemental agreement can be effective and valid only on the approval by the Appropriate Commission.
- G. The Seller and the Procurer had then executed a Supplemental Agreement dated 01.03.2019 and further entered into First and Second Addendums to the Supplemental Agreement which were subject to the approval to the Supplemental Agreements by the Gujarat Electricity Regulatory Commission ('GERC') being the Appropriate Commission under the terms of the PPA.
- H. GUVNL had filed a Petition before Hon'ble Gujarat Electricity Regulatory Commission being Petition No. 1807/2019 for the approval of the Supplemental Agreements.
- I. As per the recommendations of High Powered Committee accepted by Govt. of Gujarat through G.R. dated 1.12.2018, one of the primary conditions for allowing fuel cost as a pass through w.e.f. 15.10.2018 is that the Seller shall bear all the losses for the past period, i.e. period prior to 15.10.2018
- J. The Seller and Procurer had mutually agreed to modify the provision in the Supplemental Agreement dated 01.03.2019 related to FOB Cost of Coal under Clause 3.2.4 (I) and withdraw the maximum of 10% tolerance allowed above HBA Price and the same was placed before the Gujarat Electricity Regulatory Commission
- K. The Gujarat Electricity Regulatory Commission vide order dated 27.04.2020 after hearing the parties and receiving representation from Consumer organisations gave a conditional approval to the Supplemental Agreement by



directing the Parties to carry out certain modifications in the Supplemental Agreement as stated in the order dated 27.04.2020.

- L. On 1.06.2020 EPGL filed an Appeal being Appeal No 108 of 2020 before the Hon'ble Appellate Tribunal for Electricity challenging the order dated 27.04.2020 passed by the Gujarat Electricity Regulatory Commission.
- M. In the meanwhile the Government of Gujarat was of the considered view that the Govt. of Gujarat GR dated 1.12.2018 was not achieving the objective and purpose for which it was resolved and to further safeguard the public interest, Govt. of Gujarat vide GR dated 12.06.2020 has revoked earlier GR dated 1.12.2018 for all intent and purposes. Govt. of Gujarat has issued Guidelines dated 12.06.2020 for signing of Supplemental Agreement between Procurer (GUVNL) & Seller (EPGL) with modified terms and conditions as per GERC order dated 27.04.2020 and in accordance with terms stated in Guidelines dated 12.06.2020.
- N. EPGL has agreed to withdraw the Appeal being Appeal No. 108 of 2020 filed before the Hon'ble Appellate Tribunal for Electricity and on 14.10.2020 filed an application before the Hon'ble Appellate Tribunal for Electricity for withdrawal of the Appeal.
- O. GUVNL vide letter dated 11.11.2020 has forwarded the draft SPPA incorporating the modifications as per GERC order dated 27.04.2020 and in accordance with Govt. of Gujarat Guidelines dated 12.06.2020.
- P. EPGL vide letter dated 25.01.2021 has conveyed it's consent to the draft SPPA and requested to incorporate (i) Effective Date of SPPA shall be from the date of approval of GERC (b) 122 MW untied capacity from EPGL project to be tied up by GUVNL under SPPA instead of 100 MW.
- Q. GUVNL vide letter dated 30.01.2021 has forwarded the draft of SPPA to EPD, GoG modified in accordance with the directives as per GERC order dated 27.04.2020 and Govt. Guidelines dated 12.06.2020 and also intimated the request of EPGL.
- R. Govt. of Gujarat vide GR dated 5.06.2021 has accorded approval for signing of SPPA between GUVNL and EPGL in accordance with the GERC order dated 27.04.2020 and Govt. Guidelines dated 12.06.2020 considering the effective date of SPPA to be the date of approval of revised SPPA by GERC and allowing to tie up 122 MW untied capacity from EPGL project under the SPPA.



- S. The Parties have agreed to modify the Supplemental Agreements earlier signed by them in due compliance of the conditions contained in the Order dated 27.04.2020 passed by the Gujarat Electricity Regulatory Commission and in accordance with the Govt. of Gujarat guidelines dated 12.06.2020 and Govt. of Gujarat GR dated 5.06.2021 and are therefore entering into this Supplemental Agreement in terms of Order dated 27.04.2020, Govt. of Gujarat guidelines dated 12.06.2020 and Govt. of Gujarat GR dated 5.06.2021.
- T. In view of the modifications directed by the Hon'ble GERC order dated 27.04.2020, Govt. of Gujarat guidelines dated 12.06.2020, and Govt. of Gujarat GR dated 5.06.2021, this amended and modified Supplemental Agreement being entered into between the parties in substitution of the earlier signed Supplemental Agreement dated 01.03.2019, the said earlier Supplemental Agreement dated 01.03.2019 read with Addendum(s) thereto shall stand superseded for all intent and purpose and will no longer have any effect.

NOW THEREFORE, in consideration of the premises, mutual agreements, covenants and conditions set forth in this Supplemental Agreement, it is hereby agreed by and between the Parties as follows:

1. All capitalized terms, unless specifically defined in this Supplemental Agreement, shall have the meanings ascribed to them in the PPA.
2. With the execution of this Supplemental Agreement, all relevant Articles of the Power Purchase Agreement in respect of the matters covered in this Supplemental Agreement, shall stand amended, modified and/or replaced to the extent provided in this Supplemental Agreement and in the event of any conflict in the interpretation between the clauses of the PPA and this Supplemental Agreement, or in the application of any provision of the PPA or this Supplemental Agreement, then the provisions of this Supplemental Agreement shall prevail. Except to the extent specifically amended, modified and/or replaced hereunder, all other terms and conditions of the PPA shall continue to apply and shall remain unchanged.

3. The Parties agree as follows:

3.1 The following definitions shall be added:

- (i) Article 1.1 of the PPA shall be amended as follows:



“**Affiliate**” with respect to any specified person shall mean any other person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified person and, in relation to a natural person, includes any “Relative” (as such expression is defined in the Companies Act, 2013) of such natural person. The expression “control” shall have the meaning ascribed to the term in the Companies Act, 2013 and the terms “controlling” and “controlled” shall be construed accordingly.

- (ii) “**Amendment Effective Date**” shall mean the effective date of this SPPA which shall be from the date of approval of this revised SPPA by Hon’ble GERC.
- (iii) “**Tariff Regulations**” shall mean the regulations of the Gujarat Electricity Regulatory Commission specifying the terms and conditions for determination of tariff, as applicable at the time of COD of the Project.

3.2 All provisions in the PPA relating to determination of Capacity Charge & Energy Charge, shall be replaced and substituted with the following provisions.

3.2.1 The Seller shall, with effect from the Amendment Effective Date, be entitled to receive, and the Procurer shall be liable to pay, Revised Tariff determined in accordance with the provisions hereinafter contained, with respect to the sale and supply of electricity under and in terms of the PPA.

“**Revised Tariff**” shall mean the sum total of Energy Charge and Capacity Charge.

“**Capacity Charge**” shall mean the Capacity Charge determined in accordance with Clause 3.2.2 of this Supplemental Agreement

“**Energy Charge**” shall mean the energy charge determined in accordance with clause 3.2.3 of this Supplemental Agreement, subject to condition provided at Clause 3.2.1

“**Exchange Rate**” shall mean the simple average of State Bank of India TT Selling rate for last 15 days prior to 1st day of the Month of power supply.

3.2.2 Capacity Charge for each Month shall be the Quoted Capacity Charge (Sum of Quoted Non Escalable Capacity Charge and Quoted Escalable Capacity Charge) mentioned at Schedule 10 of PPA dated 26.02.2007 less 20



paaise/kwh applicable upto Normative Availability of 80%. The Monthly Capacity Charge payment shall be made in accordance with Schedule 6 of PPA dated 26.02.2007. This Capacity Charge shall be subject to reduction towards penalty for declaration of Availability lower than 90% as per Clause No. 3.2.5 of this Supplemental Agreement in addition to the Contract Year Penalty for Availability below 75% as per PPA dated 26.02.2007.

3.2.3 Energy Charge shall be determined for each Month, as under:

(Energy charge rate in Rs./kWh) x {Scheduled energy (ex-bus) for the Month in kWh.}

Energy charge rate (ECR) in Rupees per kWh on ex-power plant basis shall be determined to four decimal places in accordance with the following formulae:

$$ECR = \{GHR \times LPPF / CVPF\} \times 100 / (100 - AUX)$$

Where:

AUX = Lower of (a) actual auxiliary energy consumption or (b) 6.50% as approved by Hon'ble Gujarat Electricity Regulatory Commission in Petition no. 1296/2013.

CVPF (as received basis) = Weighted Average Gross calorific value of coal in Kcal / Kg on as billed basis minus lower of (i) actual difference between GCV at loading port and unloading port or (ii) 72 Kcal / Kg towards loss of heat during transportation as per ISO 1928 (dated 01.06.2009)

ECR = Energy charge rate, in Rupees per kWh sent out.

GHR = Lower of (a) actual Gross station heat rate or (b) 2262 Kcal per kWh as approved by Hon'ble Gujarat Electricity Regulatory Commission in Petition no. 1296/2013.

LPPF = Weighted average landed price at the plant site of coal as primary fuel (which for the avoidance of doubt shall include all taxes on the sale, transportation & import of coal and inland transportation costs for transporting and delivering coal to the plant site), in Rupees per kg, during the relevant Month. LPPF shall be worked out as per table in Clause 3.2.4 of this Supplemental Agreement.



3.2.4 The Energy Charge determined as above, shall be subject to the following conditions:

(I) General Principles for determination of LPPF:

<p>FOB cost of Coal</p>	<p><u>FOB Price for Imported Coal:</u></p> <p>Shall be the lower of actual price prudently incurred by Seller or the ceilings mentioned herein under and determined in Indian Rupees at Exchange Rate. In case of change in pricing framework in Indonesia or change in source of coal to other country, Ceilings will be replaced with relevant lowest coal indices.</p> <p>Note: For determination of equivalent Coal Price for working out Landed Cost of imported coal for the Month:</p> <p>The lowest of following for the month shall be considered:</p> <p>(a) Actual FOB price of consignment</p> <p>(b) HBA price adjusted and worked as per formula stated in Annexure-A for billed GCV</p> <p>“HBA Index” shall mean the FOB Price of Indonesian imported coal having 6322 kcal/kg Gross Calorific Value in USD / MT notified by Govt of Indonesia on monthly basis</p> <p>“HBA Price” shall mean the HBA Index FOB price of Indonesian imported coal published by Govt of Indonesia from time to time for coal quality of 6322 Kcal/Kg, as adjusted for GCV (as billed) of coal consignment consumed in the Project as per the formula as stated in Annexure-A.</p> <p>The FOB price of coal shall always be subject to an upper ceiling limit of HBA Index of USD 90/MT for 6322 Kcal / Kg ascertained on a monthly basis, adjusted for quality of coal (GCV as billed) in the Project and as revised in accordance with this Supplemental Agreement (the “Ceiling HBA Price”) at sub para (II) Specific Conditions herein below.</p>
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	<p>(c) Index notified by Argus / Coalindo applicable for the quality of coal consumed</p> <p>(d) Index notified by S&P Global Platts applicable for the quality of coal consumed</p> <p>(e) Lowest Index of the country of origin applicable for the quality of coal consumed</p> <p>Note: For the coal procured having the GCV as published by above indices, the notified index price will be directly considered.</p> <p>The coal index for the coal consumed other than for the coal in the pre-determined GCV range as notified by above indices shall be arrived as follows:</p> <p>(i) For the coal consumed having GCV within range of ± 200 Kcal / Kg from GCV of above notified index, the rate shall be worked out on proportionate basis considering the nearest notified monthly index and</p> <p>(ii) For the coal consumed other than above category, the rate shall be worked out considering weighted average price of the two notified monthly index within which the GCV of consumed coal is falling to arrive at the equivalent coal price for the GCV of consumed coal.</p>
<p>Transportation and other costs</p>	<p>Ocean Freight & Insurance</p> <p>The ocean freight & insurance shall be lower of actual or as stated in Annexure – B and calculated in Indian Rupees, at Exchange Rate. (Column (c) & (d) in Table I & II respectively)</p> <p>Port / Fuel Handling Charges:</p> <p>The Port / Fuel Handling charges shall be lower of actual or as stated in Annexure – B (Column (e) & (f) in Table I)</p>



(II) Specific Conditions

- (a) The Ceiling Price for HBA Index will be 90 USD / MT. In order to limit the impact of coal price on tariff in the interest of consumers, the HBA Index Ceiling Price of USD 90 / MT (HBA Indonesia Index) shall not be subject to further revision without prior approval of State Government and GERC.
- (b) Seller agrees that in case HBA Index of Indonesian coal exceeds Ceiling Price 90 USD/MT or Revised Ceiling Price as per para (a) above, Seller shall bear the differential cost and continue to supply power under the PPA & Supplemental Agreement.
- (c) Seller shall procure imported coal only through international competitive bidding process for procurement on long term / medium term basis to ensure the availability of coal. Seller shall seek approval of Procurer for Tender document and price discovered under competitive bidding process shall also be approved by Procurer and Hon'ble Gujarat Electricity Regulatory Commission. In absence of above, the procurement of coal shall not qualify for payment of energy charges under Supplemental PPA.
- (d) Seller shall be required to make available the details and documents related to procurement of coal from the mining sources.

(III) Methodology for Merit Order Scheduling & Billing

- (i) The Seller will, on the last working day of each Month, submit to the Procurer the anticipated Energy Charges for the subsequent Month which shall be considered as ceiling for payment. The anticipated Energy Charge will be based on the estimated cost of Indonesian imported coal procurement for subsequent Month.
- (ii) Deleted
- (iii) At the end of each Month, the Bills by the Seller will be based on the Capacity Charge and Energy Charge respectively determined as per paragraphs 3.2.2 and 3.2.3 above.

The Seller has to provide the following documents along with the monthly bill:

1. Auditors certificate for each shipment in terms of value and quantity for coal received, consumed for the previous month.



2. Invoices of (i) fuel supplier i.e. invoice for the actual cost at which the imported coal is purchased from mining company from the country of origin of coal (ii) ocean freight and insurance (iii) port / fuel handling charges.
3. Copy of Bill of Entry including Bill of lading and all supporting documents. Bank challans regarding payment of cess, taxes & duties and Letter of Credit / payment details towards purchase of fuel.
4. GCV certificate of loading and unloading port by independent agency.
5. Independent Energy Auditor's Certificate for actual parameters GHR & Auxiliary consumption for the month.
6. Other documents as stated at Annexure-5 of Gujarat Electricity Regulatory Commission order dated 27.04.2020.

The applicability of Revised Tariff under this Supplemental PPA shall be from Amendment Effective Date subject to condition stated at Clause 3.2.1 above.

- (iv) For the Monthly Bills, no rebate shall be available on Energy Charge component while rebate shall be available to Procurer for Capacity Charge component as per the existing provisions of the PPA. Further, the Delay Payment Surcharge shall continue to apply as per provisions of PPA dated 26.02.2007.
- (v) Further, the Seller shall be entitled to payment towards approved Change in Law for the Energy Charge only till the Effective Date of this SPPA. Thereafter the Seller shall not be entitled to the approved Change in Law for Energy Charges. Any change in law taking place in future after this Supplemental Agreement, has to be submitted by the Seller to the Hon'ble Gujarat Electricity Regulatory Commission for approval.

3.2.5 Availability: The Parties agree that the payment of Capacity Charges linked to Availability shall be modified, as specified below, in order to provide the Procurer the benefit of higher Availability upto 90%, beyond the Normative Availability of 80% as specified in the PPA, without Procurer having to pay any Capacity Charge for such higher Availability. The Parties agree that the Seller shall maximize the utilization of the generation capacity from the Project, in the manner specified below:



- (a) The Seller shall declare availability up to 90% in a Contract Year. However, the Capacity Charge shall continue to be paid corresponding to Normative Availability of 80%, as specified in the PPA on achievement of cumulative Availability of 80% in a Contract Year. Further, in the event the cumulative Availability in any Contract Year is less than 80%, then the provisions of the PPA shall apply in respect of determination of the Capacity Charge payable to the Seller in addition to the reduction specified in sub clause (b) below.
- (b) In the event the cumulative Availability in any Contract Year is less than 90%, the Capacity Charge payable to the Seller, shall be reduced by 10% of Capacity Charges otherwise payable to the Seller. This is explained by way of illustration below:

Illustration for computing additional penalty below 90% Availability declaration

	Actual DC 82%	Actual DC 76%
PPA Capacity	1,000 MW	1,000 MW
Normative Availability	80%	80%
Capacity Charges	1.00 Rs/kWh	1.00 Rs/kWh
Normative Units	7008 Mus	7008 Mus
Actual Availability	82%	76%
Actual Units	7183 Mus	6658 Mus
Shortfall in availability compared to revised 90%	8% (701 MUs)	14% (1226 MUs)
Penalty for shortfall in 90% (10% of Capacity Charges)	Rs 0.10 / kWh (1 Rs x 10%)	Rs 0.10 / kWh (1 Rs x 10%)
Penalty Amount	Rs 7.01 crore	Rs 12.26 crore
Yearly Capacity Charges	Rs 700.8crore	Rs 665.8 crore
	(7008 MUs x 1 Rs)	(6658 MUs x 1 Rs)
Less: Penalty	Rs. 7.01 Crore	Rs. 12.26 Crore
Net of Penalty Payment	Rs. 693.79 Crore	Rs. 653.54 Crore

For avoidance of doubt, it is clarified that for all other purposes, the Normative Availability shall continue to be 80%, as specified in the PPA. It is however agreed that for the purposes of determining the incentives under the PPA, the availability shall be considered at 90% instead of 85% as mentioned in the PPA dated 26.02.2007. It is further clarified that the provisions relating to penalty for declaration of Availability below 75% during Contract Year shall also continue to apply in accordance with the provisions of existing PPA.

3.3 Deleted:

3.4 Untied Capacity offered to Procurer



3.4.1 The Seller is having 122 MW untied capacity (hereinafter referred to as **“Additional Contracted Capacity”**) from Units 1 and 2 (each of 600MW) and Seller is willing to supply the same to the Procurer and the Procurer agrees to purchase the same for the period from the date of execution of this Supplemental Agreement to the 25th Anniversary of the Commercial Operation Date of Unit No. 2 or at the option of the purchaser to the extended period of the PPA in terms of this Supplemental Agreement in terms of Clause 3.5 herein and the Contracted Capacity under the PPA shall stand increased by such Additional Contracted Capacity.

3.4.2 The tariff applicable for the Additional Contracted Capacity shall be worked out as under:

“Tariff for Additional Contracted Capacity” shall mean the sum total of Energy Charge for Additional Contracted Capacity and Capacity Charge for Additional Contracted Capacity.

“Energy Charge for Additional Contracted Capacity” shall mean the energy charge determined in accordance with Clause 3.2.3 and 3.2.4 of this Supplemental Agreement.

“Capacity Charge for Additional Contracted Capacity” shall be Rs.0.8597/Kwh or as worked out on the date of approval of this SPPA by GERC being the levelized Capacity Charge for the balance Term of PPA dated 26.02.2007.

For the avoidance of doubt, the Capacity Charge Limited to Additional Contracted Capacity only shall not be subject to discount of Rs 0.20/Kwh as specified in Clause 3.2.2 of this Agreement.

3.4.3 Seller shall be required to declare single Availability for the Project (Unit 1-2) complying with Article 8 & 9 of the PPA dated 26.02.2007 based on actual availability of coal at plant for which Seller shall furnish coal stock position on daily basis to Procurer. SLDC, Gujarat shall allocate such Availability on proportionate basis between the Contracted Capacity of 1000 MW, Additional Contracted Capacity of 122 MW. SLDC, Gujarat shall schedule Energy from the Project from above respective Capacity by adhering to Merit Order Protocol. SLDC, Gujarat shall separately certify the Availability as well as Scheduled Energy from the above Capacity.



3.4.4 Procurer shall make payment to the Seller for the Additional Contracted Capacity as per the provision of PPA dated 26.02.2007 read with this Supplemental Agreement.

3.4.5 For the Additional Contracted Capacity, subject to the above all other terms & conditions shall be applicable as per PPA dated 26.02.2007 mutatis mutandis.

3.5 Extension of Term of the PPA

3.5.1 The Procurer shall have the right, but not the obligation, to extend the Term of the PPA by ten (10) years for the Contracted Capacity ("Extension Period"), such extension to be effected by issue of a notice by the Procurer to the Seller, stating its decision to extend the PPA for the Contracted Capacity for such period of ten years, and such notice shall be issued not later than five (5) years prior to the Expiry Date of the PPA. For the avoidance of doubt, any extension for a period other than 10 years, as above, shall be with the mutual consent of the Parties and approval of Appropriate Regulatory Commission (Gujarat Electricity Regulatory Commission).

3.5.2 The Parties agree that the extension of the PPA as aforesaid, shall be on the same terms and conditions as contained in the PPA, subject to the following conditions in relation to the Extension Period

3.5.3 For the Extension Period, the Tariff shall be determined as follows:

"Extended Term Tariff" shall mean the sum total of Energy Charge & Capacity Charge as worked out for the Extended Term

Where:

"Capacity Charge for Extended Term" shall mean the Quoted Capacity Charge as specified in the PPA, as applicable for the last Contract Year (falling prior to the Expiry Date). Furthermore, such Quoted Capacity Charge applicable for the last Contract Year as above, shall be increased to factor for additional costs, if any, incurred or to be incurred by the Seller for renovation and modernisation of the Project, and also for the consequential increase in O&M expenses. Such increase in Quoted Capacity Charge shall be determined & approved by Gujarat Electricity Regulatory Commission in accordance with the applicable Gujarat Electricity Regulatory Commission Tariff Regulations prevailing then; and



"Energy Charge for Extended Term" shall be determined for each Month of the Extension Period, as under:

Energy Charge payable to the Seller for a Month shall be:

(Energy charge rate in Rs./kWh) x {Scheduled energy (ex-bus) for the Month in kWh.}

Energy charge rate (ECR) in Rupees per kWh on ex-power plant basis shall be determined to four decimal places in accordance with the following formulae:

$$ECR = \{GHR \times LPPF / CVPF\} \times 100 / (100 - AUX)$$

Where:

AUX = Lower of (a) actual auxiliary consumption or (b) 6.50% as approved by Hon'ble Gujarat Electricity Regulatory Commission in Petition no. 1296/2013.

CVPF (as received basis) = Weighted Average Gross calorific value of coal in Kcal / Kg on as billed basis minus lower of (i) actual difference between GCV at loading port and unloading port or (ii) 72 Kcal / Kg towards loss of heat during transportation as per ISO 1928 (dated 01.06.2009)

ECR = Energy charge rate, in Rupees per kWh sent out.

GHR = Lower of (a) actual Gross station heat rate or (b) 2262 Kcal per kWh as approved by Hon'ble Gujarat Electricity Regulatory Commission in Petition no. 1296/2013.

LPPF = Weighted average landed price at the plant site of coal as primary fuel (which for the avoidance of doubt shall include all taxes on the sale, transportation & import of coal and inland transportation costs for transporting and delivering coal to the plant site), in Rupees per kg, during the relevant Month. LPPF shall be worked out as per table in Clause 3.2.4 of this Supplemental Agreement.

For the avoidance of doubt, the Capacity Charge for Extended Term shall not be subject to adjustment towards Rs 0.20 / Kwh as specified in Clause 3.2.2 of this Supplemental Agreement.

3.6 Notwithstanding anything to the contrary contained in the PPA, it is agreed between Parties that in the 10th Contract Year from the date of signing of this



Supplemental Agreement, if Seller's Energy Charges for respective Contracted Capacity under this Supplemental Agreement is higher than marginal coal based thermal power stations having 50% schedule or immediate below, as the case may be, during the previous Contract Year under Merit Order of Procurer, Procurer shall have a right to terminate the PPA & Supplemental Agreement for the Contracted Capacity and / or Additional Contracted Capacity as defined above. In the event of termination pursuant to this clause, neither Party shall be liable for any damages or penalty of any kind to the other Party.

- 3.7 It is clarified that the provisions dealing with Change in Law under the PPA dated 26.02.2007 shall continue to apply including in respect of Additional Contracted Capacity. The impact of additional expenditure to be incurred towards compliance of the Ministry of Environment, Forest & Climate Change Notification dated 7.12.2015 are not included in the tariff as per this Supplemental Agreement and any impact thereof on tariff and operational parameters shall be considered pursuant to approval of Appropriate Commission.
- 3.8 Seller shall bear the losses for prior period i.e. before implementation of this Supplemental Agreement. Further, Seller shall not raise any claim / dispute with regard to past period items before any Forum / Court in the future.
- 3.9 Seller shall unconditionally withdraw all pending cases / litigations / waive claims against GUVNL (other than Change in Law in India) before various Forums. Only the cases / litigations filed by GUVNL which are under adjudication shall be considered upon decision by appropriate forum / Court to extent of GUVNL's prayer in the matter.
- 3.10 Any change in the ownership of the Seller shall only be done with the prior intimation of any such move and after approval of the Government of Gujarat and Hon'ble Gujarat Electricity Regulatory Commission.
4. Notwithstanding anything contained herein above the parties agree that they will be bound by the stipulations, conditions and directions contained in the Order dated 27.04.2020 passed by the Hon'ble Gujarat Electricity Regulatory Commission, the Govt. of Gujarat guidelines dated 12.06.2020 and the Govt. of Gujarat GR dated 05.06.2021, and the contents therein shall be read as superseding and binding on the parties in case of any inconsistency between the terms of this Supplemental Agreement and the said order dated 27.04.2020 read with Govt. of Gujarat guidelines dated 12.06.2020 and the Govt. of Gujarat GR dated 05.06.2021 including if there is any omission to include any of the express or implied terms of the said Order dated



27.04.2020 or Govt. of Gujarat guidelines dated 12.06.2020 or the Govt. of Gujarat GR dated 05.06.2021.

5. This Supplemental Agreement shall be effective subject to the approval by Gujarat Electricity Regulatory Commission.
6. Subject to the above, the terms of this Supplemental Agreement shall be read as an integral part of the PPA dated 26.02.2007 entered into between the parties.

In Witness Whereof the Parties have executed this Forth Supplemental Agreement to the Power Purchase Agreement on the date mentioned hereinabove through their duly authorized representatives.

<p>FOR AND ON BEHALF OF M/s Essar Power Gujarat Ltd. (EPGL)</p> <p>FOR ESSAR POWER GUJARAT LIMITED</p> <p><i>[Signature]</i> AUTHORISED SIGNATORY Authorised Signatory Mr. Sandip Sinha (Sr. Vice-President)</p> <p>WITNESSES</p> <p>1. <i>[Signature]</i> (PRATEEK GARGI)</p> <p>2. <i>[Signature]</i> (Rahul Singh)</p>	<p>FOR AND ON BEHALF OF M/s Gujarat Urja Vikas Nigam Ltd.</p> <p><i>[Signature]</i> K.P. JANGID Authorised Signatory Gujarat Urja Vikas Nigam Limited Race Course, BARODA-390007.</p> <p>WITNESSES</p> <p>1. <i>[Signature]</i> (SANJAY MATHUR)</p> <p>2. <i>[Signature]</i> (K.N. Chudasama)</p>
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Annexure A

Working Methodology for determination of equivalent Coal Price based on HBA Index

1. Formulae for HPB No, 1-7

$$\text{HPB Marker (i)} = (\text{HBA} * \text{K (i)} * \text{A (i)}) - (\text{B (i)} + \text{U (i)})$$

Where

HPB Marker (i) = HPB of 1 to 7 coal price markers

K (i) = Coal Heat Value (i) / 6322

A (i) = (100 - Coal Water Content (i)) / (100 - 8) -

B (i) = (Coal Sulfur Content (i) - 0.8) * 4

U (i) = (Coal Ash Content (i) - 15) * 0.4

2. Formulae for Marker No. Coal Benchmark Price 8

$$\text{HPB Marker (i)} = (\text{HBA} * \text{K (i)} * \text{A (i)}) - (\text{B (i)} + \text{U (i)})$$

Where

HPB Marker (i) = HPB coal price marker 8

K (i) = Coal Heat Value (i) / 6322

A (i) = (100 - Coal Water Content (i)) / (100 - 8 / FKA (i))

FKA (i) = ((((((100-8) / (100 - Coal Water Content (i)))) * Coal Water Content (i))) + (100 - 8)) / 100

B (i) = (Coal Sulfur Content (i) - 0.8) * 4

U (i) = (Coal Ash Content (i) - 15) * 0.4

3. Formulae for Price of Other Coal Benchmark No. 9 – 66

$$\text{HPB (j)} = \{(\text{HPB Price Marker (i)} + (\text{B (i)} + \text{U (i)})) * (\text{K (j)} / \text{K (i)}) * [(100 - \text{Water Content (j)}) / (100 - \text{Water Content (i)}) * [(100 - 8) / (100 - 8)]] - (\text{B (j)} + \text{U (j)})\}$$

Where

HPB (j) = coal HPB other than coal Price Marker

K (i) = Coal Heat Value (i) / 6322

B (i) = (Coal Sulfur Content (i) - 0.8) * 4

U (i) = (Coal Ash Content (i) - 15) * 0.4

U (j) = (Coal Ash Content (j) - 15) * 0.4

K (j) / K (i) = Coal Calorific Value (j) / Coal Calorific Value (i)

(i) = price marker 1 – 7

(j) = batubara lain 9 – 66



4. Formulae for Price of Other Coal Benchmark No. 67 - 75 (Low Calorie Coal)

a. If TM <40%

$$\text{HPB (j)} = \{(\text{HPB Price Marker (i)} + (\text{B (i)} + \text{U (i)})) * (\text{K (j)} / \text{K (i)}) * [(100 - \text{Water Content (j)}) / (100 - \text{Water Content (i)}) * [(100 - 8 / \text{FKA (i)}) / (100 - 8 / \text{FKA (j)})] - (\text{B (j)} + \text{U (j)})\}$$

Where

HPB (j) = coal HPB other than coal Price Marker

HPB Marker (i) = HPB coal price marker (i)

B (i) = (Coal Sulfur Content (i) - 0.8) * 4

U (i) = (Coal Ash Content (i) - 15) * 0.4

B (j) = (Coal Sulfur Content (j) - 0.8) * 4

U (j) = (Coal Ash Content (j) - 15) * 0.4

FKA (j) = (((100 Coal Water Content) / (100 - Coal Water Content (j))) * Coal Water Content (j)) + (100 - Coal Water Content) / 100

K (j) / K (i) = Coal Calorific Value (j) / Coal Calorific Value (i)

(i) = price marker 8

(j) = other coal 67 – 69

b. If TM ≥ 40%

$$\text{HPB (j)} = \{(\text{HPB Price Marker (i)} + (\text{B (i)} + \text{U (i)})) * (\text{K (j)} / \text{K (i)}) * [(100 - \text{Water Content (j)}) / (100 - \text{Water Content (i)}) * [(100 - 8 / \text{FKA (i)}) / (100 - 8 / \text{FKA (j)})]\}$$

Where

HPB (j) = coal HPB other than coal Price Marker

HPB Marker (i) = HPB coal price marker (i)

K (j) / K (i) = Coal Calorific Value (j) / Coal Calorific Value (i)

(i) = price marker 8

(j) = other coal 70 - 75

The above formula is English translation of "COAL STEAM STANDARD PRICE FORMULA (THERMAL)" as notified by Govt. of Indonesia as "FORMULA HARGA PATOKAN BATUBARA STEAM (THERMAL)" in January 2017. Govt. of Indonesia has discontinued publishing prices of various categories of coal since Feb-17 and is presently publishing Coal Price for HBA Index i.e. 6322 GCV Coal on monthly basis. Govt. of Indonesia's HBA price notification for Jan-17 month is attached as under for illustrative purpose.



**HARGA BATUBARA ACUAN (HBA) & HARGA PATOKAN BATUBARA (HPB)
BULAN JANUARI 2017**

HBA

HBA (US\$/Ton)		
Kualitas:	86,23	FOB Vessel
CV = 6322 kcal/kg GAR; TM = 8 %; TS = 0,8 % ar; Ash = 15% ar		

HPB BATUBARA MARKER

NO	MEREK DAGANG/ BRAND	KUALITAS TYPICAL				HPB MARKER (US\$/ton)
		CV (kcal/kg GAR)	TM (%)	TS (%, ar)	Ash (%, ar)	
1	Gunung Bayan I	7.000	10,00	1,00	15,00	92.60
2	Prima Coal	6.700	12,00	0,60	5,00	92.21
3	Pinang 6150	6.200	14,50	0,60	5,50	83.19
4	Indominco IM_East	5.700	17,50	1,63	4,80	70.48
5	Melawan Coal	5.400	22,50	0,40	5,00	67.65
6	Envirocoal	5.000	26,00	0,10	1,20	63.18
7	Jorong J-1	4.400	32,00	0,25	4,15	50.90
8	Ecocoal	4.200	35,00	0,18	3,90	46.39

CONTOH HARGA PATOKAN BATUBARA LAINNYA YANG TERDAFTAR DI DITJEN MINERBA

No	MEREK DAGANG/ BRAND	KUALITAS TYPICAL				HPB (US\$/ton)
		CV (kcal/kg, GAR)	TM (%, ar)	TS (%, ar)	Ash (%, ar)	
9	Gunung Bayan II	7.000	12,00	2,00	10,00	88.53
10	Marunda Thermal Coal	6.600	11,00	0,50	10,00	90.29
11	Trubaindo HCV_HS	6.553	12,00	1,69	4,21	86.25
12	Medco Bara 6500	6.500	10,00	3,28	9,38	79.06
13	Trubaindo HCV_LS	6.423	11,50	0,71	4,76	88.73
14	AGM Waruba Coa	5.313	23,00	0,24	4,00	67.29
15	Pinang 6000 NAR	6.300	14,00	0,60	5,50	84.93
16	Arutmin Satui 10	6.300	11,00	1,00	10,00	84.33
17	Arutmin Senakir	6.250	11,00	1,00	12,00	82.87
18	Arutmin A6250	6.250	10,00	1,20	12,00	82.99
19	Mandiri 1	5.200	25,00	0,60	7,00	61.82
20	Wahana Coal	6.200	12,00	0,90	10,00	82.49
21	Medco Bara 6200	6.200	10,00	4,00	12,00	71.13
22	Indominco IM_West / 6500	6.171	15,50	0,76	5,22	81.38
23	TAJ Coal	6.200	10,00	1,00	14,00	82.33
24	Mandiri 2	5.100	26,00	0,60	7,00	59.95
25	Trubaindo MCV_LS	6.143	14,00	0,76	5,20	82.40
26	SKB Coal	6.130	9,00	2,20	17,00	76.30
27	Baramarta Coal	6.112	9,50	0,95	13,00	82.21
28	Arutmin A6100	6.100	11,50	1,00	12,50	80.24
29	Insari Coal	6.050	19,00	0,15	3,20	79.99
30	BCS Coal	5.915	15,10	0,56	9,40	77.65
31	Indominco IM_West / 6350	6.029	15,50	0,71	5,22	79.80
32	Bangun Coal	6.072	10,02	2,20	14,91	75.44
33	Pinang 6000	6.000	16,00	0,60	5,00	79.52
34	Indominco IMM_MCVHS	5.970	15,50	1,65	5,05	75.37
35	Multi Coal Low	5.950	16,00	1,00	7,00	76.50
36	Multi Coal Middle	5.900	16,00	2,00	7,00	71.88
37	Pinang 5900	5.900	19,00	0,90	4,50	74.65
38	Arutmin A5900	5.900	12,00	0,90	13,00	77.38



No	MEREK DAGANG/ BRAND	Kualitas Tipikal				HPB (US\$/ton)
		CV (kcal/kg GAR)	TM (%, ar)	TS (%, ar)	Ash (%, ar)	
39	Multi Coal High	5.765	16,00	3,20	7,00	65.40
40	KCM Coal	5.730	10,50	0,90	20,50	73.43
41	TSA Coal	5.700	18,00	2,00	8,00	67.30
42	Tanito Coal	5.700	17,50	1,00	8,50	71.52
43	Mahakam Coal	5.700	17,50	1,00	8,50	71.52
44	Ebony High Sulphur	5.700	18,00	1,75	4,70	69.62
45	Pinang 5700	5.700	19,00	0,50	5,00	73.65
46	IBP 5500	5.500	20,00	1,00	7,00	67.63
47	Arutmin A5700	5.700	11,00	0,80	14,00	75.61
48	BSS Coal	5.520	10,00	0,45	15,50	74.85
49	Lanna Harita Coal	5.500	22,00	1,00	6,00	66.40
50	Pinang 5500	5.500	21,00	0,40	5,50	69.82
51	Mahoni Medium Sulphur	5.500	20,00	1,30	4,70	67.35
52	Mahoni	5.500	20,00	0,80	4,70	69.35
53	Mahakam Coal B	5.400	23,00	1,50	8,00	61.65
54	Mahoni B	5.300	22,50	0,80	4,60	65.06
55	Kideco Coal	5.125	24,50	0,10	2,00	65.37
56	Agathis	5.100	25,00	0,82	4,50	60.83
57	Lanna Harita Coal	5.000	27,00	1,20	6,00	56.11
58	IBP 5000	5.000	25,00	1,00	7,00	58.00
59	Sungkai Medium Sulphur	5.000	26,00	1,30	4,50	57.06
60	Sungkai	5.000	26,00	0,90	4,50	58.66
61	Sungkai High Sulphur	5.000	26,00	1,70	4,50	55.46
62	Arutmin A5000	5.000	22,40	0,54	8,90	61.00
63	AGM Warute Coal	4.350	33,00	0,40	4,00	49.21
64	IBP 4600	4.600	28,00	0,50	7,00	53.50
65	Bas Gumay Coal	4.400	35,00	0,50	4,96	47.62
66	IBP 4400	4.400	30,00	0,50	7,00	50.06
67	IBP 4200	4.200	32,00	0,50	6,00	46.20
68	PIC Coal	4.200	33,00	1,75	6,00	40.56
69	BIB 4000	4.000	38,00	0,50	6,00	40.55
70	Borneo BIB	3.800	41,00	0,40	5,00	32.23
71	AGM Warutas Coal	3.800	40,00	0,15	5,23	32.81
72	PKN 3500	3.520	43,40	0,15	3,40	28.58
73	BMPclenco32	3.200	48,00	0,50	5,00	23.77
74	LIM 3010	3.010	47,50	0,60	5,30	22.59
75	LIM 3000	2.995	50,10	0,60	5,30	21.31



FORMULA HARGA PATOKAN BATUBARA STEAM (THERMAL)

1. Harga Batubara Acuan (dalam kesetaraan nilai kalor 6322 kkal/kg GAR;
HBA = 25% ICI - 25% Platts59 + 25% NEX + 25% GC [US\$/ton]

Di mana:

- HBA = Harga Batubara Acuan [US\$/ton]
- ICI = Indonesia Coal Index [US\$/ton]
- NEX = New Castle Export Index [US\$/ton]
- GC = New Castle Global Coal Index [US\$/ton]

Konversi nilai kalor batubara dari kondisi ADB ke GAR:

$$K_{GAR} = K_{ADB} * (100 - TM) / (100 - IM)$$

Di mana:

K GAR = Nilai kalor batubara kondisi GAR (*gross as received*)

K ADB = Nilai kalor batubara kondisi ADB (*as dried basis*)

TM = Total moisture

IM = Inherent Moisture

Untuk:

Kandungan Belerang Batubara dalam *as received* (ar)

Kandungan Abu Batubara dalam *as received* (ar)

2. Menghitung HPB marker No. 1 - 7

$$HPB \text{ Marker } (i) = (HBA * K_{(i)} * A_{(i)}) - (B_{(i)} - U_{(i)}) \quad [US$/ton]$$

Di mana:

- HBP Marker (i) = HPB dari 7 batubara price marker [US\$/ton]
- K (i) = Nilai Kalor Batubara (i) / 6322 [fraksi]
- A (i) = (100 - Kandungan Air Batubara (i)) / (100 - 8) [fraksi]
- B (i) = (Kandungan Belerang Batubara (i) - 0,8) * 4 [US\$/ton]
- U (i) = (Kandungan Abu Batubara (i) - 15) * 0,4 [US\$/ton]
- (i) = price marker 1 - 7

3. Harga Patokan Batubara Marker No. 8

$$HPB \text{ Marker } (i) = (HBA * K_{(i)} * A_{(i)}) - (B_{(i)} - U_{(i)}) \quad [US$/ton]$$

Di mana:

- HBP Marker (i) = HPB batubara price marker 8 [US\$/ton]
- K (i) = Nilai Kalor Batubara (i) / 6322 [fraksi]
- A (i) = (100 - Kandungan Air Batubara (i)) / (100 - 8 / FKA (i)) [fraksi]
- FKA (i) = (((100 - 8) / (100 - Kandungan Air Batubara (i))) * Kandungan Air Batubara (i)) + (100 - 8) / 100 [persen]
- B (i) = (Kandungan Belerang Batubara (i) - 0,8) * 4 [US\$/ton]
- U (i) = (Kandungan Abu Batubara (i) - 15) * 0,4 [US\$/ton]
- (i) = price marker 8

4. Harga Patokan Batubara Lain No. 9 - 66

$$HPB_{(j)} = \{ (HPB \text{ Price Marker } (i) + (B_{(i)} + U_{(i)})) * (K_{(j)} / K_{(i)}) * [(100 - Kandungan Air_{(j)}) / (100 - Kandungan Air_{(i)})] * [(100 - 8) / (100 - 8)] \} - (B_{(j)} + U_{(j)}) \quad [US$/ton]$$

Di mana:

- HPB (j) = HPB batubara selain batubara Price Marker [US\$/ton]
- B (i) = (Kandungan Belerang Batubara (i) - 0,8) * 4 [US\$/ton]
- U (i) = (Kandungan Abu Batubara (i) - 15) * 0,4 [US\$/ton]
- B (j) = (Kandungan Belerang Batubara (j) - 0,8) * 4 [US\$/ton]



- $U_{(j)}$ = [Kandungan Abu Batubara (j) - 15] * 0,4 [US\$/ton]
- $K_{(j)} / K_{(i)}$ = Nilai Kalor Batubara (j) / Nilai Kalor Batubara (i) [fraksi]
- (i) = price marker 1 - 7
- (j) = batubara lain 9 - 66

5. Harga Patokan Batubara Lain No. 67 - 75 (Batubara Kalori Rendah)

- Bila TM < 40%

$$HPB_{(j)} = \{ (HPB \text{ Price Marker } (i) + (B_{(i)} + U_{(i)})) * (K_{(j)} / K_{(i)}) * \frac{[(100 - \text{Kandungan Air } (j)) / (100 - \text{Kandungan Air } (i))]^*}{[(100 - 8/FKA_{(j)}) / (100 - 8/FKA_{(i)})]} - (B_{(i)} + U_{(i)}) \}$$
 [US\$/ton]

Di mana:

- $HPB_{(j)}$ = HPB batubara selain batubara Price Marker [US\$/ton]
- $HPB \text{ Marker } (i)$ = HPB batubara price marker (i) [US\$/ton]
- $B_{(i)}$ = [(Kandungan Belerang Batubara (i) - 0,8) * 4] [US\$/ton]
- $U_{(i)}$ = [Kandungan Abu Batubara (i) - 15] * 0,4 [US\$/ton]
- $B_{(j)}$ = [(Kandungan Belerang Batubara (j) - 0,8) * 4] [US\$/ton]
- $U_{(j)}$ = [Kandungan Abu Batubara (j) - 15] * 0,4 [US\$/ton]
- $FKA_{(j)}$ = $\frac{[(100 - \text{Kandungan Air Batubara } (j)) / (100 - \text{Kandungan Air Batubara } (j))] * \text{Kandungan Air Batubara } (j)}{(100 - \text{Kandungan Air Batubara } (j)) / 100}$ [persen]
- $K_{(j)} / K_{(i)}$ = Nilai Kalor Batubara (j) / Nilai Kalor Batubara (i) [fraksi]
- (i) = price marker 8
- (j) = batubara lain 67 - 69

- Bila TM ≥ 40%

$$HPB_{(j)} = \{ (HPB \text{ Price Marker } (i) + (B_{(i)} + U_{(i)})) * (K_{(j)} / K_{(i)}) * \frac{[(100 - \text{Kandungan Air } (j)) / (100 - \text{Kandungan Air } (i))]^*}{[(100 - 8/FKA_{(j)}) / (100 - 8/FKA_{(i)})]} \}$$
 [US\$/ton]

Di mana:

- $HPB_{(j)}$ = HPB batubara selain batubara Price Marker [US\$/ton]
- $HPB \text{ Marker } (i)$ = HPB batubara price marker (i) [US\$/ton]
- $FKA_{(j)}$ = $\frac{[(100 - \text{Kandungan Air Batubara } (j)) / (100 - \text{Kandungan Air Batubara } (j))] * \text{Kandungan Air Batubara } (j)}{(100 - \text{Kandungan Air Batubara } (j)) / 100}$ [persen]
- $K_{(j)} / K_{(i)}$ = Nilai Kalor Batubara (j) / Nilai Kalor Batubara (i) [fraksi]
- (i) = price marker 8
- (j) = batubara lain 70 - 75

Ketentuan:

1. Harga Batubara Acuan dan Harga Patokan Batubara diatas merupakan harga batubara untuk penjualan spot dalam periode 1 Januari 2017 sampai dengan 31 Januari 2017;
2. Dalam hal penjualan batubara dilakukan secara jangka tertentu (*term*), harga batubara mengacu pada rata-rata 3 (tiga) Harga Patokan Batubara terakhir pada bulan dimana dilakukan kesepakatan harga batubara, dengan faktor pengali 50% untuk Harga Patokan Batubara bulan terakhir, 30% untuk Harga Patokan Batubara satu bulan sebelumnya dan 20% untuk Harga Patokan Batubara dua bulan sebelumnya.



Annexure B

**Reference Rates for Ocean Freight, Insurance & other Transportation /
Handling charges as per Clause 3.2.4 of this Agreement**

Lower of following charges shall be considered (i) Worked out as per Table I or
(ii) Worked out as per Table II

Table I:

Following is worked out from Schedule 10 of EPGL's PPA dated 26.02.2007:

Contract Year	Commencement Date of Contract Year	Quoted Non Escalable Overseas Transportation Charges	Quoted Escalable Overseas Transportation Charges	Quoted Non Escalable Port / Fuel Handling Charges	Quoted Escalable Port / Fuel Handling Charges
		USD/MT	USD/MT	Rs/MT	Rs/MT
(a)	(b)	(c)	(d)	(e)	(f)
7	Oct-18	16.5098	0	274.65	0
8	01-Apr-19	16.5098	Same as above	277.51	Same as above
9	01-Apr-20	16.5098		280.60	
10	01-Apr-21	16.5098		283.47	
11	01-Apr-22	16.5098		286.55	
12	01-Apr-23	16.5098		289.64	
13	01-Apr-24	16.5098		292.72	
14	01-Apr-25	16.5098		295.81	
15	01-Apr-26	16.5098		298.90	
16	01-Apr-27	16.5098		302.20	
17	01-Apr-28	16.5098		305.51	
18	01-Apr-29	16.5098		308.59	
19	01-Apr-30	16.5098		311.90	
20	01-Apr-31	16.5098		315.43	
21	01-Apr-32	16.5098		318.73	
22	01-Apr-33	16.5098		322.04	
23	01-Apr-34	16.5098		325.57	
24	01-Apr-35	16.5098		329.09	
25	01-Apr-36	16.5098		332.62	
26	01-Apr-37	16.5098		335.71	



Table II:

Contract Year	Commencement Date of Contract Year	Quoted Non Escalable Overseas Transportation Charges USD/MT	Quoted Escalable Overseas Transportation Charges USD/MT
(a)	(b)	(c)	(d)
7	Oct-18	7.0845	3.1122
8	01-Apr-19	7.0597	To be escalated as per CERC index for Transportation Charges
9	01-Apr-20	7.0597	
10	01-Apr-21	7.0597	
11	01-Apr-22	7.0597	
12	01-Apr-23	7.1094	
13	01-Apr-24	7.1342	
14	01-Apr-25	7.1342	
15	01-Apr-26	7.1342	
16	01-Apr-27	7.1591	
17	01-Apr-28	7.1342	
18	01-Apr-29	7.1342	
19	01-Apr-30	7.1342	
20	01-Apr-31	7.1342	
21	01-Apr-32	7.1342	
22	01-Apr-33	7.1839	
23	01-Apr-34	7.2088	
24	01-Apr-35	7.2088	
25	01-Apr-36	7.2088	
26	01-Apr-37	6.9851	

The above per Metric Ton rates have been benchmarked considering the CGPL's bid

Methodology for Escalation Index shall be as per Schedule 9 of PPA dated 22.04.2007.

