

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION  
GANDHINAGAR**

**Petition No. 2331 of 2024**

**In the matter of:**

**Petition 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 Gujarat Urja Vikas Limited and Essar Power Gujarat Limited for approval of amendments by way of supplemental Power Purchase Agreement dated 05.01.2024.**

Petitioner : Gujarat Urja Vikas Nigam Limited

Represented by : Ld. Adv. Ms. Ranjitha Ramachandran along with Mr. Sanjay Mathur and Mr. Vipul Lathiya

V/s

Respondent No. 1 : Essar Power Gujarat Limited

Represented by : Ld. Advocates Mr. Buddy Ranganadhan, Mr. Nisarg Desai, Mr. Gourav Roy, Mr. Yash Dadhich along with Mr. Bhaven Bhatt and Mr. Prateek Garg

Respondent No. 2 : Energy Watchdog

Represented by : Nobody was present.

Respondent No. 3 : Prayas (Energy Group)

Represented by : Nobody was present.

Objector : Mr. Nitin Madam

Represented by : Nobody was present.

**CORAM:**

**Anil Mukim, Chairman  
Mehul M. Gandhi, Member  
S.R. Pandey, Member**

**Date: 09/12/ 2024.**

**ORDER**

1. The present Petition filed by the Petitioner seeking following reliefs:
  - a) To admit the present Petition and take on record the letter dated 10.01.2023 of the Government of Gujarat in regard to 5<sup>th</sup> Supplemental PPA for modification of 4<sup>th</sup> Supplemental PPA dated 12.08.2021 between GUVNL and EPGL.
  - b) To approve the 5<sup>th</sup> supplemental PPA dated 05.01.2024 amending certain terms of the 4<sup>th</sup> supplemental PPA dated 12.08.2021 and the PPA dated 26.02.2007 duly executed between GUVNL and the EPGL.
2. The facts mentioned in the brief in the Petition are as under:
  - 2.1. The present Petition is being filed under Sections 86(1)(b) and 86(1)(f) of the Electricity Act, 2003, seeking approval of the 5<sup>th</sup> Supplemental PPA dated 05.01.2024, between Essar Power Gujarat Limited and the Petitioner herein, Gujarat Urja Vikas Nigam Limited in regard to Power Purchase Agreement dated 26.02.2007, as amended and existing as on date of the signing of the 5<sup>th</sup> Supplemental PPA.
  - 2.2. The Petitioner, Gujarat Urja Vikas Nigam Limited (hereinafter 'GUVNL') is a Company incorporated under the provisions of the Companies Act, 1956. Petitioner is engaged in activities of bulk purchase and bulk supply of electricity and is a Licensee for the said activities under provisions of Electricity Act.
  - 2.3. The Respondent No. 1, Essar Power Gujarat Limited (hereinafter 'EPGL') is a Generating Company under Section 2(28) of the Electricity Act, 2003. EPGL has set up thermal power plant having total capacity of 1200 MW (2x660 MW) situated in Salaya, District Jamnagar, Gujarat. Energy Watchdog and Prayas (Energy Group), are the consumer organizations

(hereinafter 'Respondent No. 2 & 3') respectively.

- 2.4. The Petitioner, GUVNL had entered into a Power Purchase Agreement dated 26.02.2007 with EPGL through competitive bidding process in accordance with the guidelines issued under Section 63 of the Electricity Act 2003 for contracted capacity of 1000 MW to be supplied from Units 1 and 2 of Salaya Power Plant (hereinafter 'Bid-03 PPA'). The Supplemental PPA have been entered into from time to time on 25.11.2008, 16.10.2009, 01.03.2019 and 12.08.2021 between the parties, prior to the present 5th Supplemental PPA.
- 2.5. It is submitted 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. The Commission vide order dated 27.04.2020 had after public hearing and receiving representation from consumer organizations in the Petition, granted conditional approval to the said Supplemental Agreement, namely, to incorporate certain modifications as set out in the said Order dated 27.04.2020.
- 2.6. It is submitted that aggrieved by the decision dated 27.04.2020, EPGL had filed an Appeal being Appeal No 108 of 2020 before the Hon'ble Appellate Tribunal for Electricity.
- 2.7. In the meanwhile, the Energy and Petrochemical Dept., Government of Gujarat vide letter dated 12.06.2020 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 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 01.12.2018 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 actions regarding signing of SPPA with EPGL.

- 2.8. 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 in further modifications approved vide Government of Gujarat G.R. dated 05.06.2021, the Petitioner and EPGL agreed to and executed the amended and modified Supplemental PPA in substitution of the earlier signed Supplemental PPA dated 01.03.2019.
- 2.9. In view of the above, Appeal No. 108 of 2020 was withdrawn by EPGL, as allowed vide Order dated 25.06.2021. The Petitioner on 01.09.2021 had filed the Petition No. 2004 of 2021 for approval of the amendments to the PPA 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.
- 2.10. It is submitted that vide Order dated 20.11.2021 after hearing the parties and receiving representation from Consumer organizations, the Commission gave approval to the Fourth Supplemental Power Purchase Agreement dated 12.8.2021. The SPPA provided for HBA Index ceiling for imported coal price at 90 USD / MT & Gross Heat Rate (GHR) at lower of (a) actual Gross Station Heat Rate or (b) 2262 Kcal / kwh as approved by the Commission in Petition. No. 1296/2013.
- 2.11. It is submitted that on 11.11.2022 EPGL filed Appeal being Appeal No. 457 of 2022 before the Hon'ble Tribunal challenging the Order dated 20.11.2021 of the Commission. It is submitted that despite the approval of revised SPPA by the Commission, EPGL did not commence power

under the SPPA in spite of repeated requests claiming to be affected by the HBA Index Ceiling. EPGL alleged that the actual HBA Index is much higher than the ceiling.

2.12. It is submitted that HBA index (6322 GCV) notified by Government of Indonesia for benchmark coal price has remained higher than 90 USD / MT. The month wise details are as under;-

Month	HBA index for 6322 Kcal/ Kg (USD/MT)
Jan-23	305.21
Feb-23	277.05
Mar-23	283.08
Apr-23	265.26
May-23	206.16
Jun-23	191.26
Jul-23	191.60
Aug-23	179.90
Sep-23	133.13
Oct-23	123.96
Nov-23	139.80
Dec-23	117.38
Jan-24	125.28

2.13. It is submitted that EPGL has supplied power to GUVNL under Section 11 of the Electricity Act, 2003 directive for the period from 13.09.2022 to 31.12.2022 wherein Energy Charge received for supply of power is in accordance with the benchmark ECR notified by Expert Committee of Ministry of Power, Govt. of India.

2.14. It is submitted that the Respondent No. 1 vide letters dated 08.12.2022 and 27.12.2022 to E&P department, Government of Gujarat had requested for various modifications in the Supplemental PPA related to removal of HBA Index ceiling, increase in Station Heat Rate etc. EPGL had

also made representations to the Government of Gujarat on the aspects of the conditions contained in the 4th Supplementary PPA dated 12.08.2021 regarding HBA Index ceiling and Station Heat Rate.

- 2.15. A meeting dated 23.12.2022 was held at Government of Gujarat level to discuss the representation of EPGL with regard to modification in SPPA dated 12.08.2021. In terms of the Minutes of Meeting dated 23.12.2022 forwarded by EPD, Government of Gujarat vide letter dated 10.01.2023, it was decided that ceiling of HBA Index for USD 90/MT shall be relaxed. Further, it was decided that the relaxation in HBA ceiling shall be made effective from 01.01.2023 for which appropriate approval from Hon'ble Commission shall be obtained. Further, it was decided that for allowing revision in SHR, CEA Recommendations would be obtained and the modification in SHR shall be allowed after due approval of Hon'ble Commission.
- 2.16. Based on the discussion in the meeting, EPGL had commenced supply of power under the SPPA w.e.f 01.01.2023 pending the approval for modifications in the SPPA towards HBA Index ceiling.
- 2.17. In response to EPD, Government of Gujarat letter dated 17.02.2023, CEA vide letter dated 03.03.2023 to Government of Gujarat has referred to its report dated 06.05.2022 submitted to Ministry of Power recommending normative SHR of 2333 kcal/kwh for EPGL Salaya plant and conveying that Expert Committee of Ministry of Power while declaring the benchmark Energy Charge Rate for EPGL under Section 11 is considering the SHR of 2333 kcal/kwh.
- 2.18. It is further submitted that vide letter dated 10.10.2023 the Government of Gujarat has conveyed its approval for modification of SPPA dated 12.08.2021 between GUVNL and EPGL as under:

*"I am directed to refer to GUVNL's letters under reference on the subject noted above and the proposal of GUVNL regarding Modification in SPPA*

*dated 12.08.2021 between GUVL and M/s. EPGL, was examined and considered by the State Government.*

*2. After careful consideration, the State Government is according an approval for modification of SPPA dated 12.08.2021 between GUVNL and M/s. EPGL on the following aspects:-*

*i. Removal of "HBA Index Ceiling" of US \$ 90/MT under SPPA w.e.f. 01.01.2023.*

*ii. Approval for modification of "SHR" from 2262 Kcal/kwh to 2333 kcal/kwh in SPPA as per CEA recommendations which would be effective from 01.01.2023 subject to approval of GERC and any differential payment on account of revision in SHR shall be due and payable only after necessary approval of GERC.*

*3. I am, therefore, to request you to take appropriate actions accordingly and the same may be intimated to this Department, at the earliest please."*

2.19. It is submitted that vide email dated 20.12.2023, GUVNL forwarded a draft of the SPPA to EPGL. Vide letter dated 20.12.2023 EPGL accorded unconditional consent to the draft SPPA forwarded by GUVNL.

2.20. The Petitioner vide letter dated 02.01.2024, wrote to the Respondent no.1, EPGL as under:

*"This is in reference to various representations made by EPGL before State Govt. and GUVNL requesting the (i) Removal HBA Index Ceiling of USD 90/MT and (ii) Regarding modification in Station Heat Rate under the Supplemental PPA dated 12-08-2021 approved by Hon'ble GERC vide order dated 20.11.2021.*

*In compliance to the directive and approval received from State Govt., GUVNL vide email dated 20.12.2023 had forwarded the draft of SPPA and EPGL vide letter dated 20.12.2023 has accorded its unconditional consent to the draft SPPA forwarded by GUVNL.*

*In the above context, EPGL is requested to take appropriate actions for withdrawal of pending suits / petitions / appeals / cases / litigations etc. as per Para 1 (v) of draft SPPA in compliance to the consent given and submit the copy of the affidavit(s) filed before various judicial for a for withdrawal of the matter / cases with GUVNL.*

*In view of above, EPGL is requested to take appropriate action towards compliance for signing of SPPA and approach GUVNL for signing of SPPA along with Letter of Authorization from Board of Directors, Stamp Papers & ID proof of signatory with prior confirmation of GUVNL. The finalized draft of fifth SPPA is attached herewith for reference.”*

2.21. In terms of the above, on 05.01.2024, GUVNL and EPGL entered into the 5th Supplemental PPA in amendment to the 4th Supplemental PPA dated 12.08.2021 as under:

*“(i) The Amendment Effective Date shall be January 1, 2023 i.e. the date with effect from which, this amendment to the Fourth Supplemental Agreement shall become effective and binding upon parties subject to approval of Hon’ble GERC.*

*(ii) It is agreed that the HBA Index Ceiling of USD 90 / MT for 6322 GCV coal as mentioned under Clause 3 of the Supplemental PPA dated 12.08.2021 shall stand removed w.e.f 1.1.2023. For avoidance of doubt, HBA Index ceiling of USD 90 / MT shall not be applicable while computation of Energy Charge for energy supplied from 1.1.2023 onwards subject to consideration of lower of (a) for a (e) under the FOB cost of coal under Clause 3.2.4 (I) of SPPA dated 12.08.2021.*

*(iii) At Clauses 3.2.3 and 3.5.3 of SPPA dated 12.08.2021, the definition of GHR is to be substituted and replaced by the following:*

*“GHR = Lower of (a) actual Gross station heat rate or (b) 2333 Kcal per kWh as recommended by Central Electricity Authority, Govt. of India”*

*It is agreed that the modification in Station Heat Rate as per CEA recommendations shall be effective from 01.01.2023.*

*The above amendments shall be subject to requisite approval of Hon’ble GERC and any differential payment on account of revision in Station Heat Rate shall be due and payable in accordance with and only after necessary approval of Hon’ble GERC.*

*(iv) In view of the relief being allowed to EPGL project pursuant to Govt. of Gujarat decision(s), it is agreed that any change in ownership of Essar Power Gujarat Ltd.’s Salaya Power Project (1200 MW) shall only be done with the prior intimation of any such move and only with prior approval of the Govt. of Gujarat and Hon’ble GERC.*

*(v) All pending suits / petitions / appeals / cases / litigations etc. filed by*

*EPGL before any judicial fora or any claims of EPGL qua GUVNL shall be withdrawn by EPGL except related to Change in Law claims under the PPA.*

- 2. This Fifth Supplemental Agreement is subject to the approval by Hon'ble GERC and shall be enforceable only upon such approval by Hon'ble GERC w.e.f 1.1.2023.*
- 3. Except for the above all other terms & conditions of the existing PPA read with the existing SPPA(s) shall remain unchanged and shall be effective as before and be read as a part of this Supplemental Agreement.*
- 4. Subject to the above, this Fifth Supplemental Agreement shall be read as an integral part of the PPA dated 26.02.2007 read with Supplemental PPA(s) entered into between the parties as amended from time to time."*

2.22. In the above amended 5<sup>th</sup> supplemental PPA, the Petitioner GUVNL and the Respondent No. 1 EPGL agreed to vary terms as a part of amendment to the 4<sup>th</sup> Supplemental dated 12.08.2021. The above condition No. (iv) of the 5<sup>th</sup> Supplemental PPA dated 05.01.2024, provides that it is agreed that any change in ownership of Essar Power Gujarat Ltd.'s Salaya Power Project (1200 MW) shall only be done with the prior intimation of any such move and only with prior approval of the Govt. of Gujarat and the Commission.

2.23. It is submitted that in view of the above, the Respondent No. 1, EPGL has undertaken to withdraw all pending litigations etc. filed by EPGL before all judicial fora except related to change in law claims under the PPA. EPGL has filed an application seeking withdrawal of Appeal No 457 of 2022 in terms of the 5<sup>th</sup> SPPA which was allowed by the Hon'ble Tribunal on 23.01.2024. Further, in compliance to the SPPA terms regarding withdrawal of all pending litigations / cases filed by EPGL before various fora, EPGL vide letters dated 04.01.2024 has submitted the application for withdrawal of the pending cases in the following:

Forum	Case no.	In the matter	Date of application for Withdrawal
Hon. Supreme Court of India	M. A (Dairy) No 32487 of 2023 in Civil Appeal No. 9324 of 2016	M. A filed by EPGL for seeking restoring of C.A (filed by EPGL) in Liquidated Damages (LD)	04-01-2024
Hon. Appellate Tribunal (APTEL)	Appeal No. 457 of 2022	Appeal filed against GERC order dated 20.11.2022 approving SPPA	04-01-2024
GERC	Petition No. 2241 of 2023	For determination of adverse financial consequences under Section 11 (2) of the Electricity Act, 2003 (MOP notification dated 05-05-2022)	04-01-2024

2.24. It is submitted that the 5<sup>th</sup> Supplemental PPA which modified the 4<sup>th</sup> Supplemental PPA to the extent mentioned above, which is as per the decision of the Government of Gujarat, requires the approval of the Commission under Section 86(1)(b) of the Electricity Act, 2003 before it can be given effect to and implemented. Accordingly, GUVNL is approaching the Commission for the approval of the 5<sup>th</sup> Supplemental PPA dated 05.01.2024.

3. The Respondent No.1, vide it's Affidavit dated 21.02.2024 supported the Petitioner's submission with regard to approval of 5<sup>th</sup> SPPA dated 05.01.2024 executed between Petitioner and Respondent No. 1 by amending certain provisions of 4<sup>th</sup> SPPA dated 12.08.2021. It is stated that the amendment/modification in 5<sup>th</sup> SPPA are pursuant to decision taken by GoG. The Respondent no. 1 has also requested to allow the Petition and grant the prayer sought by the Petitioner.
4. Further the Respondent No. 1 EPGL, had vide its affidavit dated 2.05.2024 made following submissions:

- 4.1. It is submitted that a meeting was held on 06.05.2022 under the Chairmanship of the Hon'ble Minister of Power & NRE on the issues of operationalization of the power plants that are commissioned but not made operational. As per para 4.1.3 of the Minutes of the said Meeting, in the case of the Respondent No. 1 Essar Power Gujarat Limited ("EPGL"), the Central Electricity Authority (the "CEA") "mentioned that they had verified the station heat rate (SHR) and the same was found to be 2333 kcal/kg": The "CEA was directed to immediately submit the report on SHR to the Ministry of Power (MoP) and after considering the report, MoP would communicate the decision on SHR to all' the stakeholders for tariff determination."
- 4.2. It is submitted that CEA had submitted its report wherein after technical analysis, the CEA has recorded that "the station heat rate of 2333 Kcal/kWh as agreed between, M/s. Essar Power Limited and the Gujarat Government in respect of the Salaya Thermal Project (STPP) appears appropriate." It is stated that the CEA has sent a copy of the aforesaid Report to the Officer on Special Duty (Power), Government of Gujarat vide its letter dated 10.05.2023.
5. The matter was heard on 23.02.2024 and the Commission passed Daily Order dated 02.03.2024 and directed to the Petitioner GUVNL to publish a public notices of 21 days for inviting comments/objections/suggestions from the stakeholders in the present Petition and also uploaded the copy of the Petition on their website. We note the submission of the Petitioner regarding non-receipt of comments/suggestions from any stakeholder in the matter. We also note that the Petitioner has filed compliance affidavit dated 13.03.2024 before the Commission on 15.03.2024 regarding inviting comments/objections from the stakeholder. We further note that the staff of the Commission has uploaded the copy of the present Petition along with the relevant documents on website of the Commission ([www.gercin.org](http://www.gercin.org)) for inviting comments/suggestions from the stakeholders.

6. The Petitioner filed an affidavit dated 13.03.2024 regarding compliance to Daily Order dated 02.03.2024 and submitted that as directed by the Commission the Petitioner has issued public notice in two daily Gujarati Newspapers and one English Newspaper dated 12.03.2024 having wide circulation in the State and also upload the present Petition with all relevant documents on their website and invite comments/suggestions/objections from the stakeholders on affidavit within 21 days the date of issue of public notice.
7. The Office of the Commission has received comments/suggestions from individual Objector Mr. Nitin Madam dated 18.04.2024 in the present matter in response to public notice issued by the Petitioner. However, as per the submissions of the parties, they have not received copy of the said comments/suggestions submitted by individual Objector, Mr. Nitin Madam. Accordingly, we direct the staff of the Commission to provide the copy of said suggestions/objections of Mr. Nitin Madam to the Petitioner and the Respondents so as to enable them to file their reply/response on the same, if any, in the matter, within 7 (Seven) days with a copy to all the parties including Objector. The Objector was also given liberty to file its rejoinder reply, if any, within 7 (Seven) days after receipt of reply/response from the Petitioner and the Respondent.
8. The gist of objections made by objector Shri Nitin Madam as follows:
  - 8.1. He submitted that the Petition filed by GVUNL has been received in English, and he will required time to carefully study and analyse the contents of the same. In light of this, he requested to consider preliminary views on the issues raised in the Petition.
  - 8.2. He further submitted that the Petitioner, sought approval of the 5th Supplemental Power Purchase Agreement (PPA) dated 05.01.2024, which proposes amendments to the 4th Supplemental PPA dated 12.08.2021 and the original PPA dated 26.02.2007 executed between GVUNL and EPGL. It is submitted that the approval of this 5th Supplemental PPA is contrary to the

applicable legal and regulatory provisions. The proposed amendments will adversely affect the consumers of the State at large, and as such, the approval cannot be granted.

- 8.3. It is submitted that by way of these amendments, an unnecessary and unwarranted financial burden is being imposed on the consumers of the State, which is against the principles of law, the regulations, and the spirit of the regulatory framework. The Petitioner has failed to explain or justify the extent to which this burden would be imposed upon the consumers in terms of financial impact, particularly in terms of the total amount in crores of rupees.
- 8.4. Furthermore, both GUVNL and EPGL have failed to submit the necessary documents, information, and details that are required to enable the Commission to take a decision in this regard. Without these vital inputs, the matter cannot be decided.
- 8.5. It is further submitted that the Respondent, EPGL, has not filed any submission or reply in the matter. If such a reply or submission has been filed, no copy of the same has been provided to us. In the absence of the Respondent's response, the matter cannot be appropriately adjudicated.
- 8.6. In light of the aforementioned submission it is requested to the Commission to consider this preliminary submission, and grant an opportunity to file further objections and submissions after receipt of necessary details and further replies by the parties involved.
9. The Respondent No. 1, Essar Power Gujarat Ltd. filed detailed reply on affidavit with respect to the submissions/objections received by Shri Nitin Madam.
- 9.1. It is further submitted that objections by Mr. Nitin Madam have not been filed within 21 days as required by the Commission's order dated 02.03.2024 and therefore, the objections deserved to be dismissed on this ground alone.

9.2. Moreover, most of the objections are vague allegations about violation of law without more. For that reason also, the objections deserve to be dismissed. Mr. Madam also claims that the 2024 SPPA is detrimental to consumer interest. However, as the facts stated below establish, the amendments in the 2024 SPPA are actually in the interest of consumers. The changes sought to be introduced by way of the 2024 SPPA are:

- a) Removal of the coal cost ceiling of USD 90 / MT for 6322 GCV coal; and
- b) Correction of the station heat rate ("SHR") from 2262 Kcal/Kwh to 2333 kcal/Kwh.

9.3. It is submitted that the 2024 SPPA ensures that the Respondent No.1 can continue to run its power plant. Given the huge spike in power demand in India and the State of Gujarat in particular, the injection of power into the grid by EPGL will reduce the overall national average tariff for power.

9.4. The Respondent No. 1, EPGL capacity charge under the 2024 SPPA is in the range of 65 paise per unit which is possibly the lowest of any thermal generating unit in the country which has not completed its useful life. Therefore, GUVNL is getting an available capacity of 1122 MW at what is virtually a "throw away" capacity charge. If GUVNL were to replace this power from a new thermal generating plant, it would have to pay a capacity charge many times more. In fact, GUVNL has signed a PPA with DB Power in which a capacity charge of Rs. 284 / unit is being paid which is almost four times higher than EPGL's capacity charge. This is clear from the order dated 9.2.2024 in Petition No. 2263/2023 titled "GUVNL v DB Power" passed by the Commission.

9.5. In its tariff order dated 1.6.2024 for Madhya Gujarat Vij Company Limited (Case No. 2319/2024) passed by the Commission, GUVNL has projected that EPGL's power plant will be required to supply ~900 MW out of this total average demand of 14900 MW for FY 2024-25. This order also shows that the

tariff is very competitive and unless Gujarat's demand falls below 12,000 MW, EPGL's plant will always be asked to operate.

- 9.6. It is submitted that the average demand forecast is well above 12,000 MW, there is no doubt that EPGL's plant will be required to satisfy the demand. Thereby obviating the need for GUVNL to procure short term expensive power from the open market. If the 2024 SPPA is not approved, EPGL will be unable to run its power plant which will lead to a shortage of power for GUVNL which will ultimately cause power shortages and raise the cost of power. This would ultimately harm the end-consumers.
- 9.7. It is also submitted that the increase in price of implementing the correct SHR is only approximately 3% of the energy charge assuming that the coal cost ceiling is removed.
- 9.8. It is submitted that the SPPA is in accordance with law. Shri Nitain Madam has not cited any law or judgments to show that the 2024 SPPA is contrary to law. It is further submitted that a public notice regarding the 2024 SPPA was duly published by GUVNL. Full and complete details have been provided. All the requisite details, including the data on SHR have been provided by GUVNL and EPGL and no part of the SPPA is contrary to the Constitution or the Electricity Act, 2003.
- 9.9. The Respondent, EPGL filed a reply affidavit dated 21.2.2024 supporting the captioned petition. It is re-iterated that the 2024 Amendments are not contrary to the provisions of the Constitution and the Electricity Act, 2003. Therefore, it is submitted that the petition be allowed and the SPPA be approved.
10. The Petitioner GUVNL has filed its reply/response to the objections raised by Shri Nitin Madam and in pursuance to the Daily Order dated 02.09.2024 passed by the Commission.

- 10.1. The petitioner submitted that the 3rd Supplemental PPA dated 01.03.2019, which was based on the Government of Gujarat G.R. dated 01.12.2018, was approved by the Hon'ble Commission with certain modifications vide Order dated 27.04.2020 which EPGL challenged before the Hon'ble Tribunal in Appeal No. 108 of 2020.
- 10.2. Following a Government of Gujarat GR dated 12.06.2020 and Government of Gujarat Letter dated 12.06.2020 and further modifications approved by the Government on 05.06.2021, the Petitioner and the Respondent No. 1 executed the 4th Supplemental PPA on 12.08.2021. The Appeal No. 108 of 2020 was withdrawn by EPGL.
- 10.3. The Commission, vide Order dated 20.11.2021 after hearing the parties and considering the representation from Consumer organizations, gave approval to the Fourth Supplemental Power Purchase Agreement dated 12.8.2021. The SPPA provided for HBA Index ceiling for imported coal price at 90 USD / MT and Gross Heat Rate (GHR) at lower of (a) actual Gross Station Heat Rate or (b) 2262 Kcal / kwh as approved by the Commission in Petition. No. 1296/2013.
- 10.4. On 11.11.2022 the Respondent No. 1, EPGL filed Appeal being Appeal No. 457 of 2022 before the Hon'ble Tribunal challenging the Order dated 20.11.2021 of the Commission.
- 10.5. The Respondent No.1, EPGL did not commence power supply under the SPPA due to issues with the Ceiling of coal price with HBA Index and that the actual HBA price was much higher than the ceiling of USD 90/MT. EPGL has supplied power to GUVNL under Section 11 directive for the period 13.09.2022 to 31.12.2022 wherein Energy Charge received for supply of power is in accordance with the benchmark ECR notified by Expert Committee of Ministry of Power, Government of India.

- 10.6. The Respondent No.1, EPGL had requested for various modifications in the Supplemental PPA related to removal of HBA Index ceiling price, increase in Station Heat Rate etc and made representations to Government of Gujarat on these conditions contained in the 4th Supplementary PPA dated 12.08.2021. A meeting dated 23.12.2022 was held at Government of Gujarat level and in terms of the Minutes of meeting dated 23.12.2022 forwarded by Energy & Petrochemicals Dept, Government of Gujarat vide Letter dated 10.01.2023, it was decided that ceiling of HBA Index for USD 90/MT shall be relaxed. Further, it was decided that the relaxation in HBA ceiling shall be made effective from 01.01.2023 for which appropriate approval from the Commission shall be obtained. Further, it was decided that for allowing revision in SHR, CEA Recommendations would be obtained and the modification in SHR shall be allowed after due approval of the Commission.
- 10.7. Based on the discussion in the meeting, the Respondent No. 1, EPGL had commenced supply of power under the SPPA w.e.f 01.01.2023 pending the approval for modifications in the SPPA towards HBA Index ceiling.
- 10.8. In response to EPD, Government of Gujarat letter dated 17.02.2023, CEA vide its letter dated 03.03.2023 to Government of Gujarat has referred to its report dated 06.05.2022 submitted to Ministry of Power recommending normative SHR of 2333 kcal/kwh for EPGL Salaya plant and conveying that Expert Committee of Ministry of Power while declaring the benchmark Energy Charge Rate for EPGL under Section 11 is considering the SHR of 2333 kcal/kwh.
- 10.9. The Government of Gujarat vide letter dated 10.10.2023 has conveyed its approval for modification of SPPA dated 12.08.2021 between GUVNL and EPGL as under:

*"I am directed to refer to GUVNL's letters under reference on the subject noted above and the proposal of GUVNL regarding Modification in SPPA dated 12.08.2021 between GUVNL and M/s. EPGL, was examined and*

*considered by the State Government.*

*2. After careful consideration, the State Government is according an approval for modification of SPPA dated 12.08.2021 between GUVNL and M/s. EPGL on the following aspects:-*

*i. Removal of "HBA Index Ceiling" of US \$ 90/MT under SPPA w.e.f. 01.01.2023.*

*ii. Approval for modification of "SHR" from 2262 Kcal/kwh to 2333 kcal/kwh in SPPA as per CEA recommendations which would be effective from 01.01.2023 subject to approval of GERC and any differential payment on account of revision in SHR shall be due and payable only after necessary approval of GERC.*

*3. I am, therefore, to request you to take appropriate actions accordingly and the same may be intimated to this Department, at the earliest please."*

10.10. The salient features of the 5th SPPA are as under:

- a. Removal of the HBA Index Ceiling of USD 90/MT for imported coal, effective from 01.01.2023;
- b. Modification of SHR from 2262 Kcal/kWh to 2333 Kcal/kWh, effective from 01.01.2023, subject to approval by the Commission; and
- c. Withdrawal of all pending litigation by EPGL, except those related to Change in Law claims under the PPA.

10.11. The 5th Supplemental PPA which modified the 4th Supplemental PPA to the extent mentioned above, which is as per the decision of the Government of Gujarat, requires the approval of the Commission under Section 86(1)(b) of the Electricity Act, 2003 before it can be given effect to and implemented.

10.12. The Government of Gujarat has approved the amendments. There is no prescription or specific format as to how the approval of the Government has to be given to such amendments. The final approval is required to be given by the Commission under Section 86(1)(b). The Minutes of Meeting dated

23.12.2022 as well as Letter dated 10.10.2023 were specifically in reference to the EPGL.

10.13. In regard to the status of GR, it is stated that GR Dated 01.12.2018 was revoked vide GR dated 12.06.2020. Thereafter EPD, Government of Gujarat vide Letter dated 12.06.2020 had written to GUVNL for decision in regard to the supplemental PPAs with EPGL and CGPL on case to case basis. Thereafter another GR dated 05.06.2021 was issued in regard to the EPGL. The SPPA between GUVNL and EPGL was signed on 12.08.2021 and had been approved by the Hon'ble Commission vide Order dated 20.11.2021. Thereafter, Government vide Letter dated 10.10.2023 to GUVNL had accorded approval for modification of the SPPA dated 12.08.2021. The said Letter has been issued by EPD, Government of Gujarat after consideration and for specific elements to be modified in the SPPA.

10.14. It is submitted that the draft of the SPPA, signed SPPA and filing of the present Petition has been intimated to the Government of Gujarat as required under the Letter dated 10.10.2023.

10.15. During the hearing on 08.07.2024, a query was raised on the financial impact of revision in the SHR. In response to the Commission's query during the hearing regarding impact on account of revision in SHR, GUVNL had submitted that the impact is 3.15 % in SHR and amount of Rs. 89 crores as per the claim of EPGL. These amounts are as per claim by EPGL and are subject to verification and reconciliation by GUVNL after receipt of audit report etc.

10.16. The objections of Mr. Nitinbhai A. Madam has been forwarded to the Petitioner, GUVNL by the Office of the Commission, which is being responded to by the Petitioner hereinunder:

10.17. It is submitted that objection has been taken to the amendment as being contrary to established principles of law, Constitution and without any

elaboration and therefore. is vague. It is submitted that the PPA itself recognizes that there can be amendment by mutual consent subject to the approval of the Commission. In the present case, the fact is that the amendments have been approved by the Government of Gujarat. The Commission has allowed the amendments in the past also, specifically in the case of EPGL itself. Therefore, at this stage, to claim that the amendments are contrary to the Constitution or Electricity Act, 2003 or any principle of law cannot be accepted.

10.18. The rationale behind the amendments to the PPA with the Respondent No.1, EPGL was considered in the various orders passed by the Commission while approving earlier SPPAs with EPGL after considering various aspects including consumer interest.

10.19. The Objector has not raised any objection specific to the present case. The Objector has neither stated how the amendment is contrary to well established principles nor provided the Orders / decisions / judgments to which the SPPA is contrary to.

10.20. It is denied that GUVNL has not placed on record relevant documents/ information or there is intention of hiding any facts. GUVNL has presented all relevant facts to the Commission and responded to the queries raised by the Commission. There is therefore no merit in claiming that GUVNL has hide any facts. The Objector has not specified any documents which is required in the present case. The Government of Gujarat has approved the amendments which approvals are on record and further CEA letter in regard to the SHR is also on record.

10.21. In regard to the impact of the said Amendments, the Petitioner, GUVNL has already responded to the query of the Commission. It is reiterated that the actual impact would vary depending on cost of coal etc., and is not a fixed figure. Further the impact presented is as per the claim of the Respondent No.1,

EPGL and subject to verification and reconciliation by GUVNL including Independent Audit.

10.22. The Respondent No. 1, EPGL has already filed the reply and has supported the Petition.

10.23. The Petitioner reiterated its submission made in the Petition and has sought approval from the Commission under Section 86(1)(b) of the Electricity Act, 2003, for the 5th SPPA dated 05.01.2024.

11. The matter was kept for hearing on 08.07.2024 wherein the Commission passed daily Order dated 05.09.2024 deciding as under:

*“5.2. Initially, the Respondent No. 1 become the successful bidder for supply of 1000 MW of power under Bid No. 03 of the Petitioner under the Competitive Bidding Process carried out under Section 63 of the Electricity Act, 2003. Accordingly, the Petitioner and the Respondent EPGL had signed the PPA dated 26.02.2007 which was duly modified from time to time by both the parties and lastly the Petitioner has signed the Supplemental PPA with the Respondent No. 1 EPGL on 05.01.2024 in terms of approval of the Government vide its letter dated 10.10.2023. The present Petition is, therefore, preferred by the Petitioner before the Commission seeking approval of the Supplemental PPA executed with the Respondent EPGL on 05.01.2024.*

*5.3. We note that pursuant to directives of the Commission in Daily Order dated 02.03.2024, the Petitioner GUVNL has published the public notices for inviting comments/objections/suggestions from the stakeholders in the present Petition and also uploaded the copy of the Petition on their website. We note the submission of the Petitioner regarding non-receipt of comments/suggestions from any stakeholder in the matter. We also note that the Petitioner has filed compliance affidavit dated 13.03.2024 before the Commission on 15.03.2024*

*regarding inviting comments/objections from the stakeholder. We further note that the staff of the Commission has uploaded the copy of the present Petition along with the relevant documents on website of the Commission (www.gercin.org) for inviting comments/suggestions from the stakeholders. The Office of the Commission has received comments/suggestions from individual Objector Mr. Nitin Madam in the present matter. However, as per the submissions of the parties, they have not received copy of the said comments/suggestions submitted by individual Objector, Mr. Nitin Madam. Accordingly, we direct the staff of the Commission to provide the copy of said 5 suggestions/objections of Mr. Nitin Madam to the Petitioner and the Respondents so as to enable them to file their reply/response on the same, if any, in the matter, within 7 (Seven) days with a copy to all the parties including Objector. The Objector is also at liberty to file its rejoinder reply, if any, within 7 (Seven) days after receipt of reply/response from the Petitioner and the Respondent.*

*5.4. As stated above, as both the Petitioner and the Respondent has agreed to provide detail submissions on the issues involved in the present Petition with regards to modifications of SHR of the Petitioner' Power Plant and removal of ceiling of the computed coal price agreed in earlier PPAs by the parties based on the various orders of the Commission as referred above, i.e., (i) Order dated 03.08.2015 in Petition No. 1296 of 2013, (ii) Order dated 27.04.2020 in Petition No. 1807 of 2019 & (iii) Order dated 20.11.2021 in Petition No. 2004 of 2021 and also HPC recommendations accepted in various GRs dated 01.12.2018, 12.06.2020 & 05.06.2021 by the Government of Gujarat and that Guidelines of Govt. of Gujarat dated 12.06.2020 and HPC committee report and Commission's decision which was accepted by the Government vide the aforesaid GRs and status of the same, let the same be filed within two weeks' time, from the date of this Order. 5.5. We note that the counsels appearing for the Petitioner GUVNL and the Respondent EPGL have made their submissions and completed their arguments in the matter. Parties are directed to file their submissions, if any,*

*within two weeks from the date of this Order in the matter. Next date of hearing will be intimated separately, if required.”*

12. The Respondent No. 1, EPGL has filed written submission on affidavit dated 12.09.2024 and submitted that the present submissions are being filed by the Respondent pursuant to the RoP dated 02.09.2024 for the hearing held on 08.07.2024. In para 5.4 of the said RoP, the Commission required the filing of submissions by both parties.

*" ...issues involved in the present petition with regard to modifications of SHR of the Petitioner's Power Plant and removal of ceiling of the computed coal price agreed in earlier PPAs by the parties based on the various orders of the Commission as referred above i.e., (i) Order dated 03.08.2015 in Petition No. 1296 of 2013, (ii) Order dated 27.04.2020 in Petition No. 1807 of 2019 & (iii) Order dated 20.11.2021 in Petition No. 2004 of 2021 and also HPC recommendations accepted in various GRs dated 01.12.2018, 12.06.2020 & 05.06.2021 by the Government of Gujarat and that Guidelines of Govt. of Gujarat dated 12.06.2020 and HPC committee report and Commission's decision which was accepted by the Government vide the aforesaid GRs and status of the same) let the same be filed within two weeks time, from the date of this Order".*

- 12.1. It is submitted that at the outset that, factually, there is no "issue" at all in the present petition. In law, an "issue" arises when one party makes an assertion and the other party denies it. In the present case, there is no such situation. There is no denial on any of the aspects covered in the matter. Both parties are ad-idem on the proposed changes in the PPA. Even during the course of hearing before this Hon'ble Commission, there was no "issue" or difficulty or doubt with any of the proposed modifications in the PPA raised by the Commission. Therefore, neither of the parties have, till date, been put on notice about any doubt, difficulty or apprehension about any of the contents of the petition. The question raised by the Commission during the hearing was directed to the Petitioner, i.e. GUVNL and the same is recorded in Para 2.3 and 3 of the aforesaid RoP. However, this submission is being filed pursuant to the directions contained in the aforesaid RoP on the basis of the available record

with the Respondent.

12.2. The changes sought to be introduced by way of the 2024 SPPA are:

- a. Removal of the coal cost ceiling of USD 90 / MT for 6322 GCV coal; and
- b. Correction of the station heat rate (“SHR”) from 2262 Kcal/Kwh to 2333 kcal/Kwh.

12.3. As regards the direction contained in Para 4 of the aforesaid RoP, it is submitted, inter alia, that:

*“A. The removal of the ceiling on coal cost was necessary to ensure EPGL’s viability and to ensure uninterrupted and economical power supply to the consumers of Gujarat.”*

12.4. The following facts establish that the removal of the coal cost ceiling (removed by the 2024 SPPA) was necessary to ensure the survival and operation of EPGL’s plant and to ensure uninterrupted and economical power supply to the consumers of Gujarat.

12.5. It is submitted that the Essar Power Limited executed a long-term power purchase agreement on 26.2.2007 (the “PPA”) for the supply of 1000 MW power to GUVNL. Later, vide an agreement dated 25.11.2008, the PPA was novated from Essar Power Limited to EPGL. This power was to be supplied by EPGL from its 1200 MW imported coal fired power plant located at Salaya, Gujarat.

12.6. It is submitted that the tariff quoted by EPGL was predominantly based on the usage of imported coal from Indonesia which was commercially viable based on prevailing market trends pertaining to imported coal as a result of the Indonesian Regulations, EPGL, as well as other imported coal fired power plants such as Tata’s Coastal Gujarat Power Limited and Adani Power Mundra Limited suffered huge financial losses due to under recovery in fuel costs.

12.7. In 2017, the Supreme Court of India in Energy Watchdog Vs. CERC , (2017) 14

SCC 80 (Energy Watchdog) refused to grant relief to imported coal fired power plants for the under-recovery on account of the Indonesian Regulations.

12.8. Due the continuing financial difficulties faced by EPGL and other imported coal fired power plants in the State of Gujarat, the Gujarat Government vide Government Resolution dated 3.7.2018 set up a High Powered Committee (the “HPC”) to mitigate the hardships being faced as a result of the Indonesian Regulations.

12.9. On 3.10.2018, the HPC issued its recommendations in a report (the “HPC Report”). These recommendations included amending existing power purchase agreements and incorporating provisions for pass through of the cost of coal with a ceiling of USD110/MT in order to ensure the survival and viability of imported coal fired power plants in Gujarat. The HPC Report was adopted by the Government of Gujarat vide government resolution dated 1.12.2018.

12.10. In 2018, the Hon’ble Supreme Court passed an order in a Misc. Application for clarification filed in Energy Watchdog, clarifying that parties can approach the Appropriate Commission for approval of amendments proposed by the HPC and that the judgment in Energy Watchdog would not stand in the way. A supplemental power purchase agreement was executed on 1.3.2019 (“2019 SPPA”) incorporating the recommendations of the HPC. GUVNL filed a petition (Petition No. 1807/2019) before the Commission for approval of the 2019 SPPA.

12.11. It is submitted that on 27.4.2020, the Commission passed an order in Petition No. 1807/2019 adopting the 2019 SPPA after making major amendments, including reducing the coal cost ceiling from USD 110/MT to USD 90/MT and adopting an incorrect station heat rate. An appeal (Appeal No. 108/2020) was filed by EPGL against the Commission order dated 27.04.2020.

- 12.12. Thereafter, the Government of Gujarat vide Government Resolution dated 12.6.2020 revoked its previous Government Resolution dated 1.12.2018 (which has adopted the HPC Report) as it was not achieving the desired objective. It is submitted that vide a letter on the same date dated 12.6.2018, the Government of Gujarat wrote to GUVNL asking it to sign fresh supplemental power purchase agreements.
- 12.13. Thereafter, EPGL executed a Supplemental Power Purchase Agreement dated 12.8.2021 (the “2021 SPPA”) which substituted the 2019 SPPA. The 2021 SPPA adopted the same incorrect SHR and contained the same coal cost ceiling of USD 90 / MT. Further, pursuant to its obligations under the 2021 SPPA, EPGL withdrew its appeal (Appeal No. 108/2020) against the Commission’s order dated 27.4.2020.
- 12.14. The 2021 SPPA was approved by the Commission vide order dated 20.11.2021. The 2021 SPPA therefore took effect from 20.11.2021. However, due to the unreasonable low coal cost ceiling and the incorrect SHR adopted in the 2021 SPPA, EPGL was unable to run its plant.
- 12.15. In 25.2.2022, the Government of Gujarat issued a Government Resolution in which they granted a similarly situated Power Plant the very contractual terms that it denied to EPGL, i.e., the pass through of coal and application of the correct SHR.
- 12.16. At this stage, it is relevant to point out that the original coal cost ceiling of USD 110 / MT recommended by the HPC (reduced to USD 90 / MT by the Commission) was based on the historical values of the imported coal and the assessment that the probability of the ceiling being breached was minimal. However, the subsequent data proved that coal prices breached the ceiling by a huge margin. In this subsequent Government Resolution dated 25.2.2022, the Government of Gujarat recognized the futility of the approach. It is the same logic that is being applied in the present 2024 SPPA – that coal cost pass

through without an uneconomical ceiling is the only transparent and prudent way to ensure that power plants remain viable.

12.17. EPGL was able to re-start its plant around September 2022 because of notifications issued by the Ministry of Power, Government of India (the “MoP”) under Section 11 of the Electricity Act, 2003 . These notifications were issued because the MoP recognized that imported coal fired power plants were not viable without adequate coal cost pass through. These notifications calculated energy charge rates for EPGL which allowed a full pass through of coal and also applied the correct SHR.

12.18. Thereafter, EPGL and GUVNL had several meetings regarding the viability of EPGL’s power plant. In this regard, on 1.2.2023, EPGL wrote to GUVNL setting out its proposal. In this proposal, EPGL asked for the removal of the coal cost ceiling and the correction of the SHR.

12.19. EPGL and GUVNL reached an agreement regarding the coal cost ceiling and the correction of SHR. This agreement was accorded approval by both GUVNL’s Board of Directors and the Government of Gujarat vide letter dated 10.10.2023 . The 2024 SPPA was executed to ensure that EPGL’s power plant remained functional and to ensure its continued viability.

12.20. The 2024 SPPA ensures that EPGL can continue to run its power plant. Given the huge spike in power demand in India and the State of Gujarat in particular, the injection of power into the grid by EPGL will reduce the overall national average tariff for power.

12.21. The EPGL capacity charge under the 2024 SPPA is in the range of 65 paise per unit which is possibly the lowest of any thermal generating unit in the country which has not completed its useful life. Therefore, GUVNL is getting an available capacity of 1122 MW at what is virtually a “throw away” capacity charge. If GUVNL were to replace this power from a new thermal generating

plant, it would have to pay a capacity charge which is many times more. In fact, GUVNL has signed a PPA with DB Power in which a capacity charge of Rs. 2.84 / unit is being paid which is almost four times higher than EPGL's capacity charge. This is clear from the order dated 9.2.2024 in Petition No. 2263/2023 titled "GUVNL v/s DB Power" passed by the Commission.

12.22. In its tariff order dated 1.6.2024 for Madhya Gujarat Vij Company Limited (Case No. 2319/2024) passed by the Commission, GUVNL has projected that EPGL's power plant will be required to supply -900 MW out of this total average demand of 14900 MW for FY 2024-25 .

12.23. This order also shows that the tariff is very competitive and unless Gujarat's demand falls below 12,000 MW, EPGL's plant will always be asked to operate. Given that the average demand forecast is well above 12,000 MW, there is no doubt that EPGL's plant will be required to satisfy the demand. Thereby obviating the need for GUVNL to procure short term expensive power from the open market.

12.24. If the 2024 SPPA is not approved, EPGL will be unable to run its power plant which will lead to a shortage of power for GUVNL which will ultimately cause power shortages and raise the cost of power. This would ultimately harm the end-consumers. Even though, no specific issue has been pointed out in the aforesaid RoP on this aspect, regarding SHR, the 2024 SPPA simply corrects the position and incorporates the correct SHR. In fact, the Central Electricity Authority (the "CEA") has verified the correct SHR as 2333 Kcal/Kwh in its report submitted to the Officer on Special Duty (Power), Government of Gujarat vide letter dated 10.05.2023.

12.25. The incorrect SHR of 2262 Kcal/Kwh determined by the Commission in its order dated 3.8.2015 (in Petition No. 1296 of 2013) which was followed in the Commission's order dated 24.7.2020 (Petition No. 1807 of 2019) would not prevent the Commission from correcting the SHR by approving the 2024 SPPA,

inter alia, for the following reasons:-

*(i) There is no res judicata.*

12.26. Each tariff determination (similar to a tax year) gives rise to a fresh cause of action and may be challenged independently and separately. However, the same tariff principles may be continued year-on-year unless there is a material change in circumstances. In Delhi Transco Limited Vs. Delhi Electricity Regulatory Commission, App. 133/2007 (13.1.2009), the Hon'ble Appellate Tribunal for Electricity held:

*"It is not disputed by the counsel appearing before us that each assessment year of a tariff order gives rise to a fresh cause of action and can be challenged separately. It is also accepted at the bar that the principles of res judicata will not apply to the facts of this case."*

12.27. For this, the Hon'ble APTEL relied on Bharat Sanchar Nigam Limited v Union of India and Others, (2006) 1 SCC 1 and Radhasoami Satsang Swami Bag, Agra v. Commissioner of Income, (1992) 1 SCC 659 which, in the context of income tax, held while res judicata would not apply to matters pertaining to tax for different assessment years, courts would generally adopt an earlier pronouncement of the law or conclusion of fact unless there is a new ground urged or a material change in the factual position.

12.28. In the present case, the 2015 Order as also the 2020 Order were akin to tariff determinative orders, at least on the question of SHR, the material change in circumstance is that both GUVNL and EPGL have agreed to amend Art. 3.2.3 of the 2021 SPPA to reflect the correct SHR of 2333 kCal /kWh. Another intervening circumstance (as stated above) is that the CEA has also confirmed that EPGL's plant SHR is 2333 kCal /kWh. The principle of res judicata therefore would not apply and the Commission would not be bound by its findings on SHR in its order dated 3.8.2015 in Petition No. 1296/2013 and Order dated 27.4.2020 in Petition No. 1807 of 2019.

12.29. Further, the present petition seeks approval of the PPA, inter alia, to revise the tariff by means of the 2024 SPPA. Even if the original determination of the SHR by the Commission were for the life of EPGL's plant, the present petition seeks redetermination of tariff on the lines of Sec. 62(4) and/or Section 64(6) of the Electricity Act. The Hon'ble Supreme Court has, in Uttar Pradesh Power Corporation Limited v/s. National Thermal Power Corporation Limited, (2009) 6 SCC 235 held that a regulatory commission's jurisdiction to alter or amend a tariff during redetermination is not trammelled by the principles of res-judicata or Order 2, Rule 2 of the Code of Civil Procedure, 1908 which requires a plaintiff or a claimant to exhaust all reliefs emanating from the same cause of action (Kunjan Nair Sivaraman Nair v. Narayanan Nair, (2004) 3 SCC 277).

12.30. The orders dated 3.8.2015 in Petition No. 1296/2013 and 27.4.2020 in Petition No. 1807/2019 holding that the SHR is 2262 kCal/kWh will therefore not bind the Commission. The Commission is free to examine the issue afresh.

*(ii) The present petition arises from an independent and distinct causes of action from the previous orders dated 3.8.2015 and 27.4.2020.*

12.31. The first order dated 3.8.2015 passed by the Commission was passed in EPGL's claim towards change in law under Art 13 of the PPA. The SHR determined in that order was only to compute the change in law compensation and not, as is being claimed in the present petition, for the base energy charge. In fact, at the time of the order dated 3.8.2015, there was no Clause 3.2.3 (containing the SHR) in the PPA at all. Clause 3.2.3 was introduced for the first time in the 2019 SPPA.

12.32. Insofar as the order dated 27.4.2020 is concerned, the finding on SHR required an amendment to Clause 3.2.3. The very same clause 3.2.3 was incorporated in the 2021 SPPA. Today, vide the present petition, the parties are seeking the replacement of the very same Clause 3.2.3. Hence, once the very basis of the

2020 Order is being amended, there can be no question of that Order being in the way. The only question therefore, that this Hon'ble Commission may have to consider is whether the SHR of 2333 is reasonable or not. The CEA has certified the same to be reasonable. There is no material before this Hon'ble Commission to suggest otherwise.

12.33. Further, the benchmark for SHR in 2019 for Clause 3.2.3 was with reference to the CERC Regulations whereas the SHR in the current Clause 3.2.3 is benchmarked to the CEA's recommendations on EPGL's plant. The fundamental basis for the finding on SHR in the order dated 27.4.2020, therefore has changed and there can be no question of res judicata in the present case.

12.34. The CEA recommendation for the SHR of 2333 kCal/kWH for EPGL's plant was adopted by the Union Ministry of Power while issuing notifications on tariffs under Section 11 of the Electricity Act, 2003 and is therefore clearly in the interest of the consumers. GUVNL has also accepted the said SHR for the purpose of making payments during the period when Section 11 notifications applied to EPGL.

*(iii) The Order dated 3.8.2015 in Pet. 1296/2013 is ex-facie illegal*

12.35. The original order dated 3.8.2015 was ex- facie invalid in law because both GERC and CERC Regulations contemplated a multiplication factor of 1.065 on the SHR derived from the turbine heat rate and boiler efficiency. Admittedly, this was never done in the order dated 3.8.2015.

12.36. The Constitution Bench judgment of the Hon'ble Supreme Court in PTC India Limited v. Central Electricity Regulatory Commission, (2010) 4 SCC 603 has held that whenever regulations are framed, tariff must be determined in accordance with those regulations. Therefore, even the SHR of 2262 (even though wrong) had to be multiplied by 1.065 which would bring the SHR to

2409. Admittedly, this was not done. This means the original order dated 3.8.2015 suffers from a serious and fundamental infirmity insofar as the determination of SHR of EPGL'S plant is concerned.

12.37. It is the bounden duty of every authority, judicial or quasi-judicial, to correct its own errors, specifically when its actions are contrary to law. As a Constitution Bench of the Hon'ble Supreme Court held in High Court Bar Association, Allahabad v. State of U.P., 2024 INSC 150:

*" 16...No litigant should be allowed to suffer due to the fault of the Court. If that happens, it is the bounden duty of the Court to rectify its mistake.*

12.38. Therefore, the previous orders passed by the Commission on the issue of SHR do not prevent it from approving the correct SHR in the 2024 SPPA. Lastly, it is also relevant to point out that the increase in price of implementing the correct SHR is only approximately 3% of the energy charge assuming that the coal cost ceiling is removed.

12.39. The 2024 SPPA has been approved by the Government of Gujarat vide letter 10.10.2023. This approval was granted after careful consideration by the Government of Gujarat and passed in the larger public interest.

12.40. The fact that the approval of the 2024 SPPA was communicated through a letter rather than a government resolution would not take away from the validity of the approval. There is no fixed format for such approvals.

12.41. It is submitted that the remit of the Commission under Section 86(1)(b) of the Electricity Act, 2003 would not extend to the examining the validity or correctness of decisions taken by the Government of Gujarat. GUVNL is a company incorporated under the erstwhile Companies Act, 1956 with an independent corporate existence from its shareholder, the Government of Gujarat. The present petition seeks approval of a power agreement (i.e., 2024 SPPA) between a deemed licensee (i.e., GUVNL) (acting on behalf of the State's

Distribution Licensees) and a generator (i.e., EPGL). The State Government has no role under the Electricity Act 2003 in such process nor is it a party to the proceedings. Equally, the manner of the State Government's approval and communication to GUVNL for executing the 2024 SPPA has no relevance to the present proceedings. It is at best a matter between GUVNL and its shareholder, i.e., the State Government. It is respectfully submitted that matters of indoor management are beyond the remit of regulatory commissions, such as the Commission. (See Karnataka Power Transmission Corporation Limited v. Karnataka Electricity Regulatory Commission, 2006 SCC Online APTEL 79)

12.42. The correctness and validity of the Government of Gujarat's decision is therefore not relevant or germane for the purposes of approving the 2024 SPPA. As long as GUVNL as a corporate legal entity has agreed to it, for the limited purpose of Section 86(1)(b), that is all that the Commission is obliged to consider.

13. The matter was kept for hearing on 23.02.2024 and 08.07.2024.

14. Ld. Adv. Ms. Ranjitha Ramachandran appearing on behalf of the Petitioner submitted that the present matter has been filed by the Petitioner seeking approval of the Supplemental PPA dated 05.01.2024 executed between the GUVNL and the Respondent EPGL with regard to the Power Purchase Agreement dated 26.02.2007, as amended and existing as on date of the signing of the Supplemental PPA dated 05.01.2024.

14.1. She submitted that the Commission passed Daily Order dated 02.03.2024, wherein directions were given to the Petitioner for inviting comments/suggestions/objections from the stakeholders in the present Petition by issuing public notices in newspaper and accordingly, in compliance thereof, the Petitioner has published the same in (i) Indian Express, (ii) Gujarat Samachar, and (iii) Sandesh newspapers for inviting the objections and suggestions from the stakeholders in the present Petition and also uploaded

the present Petition alongwith all relevant documents on notice section of GUVNL's website. Moreover, the Petitioner has also filed compliance affidavit dated 13.03.2024 in this regard before the Commission. It is further submitted that in response to the aforesaid public notice, the Petitioner has not received any comments/objections from the stakeholders and accordingly the matter may be decided by the Commission considering the submissions of the Petitioner and based on record of the present petition.

14.2. In response to the query of the Commission that what is the financial impact if SHR which was earlier decided and approved by the Commission as well as GoG vide its GRs revises, it is submitted by the Petitioner that the Government of Gujarat has conveyed its approval for modification of SPPA dated 12.08.2021 executed between GUVNL and EPGL and also removed the HBA Index Ceiling price of US \$ 90/MT under SPPA with effect from 01.01.2023 and SHR on 01.01.2023 was 2262 Kcal which was earlier approved by the Commission in its Order dated 03.08.2015 in Petition No. 1296 of 2013 and subsequent Orders dated 27.04.2020 in Petition No. 1807 of 2019 and Order dated 20.11.2021 in Petition No. 2004 of 2021 and the said SHR was mutually agreed and modified to 2333 Kcal/kWh in SPPA as per CEA recommendations by the Petitioner and the Respondent and the same shall be effective from 01.01.2023 subject to approval of the Commission and if any differential payment on account of revision in SHR shall be due and the same shall be payable after necessary approval of the Commission. It is also submitted that there shall be differential amount of Rs. 3.15 Crores and Rs. 89 Crores respectively from 01.01.2023 to till date due to removal of HBA index and revision in SHR. She further submitted that Energy and Petrochemicals Department, Government of Gujarat vide its letter dated 10.10.2023 had accorded the approval for modification in Supplemental PPA dated 12.08.2021 executed between GUVNL and EPGL.

14.3. Responding to further query of the Commission as to whether the Government

has approved the aforesaid modifications through GR as in earlier case in line with its earlier GRs wherein High Power Committee (HPC) has recommended certain conditions for PPA and approved in GR by the Government, she submitted that earlier Energy and Petrochemicals Department, Government of Gujarat has given its approval vide GR dated 01.12.2018 and also revoked the terms of GR dated 01.12.2018 vide its GR dated 12.06.2020. Thereafter, Government of Gujarat vide its another GR dated 12.06.2020 has accepted recommendation of HPC and accorded its approval to proposal of the parties for SPPA execution of various parameters and changes in existing PPA by signing SPPA as per HPC recommendations. Subsequently, Energy and Petrochemicals Department, Government of Gujarat vide its letter dated 10.10.2023 had conveyed its approval for modification in SPPA dated 12.08.2021.

15. Ld. Adv. Mr. Buddy Ranganadhan, appearing on behalf of the Respondent EPGL in response to the above queries of the Commission, has clarified that previously there are two GRs issued, i.e., GR dated 01.12.2018 & GR dated 12.06.2020 issued by the Government of Gujarat which is simultaneously applicable to the Respondent EPGL and to other generators also. The GR dated 01.12.2018 was revoked by GR dated 12.06.2020 by Govt. of Gujarat. Whereas Energy and Petrochemicals Department, Government of Gujarat in its letter dated 10.10.2023 stated that the proposals dated 21.08.2023 & 25.08.2023 of GUVNL regarding modification in SPPA dated 12.08.2021 executed between GUVNL & EPGL was examined and considered by the State Government and accordingly, after careful consideration, the Government has accorded its approval for modification of SPPA dated 12.08.2021 on certain aspects as stated in letter dated 10.10.2023. Therefore, the contents of the aforesaid letter were limited to the Respondent EPGL only. As such, there is no such specific format in which approval is required to be granted by the State Government. He further submitted that the Respondent EPGL also not received any comments/objections from the stakeholders in the present matter.

15.1. In response to query of the Commission that what is the current status of earlier GRs dated 01.12.2018 & 12.06.2020, guidelines dated 12.06.2020 and GR dated 05.06.2021 of Govt. of Gujarat wherein the recommendations of HPC were accepted by the Government and based on it, the Commission had passed Orders in different Petitions with regards to different parameters, the counsels appearing for both the Petitioner and the Respondent have agreed to file submissions in this regard.

16. Heard the parties.

16.1. We note that the present Petition is filed by the Petitioner under Section 86 (1)(b) and 86(1)(f) of the Electricity Act, 2003 read with Article 18.1 of the PPA dated 26.02.2007 under 1000 MW (Bid-3) seeking approval of the Commission for the Supplemental PPA dated 05.01.2024 executed between the Petitioner GUVNL and the Respondent No. 1 EPGL.

16.2. The undisputed fact of the present Petition are as under:

16.3. The Petitioner and the Respondent No. 1 entered in to PPA dated 26.02.2007 for contracted capacity of 1000 MW of power generation from Respondent plant unit 1 and 2 supplied by the Respondent No. 1 to the Petitioner.

16.4. The Petitioner and the Respondent No. 1 have executed supplemental PPA on 25.11.2008, 16.10.2009, 1.03.2019 and 12.08.2021 prior to the present 5<sup>th</sup> Supplemental PPA for which the present Petition filed by the Petitioner for approval of the Commission.

16.5. The Petitioner had earlier filed Petition No. 1807 of 2019 for approval of supplemental PPA dated 1.03.2019 entered between the Petitioner and the Respondent, pursuant to Government of Gujarat Policy directives vide GR No. CGP-12-2018-166-K dated 1.12.2018. The Commission had vide its Order dated 27.04.2020 approved the supplemental PPA wherein directed to

incorporate certain modification as set out in Order dated 27.04.2020.

- 16.6. The Petitioner had filed an Appeal No. 108 of 2020 before Hon'ble APTEL against the Order dated 27.04.2020 of the Commission.
- 16.7. Energy and Petrochemicals Dept. vide its letter dated 12.06.2020 conveyed that the issue related to uniform implementation of the supplemental PPA with imported coal based power projects in the State has been examined vide GR No. CGP-12-2018-166-K dated 12.06.2020 and decided that earlier GR of dated 1.12.2018 stands revoked.
- 16.8. The Government of Gujarat vide its letter dated 12.06.2020 has given guidelines regarding signing of supplemental PPA with EPGL.
- 16.9. In compliance to the Commission order dated 27.04.2020, and GoG guidelines and GR dated 12.06.2020 and further modification approved by the Government vide its GR dated 5.06.2021 the Petitioner and the Respondent No. 1 agreed to execute amendment and modification in supplemental PPA dated 1.03.2019.
- 16.10. The Respondent No. 1 had withdrawn appeal No. 108 of 2020 filed against earlier Commission Order dated 27.04.2020. The Petitioner has filed Petition No. 2004 of 2021 for approval of amendments to the PPA by way of supplemental PPA dated 12.08.2021 pursuant to Order dated 27.04.2020 of the Commission and Government of Gujarat GR and letter dated 12.06.2020 and GoG GR dated 5.06.2021.
- 16.11. The Commission vide its Order dated 20.11.2021 approved 4<sup>th</sup> supplemental PPA dated 12.08.2021. The supplemental PPA (SPPA) provides for HBA index ceiling for imported coal price at 90 USD/MT and Gross SHR lower of actual Gross SHR or 2262 kCal/kWh as approved by the Commission in Petition No. 1296 of 2013.

- 16.12. The Respondent No. 1 filed an Appeal No. 457 of 2022 before the Hon'ble APTEL and challenged the Order dated 20.11.2021 of the Commission.
- 16.13. Despite the approval of revised SPPA by the Commission the Respondent No. 1 did not commence power generation under the SPPA claiming that the Petitioner affected by HBA index ceiling. Actual HBA index is much higher than the ceiling price.
- 16.14. The Respondent No. 1 had supplied power to the Petitioner for the period from 13.09.2022 to 31.12.2022 under the Section 11 directives of Government of India. The energy charge received for supply of power by Respondent No. 1 is in accordance with the benchmark ECR notified by expert committee of Ministry of Power, GoI.
- 16.15. A meeting dated 23.12.2022 was held at GoG level wherein the representation made by the Respondent No. 1 with regard to modification in SPPA dated 12.08.2021 was discussed and minutes of meeting dated 23.12.2022 prepared and forwarded by Energy and Petrochemicals Dept., GoG vide letter dated 10.01.2023 wherein it was decided that ceiling of HBA index for USD 90/MT shall be relaxed. It was also decided that the relaxation shall be made effective from 01.01.2023 subject to approval of the Commission. It was also decided that for allowing revision in SHR, CEA recommendation would be obtained and the modification in SHR shall be allowed after due approval of the Commission.
- 16.16. Based on meeting EPGL commence supply of power under SPPA with effect from 01.01.2023 pending approval for modification in SPPA towards HBA index ceiling.
- 16.17. CEA vide its letter dated 03.03.2023 to GoG referred to its report dated 06.05.2022 submitted to MoP recommending normative SHR of 2333 kCal/kWh for Respondent No. 1 plant conveying that expert committee of MoP while declaring the benchmark energy charge raised for EPGL under Section

11 is considering the SHR of 2333 kCal/kWh.

16.18. The GoG vide its letter dated 10.10.2023 has conveyed its approval for modification of SPPA dated 12.08.2021 between the Petitioner and the Respondent No. 1.

16.19. EPGL vide its letter dated 20.12.2023 given unconditional consent to the draft SPPA forwarded by the Petitioner. The Petitioner and the Respondent No. 1 entered into 5<sup>th</sup> SPPA in amendment to the 4<sup>th</sup> SPPA dated 12.08.2021. The Respondent No. 1 has undertaken to withdraw all pending litigation filed by it before all judicial for except related to change in law claimed under the PPA.

16.20. The Respondent No. 1 EPGL filed an application before Hon'ble APTEL seeking for withdrawal of Appeal No. 457 of 2022 in terms of execution of 5<sup>th</sup> SPPA and it was allowed by Hon'ble APTEL on 23.01.2024.

16.21. We note that the subject matter of present petition filed under Section 86 (1) (b) and 86 (1) (f) of the Act is related to approval of 5<sup>th</sup> supplemental PPA for modification in 4<sup>th</sup> Supplemental PPA dated 12.08.2021. It is necessary to refer Section 86 (1) (b) of the Act read as under:

*"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 aforesaid provision of the Act, the Commission is empowered to approve the power procurement of the distribution licensee with consideration of tariff for purchase of power, its quantum and period for such procurement.

16.22. We note that the power provided to the Commission under Section 86 (1) (b) of the Act are regulatory power which are wider than adjudicatory power provided under the Act and the same is also upheld by the Hon'ble APTEL and Hon'ble Supreme Court in its various judgements, some of which are referred to hereinunder:

1. V.S. Rice and Oil Mills V. State of A.P. (1964) 7 SCR 456.
2. PTC India Ltd. V. Central Electricity Regulatory Commission (2010) 4 SCC 603.
3. Cellular Operators Assn. of India V. Union of India (2003) 3 SCC 186.
4. Tata Power Company Limited V. Reliance Energy Company Ltd. (2009) 16 SCC 659.
5. Tarini Infrastructure V. Gujarat Urja Vikas Nigam Limited

The aforesaid decisions of Apex Court recognised that the Commission has wider power than adjudicatory power provided under the Electricity Act, 2003.. Moreover, as per the Cambridge Dictionary, the word '*regulate*' mean *to control something, especially by making it work in a particular way or an official rule or the act of controlling something*'.

16.23. Thus, as per the provisions of Electricity Act, 2003, read with principles laid down by the Apex Courts under its various judgments, the subject matter of addition, amendment, alter, change/modify the terms and conditions of tariff for power purchase falls under the regulatory power of the Commission.

16.24. We also note that the procurement of power as and when carried out by the licensee on long terms or medium term or short-term basis, the same is subject to approval of the Commission as per the provisions of Section 62 read with Section 64, Section 86 of the Act or alternatively under Section 63 read with Section 86 of the Act. Thus, there are two routes available under the Act for power procurement by the Distribution Licensee to meet its requirement.

16.25. We note that the Petitioner had carried out competitive bidding process for procurement of power in accordance with guidelines issued under Section 63 of the Act for 3000 MW wherein the Respondent No. 1 was selected as successful bidder for supply of 1000 MW power generated from its plant under competitive bidding carried out by the Petitioner. The Petitioner and the Respondent No 1 had executed PPA dated 26.02.2007 under the said bidding process. Thereafter the amendments/modifications were made in the aforesaid PPA by way of signing of supplemental PPAs dated 25.11.2008, 16.10.2009, 1.03.2019 and 12.08.2021 by and between the parties including present 5<sup>th</sup> SPPA.

16.26. As the Petitioner and the Respondent No 1 have agreed for amendment/modification in original PPA dated 26.02.2007. It is necessary to refer the Article 18.1 of the aforesaid PPA, which reads as under:

*“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.”*

The aforesaid provision of the original PPA dated 26.02.2007 provides that parties to the agreement have rights to amend or supplement by of written agreement between them and amend the PPA subject to approval of the Commission. Thus, an amendment in the PPA is permissible as per the bidding documents approved by the Commission as well as the adoption of tariff carried out by the Commission wherein the PPA is also part of the said adoption process which provided for amendment in the PPA.

16.27. We also note that the Petitioner and the Respondent have made amendment from time to time based on the aforesaid provisions of the PPA approved by the Commission on 25.11.2008, 16.10.2009, 1.03.2019 and 12.08.2021.

16.28. The Petitioner had filed Petition No. 1807 of 2009 before the Commission for approval of amendment in PPA dated 26.02.2007 vide SPPA dated 1.03.2019 pursuant to GoG Policy directives vide Government GR No. CGP-12-2018-166-A dated 1.12.2018. The Commission after public hearing in the subject matter of aforesaid Petition, approved the SPPA dated 01.03.2019 with directions to incorporate certain modifications as set out in Order dated 27.04.2020 of the Commission in aforesaid SPPA dated 01.03.2019 submitted by the Petitioner. The aforesaid decision of the Commission was challenged by the Respondent No. 1 by filing Appeal No. 108 of 2020 before Hon'ble APTEL and same was withdrawn by the Respondent No 1 and the same was allowed by Hon'ble APTEL vide Order dated 25.06.2021.

16.29. We also note that E&P Department, government of Gujarat vide its letter dated 12.06.2020 conveyed to GUVNL that the issue related to uniform implementation of SPPA with imported coal based power projects located in the State of Gujarat has been examined by Government vide GR No. CGP-12-2018-166-K dated 12.06.2020 and decided to revoke the earlier GR dated 1.12.2018 for all its intents and purpose.

16.30. The Government of Gujarat issued GR dated 05.06.2021 with consideration of Commission's decision dated 27.04.2020, earlier GR and Government guidelines dated 12.06.2020. Based on aforesaid GR, the Petitioner and the Respondent No. 1 executed SPPA dated 12.08.2021. The Petitioner had filed a Petition No. 2004 of 2021 for approval of SPPA dated 12.08.2021 for amendment in PPA pursuant to Commission's Order dated 27.04.2020, Government GR and guideline dated 12.06.2020 and Government GR dated 05.06.2021. After carryout public hearing and hearing the parties, the Commission granted approval to the 4<sup>th</sup> SPPA dated 12.08.2021. The said approval of SPPA provides for consideration of imported coal pricing as well as Gross Heat Rate of the Respondent No. 1 plant for computation of Energy

charges, which are stated below:

- (i) The imported coal price ceiling is linked with HBA index price at 90 USD/MT.
- (ii) Gross Heat Rate (GHR) of the Respondent plant is provided as lower of (a) actual Gross Station Heat Rate or (b) 2262 kCal/kWh as approved by the Commission in its Order dated 03.08.2015 in Petition No. 1296 of 2013.

16.31. The Respondent challenged the aforesaid decision of the Commission in Order dated 20.11.2021 by filing Appeal No. 457 of 2022 before the Hon'ble APTEL. The said Appeal was later on withdrawn in terms of execution of 5<sup>th</sup> SPPA executed between the Petitioner and the Respondent which is also subject matter of approval of the Commission under present petition. The Hon'ble Tribunal has permitted for withdrawal of the Appeal No. 457 of 2022 as prayed for by the Respondent No. 1.

16.32. We also note that there are various correspondence and discussions made between Petitioner and Respondent No. 1 as well as Government of Gujarat on aforesaid subject matter from time to time and it was decided to sign 5<sup>th</sup> SPPA between Petitioner and Respondent No. 1. We also note that the subject matter of present Petition is with regard to amendment in above referred two parameters provided under 4<sup>th</sup> SPPA i.e. (i) linkage of imported coal price ceiling with HBA index price at 90 USD /MT as well as Gross Station Heat Rate of the Petitioner plant considered at 2262 kCal/kWh. We also referred to the relevant provisions in 4<sup>th</sup> SPPA dated 12.08.2021 read with Order dated 20.11.2021 in Petition No. 2004/2021 passed by the Commission with regard to above two parameters and correspondence exchanged amongst the parties, thereafter, on aforesaid subject matter.

16.33. Now we deal with the issue of imported coal price ceiling linked with HBA

index at 90 USD/MT.

16.34. It is necessary to refer the Govt GR dated 05.06.2021 and amendment in 4<sup>th</sup> SPPA of dated 12.08.2021 executed between the parties pursuant aforesaid Govt GR dated 05.06.2021. The relevant amendment to PPA executed vide 4<sup>th</sup> SPPA as provided under Clause 3.2.4 read as under:

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

*(i) General Principles for determination of LPPF:*

<p><i>FOB cost of Coal</i></p>	<p><u><i>FOB Price for Imported Coal:</i></u> <i>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.</i></p> <p><i>Note: For determination of equivalent Coal Price for working out Landed Cost of imported coal for the Month:</i></p> <p><i>The lowest of following for the month shall be considered:</i></p> <p><i>(a) Actual FOB price of consignment</i> <i>(b) HBA price adjusted and worked as per formula stated in Annexure-A for billed GCV</i></p> <p><i>"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</i> <i>"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.</i></p>
--------------------------------	---

	<p><i>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.</i></p> <p><i>(c) Index notified by Argus / Coalindo applicable for the quality of coal consumed</i>  <i>(d) Index notified by S&amp;P Global Platts applicable for the quality of coal consumed</i>  <i>(e) Lowest Index of the country of origin applicable for the quality of coal consumed</i></p> <p><i>Note:</i></p> <p><i>For the coal procured having the GOV as published by above indices, the notified index price will be directly considered.</i></p> <p><i>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></p> <p><i>(i) For the coal consumed having GCV within range of <math>\pm 200</math> Kcal / Kg from GCV of above notified index, the rate shall be worked out on proportionate basis considering the nearest notified monthly index and</i></p> <p><i>(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.</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.”*

16.35. As per aforesaid provisions of 4<sup>th</sup> SPPA, the Petitioner and the Respondent agreed that the computation of energy charge shall be subject to various conditions provided in Article 3.2.4 of SPPA, consists of FOB cost of imported coal. The mechanism for FOB price of imported coal has been provided in the above refereed clause of SPPA.

16.36. From the above, it is clear that the HBA index shall mean the FOB price of Indonesian imported coal having GCV of 6322 kCal/Kg in USD per MT notified by Govt of Indonesia on monthly basis. It also provides that HBA Index price shall mean HBA index FOB price of Indonesian imported coal published by Government of Indonesia from time to time for quality of coal of 6322 kCal/Kg as adjusted for GCV of coal consignment consumed in the plant as per formula provided in Annexure – A of the said 4<sup>th</sup> SPPA.

16.37. It is also provided that FOB price of coal shall always be subject to upper ceiling limit of HBA index of USD 90 per MT for 6322 kCal/Kg ascertained on monthly

basis as adjusted for quality of coal consumed in the project and as revised in accordance with SPPA (i.e. subject to the ceiling of HBA price).

16.38. The specific conditions provided in Article 3.2.4 (II) are also relevant in this case as referred above. The conditions provided is that the ceiling price for HBA index will be 90 USD/MT. It is also provided that the said ceiling price shall not be subject to further revision without prior approval of State Government and the Commission. Thus, for any change in ceiling price of HBA index of imported coal, the approval of the State Government as well as the Commission shall be required. The aforesaid provision further provides that the Respondent No. 1 shall bear all the differential cost of coal price, if any and continue to supply power under the PPA and SPPA.

16.39. We note that the submission of the Petitioner that after passing the Order dated 20.11.2021 in Petition No. 2004 of 2021 by the Commission and signing of SPPA by the parties, the Respondent No. 1 made representation to Energy and Petrochemicals Dept. Government of Gujarat vide letters dated 08.12.2022 and 27.12.2022 and requested for various modification in SPPA related to removal of HBA index ceiling price of imported coal, increase in SHR. It is also stated that a meeting dated 23.12.2022 was held at Government of Gujarat level to discuss the representation of EPGL with regard to modification in SPPA dated 12.08.2021. It is also stated by the Petitioner that the Minutes of Meeting dated 23.12.2022 forwarded by Energy & Petrochemicals Dept, Govt of Gujarat vide letter dated 10.01.2023 wherein it is decided that the ceiling of HBA index for USD 90/MT shall be relaxed. It was also decided that the said relaxation in HBA ceiling shall be made effective from 01.01.2023 for which an approval of the Commission shall be obtained. Based on the above discussion in meeting, the Respondent no. 1 had commenced supply of power under SPPA with effect from 01.01.2023 pending the approval for modification in the SPPA towards HBA index ceiling. Thus, it was agreed between the parties i.e. Petitioner and the Respondent No. 1 for removal of HBA index ceiling price of imported coal

provided in SPPA dated 12.08.2021, as approved by the Government of Gujarat.

16.40. The Petitioner has placed on record a letter No. EPG-12-2019-15-K dated 10.10.2023 of Energy & Petrochemicals Dept, Govt of Gujarat, wherein State Government has accorded approval (i) for modification of SPPA dated 12.08.2021 between the Petitioner, GUVNL and the Respondent, EPGL, with regard to removal of HBA Index Ceiling of 90 USD /MT under SPPA w.e.f. 01.01.2023 and (ii) approval for modification of SHR from 2262 Kcal / kWh to 2333 Kcal / kWh in SPPA as per CEA recommendations effective from 01.01.2023 subject to approval of the Commission and any differential payment on account of revision in SHR shall be due and payable only after necessary approval of the Commission.

16.41. In the aforesaid letter, Government of Gujarat after considering the proposal of the Petitioner for bringing modification in SPPA dated 12.08.2021, granted approval for removal of HBA index ceiling price of USD 90/MT in the SPPA with effect from 1.01.2023. Thus, the Government of Gujarat has granted approval for removal of HBA index ceiling price of USD 90/MT provided in 4<sup>th</sup> SPPA dated 12.08.2021 with effect from 01.01.2023.

16.42. We also note that the Petitioner has submitted HBA index price of coal of 6322 kCal/Kg (GCV), notified by Government of Indonesia for benchmark of coal price from the month of January 2023 to January 2024 as stated below:

Month	HBA index for 6322 Kcal/ Kg (USD/MT)
Jan-23	305.21
Feb-23	277.05
Mar-23	283.08
Apr-23	265.26

May-23	206.16
Jun-23	191.26
Jul-23	191.60
Aug-23	179.90
Sep-23	133.13
Oct-23	123.96
Nov-23	139.80
Dec-23	117.38
Jan-24	125.28

16.43. From the above submission of the Petitioner, it seems that the HBA index for Indonesian coal is having the coal price higher than 90 USD/MT, which is recognised by the Petitioner itself and on request of the removal of the ceiling limit proposed by the Petitioner as well as the Respondent no. 1, the Government of Gujarat had granted approval for such removal of ceiling of imported coal price from 01.01.2023. We, therefore, deem it appropriate to approve the proposal of the Petitioner for 'removal of HBA index ceiling' of USD 90/MT under SPPA with effect from 1.01.2023 as prayed for by the Petitioner and to grant approval to the 5<sup>th</sup> SPPA for modification of 4<sup>th</sup> SPPA dated 12.08.2021 executed between the Petitioner and the Respondent No. 1.

16.44. Considering the above, we hereby decide and approve the amendments proposed by the Petitioner and Respondent No. 1 as a part of 5<sup>th</sup> SPPA dated 5.01.2024 for modification in 4<sup>th</sup> SPPA dated 12.08.2021 executed between the Petitioner and the Respondent No. 1.

16.45. As agreed between the parties, the HBA Index Ceiling price of USD 90 / MT for 6322 GCV coal as mentioned under Clause 3 of the Supplemental PPA dated 12.08.2021 shall stand removed w.e.f 01.01.2023. For avoidance of any doubts, the HBA Index ceiling of USD 90 / MT shall not be applicable while computation of Energy Charge for energy supplied by Respondent No.1 to the Petitioner for the period from 01.01.2023 and onwards subject to consideration of FOB cost of coal as lower of (a) to (e) provided under the Clause 3.2.4 (I) of SPPA dated

12.08.2021.

16.46. Now, we deal with the proposed amendment in Gross Station Heat Rate agreed between the Petitioner and the Respondent No. 1, wherein they have agreed to modify/amend the SHR of the Respondent No. 1 plant from 2262 kCal/kWh to 2333 kCal/kWh in SPPA as per CEA recommendations effective from 01.01.2023, for computation of energy charges.

16.47. We find it necessary to refer to the decision of the Commission with regard to consideration of SHR of the Respondent No. 1 plant as decided by the Commission in earlier proceedings prior to present Petition filed by the Petitioner.

16.48. The Commission had in its Order dated 03.08.2015 in Petition No. 1296 of 2013 decided the SHR of Respondent's power plant as under:

“ .....

*8.12. We note that the claim of the petitioner as regard to station heat rate as 2314 KCL/Kwh is not legal and valid and the same is not acceptable on following grounds: (a) The petitioner himself in original petition dated 16.01.2013 submitted the turbine heat rate as 8243.4 KJ/Kwh and its boiler efficiency 87.1%. Based on it, SHR works out as 2262 KCL/Kwh. Thereafter, the Commission vide its daily order dated 25.04.2013 directed the petitioner to provide the data of original equipment manufacturer technical data assured by OEM/Supply and EPC contractor indicating the guaranteed parameters of boiler and turbine efficiency, auxiliary consumption, station heat rate, PG test report etc.*

*(b) The petitioner vide its affidavit in rejoinder – in reply dated 24.06.2013 submitted the documents of M/s. Hurbine Power Engineering Company Limited specifying the boiler efficiency as 87.1% and turbine heat rate 8243.4 KJ/Kwh works out to heat rate as 1970.22 KCL/Kwh and SHR on that basis works out to*

2262 KCL/Kwh, which is same as that furnished in the original petition. (c) The petitioner had with its affidavit dated 12.11.2013 stated that there is an error in turbine heat rate and boiler heat rate submitted by the petitioner in original petition dated 16.01.2013 and subsequent affidavit dated 24.06.2013. The petitioner has also submitted that the above claim of change in boiler efficiency and turbine heat rate and station heat rate is based on the documents of equipments procured by them from M/s. Global Supply (UAE) FZE. The above supplier is not an OEM. The agreements submitted by the petitioner do not specify the technical parameters of SHR, boiler efficiency and turbine heat rate ensured by the original equipment manufacturer i.e. Hurbine Engineering Power Company Limited. (d) The petitioner admitted that so far no performance guarantee test has been carried out by the Original equipment manufacturer which is Hurbine Engineering Power Company Limited. In the absence of the PG test report, it is difficult to derive the correct turbine cycle heat rate as well as boiler efficiency. The effect of the OEM documents is required to be given.

8.13. Considering the above facts, we decide the technical parameters of boiler efficiency, turbine cycle heat rate, and SHR as under:

<i>Particulars</i>	<i>Unit</i>
<i>Turbine Heat Rate</i>	<i>8243.4 KJ/Kwh equivalent to 1970.22 KCL/Kwh.</i>
<i>Boiler efficiency</i>	<i>87.1%</i>
<i>Station Heat Rate = Turbine Heat Rate/Boiler Efficiency</i>	<i>2262 KCL/Kwh</i>

.....”

16.49. We also note that the Petitioner had filed Petition No. 1807 of 2019 for approval of SPPA dated 1.03.2019 for amendment in the PPA dated 26.02.2007, wherein the Commission passed the Order dated 27.04.2020, and

with regard to the aforesaid issue of SHR of the Respondent's plant, the Commission decided as under:

" ....

*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*

*consumer's 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.*

*.....*

*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.*

*.....”*

16.50. Thus, in the aforesaid Order, the Commission has decided that the SHR of the Respondent's power plant shall be lower of actual SHR or Gross SHR of 2262 kCal/kWh. The Commission has also directed to the Petitioner and the Respondent to make necessary amendments in the SPPA dated 1.03.2019 accordingly.

16.51. It is also necessary to refer the Order of the Commission dated 20.11.2021 in Petition No. 2204 of 2021, wherein the Petitioner had approached to the Commission for approval of 4<sup>th</sup> SPPA for amendment to PPA dated 26.02.2007 executed between the Petitioner and the Respondent No.1. In the said proceedings, the Respondent No. 1 had made submission on the issue of consideration of Gross SHR for its plant and after considering the submissions of the Respondent No. 1 and the Petitioner therein, the Commission had decided about Gross SHR of the Respondent No. 1 plant. The relevant portion of the said Order is reproduced below:

*“19.21 Now, we deal with the Amendment / modification in Article / Clause 3.2.3 of SPPA 12.08.2021 state regarding capacity charge for each month claim by the Respondent No.1 to the Petitioner for supply of energy to the Respondent.*

*19.22 The Supplemental PPA dated 1.03.2019 consists of clause 3.2.3 stating about Energy Charge determination on monthly basis. The aforesaid provision consists of the Gross Heat Rate of the plant provision which is necessary while determining the energy charge 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 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.*

*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.” .....*

In the aforesaid Article the Petitioner and the Respondents agreed that for determination of energy charge, Gross Heat Rate is to be consider as 2333 kCal/kWh.

The Commission has in its Order dated 27.04.2020 in Petition No. 1807 of 2019

decided about the Gross Heat Rate of the plant applicable to the Respondent plant with consideration of its earlier decision in Petition No. 1296 of 2013 that the Gross Station Heat Rate shall be 2262 kCal/kWh instead of 2333 kCal/kWh agreed between the parties. The relevant portion of the said decision is reproduced below:

***“ 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.....

.....

.....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.”

19.23 Thus, in the aforesaid decision the Commission has decided about applicability of Gross Station Heat Rate for determination of energy charge shall be as lower of actual Gross Heat Rate or 2262 Kcal/kWh. The Commission has also decided that the aforesaid Article / Clause consist of “energy charge” receivable by Adani Power Limited whose PPA with Petitioner was subject matter of Petition No. 374/MP/2018 before the CERC has no relevance in this matter.

19.24 Further, the Government of Gujarat in its guidelines dated 12.06.2020 and G.R. dated 05.06.2021 as referred above has decided that the SPPA executed by the Petitioner GUVNL with Essar Power Ltd. in accordance with Order dated 27.04.2020 in Petition No. 1807 of 2019 of the Commission.

19.25 The SPPA dated 12.08.2021 submitted with the Petition consist of Article/ Clause 3.2.3 as under:

.....“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.....”*

*On verification of the aforesaid Articles of the SPPA dated 12.08.2021, it is clear that the modification in Article 3.2.3 carried out by the Petitioner and the Respondent No.1 in accordance with the Order dated 27.04.2020 in Petition No. 1807 of 2019 and Government of Gujarat guidelines dated 12.06.2020 and G.R. dated 05.06.2021.*

*We also note that in the aforesaid Article/ clause the provision related to operation parameters of Adani Power Ltd. (viz. Auxiliary Consumption and Gross Heat Rate) for computation of energy charge rate to be aligned as per approval by Central Commission in Petition No. 374/MP/2018 provided in earlier SPPA dated 1.03.2019 is deleted. Thus, the aforesaid amendments are in compliance to the aforesaid decision of Commission and Government of Gujarat. Hence, we decide to approve the modification made in Article 3.2.3 of the Supplemental PPA dated 12.08.2021.”*

16.52. Thus, in the aforesaid decision, the Commission once again recognized that the Gross Station Heat Rate for the Respondent's Power plant shall be lower of (a) actual Gross station heat rate or (b) 2262 kCal / kWh as approved by the Commission in Petition No. 1296/2013.

16.53. We note that the submission of the Petitioner that the Respondent No. 1 has supplied the power to the Petitioner under Section 11, directives of the Govt of India for the period 13.09.2022 to 31.12.2022, wherein the energy charge for supplied energy is in accordance with ECR notified by expert committee of Ministry of Power, Govt. of India.

16.54. The Petitioner has submitted that on the representation of the Respondent No. 1 with regard to modification in Gross Station Heat Rate, the Government of Gujarat held a meeting on 23.12.2022, wherein it was decided that SHR would be based on CEA recommendation and the same should be allowed after obtaining approval from the Commission. It has placed on the record that the Energy & Petrochemical Deptt, Govt of Gujarat vide its letter No. EPG-12-2019-15-K-dated 17.02.2023 referred the matter to CEA with regard to technical recommendation for SHR in case of Respondent No. 1 plant.

16.55. We note that in the aforesaid letter to CEA, the Government of Gujarat has referred the representation from Respondent No. 1 representing that it is technically not possible to achieve Gross SHR of 2262 kCal/kWh and they have requested to revise the SHR to 2333 kCal/kWh for their plant in line with CEA terms as endorsed by expert committee of Ministry of Power. Based on above, the Government of Gujarat has requested to CEA to provide its recommendation on above subject matter.

16.56. The CEA has vide letter No. CEA/TPM/EPGL/2023/134 dated 3.03.2023 has conveyed that in the meeting held on 02.05.2022, the CEA was directed to verify the SHR of Salaya TPP. Accordingly, CEA vide letter dated 06.05.2022 has already submitted the detailed report for Salaya Thermal Power Plant to Ministry of Power, Govt of India.

16.57. Thus, in the aforesaid communication, the CEA has stated that in the meeting

held on 2.05.2022, CEA was directed to verify SHR of the Respondent No. 1's plant and CEA has vide its recommendation dated 06.05.2022 submitted the detailed report and recommendation that normative heat rate and normative SHR of 2333 kCal/kWh may be considered for the Respondent No. 1 plant.

16.58. We note that in the MoM dated 06.05.2022, it was discussed about operationalization of power plant under Section 11 of the Act specifically with respect to imported coal based power plants. It is also discussed that the power plant will get benchmark price determine by the committee constituted by Ministry of Power with representatives from Ministry of Power, CEA and CERC. In the said MoM, it is stated that the CEA has verified SHR of the Respondent No. 1 plant and was found to be 2333 kCal/Kg. Thus, as per the aforesaid MoM, the CEA has recommended SHR for the Respondent No. 1's Power Plant as 2333 kCal/kWh.

16.59. We also note that the CEA in its letter dated 25.04.2023 in response to the reference made by Energy & Petrochemical Dept, Govt of Gujarat, has referred to the report submitted by them to Ministry of Power vide their letter dated 06.05.2022. Further CEA vide their letter No. CEA/TPM/EPGL/2023/267 dated 10.05.2023, has provided the copy of the aforesaid Report to the State Government.

The aforesaid CEA report inter-alia provides that as per the CEA recommendation on operation norms for the tariff period 2019-24, the 5% margin in the heat rate is to be considered due to the fact that units are always not running on full load and design coal GCV. Accordingly, the CEA has recommended normative gross station Heat rate of 2333 kCal/kWh (2222 x 1.05) for the Power Plant of the Respondent and stated that the station heat rate of 2333 KCal/kWh as agreed between M/S Essar Power Limited and GUVNL based on CEA recommendation in respect of the Salaya Thermal Power Project (STPP) (2X600 MW) appears appropriate. Further, the CEA has also

provided the detailed computation for SHR at Appendix -I of the Report.

16.60. In the aforesaid report, the CEA has considered the various technical parameters of the Respondent No. 1's plant, power generation, PLF, Boiler types and efficiency, Gross Turbine Heat Rate, design heat rate etc. Based on it, it is stated that as per CEA the normative Gross Station Heat Rate is equivalent to 1.05 times to design GSHR, which works out to 2333 kCal/kWh.

16.61. We note that based on aforesaid recommendation of CEA, the Government of Gujarat vide its letter no. EPG-12-2019-15-K dated 10.10.2022 approved for modification of SHR from 2262 kCal/kWh to 2333 kCal/kWh in SPPA as per CEA recommendation which would be effective from 01.01.2023, subject to approval of the Commission.

16.62. We note that the modification in SHR requested by the Respondent No. 1 to the Petitioner and Government is also subject matter of determination of benchmark tariff provided to power projects who were directed to operate their plant under Section 11 of the Act invoked on 05.05.2022 by Ministry of Power, which also include the Power Plant of Respondent No. 1. As per Section 11 directives issued by Ministry of Power, the benchmark price applicable to Power plants is decided by the Expert Committee constituted by Ministry of Power consisting of representatives from Ministry of Power, CEA and CERC, wherein the various technical parameters which include SHR of the plant was discussed and decided. The CEA has in its report stated that SHR of the Respondent No. 1 plant was found to be 2333 kCal/Kg. In support of aforesaid, the CEA has also carried out study wherein after verification it has recommended to consider the normative SHR of the Respondent No. 1 plant as 2333 kCal/kWh.

16.63. We note that the recommendation for SHR proposed by the CEA for Respondent No. 1 plant is based on study carried out by them with

consideration of various technical and operational parameters which was accepted by Ministry of Power, Govt of India. Further, the Government of Gujarat has also accorded its approval based on the aforesaid CEA report to modify the SHR of the Respondent No. 1 plant as 2333 kCal/kWh, which seems valid.

16.64. The Commission notes that the modification in Gross SHR of 2333 kCal/kWh is as per the recommendation of CEA, Government of India, and is also considered by the committee constituted by Ministry of Power for determination of ECR for supply of power under Section 11 directives of Ministry of Power, Govt. of India as well as approved by the Government of Gujarat.

16.65. We are therefore of the considered view that the agreed terms between the Petitioner and the Respondent No. 1 with regard to SHR of Respondent No. 1's Power Plant is as per the report of the CEA as stated above and modification of SHR of the Respondent No. 1 plant provided in the 5<sup>th</sup> SPPA dated 5.01.2024 for amendment to 4<sup>th</sup> SPPA, is valid.

16.66. Considering the same, in the approved clauses 3.2.3 and 3.5.3 of 4<sup>th</sup> SPPA dated 12.08.2021, the definition of Gross Station Heat Rate shall be substituted and replaced by the following:

*"GSHR = Lower of (a) actual Gross Station heat rate or (b) 2333 Kcal per kWh as recommended by Central Electricity Authority, Govt. of India."*

16.67. We also decide that as agreed between the parties as well as approved by Government of Gujarat the aforesaid amendment in SHR of the Respondent No. 1's Power Plant, shall be effective from 01.01.2023.

16.68. We also note that the proposed amendment in 5<sup>th</sup> SPPA 05.01.2024 agreed between the parties is subject to withdrawal of all pending suites/ Petitions/ Appeals/ Cases / litigations etc. filed by Respondent No.1 EPGL before any

judicial fora or any claim of Respondent No.1 EPGL qua GUVNL shall be withdrawn by EPGL except related to change in law claims under the PPA. The Petitioner has submitted that the Respondent no. 1 has undertaken for withdrawal of all pending cases/litigations filed by them before all judicial fora except claim towards change in law claimed under the PPA. We note that the Respondent No. 1 had filed an Application seeking withdrawal of Appeal No. 457 of 2022 in terms of 5<sup>th</sup> SPPA, which was allowed by Hon'ble APTEL on 23.01.2024. Further, in compliance to the SPPA terms regarding withdrawal of all pending litigations / cases filed by Respondent No.1 EPGL before various fora, Respondent No.1 EPGL vide letters dated 04.01.2024 has submitted the application for withdrawal of the pending cases in the following:

Forum	Case no.	In the matter	Date of application for Withdrawal
Hon'ble Supreme Court of India	M. A (Dairy) No 32487 of 2023 in Civil Appeal No. 9324-9324 of 2016	M. A filed by EPGL for seeking restoring of C.A (filed by EPGL) in Liquidated Damages (LD)	04-01-2024
Hon'ble Appellate Tribunal (APTEL)	Appeal No. 457 of 2022	Appeal filed against GERC order dated 20.11.2022 approving SPPA	04-01-2024
GERC	Petition No. 2241 of 2023	For determination of adverse financial consequences under Section 11 (2) of the Electricity Act, 2003 (MOP notification dated 05-05-2022)	04-01-2024

16.69. We note that as agreed between the parties, i.e. Petitioner and Respondent No. 1, the Petitioner shall ensure about withdrawal of all pending cases / litigations initiated by the Respondent No.1 before various foras except cases related to

change in law claim under the PPA by the Respondent No. 1.

16.70. Now we deal with the issue raised by the objectors against proposed amendment in the 5<sup>th</sup> SPPA which is subject matter of approval in present Petition.

16.71. The Objector has stated that the proposed amendment is contrary to the Applicable legal and regulatory provision and affect the consumers of the State at large and the same cannot be granted.

16.72. We note that the aforesaid objections of the objector are not correct and acceptable on the ground that the present petition is filed by the Petitioner for approval of modification in some of the provisions of 4<sup>th</sup> SPPA and PPA dated 26.02.2007, the modifications sought to incorporate in the 5<sup>th</sup> SPPA is with consideration of the valid technical and legal aspects. As recorded in earlier part of this Order, the Commission has jurisdiction / power to regulate the power procurement of the distribution licensee which include approval of PPA. Further, the proposed amendment in the 5<sup>th</sup> SPPA by and between the parties is in accordance with the provisions of original PPA dated 26.02.2007, which was approved by the Commission at the relevant time as a part of bidding documents of competitive bidding carried out by the Petitioner. Moreover, the PPA executed with the Respondent No.1 was also part of the proceedings for adoption of tariff Petition filed by the Petitioner at relevant time. The Article 18.1 of the said PPA provides for amendment/modification in the PPA by the parties subject to approval of the Commission. Hence, the present Petition filed by the Petitioner is in accordance with the approved PPA and is legal and valid. So far as proposed amendment with regard to removal of ceiling price of HBA Index for imported coal and amendment in SHR of the Respondent No. 1's plant is concerned, the same are discussed and dealt in detail in earlier part of this Order. There are not any valid arguments or justifications or supporting facts / documents placed on record by the objector against the proposed amendment sought by the Petitioner in the PPA. Hence, the same is not

acceptable.

16.73. So far as the consumers interest is concerned, we note that the consumers interest cannot be looked into isolation manner by ignoring the technical and financial aspects affecting the performance and financial viability of generator/licensee, who are having agreement with each other. The proposed amendment in the SHR as well as HBA Ceiling of coal price which are directly affecting the cost of generation of the Respondent No. 1's plant. In the present case, we note that valid and necessary justifications and reasons are placed on record by the Petitioner and the Respondent No. 1 for proposed modification in 5<sup>th</sup> SPPA executed between the parties. As stated above, the Commission has analyzed and examined the same prior to granting approval to 5<sup>th</sup> SPPA. Hence, the contentions of the objectors against the same are not acceptable.

16.74. We note that the submission of the objector that the Petitioner as well as Respondent No.1 has not placed on record the necessary documents, information etc. to take decision by the Commission in the present matter, is not correct as the Commission has prior to arriving any decision in the present matter, has discussed and analyzed the documents on records and sought additional required information /documents from the parties and based on such detailed analysis and consideration of the same as recorded earlier, decided the matter. Therefore, the contentions of the objectors are not valid and acceptable.

### **ORDER**

17. Considering the above discussions and analysis, we decide that the present petition succeeds.

17.1. We decide to approve the 5<sup>th</sup> SPPA to amend 4<sup>th</sup> SPPA dated 12.08.2021 executed between Petitioner, GUVNL and Respondent No. 1, EPGL, with regard to certain terms as agreed by the parties under 5<sup>th</sup> SPPA dated 5.01.2024.

17.2. As agreed between the parties, the HBA Index Ceiling of USD 90 / MT for 6322

GCV coal as mentioned under Clause 3.2.4 (I) of the Supplemental PPA dated 12.08.2021 shall stand removed w.e.f 01.01.2023. For avoidance of doubt, HBA Index ceiling of USD 90 / MT shall not be applicable while computation of Energy Charge for energy supplied from 01.01.2023 and onwards subject to consideration that FOB cost of coal shall be lower of (a) to (e) as provided under Clause 3.2.4 (I) of SPPA dated 12.08.2021.

17.3. The Commission approves the modification in Gross SHR as lower of actual or 2333 kCal/kWh as recommend by CEA, Government of India, and also considered by the committee constituted by Ministry of Power for determination of ECR for supply of power under Section 11 directives of Ministry of Power, Govt. of India as well as approved by the Government of Gujarat.

17.4. In the approved clauses 3.2.3 and 3.5.3 of 4<sup>th</sup> SPPA dated 12.08.2021, the definition of Gross Station Heat Rate be substituted and replaced by the following:

*“GSHR = Lower of (a) actual Gross Station heat rate or (b) 2333 Kcal per kWh as recommended by Central Electricity Authority, Govt. of India.”*

17.5. The aforesaid modification shall be effective from 01.01.2023.

17.6. We also decide that as agreed by the Respondent No. 1 EPGL in the 5<sup>th</sup> supplemental PPA dated 05.01.2024, any change in ownership of Essar Power Gujarat Ltd.’s Salaya Power Project (1200 MW) shall only be done with the prior intimation of any such move and only with prior approval of the Govt. of Gujarat and the Commission.

17.7. Except to above, all other terms and the conditions of the existing SPPA(s) shall remain unchanged and shall be effective as before and be read as a part of 5<sup>th</sup> SPPA.

17.8. The 5<sup>th</sup> SPPA shall be read as integral part of the PPA dated 26.02.2007 readwith SPPA(s) entered between the parties as amended from time to time.

18. We order accordingly.

19. The Petition stands disposed of.

**Sd/-**

**[S.R. Pandey]  
Member**

**Sd/-**

**[Mehul M. Gandhi]  
Member**

**Sd/-**

**[Anil Mukim]  
Chairman**

Place: Gandhinagar.

Date: 09.12.2024.

