

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 374/MP/2018

**Coram:
Shri P. K. Pujari, Chairperson
Dr. M. K. Iyer, Member
Shri I.S. Jha, Member**

Date of Order: 12th April, 2019

In the matter of

Petition under Section 79 (1)(b) of the Electricity Act, 2003 read with Article 18.1 of the Power Purchase Agreements (PPAs) dated 6.2.2007 and 2.2.2007 under 1000 MW Bid-01 and 1000 MW Bid-02 respectively, executed between Gujarat Urja Vikas Nigam Limited and Adani Power (Mundra) Limited for approval of amendments to the PPAs by way of Supplemental PPAs.

And

In the matter of

Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhavan
Race Course Circle
Vadodara-390 007

...Petitioner

Vs

- 1) Adani Power (Mundra) Limited
"Shikhar", Near Mithakhali Circle
Navrangpura
Ahmedabad-380 009
- 2) Energy Watchdog
B-5/51, Paschim Vihar
New Delhi-110 063
- 3) Prayas (Energy Group)
Unit III A & B, Devgiri
Joshi Railway Museum lane
Kothrud Industrial Area
Kothrud, Pune-411 038

....Respondents

Parties present:

- 1) Shri Hemant Sahai, Advocate, Gujarat Urja Vikas Nigam Limited
- 2) Shri Nitish Gupta, Advocate, Gujarat Urja Vikas Nigam Limited
- 3) Ms. Himangini Mehta, Advocate, Gujarat Urja Vikas Nigam Limited
- 4) Shri S.K. Nair, Gujarat Urja Vikas Nigam Limited
- 5) Shri Amit Kapoor, Advocate, Adani Power (Mundra) Limited
- 6) Ms. Poonam Verma, Advocate, Adani Power (Mundra) Limited
- 7) Ms. Abiha Zaidi, Advocate, Adani Power (Mundra) Limited
- 8) Shri Harish Pariyani, Adani Power (Mundra) Limited
- 9) Shri Jaginesh Langalia, Adani Power (Mundra) Limited
- 10) Shri Tanmay Vyas, Adani Power (Mundra) Limited
- 11) Shri M.G. Ramachandran, Advocate, Prayas (Energy Group)
- 12) Ms. Ranjitha Ramachandran, Advocate, Prayas (Energy Group)
- 13) Ms. Tanya Sareen, Advocate, Prayas (Energy Group)
- 14) Shri Shubham Arya, Advocate, Prayas (Energy Group)
- 15) Shri Anshu, Prayas (Energy Group)
- 16) Shri Anil Kumab, Energy Watchdog

ORDER

Pursuant to the order of Hon'ble Supreme Court dated 29.10.2018 in Miscellaneous Application No. 2705-2706 of 2018 in CA No. 5399-5400 of 2016 (Energy Watchdog & Ors. Vs. CERC & Ors) and the Government of Gujarat Policy Directive vide Government Resolution (GR) No. CGP-12-2018-166-K dated 1.12.2018 accepting the recommendations of High Power Committee Report as stated in GR, the Petitioner, Gujarat Urja Vikas Nigam Limited (GUVNL), has filed the present petition under Section 79(1)(b) of the Electricity Act, 2003 (the Act) seeking approval of the Commission to the proposed amendments of the Power Purchase Agreements (PPAs) dated 6.2.2007 and 2.2.2007 entered into with Respondent No.1, Adani Power (Mundra) Ltd., for supply of contracted capacity of 1000 MW each from Units 1 to 4 and Units 5 and 6 of Mundra Power Plant respectively in terms of Article 18.1 of said PPAs.

Facts of the Case

2. The Petitioner had entered into separate PPAs for purchase of power from (i) Mundra Ultra Mega Power Project (Mundra UMPP) of Coastal Gujarat Power Limited (hereinafter referred to as “CGPL”) (1805 MW) (ii) Mundra Power Plant of Adani Power (Mundra) Limited (hereinafter referred to as “APMuL”) (2000 MW) and (iii) Salaya Project of Essar Power Limited (1000 MW) in 2007. Subsequent to the signing of these PPAs, Indonesian Government on 23.9.2010 issued Regulation No. 17 of 2010 titled as “Procedure to Determine the Benchmark Price for Mineral and Coal Sales” (Indonesian Regulations) mandating export of coal on benchmark prices notified by the Indonesian Government. APMuL and CGPL approached the Commission seeking relief to offset the adverse financial impact of the Indonesian Regulations in Petition Nos.155/MP/2012 and 159/MP/2012 respectively. The Commission in its orders dated 2.4.2013 in Petition No.155/MP/2012 and 15.4.2013 in Petition No.159/MP/2013 decided that Indonesian Regulations are neither covered under Change in Law nor under Force Majeure but directed for grant of relief under regulatory powers of the Commission under Section 79(1)(b) of the Act. Subsequently, vide orders dated 21.2.2014, the Commission granted compensatory tariff to both APMuL and CGPL. The Appellate Tribunal for Electricity (Appellate Tribunal) set aside the said orders of the Commission and held that the Indonesian Regulations constituted force majeure under the respective PPAs. On appeal, the Hon’ble Supreme Court vide its judgment dated 11.4.2017 in CA No. 5399-5400 of 2016 [Energy Watchdog vs Central Electricity Regulatory Commission & Ors., [(2017) 14 SCC 80] (hereinafter referred to as “Energy Watchdog Case”) decided that enactment of Indonesian Regulations did not constitute either a change in law or Force Majeure, as contractually specified under the respective PPAs.

3. Faced with the high cost of generation and supply of power from its imported coal based project, namely, Mundra Power Project, APMuL vide its letter dated 16.4.2017 addressed to the Petitioner submitted a proposal to take over 51% of equity of Mundra Power Project (Units 1 to 6) at value of Re. 1 and purchase power from the said Project on cost plus basis. It was further stated in the said letter that, "Since the existing coal stock is at critical level, adequate for only 7-10 days of operation, and the Financial Institutions are not willing to extend any further support, we request GUVNL to procure coal and supply to APL and APL will supply power utilizing such coal and will charge only capacity charges as per PPA so that operations of Mundra Project is continued". APMuL also addressed various letters dated 21.4.2017, 6.5.2017, 12.5.2017 and 25.5.2017 to the Petitioner to have early resolution and decision on the proposals offered by it, in light of the severe power shortage issues.

4. Subsequent to representations made by imported coal based Project Developers, the Government of Gujarat, on 20.4.2017, wrote a letter to Ministry of Power, Government of India to call for a meeting of all stakeholders. Ministry of Power, Government of India convened a meeting on 20.6.2017 of stakeholders including the representatives from the State Governments of Gujarat, Maharashtra, Punjab, Haryana, Rajasthan, representatives from various Banks and Financial Institutions (Power Finance Corporation & Rural Electrification Corporation) and representatives from generating companies for resolution of the issues being faced by imported coal based power plants. Pursuant to the said meeting, a Working Group was constituted of members of all the procurers States, and banks represented by Punjab National Bank and Canara Bank with the State Bank of India acting as a convener to find a solution

through a consultative process. The Working Group submitted its report on 10.1.2018 recommending two options, i.e. (i) State Government to takeover projects through majority stake and subsequently PPAs be amended to address viability issues by allowing fuel cost pass through or (ii) Amending PPAs without change in ownership-wherein Procurers may agree for pass through of fuel cost.

5. Subsequent to the submission of report by the Working Group, the State Bank of India on 17.1.2018 wrote to Government of India that Government of Gujarat may form a High Power Committee comprising of individuals with proven expertise drawn from the judiciary, banking and power sectors (with regulatory knowledge) to review the report of the Working Group and suggest means for early resolution of issues relating to these projects. Government of Gujarat on 3.7.2018 issued Resolution No. CGP-12-2018-166-K constituting a High Power Committee for reviewing the report of Working Group and obtaining its recommendations, with regard to resolution of the issues of the imported coal based power projects located in the State of Gujarat. The HPC comprised of (i) Hon'ble Mr. Justice R.K. Agrawal, former Justice of Hon'ble Supreme Court; (ii) Sh. S.S. Mundra, former Deputy Governor, RBI and; (iii) Dr. Pramod Deo, Former Chairman, CERC. The High Power Committee (HPC) conducted various meetings with the stakeholders viz. Discoms/officials of procurer States, consumer representative groups, lenders and generators including Energy Watchdog and Prayas (Energy Group) (hereinafter referred to as "Prayas") and submitted its report to Government of Gujarat.

6. The recommendations of the HPC in Chapter X of its report are extracted as under:

“10.1 The preceding chapters of this report including the preamble clearly set out that the genesis and basis of the HPC’s entire analysis and recommendations are premised on serving the consumer interest. HPC while undertaking the analyses and making the recommendations in this Report has the ‘consumer interest’ paramount and this has been the focal point of their approach.

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

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

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

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

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

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

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

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

10.8 Draft Supplemental PPA for effecting Amendment to the PPAs.

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

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

7. Before implementing the recommendations of the HPC, Government of Gujarat and GUVNL sought a clarification from the Hon'ble Supreme Court whether any amendments to the PPAs in the light of the recommendations of the HPC will be possible on the face of the judgment of the Hon'ble Supreme Court dated 11.4.2017 in Civil Appeal No. 5399-5400 of 2016 (hereinafter referred to as the Energy Watchdog

Case). The following prayers were made in the Miscellaneous Application No. 2705-2706 of 2018 in CA No. 5399-5400 of 2016:

“(a) Clarify the judgment of Hon’ble Court in (2017) 14 SCC 80 to the extent that the same does not in any manner impinge upon to exercise the option to operate Clause 18.1 and amend PPA in public interest;

(b) Pass directions to the concerned Regulatory Commissions to expeditiously dispose of applications seeking such amendment of PPA;

(c) Pass any such further orders as it may deem fit in the facts and circumstances of the case.”

8. The Hon’ble Supreme Court in its order dated 29.10.2018 in Misc. Application No. 2705-2706 of 2018 in CA No. 5399-5400 of 2016 issued the following directions:

“Having heard learned counsel for the parties, including the learned Attorney General appearing for the State of Gujarat, we allow the application for impleadment of the State of Gujarat. We are of the view that having pursued the High Power Committee’s report which was given after our judgment dated 11.4.2017, it will be open to the applicants to approach the Central Electricity Regulatory Commission (CERC) for approval of the proposed amendments to be made to the Power Purchase Agreements (PPAs) in question.

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

The miscellaneous applications are disposed of accordingly.

Pending applications, if any, stand disposed of.”

9. Thereafter, the Government of Gujarat accepting some of the recommendations as suggested by HPC, modifying certain recommendations and rejecting some recommendations issued the Policy Directives vide GR dated 1.12.2018. The relevant provisions of the said GR are extracted as under:

“Thereafter, the government deliberated on all recommendations of the HPC in detail against the background of the existing and emerging power scenarios in Gujarat:

- Gujarat has a share of 4805 MW from these three projects in question, which contribute around 45% of its total energy requirement. Having the highest share of power from these projects Gujarat is the most affected State. The State grid is already facing low voltage issues in the Saurashtra and Kutch areas and the discontinuation of supply from these projects located in Kutch area would have further adverse ramifications on the quality of power and the power supply position.
- These projects are based on advanced technology, are efficient in operation and have a higher priority in the Merit Order scheduling.
- In case these projects were shut down, replacing such huge capacity with alternate sources from market would not be feasible as the short term market prices are not only much higher and volatile, the availability of power is uncertain.
- In the recent Case I, long term bids invited by other States like Andhra Pradesh, Uttar Pradesh, Telangana etc. the tariff was discovered in range of Rs. 3.94-6.31/unit.
- In the recent bids invited by M/s PTC on medium term basis, the rate of Rs.4.24/unit was discovered at the Generator bus bar which works out to Rs.4.75/unit at the Gujarat periphery.
- Since the State had surplus power due to sustained availability of power from these projects, the State did not plan new capacity addition except at Wanakbori 8 (800 MW). Further, this surplus capacity also includes Gas based stations of 3300 MW for which gas at economical rate is available only to operate 300 MW. Operating these gas based projects on costlier Regasified Liquefied Natural Gas has significantly higher generation cost and would further increase the Fuel Surcharge on consumers.
- Establishing new imported/indigenous coal based power plants would have significantly higher fixed and variable costs and the gestation period would be about 5 years and hence, would not offer any solution to immediate power requirement.
- To meet the generation loss due to non-availability of power from these projects, Gujarat Urja Vikas Nigam Ltd. (GUVNL) has purchased substantial quantum of power at an average rate of Rs.4.66/unit during FY 2018-19 (up to October) from power exchanges and under bilateral arrangement. New projects are not expected to get commissioned in the near future and hence the rate at the power exchange would remain higher. Had GUVNL not purchased such quantum of power, it would have led to the undesirable situation of load shedding in the State.
- The thermal power projects across the country with long-term linkages are already facing critical coal stock situation in addition to issues related to availability of adequate infrastructure for transportation of coal through railways and high freight cost. Therefore, optimum utilization of generation capacity of these plants, based on imported coal, located in the coastal areas, merits consideration.

It is pertinent to note that the HPC's recommendations are premised on serving the consumer interest and the HPC while undertaking the analysis and making the recommendations in the Report has the 'consumer interest' paramount and this has been the focal point of the approach of the HPC.

The government took note of the conclusions drawn by the HPC and concurs therewith in essence:

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

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

(i) The capacities from these projects will have to be replaced from alternative sources and therefore, prices will further go up in view of the clear co-relation between demand and supply; (ii) The cost of replacement power at today's market price would be higher; (iii) Setting up new projects in any event will be more expensive and will take another 4-5 years to commence supply; (iv) Increase in cost on account of procurement of power from in-efficient and old plants which would also have reliability issue; (v) Resorting to load shedding on account of difficulties associated with complete replacement of power from these projects ; and (vi) Any insolvency or liquidation of these projects would hardly address the issues of power supply. "

In view of the above, the matter in respect of taking decisions for accepting the recommendations of the HPC, fully or partially and subsequent changes/modifications/amendments to the PPA(s) was under active consideration of the Government.

Resolution:

In view of the above, after careful consideration, the Government of Gujarat has decided to accept all recommendations of the HPC except those mentioned as not accepted herein below, and has modified certain recommendations as mentioned below, and has further taken certain policy decisions as mentioned below in this context and hereby resolves as follows:

i. It is decided to accept the recommendation of the HPC about the effective date of implementation as 15.10.2018.

ii. In respect of the recommendation of the HPC about adjustment in variable cost, it is decided that the tariff will be adjusted considering actual fuel cost based on the superior of actual parameters or normative parameters as per the Regulation of the Appropriate Commission subject to ceiling of HBA Index of 110 USD / MT for 6322 Kcal / Kg coal on monthly basis. In case the HBA Index of coal exceeds 110 USD / MT, the payment will be capped at 110 USD/ MT and the generator shall bear the differential cost and continue to

supply power. Further, it is decided to review the ceiling price every 5 years as per the HPC's recommendations.

iii. As per the recommendation of the HPC about sacrifice by the bankers, it is decided that the fixed cost @ 20 paise / kWh is to be reduced to extent of normative availability of 80%.

iv. In respect of the recommendation of the HPC for sharing of mining profit, it is decided that 100% mining profit towards coal utilized at respective projects stipulated from their coal mines shall be shared. However, in case the coal from stipulated mines is not transferred or less transferred to the power plants and is sold outside, the profit is to be shared equivalent to energy supplied under PPA considering coal supplied to power plant as well as coal sold outside. In any case, the mining profit will be minimum 5 paise/kWh in case of APL and 15 paise/kWh in case of CGPL. In case of EPGL, no mining profit will be shared.

v. As regards the recommendation of HPC for tying up of free capacity, it is decided that the procurers may tie up the untied up capacity of 550 MW available with APL and 100 MW with EPGL. The free capacity from APL will be offered to Gujarat and Haryana in proportion of 83:17. The tariff for such capacity shall be as per revised variable cost (no mining profit to be adjusted) and fixed cost (levelised for balance term of PPA). It is decided that the untied capacity from the projects be tied up by GUVNL from the identified units under existing PPA i.e. unit 1 to 6 of APL and unit 1 & 2 of EPGL. As GUVNL has no share from unit # 7, 8 & 9 of M/s. APL and these units have different fuel sources and tariff structure, taking free capacity (22 MW) does not come in question here.

vi. With reference to the recommendation of the HPC about increase in plant availability, it is decided to accept the recommendation of the HPC that the project developer shall increase the availability up to 90% without procurer having to pay capacity charge beyond 80% while penalty shall be applicable at 10% of capacity charges for availability below 90% to the extent of short availability. Moreover, penalty and incentive shall continue to apply in accordance with existing provisions of PPA.

vii. As far as the recommendation of the HPC about the extension of the PPA tenure is concerned, it is decided that procurers will have the option for extending the PPA for 10 years after the existing tenure of 25 years.

viii. As against the recommendation of the HPC in respect of waiver/refund of penalty, it is decided that the penalty shall not be waived/refunded.

ix. It is decided that no rebate shall be applicable on Energy Charge for the balance term of the PPA. However, rebate on payment of capacity charges shall be applicable. Further, delay payment charge provision is retained as per the existing PPA.

x. In respect of freight, port and coal handling charges, it is decided as follows:-

- In case of Adani (APMuL), the port charges and transportation charges are not quoted in the bid separately therefore the Port & Coal handling charges shall be considered lower of actual or charges as per the Agreement of M/s CGPL (Tata) with M/s Adani Port which was negotiated by M/s Power Finance Corporation, Govt, of India before inviting the competitive bids. As regard to the ocean freight & insurance for transportation of coal, the escalation for the same shall be considered by linking it with the index notified by the CERC or the actual

Ocean Freight paid by Project Developer, whichever is lower.

- In case of CGPL (UMPP), port and coal handling shall be actual or as per the quoted charges in bid and escalated as per the PPA, whichever is lower. The ocean freight and insurance shall be lower of the actual or the freight worked out as per the CERC index from time to time subject to a maximum of quoted charges in bid and escalated as per the PPA, if any.
- In case of EPGL, port and coal handling shall be actual or as per the quoted charges in bid and escalated as per the PPA, whichever is lower. The ocean freight and insurance shall be lower of the actual or the freight worked out as per the CERC index from time to time subject to a maximum of the quoted charges in bid and escalated as per the PPA, if any.

xi. It is decided that in the 10th year from the date of signing of the supplemental PPA, if energy charges of these respective projects under the PPA(s) is higher than marginal coal based thermal power stations having 50 % schedule or immediate below, as the case may be, during the previous financial year under merit order of GUVNL, GUVNL shall have a right to terminate the PPA. In the event of termination pursuant to this decision, neither party shall be liable for any damages or penalty of any kind to the other party.

xii. It is decided to execute amendments in PPA(s) of for Adani Power Ltd. (Unit 1-6) and Essar Power Gujarat Ltd. and approach appropriate Regulatory Commission for approval of the same immediately. In case of amendment in PPA of Coastal Gujarat Power Ltd., since the PPA for Mundra UMPP is a joint contract wherein four other States (i.e. Maharashtra, Rajasthan, Punjab and Haryana) are also having allocation, the amendments in the PPA shall be carried out and presented to the CERC along with the consent and supplemental PPA jointly signed also by the other four states in question.

In view of the aforesaid, it is also resolved to direct GUVNL to ensure adequate and efficient supply of energy at economical tariff and maintain its respective energy basket in a manner that has a mix of power sources that addresses all issues including availability of reliable base load power generation, optimum utilization of existing resources and installed generation capacities etc. by allowing revival and rehabilitation package to the financially stressed and economically unviable imported coal based power projects through consequential amendment(s)/ modification(s) in existing PPA(s), in larger public interest. Accordingly, GUVNL is directed to submit the amended/modified PPA(s) before appropriate Regulatory Commission for allowing the aforesaid consequential changes/modifications/ amendments and for the purpose, it is further resolved that the Board of Directors of GUVNL is authorized for taking decisions in respect of any incidental issues while carrying out the amendments to PPA(s).

This issue with the concurrence of the Finance Department on this department's file of even number, dated 01.12.2018.

By order and in the name of the Governor of Gujarat.”

10. Consequently, the Petitioner and the APMuL have mutually agreed and signed the Supplemental PPAs in Bid-01 and Bid-02 PPAs on 5.12.2018 in terms of Article

18.1 of the respective PPAs. The provisions of Supplemental PPAs in case of Bid-01 and Bid-02 are similar except on operational parameters of Gross Station Heat Rate (GSHR) and Auxiliary Consumption, since the unit sizes are different in both PPAs.

11. The main provisions of the Supplemental PPA in case of Bid-01 are extracted as under:

“3. The following definitions shall be added:

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

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

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

(iii) The existing definition of “Appropriate Commission” in the PPA shall be replaced with the following definition:

“**Appropriate Commission**” shall have the meaning ascribed thereto in the Electricity Act, 2003.

(iv) “**Tariff Regulations**” shall mean the regulations of the Appropriate Commission specifying the terms and conditions for determination of tariff, as applicable at the time of COD of the Project.

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

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

“**Revised Tariff**” shall mean the sum total of Energy Charge and Capacity Charge.

“Capacity Charge” shall mean the Capacity Charge determined in accordance with Clause 3.2.2 of this Supplemental Agreement.

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

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

3.2.2 Capacity Charge for each Month shall be the Quoted Capacity Charge mentioned at Schedule 10 of PPA dated 6.2.2007 less 20 paise/kWh applicable upto Normative Availability of 80%. The Monthly Capacity Charge payment shall be made in accordance with Schedule 6 of the PPA dated 6.2.2007. This Capacity Charge shall be subject to reduction towards penalty for declaration of Availability lower than 90% as per Clause No. 3.2.5 of this Supplemental Agreement in addition to the penalty for declaration of Availability below Minimum Off-take Guarantee as per PPA dated 6.2.2007.

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

(Energy Charge Rate in Rs./kWh) X {Scheduled energy (ex-bus) for the Month in kWh}

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

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

Where:

AUX = Lower of actual or normative auxiliary energy consumption of 9% as specified in the Tariff Regulations as defined herein.

CVPF (as received basis) = Weighted Average Gross calorific value of coal in Kcal/Kg on as billed basis minus lower of (i) actual difference between GCV at loading port and unloading port or (ii) 72 Kcal/Kg towards loss of heat during transportation as per ISO 1928 (dated 1.6.2009)

ECR = Energy Charge Rate, in Rupees per kWh sent out.

GHR = Lower of actual or Gross station heat rate of 2340 in kCal per kWh as specified in the Tariff Regulations as defined herein.

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

DT = is discount in relation to Mining Profit as determined in Clause 3.3 of this Supplemental Agreement.

For the avoidance of doubt, this discount (DT) will be determined and applied only in respect of Energy Charge in respect of actual power generation for Contracted Capacity as specified in the PPA dated 6.2.2007 and in respect only of such proportion of the Capacity that pertains to Contracted Capacity linked to imported coal as Fuel.

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

(I) General Principles for determination of LPPF:

FOB Cost of Coal	<u>FOB Price for Imported Coal:</u>
	<p>Shall be the lower of actual price or the HBA Price (as defined hereinafter) determined in Indian Rupees at Exchange Rate. In case of change in pricing framework in Indonesia or change in source of coal to other country, HBA Price will be replaced with relevant coal indices as mutually agreed.</p> <p>“HBA Index” shall mean the FOB Price of Indonesian imported coal having 6322 kcal/kg Gross Calorific Value in USD/ MT notified by Government of Indonesia on monthly basis.</p> <p>“HBA Price” shall mean the HBA Index FOB price of Indonesian imported coal published by Government of Indonesia from time to time for coal quality of 6322 Kcal/Kg, as adjusted for GCV (as billed) of coal consignment consumed in the Project as per the formula as stated in Annexure-A. Further, tolerance of maximum 10% over HBA price derived for a quality of coal shall be allowed. HBA price + maximum 10% tolerance shall not be higher than HBA coal price worked out on proportionate basis with reference to HBA Index. This tolerance of 10% of HBA price shall not be allowed for coal procured from mines owned by Seller/ its Affiliates.</p> <p>The actual FOB price of coal shall always be subject to an upper ceiling limit of HBA Index of USD 110/MT for 6322 Kcal/Kg ascertained on a monthly basis, adjusted for quality of coal (GCV as billed) in the Project and as revised from time to time in accordance with this Supplemental Agreement (the “Ceiling Price”). This has been explained in greater detail in sub para (II) Specific Conditions herein below.</p> <p>Illustrations: For determination of equivalent Coal Price for working out Landed Cost of imported coal for the Month:</p> <p>The lower of following for the month shall be considered:</p>

	<p>(a) Actual FOB price of consignment</p> <p>(b) HBA Price worked as per formula for billed GCV plus maximum 10% tolerance on HBA Price (10% tolerance not allowed for coal procured from mines owned by Seller/ its Affiliate)</p> <p>(c) HBA Price worked out on proportionate basis with reference with HBA Index for 6322 GCV coal</p> <p>Note: HBA Price for billed GCV shall be worked out (on proportionate basis and as per formula) considering ceiling of HBA Index of USD 110/MT or as revised as per sub para (II) Specific Conditions of this Supplemental Agreement.</p>
<p>Transportation and other costs</p>	<p><u>Ocean Freight & Insurance</u></p> <p>The Ocean Freight and Insurance shall be lower of actual or as stated in Annexure- B and calculated in Indian Rupees, at Exchange Rate.</p> <p><u>Port/ Fuel Handling Charges:</u></p> <p>The Port/ Fuel Handling Charges shall be lower of actual or as stated in Annexure – B</p> <p><u>Transit Losses:</u></p> <p>Actual or 0.2%, whichever is lower</p> <p><u>Other Charges (Sampling, Inspection, Customs clearance and Forwarding Agency Charge):</u></p> <p>Actual or 3% of CIF, whichever is lower- Seller to tie up services (Sampling, Inspection, Customs clearance and Forwarding Agency Charge) through competitive bidding with approval of tender documents from Procurer & seek approval of discovered rate from Procurer</p>

(II) Specific Conditions

- (a) The Ceiling Price for HBA Index will be fixed for 5 years at a time, with the first 5 year period commencing from the Amendment Effective Date and the last such 5 year period ending on the Expiry Date even if the last period is less than 5 years. The Ceiling Price will be reset and recalibrated for the next five year period, as per the following methodology:
- (i) If the HBA Price at any time during the relevant 5 year period, exceeds the Ceiling Price specified for the said relevant 5 year

period, then the Ceiling Price for the subsequent 5 year period will be increased by a percentage factor equivalent to the percentage increase in domestic CIL coal price (FOR) for linkage coal (Average price of G-7 to G-14 grade of coal used for power generation), during the corresponding 5 year period. The principle is that the imported coal Ceiling Price should move in tandem with domestic coal price increase.

- (ii) If the HBA Price does not at any time during the relevant 5 year period, exceed the Ceiling Price specified for the said relevant 5 year period, however, if the average HBA Price during the relevant five year period is higher than the average HBA Price during the immediately preceding five year period, the Ceiling Price for the relevant 5 year period shall be increased by a percentage factor equivalent to the lower of:

- (x) the percentage increase in domestic CIL coal price (FOR) for linkage coal (Average price of G-7 to G-14 grade of coal used for power generation), during the 5 year period corresponding with the relevant 5 year period; or

- (y) escalation in the HBA Index over the relevant 5 year period

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

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

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

(III) Methodology for Merit Order Scheduling & Billing

- (i) The Seller will, on the last working day of each Month, submit to the Procurer the anticipated Energy Charges for the subsequent Month. The anticipated Energy Charge will be based on the estimated cost of Indonesian imported coal procurement for subsequent Month. This anticipated Energy Charges determined as above, will be reduced by the amounts as provided in paragraph (ii) Mining Profit below, to

arrive at the anticipated Energy Charge for determining merit order standing.

- (ii) Mining Profit may be reckoned based on profit in the form of per unit as per the methodology specified at Annexure-C.
- (iii) At the end of each Month, the Bills by the Seller will be based on the Capacity Charge and Energy Charge respectively determined as per paragraphs 3.2.2 and 3.2.3 above.

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

1. Auditors certificate for each shipment in terms of value and quantity for coal received, consumed for the previous month.
 2. Invoices of fuel supplier, ocean freight and insurance, port / fuel handling charges and other charges.
 3. Copy of Bill of Entry and bank challans regarding payment of cess, taxes and duties.
 4. GCV certificate of loading and unloading port.
 5. Certificate for actual parameters GHR & Auxiliary consumption for the month.
 6. Certificate for Mining Production, Coal used at plant, Coal sold outside from the mine for the previous month. Also provide the documents related to tax, cess, duties etc as applicable to Mining coal.
- (iv) The payment of the Monthly Bill and Supplementary Bill shall be as per the Tariff specified under PPA dated 6.02.2007 until the approval of the Supplemental Agreement by Appropriate Commission. Differential amount towards Revised Tariff shall be payable after approval of Appropriate Commission without any interest / carrying cost / delay payment surcharge.
 - (v) For the Monthly Bills, no rebate shall be available on Energy Charge component while rebate shall be available to Procurer for Capacity Charge component as per the existing provisions of the PPA. It is to clarify that this clause shall be effective for the Monthly Bills submitted after the approval of Appropriate Commission. Further, the Delay Payment Surcharge shall continue to apply as per provisions of PPA dated 6.02.2007.
 - (vi) Further, the Seller shall not be entitled to any payment towards approved Change in Law for the Energy Charge from the date of

approval of Supplemental Agreement by Appropriate Commission. Any payment received by the Seller towards approved Change in Law for the Energy Charge component for the period between Amendment Effective Date and the date of approval by the Appropriate Commission shall be adjusted in the differential amount stated at Para (iv) above.

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

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

Illustration for computing additional penalty below 90% Availability declaration:

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

For avoidance of doubt, it is clarified that for all other purposes including passing on the discount of 20 paise/kwh, the Normative Availability shall continue to be 80%, as specified in the PPA. It is further clarified that for the purposes of determining the Incentives under the PPA on account of Schedule being higher than Normative Availability, the Normative Availability shall continue to be reckoned at 80% as per existing PPA. Conversely, provisions relating to penalty for lower Availability below Minimum Offtake Guarantee for relevant period shall also continue to apply in accordance with the provisions of existing PPA.

3.3 **Pass through of Mining Profits by the Seller**

3.3.1 Notwithstanding anything to the contrary contained in the PPA, the Procurer shall, with effect from the Amendment Effective Date, be entitled to receive, and the Seller shall provide, a discount for pass through of the Mining Profits, determined in the manner set out herein below, subject to a floor as explained in Annexure C hereto.

"Mining Profit" shall mean the profit earned by the Seller and/or its Affiliate from the mining operations of the coal mines owned by it in Indonesia, proportionate to the quantum of coal being supplied from such owned mine, for operations of the Seller's power generation Project in India or sold to third party and shall be computed in accordance with the methodology specified in Annexure - C

3.3.2 The discount equivalent to the Mining Profit shall be passed on by the Seller by way of reduction in the Monthly Bill issued by the Seller.

3.4 **Untied Capacity offered to Procurer**

3.4.1 The Seller is having 200 MW untied capacity (hereinafter referred to as "**Additional Contracted Capacity**") from Units 1-4 (each of 330 MW) and Seller is willing to supply the same to the Procurer and the Procurer agrees to purchase the same for the period from the date of approval of this Supplemental Agreement by the Appropriate Commission to the 25th Anniversary of the Commercial Operation Date of Unit No. 4 and the Contracted Capacity under the PPA shall stand increased by such Additional Contracted Capacity.

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

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

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

"**Capacity Charge for Additional Contracted Capacity**" shall be Rs. 0.9905/Kwh being the levelised Capacity Charge for the balance Term of PPA dated 06.02.2007.

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

- 3.4.3 Seller shall be required to declare single Availability for the Project (Unit 1-4) complying with Article 8 & 9 of the PPA dated 06.02.2007. SLOC, Gujarat shall allocate such Availability on proportionate basis between the Contracted Capacity of 1000 MW & Additional Contracted Capacity of 200 MW. SLOC Gujarat shall schedule Energy from the Project from above respective Capacity by adhering to Merit Order Protocol. SLOC, Gujarat shall separately certify the Availability as well as Scheduled Energy from the above Capacity.
- 3.4.4 Procurer shall make payment to the Seller for the Additional Contracted Capacity as per the provision of PPA dated 06.02.2007 read together with this Supplemental Agreement.
- 3.4.5 For the Additional Contracted Capacity, all other terms & conditions shall be applicable as per PPA dated 6.2.2007.

3.5 **Extension of Term of the PPA**

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

Where:

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

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

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

(Energy charge rate in Rs./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:

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

Where:

AUX = Lower of actual or normative auxiliary energy consumption of 9% as specified in the Tariff Regulations as defined herein.

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

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

GHR = Lower of actual or Gross station heat rate of 2340 in kCal per kWh as specified in the Tariff Regulations as defined herein.

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

For the avoidance of doubt, the Capacity Charge for Extended Term shall not be subject to adjustment towards Rs. 0.20 / Kwh and Energy Charge for Extended Term shall not have discount for pass through of the Mining Profits as specified in Clause 3.3 of this Supplemental Agreement.

- 3.6 Notwithstanding anything to the contrary contained in the PPA, it is agreed between Parties that in the 10th Contract Year from the date of signing of this Supplemental Agreement, if Seller's Energy Charges for respective Contracted Capacity under this Supplemental Agreement is higher than marginal coal based thermal power stations having 50% schedule or immediate below, as the case may be, during the previous Contract Year under Merit Order of Procurer, Procurer shall have a right to terminate the PPA & Supplemental Agreement for the Contracted Capacity and / or Additional Contracted Capacity as defined above. In the event of termination pursuant to this clause, neither Party shall be liable for any damages or penalty of any kind to the other Party.

3.7 It is clarified that the provisions dealing with Change in Law under the PPA dated 06.02.2007 shall continue to apply including in respect of Additional Contracted Capacity. The impact of additional expenditure to be incurred towards compliance of the Ministry of Environment, Forest & Climate Change Notification dated 7.12.2015 are not included in the tariff as per this Supplemental Agreement and any impact thereof on tariff and operational parameters shall be considered pursuant to approval of Appropriate Commission.”

12. In Supplemental PPA for Bid-02 PPA, there are slight variations from Bid-01 PPA with regard to GSHR (2274 in Kcal/kg), Auxiliary Consumption (6.50%), untied capacity available (234 MW). However, other provisions by and large remain the same.

13. The Petitioner has filed the present petition for approval of the amendments to the Bid-01 and Bid-02 PPAs by taking into consideration the views of the Respondent Consumer Groups namely, Energy Watchdog and Prayas as directed by the Hon'ble Supreme Court in its order dated 29.10.2018 with following prayers:

“(a) Approve the amendment in the Bid-01 PPA and Bid-02 PPA both dated 5.12.2018 as provided in these Supplemental PPAs.

(b) Pass any such further orders as it may deem fit in the facts and circumstances of the case.”

Submissions of the Petitioner

14. The Petitioner has submitted that the present petition has been filed in order to implement and give effect to the policy decision of the Government of Gujarat to rehabilitate, *inter-alia*, the Mundra Power Plant of APMuL, pursuant to and consistent with the recommendations of the HPC which was constituted pursuant to a policy decision of the Government of Gujarat vide its Resolution dated 3.7.2018 in the larger public interest of the electricity consumers of the State of Gujarat. The Petitioner has further submitted that subsequently, the Government of Gujarat vide another policy decision, as reflected in the Resolution dated 1.12.2018, accepted the

recommendations of HPC with certain modifications which was done in the larger public interest of the electricity consumers of the State of Gujarat. The Petitioner has emphasised that the modifications as suggested by the Government of Gujarat made the rehabilitation plan stricter for the Respondent No. 1, thereby promoting the consumer interest while also ensuring rehabilitation of the power project to ensure sustainable operation of the power plant which is in the larger interest of the electricity consumers of the State of Gujarat. Since the implementation of the diverse components of the rehabilitation plan recommended by the HPC and to the extent accepted by Government of Gujarat included making certain amendments to the PPAs, the Petitioner by way of the present Petition has sought approval of this Commission to the said amendments to PPAs dated 6.2.2007 and 2.2.2007 entered into between the Petitioner and APMuL. The Petitioner has submitted that the Petitioner and APMuL have mutually agreed and signed the Supplemental PPAs to Bid-01 and Bid-02 PPAs on 5.12.2018 as provided in Article 18.1 of the respective PPAs pursuant to and considering the recommendations of the HPC and the Policy decision of the Government of Gujarat. The Petitioner has elaborated the salient features of the Supplemental PPAs as under:

(a) Date of applicability shall be from 15th October, 2018.

(b) Fuel cost shall be pass-through on actual basis subject to ceiling of imported coal cost of 110 USD/MT for 6322 Kcal/Kg GCV coal. The landed cost of fuel shall be worked out considering coal consumed at plant as lower of actual coal cost discovered through competitive bid with a ceiling of HBA Index formula derived price having a tolerance of maximum 10% and shall not be higher than the coal

price determined on proportionate basis to HBA Index. This tolerance of 10% shall not be applicable for coal procured from mines owned by the Seller or its Affiliates. The Seller shall purchase coal through competitive bidding process for which bid document and rate discovered is to be approved by GUVNL. The Seller shall continue to supply power and bear the price risk beyond the ceiling price of USD 110/MT for 6322 Kcal/Kg.

- (c) Reduction in Capacity Charges to the extent of Rs.0.20/kWh as recommended by HPC.
- (d) APMuL shall give discount towards mining profit for coal consumed from mines owned by it or its Affiliates as per the formula stated in the Supplemental Agreement. At all times during term of the PPA, minimum mining profit of 5 paise/kWh will be passed on to the procurer.
- (e) Tie-up of free capacity of 200 MW of the Respondent No. 1 at the capacity charge equal to the levelised capacity charge for balance period of the existing PPAs without any discount and the Energy Charge as stated at 'b' above without any discount towards mining profit.
- (f) Extension of PPA tenure by 10 years with capacity charge equal to the quoted capacity tariff of the terminal year without any discount and the energy charge as actual. The Capital Cost of renovation and modernization as well as incremental O&M expenses shall be allowed additionally in the capacity charge as per the mechanism provided in the Supplemental PPAs.

15. The Petitioner has submitted that considering the overall circumstances, the amendments in Bid -01 and Bid-02 PPAs executed with by the Petitioner with APMuL as per the terms summarised above are the most preferred option in the interest of consumers in the State. The Petitioner has submitted that present petition has been filed for approval of the amendments to the PPAs made after duly taking into consideration the views of the Respondent Consumer Groups as directed by the Hon'ble Supreme Court in its order dated 29.10.2018.

16. The Petition was listed for admission on 20.12.2018. The Commission after hearing the Petitioner admitted the petition and issued notice to the Respondents. During the hearing, learned counsel for Prayas sought certain clarifications. The Commission directed the Consumer Groups to indicate the provisions which require clarification and directed the Petitioner to clarify the same. The Petitioner clarified the queries of Prayas vide its affidavit dated 7.1.2019. One Shri Ravi Shankar Kapoor filed an affidavit dated 3.1.2019 seeking impleadment as a Respondent in the Petition. The Commission in the Record of Proceedings dated 21.1.2019 observed that in the light of the Hon'ble Supreme Court's order dated 29.10.2018, Shri Kapoor cannot be impleaded as Respondent in this case. However, the Commission directed that Shri Kapoor can make submission on the issues raised in the Petition and accordingly, directed that the submissions already made by Shri Kapoor be taken on record and also permitted Shri Kapoor to make further submissions, if any. Replies to the Petition have been filed by Energy Watchdog and Prayas. Shri Ravi Shankar Kapoor has also filed his objections to the Petition. The Petitioner has filed rejoinders to the replies of Prayas and Energy Watchdog.

Replies of the Respondents

17. Prayas in its reply has made the following submissions:

- (a) The Hon'ble Supreme Court in its order dated 29.10.2018 has not given any mandate that the amendment sought for should be allowed. The direction given is only that the amendment application should be considered in accordance with law after considering all objections and submissions of the Consumer Groups. The Commission needs to consider the objections of the Consumer Groups that in view of the claim of the Project Developer for compensatory tariff under general exercise of regulatory powers and/or for relief under the Change in Law and Force Majeure in terms of the PPAs, having been rejected by the Hon'ble Supreme Court, there is no justification for allowing any relief in the present proceedings by way of amending the tariff terms and conditions in the PPAs.
- (b) The Commission is not bound by the recommendations of HPC or directives of the Gujarat Government. The Commission has to take an independent and unbiased view of the matter and take a judicial decision after considering the views of all stakeholders, including the Consumer Groups in accordance with law. The touchstone should be whether the amendment being sought to be approved would be in the interest of the consumers.
- (c) There are serious legal and proprietary issues in the Supplemental PPAs as has been proposed. The proposal is to convert a tariff based competitive bid project under Section 63 of the Act into a hybrid of Sections 62 and 63 of the Act for which there is no legislative sanction under the Act.

- (d) The matter for increase in tariff has already been decided in Energy Watchdog Case as being not admissible in law. Therefore, reliefs which were sought by the Project Developers but were rejected by the Hon'ble Supreme Court cannot be allowed by way of amendment to the PPAs.
- (e) The appropriate manner in which hardship of a generator should be addressed would be to give financial accommodation to the generator, but at the same time, the overall financial outflow to the procurers over the remaining period of the PPAs should remain neutral. Prayas has suggested a slew of measures and avenues to implement revenue neutrality to the consumers.
- (f) The recommendations of the HPC and the Supplemental Agreements proposed have proceeded on the basis of the misplaced view that the process provided under the Insolvency and Bankruptcy Code (IBC) needs to be avoided at any cost and the Project Developer should be bailed out at the cost of the procurer and consumers at large. The HPC has not appreciated the basic fact that the recommended increased tariff to be paid to the Project Developer, even if offered to a third party after a transparent process under the IBC, would be the appropriate course and that it shall also be in accordance with the objectives and reasons for which the IBC has been enacted.
- (g) In any event, the extent of the amendments to vary the tariff terms and conditions need to be restricted to the direct and consequential effect of the alleged hardship that is caused by promulgation of the Indonesian Regulations providing for benchmark prices for export of coal and cannot be extended to other aspects

such as freight or transportation cost, import of coal from countries other than Indonesia, insurance, port handling charges, foreign exchange rate variation etc.

(h) The Guidelines notified by the Government of India under Section 63 of the Act and the terms contained therein are statutory in nature and are binding on all including the Commission as held by the Hon'ble Supreme Court in Energy Watchdog Case. Clause 4.3 of the Guidelines specifically provides that the Exchange Rate Variation is to the account of the generators. The principles laid down in the judgments of the Hon'ble Supreme Court in Numaligarh Refinery Limited Vs Dealing Industrial Company Limited [(2007) 8 SCC 466] and M/s Alopi Parshad & Sons Vs UOI [AIR 1960 SC 588], judgment of the Hon'ble High Court of Gujarat in Commissioner of Income Tax Vs Priyanka Gems [(2014) 367 ITR 575 (Guj)], and the judgment of Hon'ble High Court of Delhi in Cairn UK Holding Limited Vs. Director of Income Tax [(2013) 359 ITR 268(Delhi)] clearly restricts taking into any consideration of the Exchange Rate Variation for grant of relief to the Project Developer. To the extent that the stipulations in the PPAs are part of the statutory guidelines, there cannot be any amendment to the said provisions.

18. Energy Watchdog in its reply has submitted that the present petition is bad in law, bad in facts and against the consumer/public interest. Energy Watchdog has further submitted as under:

(a) The sanctity of the bidding process is required to be preserved. Once price is discovered under Section 63 of the Act by adopting competitive bidding route, the price becomes sacrosanct and Section 63 process cannot be converted into

Section 62 process of tariff determination by amending the PPAs. This Commission has no power to approve the Supplemental PPAs to hike tariff.

- (b) For the last five years, the Respondent No.1 has been reiterating about change in Indonesian Laws leading to higher imported coal cost, resulting in unviable business. The Hon'ble Supreme Court in its judgment dated 11.4.2017 in Energy Watchdog Case has dealt with this argument and has held that arranging fuel is the responsibility of the bidder and the generators must honour their contract even if there is unexpected rise in fuel price.
- (c) The tariff difference between the successful bidder and unsuccessful bidders was very low. The unsuccessful bidders were not aware of the situation that at some stage they will be able to get higher price through arm-twisting and therefore, they had quoted reasonable tariff as per their risk and reward assessment.
- (d) The proposed move of the Petitioner is not in public interest. It is going to set a bad precedent and the bidding process will lose its sanctity.
- (e) The HPC has cited two examples in change in the terms of the contract, one related to aviation sector regarding Air Development Fund and other related to telecom sector regarding change from NTP 1994 to NTP 1999. However, these cases are distinguishable from the present case.
- (f) The Central Government's approach in dealing with the stressed projects is transparent and within legal framework whereas in the present case, the State Government has adopted a different approach.

19. Shri Ravi Shankar Kapoor has submitted that the present petition for amendment of the PPA does not fall under the jurisdiction of the Commission since the respective State Commissions have adopted the tariff and the discretion for approval of the PPA or power procurement process is lying with respective SERCs. Though the Hon'ble Supreme Court has asked CERC to decide the matter in accordance with law, Hon'ble Supreme Court has not decided the issue of approval of the PPAs. Shri Kapoor has further submitted that the issue related to inability to supply electricity at the bid rate due to fuel source was also raised by APMuL which has been dealt with by Guajrat Electricity Regulatory Commission (GERC) in its order dated 31.8.2010 in Petition No.1000 of 2010. The order of GERC has been upheld by the Appellate Tribunal. Therefore, the Commission should decide whether CERC can decide the present matter *de novo* when jurisdiction in the matter has been exercised by GERC. Shri Kapoor has further submitted as under:

(a) The proposed amendments in PPA by way of supplementary agreement are in contravention of the very basis of selection of bidder through competitive bidding process. APMuL had chosen to supply electricity at fixed rate and got selected as a successful bidder. Now the Petitioner by signing the supplemental PPA is requesting the Commission to allow APMuL to revise the bid rate.

(b) The High Power Committee has neither dealt with nor looked into two important aspects such as over invoicing of import of machinery and coal and the role of lenders by not sharing documents with Directorate of Revenue Intelligence (DRI).

(c) APMuL had earlier offered the ownership of 51% of the project at Re.1/- per unit which was not accepted by Government of Gujarat and GUVNL. Now GUVNL has agreed to give full energy cost as pass through in addition to the entire fixed cost quoted in the tariff. This amply clarifies that APMuL would be allowed to earn ROE for the entire balance life including for the extended term under the pretext of benefits to the consumers. Therefore, the Commission should look into this aspect.

(d) If the recommendations of HPC are accepted, it would lead to an impact of Rs.1.29 lakh crore over 30 years period on the consumers of Gujarat, Haryana, Maharashtra, Punjab and Rajasthan in addition to the impact of Rs.18,000 crore on the lenders of the said IPPs. The HPC report is a ploy to circumvent the Hon'ble Supreme Court judgment dated 11.4.2017 in Energy Watchdog Case which clearly upholds the sanctity of the PPA and allows no room for grant of any relief to the said IPPs.

(e) The Commission may consider initiating an enquiry under Section 128 of the Act to deal with the issue of whether there is a case for recovery of the amount from APMuL, and if yes, the quantification thereof and necessary directions for recovery and penal action against APMuL.

20. The Petitioner has submitted rejoinders refuting the contentions of Energy Watchdog and Prayas and reiterated that the proposed amendments to the PPAs are in public interest.

Oral Submissions by the Parties during the hearing

21. Learned Senior Counsel, Mr. Mukul Rohatgi, appearing on behalf of the Petitioner submitted that the Hon'ble Supreme Court has looked into the report of the HPC which was headed by a former judge of the Hon'ble Supreme Court. Learned Senior Counsel further submitted that the Hon'ble Supreme Court after analysing the report came to the conclusion that its judgment dated 11.4.2017 does not come in the way and the proposed amendments to the PPA can be approved by the Commission. Learned Senior Counsel further stated that the spirit of the order of the Hon'ble Supreme Court dated 29.10.2018 is that the proposed amendments are necessary and the scope of Article 18 of the PPAs is not meant for amending or correcting clerical mistakes but to address situations as in the present case.

22. Learned Counsel for Prayas submitted that the proposed amendments are not maintainable on the grounds of protection of consumer interest; reliefs being inadmissible on account of judgment in Energy Watchdog Case; hardship to be considered with overall tariff neutrality under long term PPAs; importance of the Insolvency and Bankruptcy Code; implications of guidelines notified by the Central Government under Section 63 of the Electricity Act, 2003; and burden to be shared by the promoter, namely Adani Enterprises Limited. Learned Counsel further submitted as under:

(a) Amendment of the PPAs, if any, should be restricted to the impact of Indonesian Regulations.

(b) Tolerance limit of 10% should be removed.

- (c) Relief to be restricted to the increase in imported coal price only. Cost other than increase in cost of coal at the exchange rate prevalent cannot be considered for relief computation.
- (d) Relief being allowed to the project developer by the proposed amendment is excessive.
- (e) The extension on the term of the PPA by 10 years should be on the same terms and conditions as in the previous period.
- (f) Residual value of the generating station at the end should go to the benefit of the Procurers and thereby to the consumers.
- (g) Quoted energy charges being statutory in nature cannot be amended.
- (h) APMuL after taking the risk of quoting non-escalable energy charges cannot be allowed to convert the Section 63 PPA into hybrid scheme of Section 62 and Section 63 of the Act.
- (i) Any decision on the revision in the tariff should be applied prospectively for energy supplied from the month following the order passed by the Commission, and not retrospectively.

23. Learned counsel for Energy Watchdog adopted the submissions made by the learned counsel of the Prayas and submitted that amendment to the PPAs is like entering into fresh PPAs. Learned counsel submitted that since the HPC is not a statutory body, its recommendations are not binding.

24. Learned counsel for the Petitioner submitted that Policy decision should be tested on the touchstones of fairness, lack of arbitrariness and public interest. Learned counsel made detailed submission on the HPC report and contended that the process followed was transparent, well considered by experts and is in public interest. Learned counsel further submitted as under:

- (a) The power to amend the PPA flows from Section 63 of the Act through competitive bidding guidelines and Article 18.1 of the PPA. Therefore, the Commission has power to approve the amendment to the PPA/tariff.
- (b) The Commission has power to approve amendment to the PPA even outside the guidelines by exercising regulatory power under Section 79 (1) (b). In support of his argument, learned counsel relied on the judgments of Hon'ble Supreme Court in Energy Watchdog Case and All India Power Engineer Federation & Ors. Vs Sasan Power Ltd. & Ors. [(2017) 1 SCC 487] (hereinafter referred to as the Sasan Case) and submitted that increase in tariff can be allowed with the approval of the Commission.
- (c) The Commission has already exercised the power as provided under the PPA to approve amendments to various PPAs pursuant to SHAKTI policy in other Petitions including Petition No. 41/MP/2018 (GMR Kamalanga Energy Ltd. Vs GRIDCO & Ors) and Petition No. 21/MP/2018 (KSK Mahanadi Power Co. Ltd vs TANGEDCO & Ors). In the present Petition also, the amendment to the PPA is based on a policy directive and identical to the approval granted under SHAKTI policy.

(d) HPC's approach was to ensure sustainable cash flow to the power producer but at the same time ensured that the burden on consumers is reduced to the maximum extent and possible leakages have been arrested.

(e) Learned counsel further made extensive rebuttal of issues raised by Prayas on commercial issues and concluded that the recommendations made by HPC were on the premise of public interest.

25. The Learned counsel for APMuL submitted that hardship is being faced by APMuL since 2012 after coming into effect of the Indonesian Regulations. Learned counsel submitted that intention behind the three GRs passed by the Government of Gujarat in July 2013, July 2018 and December 2018 was to resolve and revive the projects in public interest. Learned counsel submitted that none of these GRs were challenged by any party so far. Learned counsel referred to the decision of the Hon`ble Supreme Court in the case of Southern Petrochemical Industries Co. Ltd. Vs Electrical Inspector and ETIO [(2007) 5 SCC 447] and the judgment of the Hon`ble Supreme Court in AP Electricity Regulatory Commission vs RVK Energy (P) Ltd. [(2008) 17 SCC 769] and submitted that the Commission, being a statutory authority, must endeavour to give effect to policy decisions of the State Government of Gujarat. In response to the commercial issues raised by Prayas, the learned counsel submitted that since the tariff quoted by APMuL does not have break up, all the coal cost components viz. coal cost, ocean freight and port handling charges have been linked to certain benchmarks in the supplemental PPA. Learned counsel submitted that the Commission has the power to approve the amendments to the PPAs in terms of Article 18 of the PPAs and decision of the Hon`ble Supreme Court in the Energy Watchdog Case and Sasan Case.

26. The parties have also filed extensive written submissions reiterating their arguments during oral submissions.

ANALYSIS AND DECISION

27. From the pleadings of the parties including the written and oral submissions, the following issues arise for our consideration:

Issue No. 1: Whether the Commission has the power to approve the proposed amendments, especially since the tariffs specified in the PPAs, were determined under Section 63 of the Act?

Issue No. 2: If the answer to the first issue is affirmative, then what are the principles to be kept in mind by the Commission while approving or disallowing such amendments?

Issue No. 3: Whether the proposed amendments to the PPAs fulfill the aforesaid principles, if so then to what extent, for this Commission to consider and approve them?

Issue No. 4: Whether the alternative suggestions made by the Consumer Groups can be considered?

Issue No.1: Whether the Commission has the power to approve the proposed amendments, especially since the tariffs specified in the PPAs, were determined under Section 63 of the Act?

28. On the first issue, the Petitioner has submitted that the Commission is vested with necessary powers/jurisdiction under Section 79(1)(b) of the Act to approve the

amendments sought to be made to the Bid-01 and Bid-02 PPAs between Petitioner and Respondent No. 1 by way of supplemental PPAs dated 5.12.2018. The Petitioner has submitted that Hon'ble Supreme Court in the Sasan Case has upheld the wide scope of this Commission's regulatory powers under Section 79(1)(b) of the Act to regulate the tariff of a generating company having a composite scheme of generation and sale of electricity in more than one State, even in cases of adoption of tariff under Section 63 of the Act. Therefore, it cannot be argued that this Commission lacks necessary power to approve the amendments to PPAs having an impact on tariff adopted under Section 63 of the Act. The Petitioner has submitted that in the Energy Watchdog Case, Hon'ble Supreme Court after analysing the scope of Section 63 and 79(1)(b) of the Act came to the conclusion that even in cases where tariff has been adopted under Section 63 of the Act, this Commission is not divested of its powers under Section 79(1)(b) to regulate the said tariff. The Petitioner has further submitted that this Commission's power to approve amendments to the PPAs in the public interest exists, even in cases of determination of tariff by bidding process in accordance with guidelines issued by the Central Government under Section 63 of the Act and this power flows from the said Section 63 of the Act itself. The Petitioner has also submitted that this Commission and some State Commissions have approved amendments to the Section 63 PPAs leading to change in tariff in pursuance to policy decision of the Union Ministry of Coal while implementing the SHAKTI [Scheme for Harnessing and Allocation of Koyala (coal) Transparently in India] scheme. The Petitioner has submitted that while allowing the said amendments to PPAs under SHAKTI scheme, this Commission also returned a categorical finding that *"once the composite scheme emerges after the commencement of supply from a generating station to more than one State, this Commission will have*

jurisdiction to regulate the tariff which will include the amendments to the PPAs to factor in the discount offered by the Petitioner in the tariff for the coal linkage under SHAKTI Scheme.” The Petitioner has submitted that as amendments to PPAs were allowed by this Commission in furtherance of SHAKTI Scheme of the Ministry of Coal, the amendments proposed in the instant case may be approved as these amendments are in furtherance of the policy decision of the Government of Gujarat acting through Energy & Petrochemical Department, which is evident from the GR dated 3.7.2018 constituting the HPC and the GR dated 1.12.2018. The Petitioner has emphasized that the present case is a case of implementation of economic policy of the Government of Gujarat and not a policy directive under Section 107 or 108 of the Act. Referring to the order of the Hon’ble Supreme Court dated 29.10.2018 in Miscellaneous Application Nos. 2705-2706 of 2018 in Civil Appeal no. 5399-5400 of 2016, the Petitioner has submitted that any and all questions regarding the jurisdiction and power of this Commission to approve the amendments in question, has been put to rest with the following observations of the Hon’ble Supreme Court:

“We are of the view that, having perused the High Power Committee’s report, which was given after our judgment dated 11th April, 2017, it will be open to the applicants to approach the Central Electricity Regulatory Commission (C.E.R.C.) for approval of the proposed amendments to be made to the Power Purchase Agreements (PPAs) in question.”

The Petitioner has submitted that since the Bid-01 and Bid-02 PPAs between the Petitioner and APMuL contain a specific provision being Article 18.1 allowing parties to approve amendment of the PPAs with the approval of the Commission, it can very well be deduced that the Commission’s power to amend the PPAs flows from the competitive bidding guidelines dated 19.1.2005 issued by the Central Government

under Section 63 of the Act, leading to the conclusion that the said power flows from the Section 63 of the Act itself.

29. On the other hand, the Consumer Groups have advanced extensive arguments as under contending that the Commission does not have the power to approve amendments to the Section 63 PPAs having impact on tariff:

(a) It is incorrect on the part of the Petitioner or the Project Developer to suggest that the Hon'ble Supreme Court in its order dated 29.10.2018 has directed this Commission to allow amendment sought by GUVNL based on the consideration of the report of the HPC as there is a reference to HPC's report in the said order. The decision of the Hon'ble Supreme Court in the said order merely clarified that Energy Watchdog Case will not come in the way of the Commission while considering maintainability of the application for amendment of the PPAs. The Hon'ble Supreme Court has not made any comments about the merits of the HPC report or any recommendations thereunder;

(b) The proceedings initiated by the Project Developer in regard to the relief claimed for the consequences of Indonesian Regulations determining benchmark minimum prices of imported coal have been finally decided by the Hon'ble Supreme Court in Energy Watchdog Case. The Project Developers have been held not entitled to any relief under any of the three heads, namely, exercise of general regulatory powers to grant compensatory tariff; force majeure under Article 12 of the PPA; and Change in Law under Article 13 of the PPA. In such a situation, they cannot be granted relief for mitigating the impact of Indonesian

Regulations through amendment of the PPAs. The total rejection of the claims of the Petitioner of any right under the PPAs or under general regulatory powers by the Hon'ble Supreme Court is a relevant consideration before the Commission while deciding the present petition;

(c) The intent behind Section 63 of the Act regarding tariff being determined through a competitive bidding process is that the quoted tariff is the only criteria for selection and, therefore, is sacrosanct and needs to be the guiding factor. It will be fundamentally against public interest and will be a bad precedent if a competitively bid tariff is given a go by and subsequently, PPAs are amended and converted into actual cost determination. In effect, the proposed amendments through the supplemental PPAs amount to converting a Section 63 tariff into a Section 62 tariff, which is impermissible in law;

(d) The tariff in the present case was determined through a bidding process conducted under the "Guidelines for determination of Tariff by Bidding Process for procurement of Power by Distribution Companies" ("Competitive Bidding Guidelines"), dated 19th January 2005 notified by the Government of India under Section 63 of the Act, and these Guidelines do not permit amendment to the tariff discovered in a bidding process as it would destroy the sanctity of the bidding process;

(e) The Competitive Bidding Guidelines are statutory in nature and have the force of law and therefore, there can be no amendment to the PPAs contrary to such

Guidelines. Furthermore, the PPAs incorporating the provisions of the Competitive Bidding Guidelines are to that extent statutory contracts;

- (f) Section 63 of the Act provides that the Appropriate Commission “shall adopt the tariff” if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. Therefore, the tariff once adopted under Section 63 and the Competitive Bidding Guidelines, cannot be amended or re-adopted by the Commission; and
- (g) Article 18.1 of the PPAs allows amendment to other provisions of the PPA except the tariff provisions, which cannot be amended.

30. APMuL has submitted that the Commission has the necessary powers under the Act, the Competitive Bidding Guidelines, Article 18.1 of the PPAs and in terms of the judgments of the Hon’ble Supreme Court in Sasan Case and Energy Watchdog Case to approve amendments to the PPAs. APMuL has further elaborated the scope of powers of the Commission in this regard as under:

- (a) The Supplemental PPAs fulfill the statutory guidelines envisaged under Section 61 of the Act by seeking to strike a balance between interests of diverse stakeholders including the (i) consumers, (ii) lenders, (iii) State government, (iv) procurers and (v) generator. The amendment clearly falls within the jurisdiction of this Commission bearing in mind the established principles securing public interest.

(b) Article 18.1 of the PPAs neither excludes any provision of PPA from ambit of amendments, nor restricts amendments to any aspect (implications on the tariff or otherwise). The safeguard built is in the statutory scheme as expounded by the Hon'ble Supreme Court in Sasan Case i.e., approval of the Appropriate Commission. Evidently, the parties are contractually entitled to seek amendment of PPAs at a subsequent stage as seen in the present case. Therefore, the Petitioner approached this Commission for its approval.

(c) The power to approve the proposed amendments to PPAs in terms of Article 18.1 of PPAs flows to the Central Commission from Sections 63 and 79 of the Act.

(d) The amendments to Section 63 PPAs in a number of cases have been allowed by this Commission and State Commissions pursuant to government policies (e.g. SHAKTI scheme) in public interest by exercising the regulatory power as provided in Article 18.1 (or other relevant provision) of PPA read with Section 63 and 79 of the Act.

(e) The stand of the consumer groups that a PPA with tariff adopted under Section 63 of the Act is sacrosanct and its tariff cannot be modified being a standalone provision has been rejected by Hon'ble Supreme Court in Energy Watchdog Case at paragraphs 19 and 20. Besides the Act, the delegated legislation i.e. the Competitive Bidding Guidelines provide for regulatory oversight of PPA and tariff therein. Therefore, the Commission is statutorily empowered to consider and approve amendments to a PPA having tariff implications.

(f) Para 5.17 of the amended Tariff Policy, 2016 provides for the following for dispute resolution:

“5.17 Where any dispute arises claiming any change in or regarding determination of the tariff or any tariff related matters, or which partly or wholly could result in change in tariff, such dispute shall be adjudicated by the Appropriate Commission. All other disputes shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996.”

Therefore, the specific inclusion of a provision for amendment in Clause 5.17 establishes the intent of the Legislature to clarify that the framework of Section 63 of the Act incorporates tariff changes.

31. We have considered the submissions of the Consumer Groups, the Petitioner and APMuL. In the present petition, the Petitioner has approached the Commission for approval of the amendment of the PPAs under Article 18.1 of the respective PPAs (Bid-01 and Bid-02) after Hon'ble Supreme Court in its order dated 29.10.2018 clarified that *“having perused the High Power Committee's report, which was given after our judgment dated 11th April, 2017, it will be open to the applicants to approach the Central Electricity Regulatory Commission (C.E.R.C) for approval of the proposed amendments to be made to the Power Purchase Agreements (PPAs) in question.”* Hon'ble Supreme Court further clarified that *“our judgment will not stand in the way of maintaining such applications, we also make it clear that each of the consumer groups, who had appeared before us and who have appeared before us today, will be heard on all objections that they may make to the proposed amendments to the PPA, after which, it will be open to the C.E.R.C. to decide the matter in accordance with law.”*

32. Prayas has submitted in its written submission that it has not challenged the maintainability of the petition. It has also submitted that the petition filed by the Petitioner needs to be considered on merit of granting relief for the amendment of the provisions of the PPAs, including whether any amendment should be allowed at all or if it is to be allowed, then to what extent and in what manner. Prayas has also stated that these issues are within the jurisdiction of the Commission and have to be decided by the Commission.

33. Energy Watchdog has submitted that the Commission has no power to approve the Supplemental PPAs to hike tariff as the tariff discovered under section 63 of the Act through competitive bidding route is sacrosanct and cannot be converted into Section 62 tariff determination by amending the PPAs.

34. Shri Ravi Shankar Kapoor has submitted that this Commission does not have the jurisdiction in the matter, since tariff under Bid-01 and Bid-02 PPAs were adopted by GERC. Further, GERC in its order dated 31.8.2010 in Petition No.1000 of 2010 has already dealt with the issue related to inability of APMuL to supply electricity at the bid rate due to issues relating to fuel source and the said order having been upheld by the Appellate Tribunal, the Commission has to take a view whether it can decide the present matter de novo when jurisdiction in the matter has already been exercised by GERC.

35. With regard to the objection of Shri Kapoor, it is clarified that Case 1 PPAs were entered into by APMuL with GUVNL and Haryana Utilities at different points of time and the PPAs have been adopted by the respective State Commissions. However, the said

fact does not denude the powers of this Commission to exercise its jurisdiction when the generating station has a composite scheme for generation and supply of power in more than one State. In fact, the Commission in its order dated 16.10.2012 in Petition No.155/MP/2012 (Adani Power Ltd Vs. UHBVNL & Others) has decided the jurisdiction of the Commission over the Mundra Power Project of APMuL as under:

“23.....Therefore, it is our considered opinion that a generating company may enter into the composite scheme for generation and sale of electricity in more than one State at any time during the life of the generating station(s) owned by it. Any other interpretation will also impinge on the policy of common approach on the matters of tariff of the generating companies supplying electricity to more than one State enshrined in clause (b) of subsection (1) of Section 79. In this view of the matter, it is concluded that Adani entered into composite scheme for generation and sale of electricity in more than one State on 7.8.2008 when it signed PPAs with the distribution companies in the State of Haryana.....”

36. The above decision of the Commission with regard to composite scheme and the jurisdiction of the Commission to regulate the tariff of the generating stations which have a composite scheme was upheld by the Appellate Tribunal and subsequently upheld by the Hon'ble Supreme Court in the Energy Watchdog Case. Further, it is pertinent to mention about a precedent case wherein APMuL had filed Petition No.1093/2011 before GERC seeking adjudication of dispute pertaining to supply of power prior to SCOD of the generating station. GERC in its order dated 21.10.2011 decided the matter in favour of APMuL. GUVNL filed Appeal No.185 of 2011 before the Appellate Tribunal challenging the said order. The Appellate Tribunal in the judgment dated 4.10.2012 upheld the judgment of GERC. GUVNL filed Civil Appeal No.2567 of 2013 before the Hon'ble Supreme Court challenging the judgment of the Appellate Tribunal dated 4.10.2012. The stay application filed by GUVNL has been dismissed by the Hon'ble Supreme Court vide order dated 2.5.2013. APMuL filed an Execution Petition before the

Appellate Tribunal which was dismissed vide its order dated 12.3.2015 granting liberty to approach the Appropriate forum. APMuL approached this Commission by way of Petition No. 154/MP/2014 for appropriate reliefs. An objection was raised by GUVNL that this Commission was not the appropriate forum since the issue was originally decided by GERC. The Commission vide its order dated 16.6.2016 held that in the light of its earlier order dated 16.10.2012 in Petition No.155/MP/2012 and the Full Bench Judgment of the Appellate Tribunal, the generating station of APMuL has a composite scheme and therefore, this Commission has the necessary jurisdiction to regulate tariff and adjudicate the disputes. In view of the above precedent case and the judgment of the Hon'ble Supreme Court in Energy Watchdog Case, this Commission has jurisdiction to deal with regulation of tariff of the generating station of APMuL and needless to state that this jurisdiction includes amendment of the PPAs in respect of the Mundra Power Project of APMuL.

37. As regards the submissions of Prayas and Energy Watchdog that this Commission does not have the power to amend the tariff under Section 63 of the Act, as proposed in the supplemental PPAs, we have considered the said proposition hereunder:

(a) Section 63 of the Act prescribes that *“Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the Guidelines issued by the Central Government.”* The Guidelines were issued by the Central Government under Section 63 of the Act, entitled *“Guidelines for determination of Tariff by Bidding Process for procurement of Power by*

Distribution Companies”, dated 19th January 2005. Therefore, the bidding process is to be conducted in accordance with these Guidelines.

(b) These Guidelines in clause 3.1(i) prescribe that the bidding documents shall be as approved by the appropriate Regulatory Commission, unless the bid documents are as per the Standard Bid Documents (SBD) issued by the Central Government. In the present case, the two PPAs of APMuL with GUVNL were approved by GERC in accordance with the Guidelines issued under Section 63 of the Act and accordingly, these two PPAs have the statutory sanction as they flow from the Guidelines issued under Section 63 of the Act.

(c) Neither the Guidelines nor the approved PPAs in the present case prevent, prohibit, restrict or in any other manner circumscribe the powers of this Commission from approving amendments to the PPAs. In fact, Article 18.1 of the PPAs provide for amendment of the PPAs with the approval of Appropriate Commission. Articles 18.1 of the Bid-01 and Bid-02 PPAs are reproduced below:

“Bid-01 PPA

“18.1 Amendment

This Agreement may only be amended or supplemented by a written agreement between the Parties.”

Bid-02 PPA

“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.”

It is clear that the approval of the Appropriate Commission is required to any amendment to the PPAs.

- (d) The power of the Commission to approve amendments to the PPAs in terms of Article 18.1 of the respective PPAs has the legal sanction and authority flowing from Section 63 of the Act, and the SBD/approved bidding documents issued under the Guidelines.
- (e) This position is further fortified by the judgment of the Hon'ble Supreme Court in Sasan Case. The relevant paragraphs are extracted as under:

“30. A perusal of the CERC tariff adoption order in the present case dated 17-10-2007 makes it clear that the tariff is adopted by the Commission only because the competitive bidding process which has been undertaken is in accordance with the Guidelines so issued.

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

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

(f) The findings of the Hon'ble Supreme Court in paragraph 20 of the judgment in Energy Watchdog Case makes it clear that this Commission can exercise powers to regulate tariff under Section 79(1)(b), even where the tariff has been determined under Section 63 of the Act, subject to the condition that such power is exercised consistently with the Guidelines. The relevant portions of the said judgment are extracted below:

“20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to “regulate” tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.”

(g) In the light of the above judgments, it emerges that the PPAs in question including the powers to approve amendments thereto contained in Article 18.1 of the respective PPAs flow from and are consistent with the Guidelines and Section 63 of the Act. Without prejudice to the above power flowing from Article 18.1 of PPAs, the Commission can exercise its powers to regulate tariff under Section 79(1) (b) of the Act in a scenario where it is not covered by any of the provisions of the Guidelines or where no Guidelines are framed at all or Guidelines do not deal with a given situation, as clearly stipulated in paragraph 20 of the judgment in Energy Watchdog Case extracted above. Therefore, not only does the Commission have the statutory powers to allow amendments pursuant to Article 18.1 of the respective PPAs, but also has the regulatory power under Section 79(1) (b) of the Act in the absence of any Guidelines or specific provisions in the Guidelines with regard to amendment of the PPAs to either approve the proposed amendment or reject the same.

38. The Commission has exercised such powers and approved amendments in PPAs executed under Section 63 of the Act, pursuant to policy decisions under the SHAKTI scheme of the Ministry of Coal, Government of India. The following orders of the Commission can be referred in this connection:

- (i) Order dated 21.2.2018 in the matter of KSK Mahanadi Power Co. Ltd. vs TANGEDCO & Ors., Pet. No. 21/MP/2018; and
- (ii) Order dated 21.2.2018 in the matter of GMR Kamalanga Energy Ltd. vs GRIDCO Ltd. & Anr., Pet. No. 41/MP/2018.

39. The Commission's Order dated 21.2.2018 in Petition No. 21/MP/2018 (KSK Mahanadi Power Co. Ltd. vs TANGEDCO & Ors.) clearly sets out the ratio and legal basis for the Commission exercising the power to amend the tariff to factor the discount offered under the SHAKTI scheme. Relevant paras of the said order are extracted as under:

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

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

(i) CIL/SCCL may grant Coal linkages for Central Government and State Government Gencos at the notified price of CIL/SCCL. Similarly, coal linkages may be granted for JVs formed between or within CPSUs and State Govt/PSUs. The recommendations shall be made by Ministry of Power.

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

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

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

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

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

40. In accordance with the SHAKTI scheme, the Petitioner therein, who had already concluded the long term PPAs based on domestic coal was eligible to participate in the bidding process. The grant of coal linkage on notified price from each source is to be based on the discount offered by the power producer on the existing tariff for the balance period of the PPA. The discount would be computed with reference to linkage coal supplied and received under the “SHAKTI scheme”. Moreover, the discount offered by the generating companies is to be adjusted from the gross amount of the monthly bill raised in terms of the PPA.” Accordingly, the Commission in the above mentioned Petition, issued the following directions:-

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

41. The legal principles adopted in the aforesaid orders in the context of the SHAKTI scheme are that the Commission can approve amendments to the tariff provisions in the PPA if parties agree to such amendments through Supplemental PPAs pursuant to policy directive of the Government, if it is in public interest. Similarly, in the present case, the Government of Gujarat has issued a policy directive in the form of the GR

dated 1.12.2018 for rehabilitation of the stressed imported coal based power projects in consumer interests. The Commission is of the view that as in the cases of SHAKTI Scheme, the supplemental PPAs involving revision of tariff pursuant to the policy directive of the Government of Gujarat as propounded in the GR of 1.12.2018 which has been submitted to the Commission for approval needs to be considered if it is in the public interest.

42. In the light of the above discussion, we are of the view that this Commission has the requisite jurisdiction and power under Section 79(1)(b) of the Act in the light of the judgment of the Hon'ble Supreme Court in Sasan Case and Energy Watchdog Case as well as Article 18.1 of the Bid 01 and Bid-02 PPAs to consider the proposed amendments to the PPAs, including the provisions relating to tariff in the PPAs, since they flow from the Competitive Bidding Guidelines issued by the Central Government in pursuance to the provisions of Section 63 of the Act.

43. The Consumer Groups have raised the following specific objections with regard to the jurisdiction and power of the Commission to approve the Supplemental PPAs:

(a) No relief can be granted through amendment of PPAs which has been specifically rejected by the Hon'ble Supreme Court in Energy Watchdog Case.

(b) The proposed amendments seek to convert a Section 63 PPA into a Section 62 PPA.

44. On the first objection, the Consumer Groups have submitted that it would be unfair, unjust and improper that what is not permissible in law and what has been so

adjudicated and rejected by the Hon'ble Supreme Court in Energy Watchdog Case, is now being claimed by way of amendment under the provisions of the PPA, particularly requiring the Procurers and thereby the consumers at large to share significant burden of the increased tariff, during the entire period of the PPAs from October 2018. The Petitioner has submitted that the judgment in Energy Watchdog Case was based on a contractual interpretation of the PPAs as they then stood and the said judgment does not lay down the law, as alleged, rather it merely interprets the contractual provisions. Therefore, the said judgment does not preclude the Commission from examining the proposed amendments to the said PPAs and dealing with them as per law.

45. In our view, the objection of the Consumer Groups cannot be sustained. A recapitulation of the history to the present proceedings demonstrates that the judgment in Energy Watchdog Case is not an impediment to the Commission for considering the proposed amendments to the PPAs and allowing the same if it is in public interest. The first round of litigation which culminated in the judgment in the Energy Watchdog Case passed by the Hon'ble Supreme Court was with regard to the interpretation of the contractual provisions of the PPAs i.e. whether the impact of Indonesian Regulations is covered under the provisions of Change in Law or Force Majeure in the PPAs. Hon'ble Supreme Court in the Energy Watchdog Case held that Indonesian Regulations are neither covered under Change in Law nor under Force Majeure in terms of the provisions of the PPAs. However, in the present case, Government of Gujarat constituted the HPC to find solution in respect of power supply by the imported coal based projects to the Procurer States. Before implementing the recommendations of the HPC which includes effecting certain amendments to the PPAs, the Government of

Gujarat found it prudent to seek a clarification from the Hon'ble Supreme Court in view of the concerns raised by the Consumer Organizations, namely, Energy Watchdog and Prayas that any amendments to the PPAs will be contrary to the judgment of the Hon'ble Supreme Court in Energy Watchdog Case. Accordingly, Applications seeking clarifications to this effect were filed by the Government of Gujarat and Petitioner herein before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court vide its order dated 29.10.2018, after perusing the HPC report, clarified that it would be open to the applicants (Petitioner herein) to approach the Central Electricity Regulatory Commission for approval of the proposed amendments to be made to the PPAs in question. Accordingly, the Petitioner has filed the present Petition seeking approval for the proposed amendments to the PPAs as contained in the Supplemental PPAs dated 5.12.2018. Therefore, the scope of the present petition is the amendment of the PPAs in pursuance to Article 18 of the PPAs. Considering the clarification by the Hon'ble Supreme Court that judgment in the Energy Watchdog Case would not stand in the way of maintaining the application for amendment of the PPAs, we are of the view that the present petition seeking approval for the proposed amendments to the PPAs shall be decided on the facts of the case, and the judgment in Energy Watchdog Case of the Hon'ble Supreme Court is not a barrier to the Commission for evaluating the proposed amendments and allowing the same, if it is found to be in public interest.

46. On the second objection, the Consumer Groups have submitted that the proposals contained in the proposed amendments converts the project, which should maintain the characteristics of Tariff Based Competitive Bid Process under Section 63 of the Electricity Act only to a hybrid of Sections 62 and 63. Wherever Project Developer

has claimed hardship, actual cost is being considered under Section 62, which is outside the scope of Section 63. The Consumer Groups have submitted that there is no legislative sanction to such a hybrid scheme of tariff determination under the Electricity Act, 2003. It is submitted that the parliamentary intention behind Section 63 is to keep tariff based competitive bid process independent of tariff determination under Section 62 as Section 63 of the Act provides for Non obstante clause qua Section 62 of the Act.

47. In our view, the above objection of the Consumer Groups does not have any merit. Article 18 of the PPAs provides for amendment of the PPAs through the mutual agreement of parties with the approval of this Commission. In furtherance of Section 63 of the Act, the Central Government has issued the competitive bidding guidelines dated 19.1.2005 and subsequently has issued the Standard Bidding Documents which included the model PPA. As per the said guidelines, the Procurers, in this case GUVNL, furnished to the bidders the Model PPA along with the RfQ/RfP. The said model PPA contained a provision for amendments of PPA, if so agreed by the parties and approved by this Commission. Accordingly, PPAs dated 6.2.2007 and 2.2.2007 entered between the Petitioner and Respondent No. 1 contained a specific provision being Article 18.1 allowing the parties to amend the PPAs with the approval of the appropriate Commission. Therefore, the provisions for amendment of the PPAs flow from Competitive Bidding Guidelines issued under Section 63 of the Act. Hon'ble Supreme Court in Energy Watchdog Case has observed that "in a situation where the guidelines issued by the Central Government under Section 63 covers the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines." Since the PPAs

contain provisions for amendment, the same can be given effect to if the parties agree to amend the provisions of the PPAs and this Commission approves the same. It is pertinent to mention that Article 18.1 of the PPAs provides that “this Agreement may only be amended or supplemented by a written agreement by the parties”. Thus, the provisions for amendment of the PPAs apply to all provisions including the provisions for determination of capacity charge and energy charge. Therefore, if the parties to the PPAs agree to a different tariff structure through Supplemental Agreement, the same shall be given effect to with the approval of the Commission. However, in terms of the judgment in Sasan Case, the Commission while approving such amendment shall have to be guided by consideration of public interest. In our view, amendment of the PPAs by the parties to prescribe a different tariff structure for energy charge is in terms of Article 18.1 of the PPAs and cannot be termed as tariff determination under Section 62 of the Act.

Issue No.2: If the answer to the first issue is in affirmative, then what are the principles to be kept in mind by the Commission while approving or disallowing such amendments?

48. The Petitioner has submitted that while approving the proposed amendments, the Commission needs to consider if the said amendments are in public interest. The Petitioner has submitted that the rehabilitation scheme of the Government of Gujarat is being implemented in larger public interest, so that the project is revived and sourcing power from alternate expensive source is avoided. Besides, the Petitioner has urged the Commission to take cognizance of the Policy directives contained in the GR dated 1.12.2018 to ascertain whether the proposed amendments are in public interest. The Petitioner has submitted that to the extent the rehabilitation package is implemented

through the policy decision of the Government of Gujarat taken in larger public interest, the Commission should approve the proposed amendments to the PPAs dated 6.2.2007 and 2.2.2007 as have been allowed in the cases of SHAKTI scheme.

49. The Petitioner has submitted that perusal of the GR dated 1.12.2018 shows that the Government of Gujarat has deliberated on all recommendations of the HPC in detail against the background of the existing and emerging power scenarios in the State of Gujarat. The said deliberations in the GR are extracted in para 9 above and are not repeated herein for the sake of brevity. The Petitioner has relied upon the following judgments of the Hon'ble Supreme Court and has submitted that the said judgments lay down the principles for adjudication and scope for interference by a Court of Law in Policy Decisions of the Government in larger public interest:

(i) Netai Bag and Ors -v- State of West Bengal and Ors (2000) 8 SCC 262;

(ii) Sachidanand Pandey and Anr -v- State of West Bengal and Ors (1987) 2 SCC 295;

(iii) Krishnan Kakkanth -v- Government of Kerala & Ors (1997) 9 SCC 495;

(iv) Arun Kumar Agarwal -v- Union of India & Ors (2013) 7 SCC 1; and

(v) Delhi Science Forum & Ors -v- Union of India and Anr (1996) 2 SCC 405.

The Petitioner has submitted that as per the principles laid down in the above judgments, the Government is entitled to make pragmatic adjustments and policy decisions which may be necessary or called for under the prevalent peculiar circumstances. Further, the Courts cannot strike down a policy decision taken by the Government merely because an alternative decision would have been fairer or wise or more scientific or logical. Unless the policy decision is demonstrably capricious or

arbitrary and not informed by any reason whatsoever or suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down.

50. The Petitioner has submitted that tested on the aforesaid principles, the policy decision of the Government of Gujarat taken in the larger public interest to salvage the project in question involves carrying out certain amendments to the PPAs after obtaining the necessary approval from this Commission and should not be interfered with. The Petitioner has submitted that the contention of the Consumer Groups in their replies and during the course of arguments questioning merits of some of the aspects of the policy decision in isolation is not a correct approach. According to the Petitioner, the settled position of law is that a policy document needs to be read as a whole as various components of a policy are inter-linked and balanced. Reading each component in isolation would present a distorted picture. The Petitioner has submitted that the HPC recommendations have been finely balanced with the intention of resolving the financial and cash flow mismatch issues being faced by the projects in a sustainable manner and avoiding the requirement of purchasing expensive power from alternative sources. Further, the Policy Decision contained in the GR dated 1.12.2018 envisages that the proposed re-structuring will result in making the projects financially self-sustaining in their operations, while at the same time requiring the developers to absorb all the past accumulated losses and also take financial haircuts in the future operations of the projects. The Petitioner has submitted that Policy GR dated 1.12.2018 of Government of Gujarat accepting the recommendation of HPC is in the larger public interest.

51. The Petitioner has submitted that the proposed amendments are in the interests of the consumers, since non-availability of power from APMuL will result in the Petitioner not only incurring higher cost for procuring power from alternative sources thus burdening the consumers, but also not being able to provide uninterrupted power supply to the consumers. Continuous availability of such quantum of power from alternate sources is uncertain and the process of procurement is time consuming. The HPC has carried out detailed consultative process and has also analysed the circumstances and facts associated with the issue and the HPC has considered submissions by all stakeholders, namely, Developers, Procurers, Lenders as well as the Consumer Groups. The consultative process undertaken with the diverse stakeholders has been enumerated in Chapter VI of the HPC report. The HPC at para 7.1 of the report has clearly noted that “only a mechanism which results in savings to the consumers in the long run is to be considered”. Further, the HPC in Chapter VII titled “Public/Consumer interest involved in salvaging these projects”, particularly in paras 7.3.2, 7.4 and 7.5, has also analysed various aspects such as importance of these projects and reliability, impact of shutting down these projects on DISCOMS and end consumers, Lenders and State Government. The Petitioner has submitted that keeping in view the consumer interest, the Petitioner and the APMuL have mutually agreed and signed the Supplemental PPAs on 5.12.2018 pursuant to and consistent with the policy decision of the Government of Gujarat contained in GR dated 1.12.2018. The Petitioner has submitted that the amendments proposed are in the interest of State and the consumers.

52. APMuL has submitted that the Supplemental PPAs are aimed to subserve the interest of consumers for several reasons. Firstly, they ensure that the risks are equitably balanced by having minimal impact on the tariff, with accumulated losses to the account of power producers. Secondly, they allow consumers to avail the benefit of cheap power even beyond the initial contracted period of the PPA. There is no dispute that power from the project is amongst the cheapest for the procurer within its basket of power procurement sources. Thirdly, they facilitate a financially stressed asset to become financially viable, preventing bank loans from turning NPA and resulting in availability of cheap and reliable supply of electricity to the consumers. Fourthly, they ensure that GUVNL need not incur higher cost for replacement of its power, thereby burdening the consumers. Fifthly, they enable GUVNL to provide uninterrupted power supply to the consumers, considering the uncertainty regarding the availability of such quantity of power from alternate sources.

53. APMuL has submitted that the resolution framework underlying the proposed amendment of the PPAs is the outcome of a series of policy decisions and Expert Committee Reports, namely, GR of Government of Gujarat dated 3.5.2013, Deepak Parekh Committee Report of August 2013, Working Group Report of January 2018, Report of the High Power Committee dated 3.10.2018, GR of Government of Gujarat dated 01.12.2018. APMuL has submitted that the Supplemental PPAs which have been submitted for approval in the present petition, are flowing out of above multiple GRs and Reports and thus constitute an executive decision of the State under Article 162 of the Constitution of India. APMuL has further submitted that there is equitable sharing of the financial burden. While fuel cost pass-through is a mitigation against hardship arising

from the increase in coal price, consumers' interests have been safeguarded through financial re-structuring of the Project. APMuL has also submitted that as per the new Standard Bidding Documents, fuel cost is made a pass through for all future power procurements under Competitive bidding, keeping in view the risk associated with fuel. Availability of power from APMuL will benefit consumers immediately since the capacity charge of the project is competitive and in addition, a discount of 20 Paise/unit is now applicable. APMuL has submitted that the proposed scheme takes consumer interests fully into consideration and therefore meets the test as laid down in the judgment in the Sasan Power Case of the Hon'ble Supreme Court.

54. The Consumer Groups have argued that the stand taken by the Petitioner and the Project Developer in regard to the Policy Directive of the Government of Gujarat being binding on the Commission is misconceived, patently erroneous and is liable to be rejected for several reasons. Firstly, as per the Statement of Objects and Reasons of the Act, the objective of the Act is to distance the regulatory responsibilities from the Government to the Regulatory Commissions and to restrict the role of Policy decision of the Central Government and the State Governments with regard to regulatory responsibilities. Secondly, the functions of the Central Commission under section 79 of the Act have not been made in any manner subject to exercise of any power by the State Government. Thirdly, Section 107 of the Act vests the powers to issue Policy Directives to the Central Commission only with the Central Government and not with the State Governments. Fourthly, in matters of tariff, the Act envisages that the Policy Directive should not interfere with the tariff determination even by the State Commission as is evident from Section 65 of the Act where the State Government can grant subsidy

but cannot direct State Commission to subsidise. Therefore, the State Government cannot direct subsidisation of a generating company without giving similar subsidy to the concerned distribution company. Thus, the domain in regard to the tariff of the electricity utilities is entirely with the Appropriate Commission and not with the Appropriate Government. The very objective of distancing the Government from the tariff determination process will be rendered redundant if the interpretation of the Petitioner and the Project Developer in regard to the Policy Directive of the Government of Gujarat being binding on this Commission is accepted. Even otherwise, the Policy Directive issued by the State Government to the State Commissions in the matter of tariff are not binding as has been held by the Appellate Tribunal in Polyplex Corporation Limited v Uttarakhand Electricity Regulatory Commission and Others [(2011) ELR APTEL 195]. The Consumer Groups have also submitted that the various judgments relied on by the Petitioner are distinguishable and have no relevance at all to the present case. These judgments deal with the decisions made by Government and Government Authorities when they have the authority to take such decision and judicial review of such decisions by the Hon'ble High Courts in exercise of writ jurisdiction. These decisions cannot apply to situations where the decision making authority is the regulatory commission and the Government is giving directions to the Commission to decide the matter in a particular manner. The Consumer Groups have submitted that the issue whether the amendment should or should not be allowed to the PPAs as sought for by the Petitioner and supported by the Project Developer is entirely within the scope and functions of this Commission and need to be exercised by the Commission in accordance with the settled principles of law.

55. We have considered the submissions of the Petitioner, APMuL and Consumer Groups. We have concluded with respect to Issue No.1 that this Commission has the power and authority under law to decide whether the proposed amendments to the PPAs meet the overall test of public interest and consumer interest and decide whether the proposed amendments should be accepted or not. This is abundantly clear from the judgment of the Hon'ble Supreme Court in the Sasan Case. The relevant portion from para 31 of the said judgment is extracted below:

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

56. The Consumer Groups have vehemently argued that the proposed amendments are not in public interest and have submitted that rather they are against public interest. In support of this argument, they have made following submissions:

- (a) The proposed amendments would increase the retail tariff and hence against consumer interest;
- (b) The Policy GR of the Government of Gujarat and the process followed by the HPC is not transparent and has not taken the legitimate concerns of the stakeholders, especially the consumer groups into consideration.
- (c) The hardship of the project developers de hors the interest of the consumers cannot be considered at all.

(d) The course adopted by the HPC is flawed and not in larger public interest.

According to the Consumer Groups, consumer interest would be better served if the project is offered to another party after a transparent process under the IBC and the existing promoter is allowed to exit the management. This will be the appropriate course of action and shall be in accordance with the objects and reasons for which the IBC had been enacted. The course suggested by HPC avoids the IBC process.

(e) The HPC has erred in assuming that the project developer needs to be bailed out since paying higher price to a corporate entity for its inability to manage its business risks is different from paying higher price in the event the corporate entity is liquidated and the undertakings are vested in a new party.

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

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

Further, in the case of Raunaq International Limited Vs I.V.R Construction Limited [(1999) 1 SCC 492], Hon'ble Supreme Court has dealt with the basic elements of public interest while dealing with commercial contracts as under:

“10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly

interested in the timely fulfillment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work — thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.”

In the case of Bihar Public Service Commission Vs Saiyad Hussain Abbas Rizwi [(2012) 13 SCC 61], Hon’ble Supreme Court has held that “public interest would mean the general welfare of the public that warrants recommendations and protection. It is something in which public as a whole has a stake.”

58. Public interest is one of the cornerstones of the Electricity Act, 2003 and one of the focal points of the Tariff Policy. It will be appropriate to extract some of the relevant provisions:

(i) Sections 61 (b), (c), (d), (g) of Electricity Act, 2003 are extracted as under:

“Section 61 (Tariff regulations):

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

- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
-
- (g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;”

(ii) Relevant provisions of the Tariff Policy are extracted as under:

“1.3 It is therefore essential to attract adequate investments in the power sector by providing appropriate return on investment as budgetary resources of the Central and State Governments are incapable of providing the requisite funds. It is equally necessary to ensure availability of electricity to different categories of consumers at reasonable rates for achieving the objectives of rapid economic development of the country and improvement in the living standards of the people.

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

“4.0 OBJECTIVES OF THE POLICY

The objectives of this tariff policy are to:

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

59. Therefore, the scope of public interest has to be derived from the provisions of the Act as well as the Tariff Policy. The provisions of the Act and Tariff Policy not only emphasise on competition, efficiency, economical use of resources and optimum investment but also balancing the interest of consumers and project developers so as to ensure financial viability of the sector as well as ensuring availability of electricity to consumers at reasonable and competitive rates. Thus, proper definition and evaluation of public interest cannot be undertaken in vacuum or in theoretical terms and certainly not merely from a uni-dimensional perspective of looking only at tariffs applicable to consumers. In this context, the relevant portions of the judgment of the Appellate Tribunal dated 28th September 2015 in Appeal No. 198 of 2014 are extracted below:

“48. It was contended by Mr. Ramachandran, learned counsel for the Appellant that the Electricity Act focuses attention on consumer interest. It is the consumer who has to be

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

60. Therefore, the Commission as a regulator has to balance the interest of the Consumers and Project Developers. The Petitioner has submitted that the Government of Gujarat in the GR dated 1.12.2018 has taken the policy decision to rehabilitate the stressed imported coal based power projects in public interest and such policy decision should not be interfered with in the light of the legal principles laid down in a catena of judgments. The Petitioner has relied upon the following judgments in this connection:

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

"19. Though the State cannot escape its liability to show its actions to be fair, reasonable and in accordance with law yet wherever challenge is thrown to any of such action, initial burden of showing the prima facie existence of violation of the mandate of the Constitution lies upon the person approaching the Court. We have found in this case, that the appellants have miserably failed to place on record or to point out to any alleged constitutional vice or illegality. Neither the High Court nor this Court would have ventured to make a roving inquiry particularly in a writ petition filed at the instance of the erstwhile owners of the

land, whose main object appeared to get the land back by any means as, admittedly, with the passage of time and development of the area, the value of the land had appreciated manifold....

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

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

“37. In *Kasturi Lal Lakshmi Reddy v. State of J.&K.* [(1980) 4 SCC 1 : AIR 1980 SC 1992 : (1980) 3 SCR 1338] Bhagwati, J. (as he then was) again, speaking for the court reiterated what he had said earlier in *R.D. Shetty v. International Airport Authority* [(1979) 3 SCC 489 : (1979) 3 SCR 1014 : (1979) 2 LLJ 217]. He proceeded to say: (SCC p. 13, para 14)

“The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the court would have to decide whether the action of the Government is reasonable and in public interest. But one basic principle which must guide the court in arriving at its determination on this question is that there is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and therefore the court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the court under the Constitution to invalidate the governmental action.”

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

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

37.The law is well settled that even in the matter of grant of largesse, award of job contracts etc, the Government is permitted to depart from the general norms set down by it, in favour of particular group of persons by subjecting such persons with different standard or norm, if such departure is not arbitrary but based on some valid principle which in itself is not irrational, unreasonable or discriminatory [Dayaram Shetty's case].

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

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

61. We note that these decisions are in the context of judicial review of the Policy Decisions of the Government. The above judgments lay down the principles for testing the legality of the policy decisions taken by the Governments in the course of exercise of their decision making power. These principles nevertheless can be the touchstones

on which it can be tested whether the proposed amendments to the PPAs are in public interest or not.

62. There is no shred of doubt that GUVNL and the distribution companies which receive supply of electricity from GUVNL are owned by the Government of Gujarat. Therefore, Government of Gujarat carries a basic responsibility to ensure that GUVNL is able to purchase power at reasonable price and supply to the distribution companies in such manner that consumer tariff remains competitive and consumers get supply of uninterrupted and reliable power. According to GUVNL, it meets about 45% of its requirements by purchasing powers from the three generating companies including APMuL. As the increase in imported coal prices from Indonesia has rendered these projects financially unviable to supply power at the competitively bid prices, the Government of Gujarat took the initiative for rehabilitation of these projects and in that direction, constituted the HPC to consider all aspects and give its recommendations. Government of Gujarat, after analyzing the recommendations, has accepted certain recommendations without modification, some recommendations with modifications and rejected certain recommendations and has issued the Policy Directives through GR dated 1.12.2018. In the light of the said policy directives, the Supplemental PPAs have been entered into between the Petitioner and APMuL. In the present petition, the Supplemental PPAs have been submitted for approval under Article 18.1 of the said PPAs.

63. We are of the view that the recommendations of the High Power Committee and the Policy Directives of the Government of Gujarat in the GR dated 1.12.2018 are necessary inputs to decide whether the proposed amendments to the PPAs are in

public interest. Therefore, it has to be examined whether the proposed amendments are indeed in public interest and relevant considerations have gone into to protect and sub-serve the public interest.

Issue No.3: Whether the proposed amendments to the PPAs fulfill the aforesaid principles and to what extent, if at all, this Commission should consider and approve the proposed amendments to the PPAs?

64. The policy directives contained in the GR dated 1.12.2018 of Government of Gujarat flows from and adopts the recommendations of the HPC contained in its report dated 3.10.2018. It is pertinent to mention that the said HPC report, in Chapter VII, deals with “public/consumer interest involved in salvaging these projects”. HPC has deliberated upon:(a) the importance of the projects; (b) the impact of shutting down these projects on the distribution companies and end consumers; and (c) the impact of shutting down these projects on lenders, State Government, generators, transmission system etc. The conclusions of the HPC report regarding public/consumer interest, has been adopted and reiterated by the Government of Gujarat in the policy direction contained in the said GR dated 1.12.2018. The relevant portions of GR dated 1.12.2018 are extracted below:

“Thereafter, the government deliberated on all recommendations of the HPC in detail against the background of the existing and emerging power scenarios in Gujarat:

- Gujarat has a share of 4805 MW from these three projects in question, which contribute around 45% of its total energy requirement. Having the highest share of power from these projects Gujarat is the most affected State. The State grid is already facing low voltage issues in the Saurashtra and Kutch areas and the discontinuation of supply from these projects located in Kutch area would have further adverse ramifications on the quality of power and the power supply position.
- These projects are based on advanced technology, are efficient in operation and have a higher priority in the Merit Order scheduling.

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

It is pertinent to note that the HPC's recommendations are premised on serving the consumer interest and the HPC while undertaking the analysis and making the recommendations in the Report has the 'consumer interest' paramount and this has been the focal point of the approach of the HPC.

The government took note of the conclusions drawn by the HPC and concurs therewith in essence:"

65. It is also noteworthy that the Hon'ble Supreme Court has, in its order dated 29.10.2018, in Misc Application 2705-06 of 2018 in Civil Appeal No. 5399-5400 of 2016, categorically stated as follows:

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

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

Thus, the aforesaid order was passed by the Hon'ble Supreme Court only after perusing the HPC report.

66. The question for consideration is whether the proposed amendments to the PPAs are in public interest. The Proposed amendments are based on the recommendations of HPC and Government of Gujarat GR dated 1.12.2018. The HPC report in Chapter VII has undertaken a very elaborate and detailed analysis of public interest based on objective data. Some of the extracts from the HPC report analysing and identifying the aspects of public interest are extracted below:

“7.3.2 Additionally, the criticality of these Projects is also evident from the following facts:

- Total installed capacity of the three Projects is 9970 MW which is almost double the installed capacity of State Generating Company in Gujarat which stands at 5516 MW

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

7.4 Price competitiveness of power produced from these Projects & Reliability

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

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

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

(Reference data provided by GUVNL)

Further, the MOD analysis for Gujarat on 9th August 2018 is as below:

Station	Capacity Allocated to State (MW)	Type of Station	Variable Cost (Rs./Unit)	Schedule (MWh)	% Cumulative Scheduled
Must Run					
Total Renewable	6637	Renewable		16936	5.9%
Total Hydro	240	Hydro		1580	6.5%
Total Nuclear	824	Nuclear		7743	9.2%

Station	Capacity Allocated to State (MW)	Type of Station	Variable Cost (Rs./Unit)	Schedule (MWh)	% Cumulative Scheduled
Others					
ALTPS	250	Thermal	1.07	3010	10.2%
ACBIL	200	Thermal	1.12	4992	12.0%
SIPAT_1	509	Thermal	1.27	12214	16.3%
SIPAT 2-WR	257	Thermal	1.33	6175	18.4%
KSTPS 3-WR	90	Thermal	1.33	2085	19.1%
KSTPS-WR	336	Thermal	1.35	5697	21.1%
VTPS 2	225	Thermal	1.44	5406	23.0%
VSTPS 3	251	Thermal	1.44	6016	25.1%
VSTPS 4	226	Thermal	1.45	2713	26.1%
SLPP II	250	Thermal	1.47	5208	27.9%
SLPP -1	250	Thermal	1.48	2125	28.7%
VSTPS -5	88	Thermal	1.49	2091	29.4%
VTPS 1	209	Thermal	1.54	4643	31.0%
APL (MUNDRA) U-5-6	1000	Thermal	1.62	28704	41.1%
CGPL MUNDRA UMPP	1805	Thermal	1.87	30951	51.9%
EPGL	1200	Thermal	1.99	0	51.9%
APL (MUNDRA) U-1-4	1000	Thermal	2.01	28800	62.0%
KAHALGAON-II	133	Thermal	2.05	3209	63.1%
DHUVARAN CCPP-II (GSECL) ON GAIL(APM)	112	Gas	2.06	436	63.2%
KLTPS 4	75	Thermal	2.12	24	63.2%
KLTPS 1-3	215	Thermal	2.29	1468	63.8%
GANDHAR	231	Gas	2.29	1982	64.4%
GIPCL-I ON GAS – APM	42	Gas	2.33	144	64.5%
KAWAS GAS	182	Gas	2.34	749	64.8%
DHUVARAN CCPP II ON ONGC WO	112	Gas	2.56	40	64.8%
GAN_ NAPM	231	Gas	2.6	542	65.0%
KAWAS NAPM	182	Gas	2.62	257	65.1%
MAUDA-II	138	Thermal	2.89	9125	68.2%

Station	Capacity Allocated to State (MW)	Type of Station	Variable Cost (Rs./Unit)	Schedule (MWh)	% Cumulative Scheduled
CLPI ON CAIRN GAS	655	Gas	2.96	202	68.3%
MAUDA-I	226	Thermal	3	4215	69.8%
UTPS 6	500	Thermal	3.17	10531	73.5%
AMGEN DEF	362	Thermal	3.43	7060	75.9%
UTPS	850	Thermal	3.46	8270	78.8%
GTPS 5	210	Thermal	3.51	4227	80.3%
GTPS34	420	Thermal	3.74	7718	83.0%
WTPS_1_6	1260	Thermal	3.78	19811	89.9%
STPS 3&4	500	Thermal	4.02	5836	92.0%
Other Gas		Gas	4.94-7.49	22899	100.0%

(Reference Meritindia.in)

As seen from the table above, the APL, CGPL & EPGL thermal stations have their variable charge per unit in the range of Rs 1.62/unit to Rs. 2.01/unit which corresponds to a cumulative scheduling between 41% to 62%. The 75% cumulative scheduling corresponds to variable tariff of approx. Rs 3.43/unit while the last thermal plant scheduled had variable tariff of Rs. 4.02/unit (92% cumulative scheduling).

.....

7.4.7 From an analysis of the data of energy purchase and the corresponding variable cost provided by GUVNL, it is clear that even after considering the actual coal cost, the entire power from these Projects gets scheduled. Therefore, there is no question of lack of competitiveness of these Projects in future on account of pass through of increased energy charge. The Procurers and Consumers Representatives have also expressed similar views during the meetings of the HPC. It was also pointed out by one of the Consumer Representatives that the capacity charge under these PPAs is very competitive and therefore, the Discoms should not lose these PPAs.

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

7.5.1 These Projects fulfil almost 16-18% power requirement of the five States and it is not possible to replace such a high contribution spread-over entire Western Region by other alternatives. Even power exchange and other short-term markets put together are incapable of replacing these capacities. CGPL's TPP and Phase III & IV of APL's TPP are based on the supercritical technology and are more efficient. Even otherwise, these Projects are more efficient as compared to the older units installed by the State Generating Companies with SHR being lower by about 369 kcal/kwh and auxiliary consumption being lowered by 5.51%⁹. Collectively, there is a saving of almost 18.5% in fuel cost of electricity is generated from these Projects.

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

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

State/Utility	Requisitioned Capacity (MW)	Date of Bidding	Range of Tariff (Rs./kWh)	Average of Quoted Tariff (Rs./kWh)
Andhra Pradesh	2400	25.06.2015	4.23 – 6.31	5.06
Tata Power	400	04.09.2015	3.99 – 4.77	4.39
Telangana	1000	28.10.2016	4.15	4.15
Andhra Pradesh	1000	05.02.2016	4.44	4.44
Uttar Pradesh	3800	26.07.2016	3.94 – 4.63	4.2

- Short-term price (Power Exchange and market price) is also around Rs 4.00 per unit as detailed below:

Month	Volume of Electricity Transacted (MUs)			Wt. Avg. Price of Electricity Transacted (Rs./kWh)		
	Bilateral	IEX	PXIL	Bilateral	IEX	PXIL
May '18	5,170	4,916		4.17	4.76	
Apr '18	4,912	4,055	6	3.63	4.03	3.36
Mar '18	5,946	3,955	24	3.59	4.10	3.90
Feb '18	4,524	3,326	28	4.13	3.42	2.12
Jan '18	4,612	3,375		3.92	3.44	
Dec '17	4,714	3,108	2	3.60	3.25	3.38
Average	5,343	4,309	15	3.80	4.30	3.63

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

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

.....

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

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

Name of Company	Capacity (MW)	Project Cost (Rs Cr.)	Project Cost (Rs. Cr/ MW)
DB Power Limited	600	4,935	8.22
HNPCL	1040	8,580	8.25
Haldia Energy Limited	600	4,685	7.81
Damodar Valley Corporation	500	4,200	8.40
GMR Chhattisgarh Energy Limited	1370	11,642	8.50
Coastal Energen	1200	7,870	6.56
Mouda STPP Stage 2 (NTPC)	1320	8,190	6.20
Sloapur STPP (NTPC)	1320	9,395	7.12
Kudgi STPP Stage 1 (NTPC)	2400	15,166	6.32

7.5.8 A comparison of the average project cost of the above projects with average project cost of the Projects under consideration clearly demonstrates an increase of about 40%. Therefore, procurement of power from the new projects will entail approximately 40% higher capacity charge. Additionally, on account of the changes made in the new SBDs, there is complete pass through of fuel costs, which would result in higher variable charge and consequently result in higher tariff. Further, in view of higher gestation period for the new projects of around 4-5 years, and these new projects would not be readily available to cater the demand in short term unlike the Projects under consideration.”

67. The relevant portions of the GR dated 1.12.2018 of Government of Gujarat are extracted as under:

“It is pertinent to note that the HPC's recommendations are premised on serving the consumer interest and the HPC while undertaking the analysis and making the recommendations in the Report has the 'consumer interest' paramount and this has been the focal point of the approach of the HPC.

The government took note of the conclusions drawn by the HPC and concurs therewith in essence:

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

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

- (i) The capacities from these projects will have to be replaced from alternative sources and therefore, prices will further go up in view of the clear co-relation between demand and supply;
- (ii) The cost of replacement power at today's market price would be higher;
- (iii) Setting up new projects in any event will be more expensive and will take another 4-5 years to commence supply;
- (iv) Increase in cost on account of procurement of power from inefficient and old plants which would also have reliability issue,
- (v) Resorting to load shedding on account of difficulties associated with complete replacement of power from these projects; and
- (vi) Any insolvency or liquidation of these projects would hardly address the issues of power supply. "

In view of the above, the matter in respect of taking decisions for accepting the recommendations of the HPC, fully or partially and subsequent changes/ modifications/ amendments to the PPA(s) was under active consideration of the Government."

68. From the above, it emerges that the HPC has taken note of the fact that three projects including the project of APMuL contribute approximately 45% of the power requirement of GUVNL. Secondly, HPC has carried out an analysis to ascertain the importance of these projects and their position in the merit order despatch of the respective States. HPC has noted that based on the analysis of the data of energy purchase and corresponding cost provided by GUVNL, the entire power from these projects gets scheduled even after considering the actual coal cost. HPC has also

specifically noted that similar views were expressed by the Procurers and Consumer Groups during the meeting and one of the Consumer Representatives pointed out that the capacity charge under these PPAs being competitive, the Discoms should not lose these PPAs. Thirdly, HPC has also observed that since these three projects fulfill 45% of power requirement of Gujarat, it is not possible to replace such high contributions through alternatives including power exchange and other short term markets. HPC has further noted that when these projects were not available or partly available, GUVNL bought replacement power from spot market for fulfilling its requirement of electricity and during the period from March to June 2018, it had to purchase 6749 MUs from other sources at the average procurement price of Rs.4.30/kWh. In the GR dated 1.12.2018 also, Government of Gujarat has taken into consideration the analysis in the HPC Report and decided as under:

“It is pertinent to note that the HPC's recommendations are premised on serving the consumer interest and the HPC while undertaking the analysis and making the recommendations in the Report has the 'consumer interest' paramount and this has been the focal point of the approach of the HPC.

The government took note of the conclusions drawn by the HPC and concurs therewith in essence.”

From the above discussion, it is clear that the reason for going for the rehabilitation package by the Government of Gujarat based on the acceptance of the recommendations of HPC is to salvage these projects in the consumer interest, as it would be difficult to arrange for such quantum of power at competitive rates and even after granting the relief in energy charge, the tariff of the project is still competitive in merit order dispatch. On perusal of the HPC report and the GR dated 1.12.2018 as extracted above, we observe that public interest and consumer interest have been given

due consideration and weightage while working out the package for rehabilitation of the Projects.

69. As opposed to recommendations of HPC and directives in the GR to salvage the projects, the Consumer Groups have submitted that the plants should have been allowed to be referred to insolvency proceedings under the Insolvency and Bankruptcy Code, which is a statutory framework to deal with such stressed assets. They have further submitted that the recommendations of the HPC and the Supplemental PPAs have proceeded on the basis of a misplaced view that the process provided under the IBC needs to be avoided at all cost. Further, the HPC has failed to appreciate the important distinction, namely, paying higher price to a corporate entity for its inability to manage its business risks is different from paying higher price in the event the corporate entity is liquidated and the undertakings are vested in a third party. The Consumer Groups have submitted that the consequences of such referral to IBC would be acceptable to the consumers, even if it results in increase in tariffs. On the other hand, the Petitioner has submitted that the HPC Report has considered and evaluated the option of approaching the National Company Law Tribunal (NCLT) for resolution of the present issue. In its analysis, HPC has relied upon the findings of the Parliamentary Standing Committee on Energy (SCE) in its 37th and 40th Report and concluded that revival of the projects at this stage itself would prove to be more fruitful, as opposed to referring them to NCLT. Further, the Government of Gujarat has issued the Policy GR after duly considering the merits of the recommendations of the HPC Report. Therefore, the entire rehabilitation scheme as provided therein should be looked at in totality.

70. We note that HPC has deliberated in detail upon the consequences of referring the projects to NCLT and recommended against doing so, which has been accepted by Government of Gujarat. As a sovereign, the Government of Gujarat is entitled to make macroeconomic policies keeping in mind the economic scenario in the State including availability of reliable power. In furtherance of such authority and responsibilities, the Government of Gujarat vide GR dated 1.12.2018 has decided to rehabilitate these projects and not shut them down or interrupt their operations. In view of the stipulations laid down in various judgements of the Hon'ble Supreme Court quoted earlier, we are of the view that it will not be appropriate for this Commission to interfere with larger economic considerations factored in by the Government of Gujarat while issuing the GR dated 1.12.2018. We also take note of para 5.7.6 of the HPC report that states that even the lenders, who have the ultimate prerogative to refer the plants to NCLT, are not in favour of the IBC route. We, therefore, do not find any merit in the arguments of the Consumer Groups on this point.

71. In the light of the above discussion, we are of the view that Government of Gujarat has taken a policy decision through a package deal to rehabilitate the imported coal based stressed power projects located in the State in the larger public interest. Therefore, the various provisions of the Supplemental PPAs should be perceived and considered as a complete package instead of discussing individual components, else it may lead to distorted results. Having said so, nevertheless, we are examining some of the provisions of the Supplemental PPAs for which specific objections have been raised by the Consumer Groups.

(A) Effective Date

72. The Supplemental PPAs define “Amendment Effective Date” as under:

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

The Consumer Groups have submitted during the hearing that the Supplemental PPAs should be given effect to from the date of issue of order of the Commission. We have noticed that the effective date has been proposed by the HPC and the Government of Gujarat policy GR with effect from 15.10.2018. The rationale behind prescribing a fixed date has been elaborated in para 8.9.2 of the HPC report which has been accepted by the Government of Gujarat. The parties to the PPAs have explicitly agreed to the effective date as 15.10.2018 and the losses before that have been agreed to be absorbed by APMuL. In our view, having a definitive effective date is critical for the effective implementation of the rehabilitation scheme. This predictability in the effective date also ensures that the losses do not balloon any further thereby frustrating the entire rehabilitation exercise. At the same time, it also provides a degree of certainty to the procurer regarding supply of substantial quantum of power at reasonable rate and enables the procurer to undertake appropriate power procurement exercise. Since Government of Gujarat has accepted the effective date based on the recommendations of the HPC, we do not find any justification to interfere with the same.

(B) Rebate in Capacity Charge

73. In Clause 3.2.2 of the Supplemental PPAs, the Petitioner and APMuL have agreed to the payment of capacity charge as under:

Bid 01 PPA

“3.2.2 Capacity Charge for each Month shall be the Quoted Capacity Charge mentioned at Schedule 10 of PPA dated 6.2.2007 less 20 paise/kWh applicable upto Normative Availability of 80%. The Monthly Capacity Charge payment shall be made in accordance with Schedule 6 of the PPA dated 6.2.2007. This Capacity Charge shall be subject to reduction towards penalty for declaration of Availability lower than 90% as per Clause No. 3.2.5 of this Supplemental Agreement in addition to the penalty for declaration of Availability below Minimum Off-take Guarantee as per PPA dated 6.2.2007.”

Bid 02 PPA

“3.2.2 Capacity Charge for each Month shall be the Quoted Capacity Charge mentioned at Schedule 10 of PPA dated 2.2.2007 less 20 paise/kWh applicable upto Normative Availability of 80%. The Monthly Capacity Charge payment shall be made in accordance with Schedule 6 of the PPA dated 2.2.2007. This Capacity Charge shall be subject to reduction towards penalty for declaration of Availability lower than 90% as per Clause No. 3.2.5 of this Supplemental Agreement in addition to the penalty for declaration of Availability below Minimum Off-take Guarantee as per PPA dated 2.2.2007.”

HPC in para 10.5 of the Report has recommended solutions which entail undertaking financial and commercial restructuring which is based on the premise that the burden of hardships will have to be borne by all the stakeholders. One of the aspects of financial and commercial restructuring is the reduction of capacity charges on account of sacrifice by the lenders. As per the GR dated 1.12.2018 of Government of Gujarat, on account of the sacrifice by the lenders, the fixed cost @ 20 paise/kWh is to be reduced to the extent of normative availability of 80%.

74. Clause 3.2.5 of the Supplemental PPAs deals with normative availability and the provisions of incentives and penalty as under:

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

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

Illustration for computing additional penalty below 90% Availability declaration:

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

For avoidance of doubt, it is clarified that for all other purposes including passing on the discount of 20 paise/kwh, the Normative Availability shall continue to be 80%, as specified in the PPA. It is further clarified that for the purposes of determining the Incentives under the PPA on account of Schedule being higher than Normative Availability, the Normative Availability shall continue to be reckoned at 80% as per existing PPA. Conversely, provisions relating to penalty for lower Availability below Minimum Off take Guarantee for relevant period shall also continue to apply in accordance with the provisions of existing PPA.”

With reference to the query of Prayas, GUVNL in its affidavit dated 2.1.2019 has explained the working of penalty in respect of Bid-02 PPA at the actual availability of 88% and 70%.

75. Prayas has advocated that the increase in normative plant availability from 80% to 90% in all respects must be effected so as to reduce and spread the quoted capacity charges by spreading it over higher availability and thereby bringing down the per unit capacity charge from Re. 1 to 88 paise approximately. It has been further stated that higher availability should be applicable for all purposes specified in the PPAs, i.e. for recovery of capacity charges as well as for determination of incentives and disincentives. On the other hand, the Petitioner has submitted that the issue of increase of normative availability has been adequately dealt with by the HPC and correspondingly incorporated in Supplemental PPAs. The Supplemental PPAs state that the generator would be giving the benefit of higher availability to the procurer as the procurer would not have to pay capacity charges for availability beyond the normative availability of 80%. Further, the Supplemental PPAs clearly state that the provisions of the subsisting PPAs would continue to apply with regard to determining both incentives and penalty. The Petitioner has submitted that this is in furtherance of the mandate of the rehabilitation package which is to ensure that the generators do not incur further losses. The Petitioner has submitted that since the capacity charges are already being reduced by 20 paise per kWh, the normative availability has been kept at 80% only while ensuring that cheaper power, beyond the availability of 80% becomes available to the procurers. Further, no incentive is being given to the generator up to the availability of 85% in Bid 02 PPA.

76. We have considered the submissions as made above. As stated earlier, any provision has to be seen in totality by evaluating the related and consequential clauses in the PPAs and the Supplemental PPAs. The proposed amendments provide for a reduction of capacity charge by 20 paise per Kwh. As per the HPC Report, even the Consumer Groups have admitted that the fixed cost is quiet attractive. Even though payment of capacity charges has been pegged at achieving 80% of target availability, the generator is required to provide higher availability of 90% without any liability on the Procurer to make payment of additional capacity charge. However, if the cumulative availability in a contract year is less than 90%, the generator is required to pay a penalty at the rate of 10% of the capacity charge over and above the penalty provisions in the original PPA. The scheme seeks to balance the interest of consumers vis-a-vis the Project Developer as the Petitioner gets availability above 80% and upto 90% without having to pay additional capacity charge for such higher availability whereas in case of availability being lower than 90%, the Project Developer is required to pay the penalty at the rate of 10% of the capacity charge. We are of the considered view that normative plant availability at 80% as decided in the GR of 1.12.2018 and incorporated in the Supplemental PPAs, being part of the complete rehabilitation package through commercial and financial restructuring of the power project of APMuL, seems to be reasonable.

(C) Energy Charge

77. Article 3.2.3 of the Supplemental PPAs (Bid 01) deal with determination of energy charge 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:

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

Where:

AUX = Lower of actual or normative auxiliary energy consumption of 9% as specified in the Tariff Regulations as defined herein.

CVPF (as received basis) = Weighted Average Gross calorific value of coal in Kcal/Kg on as billed basis minus lower of (i) actual difference between GCV at loading port and unloading port or (ii) 72 Kcal/Kg towards loss of heat during transportation as per ISO 1928 (dated 1.6.2009)

ECR = Energy Charge Rate, in Rupees per kWh sent out.

GHR = Lower of actual or Gross station heat rate of 2340 in kCal per kWh as specified in the Tariff Regulations as defined herein.

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

DT = is discount in relation to Mining Profit as determined in Clause 3.3 of this Supplemental Agreement.

For the avoidance of doubt, this discount (DT) will be determined and applied only in respect of Energy Charge in respect of actual power generation for Contracted Capacity as specified in the PPA dated 6.2.2007 and in respect only of such proportion of the Capacity that pertains to Contracted Capacity linked to imported coal as Fuel.”

Bid-02 PPA has similar provision except different values relating to GHR and Aux which have been fixed at 2274/kCal/kWh and 6.5% respectively.

78. 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.

79. In the formula for calculation of energy charge, Gross Station Heat Rate (GSHR) of 2340 kCal/kWh or actual whichever is lower has been considered in case of Bid 01 Supplemental PPA. In case of Bid-02 Supplemental PPA, GSHR of 2274 kCal/kWh or actual whichever is lower has been considered. As regards Aux Consumption for Bid 01 PPA, the rate of 9% as per the CERC Tariff Regulations, 2009 (as on CoD of the Project) or actual whichever is lower has been considered whereas in case of Bid-02 PPA, the Aux Consumption of 6.5% as per the CERC Tariff Regulations, 2009 (as on CoD of the Project) or actual whichever is lower has been considered. In this connection, Prayas has submitted that the GSHR 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.

80. 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 CERC Tariff Regulations, 2009. As such, the Petitioner has taken due care to ensure that the lowest possible normative parameters are considered so as to protect consumer 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. The Petitioner has further submitted that while the Tariff Policy and the new Standard Bidding Documents provide for additional relief towards operating parameters with the age of the Plant, in the Supplemental PPAs, such relaxation was not extended to the

Respondent No. 1 and the operating parameters are fixed as per CERC Tariff Regulations, 2009 which were in vogue at the time of commissioning.

81. From the provisions of GSHR and Aux Consumption in Supplemental PPAs, we observe that lower of the actual and the normative GSHR and lower of the actual and normative Aux Consumption as specified in the CERC Tariff Regulations, 2009 has been reckoned for purposes of determination of energy charge rate. The suggestion of the Consumer Groups is to include a third benchmark, i.e. parameters as considered by the project developer while submitting bids. However, these are Case 1 bids and the bid criteria included quoted capacity charge and quoted energy charge. The GSHR was neither a bid criteria for evaluation, nor is there any reference to GSHR in the PPAs, for the purpose of calculation of energy charge. 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 to the normative GSHR contained in the CERC Tariff Regulations, 2009. As regards the submissions of Consumer Groups for applicability of the prevalent Tariff Regulations for determination of GSHR and Aux Consumption, it is noted that the Tariff policy and Standard Bidding Documents provide for additional relief in operating parameters with the age of the Plant, whereas in the Supplemental PPAs, such relaxation has not been extended to APMuL and therefore, the operating parameters are fixed as per CERC Tariff Regulations, 2009 which were in vogue at the time of commissioning of the project.

(D) General Principles for determination of LPPF

82. Energy Charge in the Supplemental PPA is dependent on the condition of LPPF. LPPF consists of “FoB cost of coal” and “transportation and other costs”. Relevant provisions are extracted as under:

FOB Cost of Coal	<p><u>FOB Price for Imported Coal:</u></p> <p>Shall be the lower of actual price or the HBA Price (as defined hereinafter) determined in Indian Rupees at Exchange Rate. In case of change in pricing framework in Indonesia or change in source of coal to other country, HBA Price will be replaced with relevant coal indices as mutually agreed.</p> <p>“HBA Index” shall mean the FOB Price of Indonesian imported coal having 6322 kcal/kg Gross Calorific Value in USD/ MT notified by Government of Indonesia on monthly basis.</p> <p>“HBA Price” shall mean the HBA Index FOB price of Indonesian imported coal published by Government of Indonesia from time to time for coal quality of 6322 Kcal/Kg, as adjusted for GCV (as billed) of coal consignment consumed in the Project as per the formula as stated in Annexure-A. Further, tolerance of maximum 10% over HBA price derived for a quality of coal shall be allowed. HBA price + maximum 10% tolerance shall not be higher than HBA coal price worked out on proportionate basis with reference to HBA Index. This tolerance of 10% of HBA price shall not be allowed for coal procured from mines owned by Seller/ its Affiliates.</p> <p>The actual FOB price of coal shall always be subject to an upper ceiling limit of HBA Index of USD 110/MT for 6322 Kcal/Kg ascertained on a monthly basis, adjusted for quality of coal (GCV as billed) in the Project and as revised from time to time in accordance with this Supplemental Agreement (the “Ceiling Price”). This has been explained in greater detail in sub para (II) Specific Conditions herein below.</p> <p>Illustrations: For determination of equivalent Coal Price for working out Landed Cost of imported coal for the Month:</p> <p>The lower of following for the month shall be considered:</p>
-------------------------	--

	<p>(a) Actual FOB price of consignment</p> <p>(b) HBA Price worked as per formula for billed GCV plus maximum 10% tolerance on HBA Price (10% tolerance not allowed for coal procured from mines owned by Seller/ its Affiliate)</p> <p>(c) HBA Price worked out on proportionate basis with reference with HBA Index for 6322 GCV coal</p> <p>Note: HBA Price for billed GCV shall be worked out (on proportionate basis and as per formula) considering ceiling of HBA Index of USD 110/MT or as revised as per sub para (II) Specific Conditions of this Supplemental Agreement.</p>
<p>Transportation and other costs</p>	<p><u>Ocean Freight & Insurance</u></p> <p>The Ocean Freight and Insurance shall be lower of actual or as stated in Annexure- B and calculated in Indian Rupees, at Exchange Rate.</p> <p><u>Port/ Fuel Handling Charges:</u></p> <p>The Port/ Fuel Handling Charges shall be lower of actual or as stated in Annexure – B</p> <p><u>Transit Losses:</u></p> <p>Actual or 0.2%, whichever is lower</p> <p><u>Other Charges (Sampling, Inspection, Customs clearance and Forwarding Agency Charge):</u></p> <p>Actual or 3% of CIF, whichever is lower- Seller to tie up services (Sampling, Inspection, Customs clearance and Forwarding Agency Charge) through competitive bidding with approval of tender documents from Procurer & seek approval of discovered rate from Procurer</p>

83. As per the above provisions, FOB price of imported coal for a month shall be lower of (i) actual FOB price of the consignment; (ii) HBA price worked out as per formula for billed GCV plus maximum 10% tolerance on HBA price and (iii) HBA Price worked out on proportionate basis with reference to HBA Index for 6322 GCV coal considering ceiling of HBA Index of USD 110/MT or specific conditions at sub-para (II) and determined in Indian Rupees at Exchange rate. In case of change in pricing

framework in Indonesia or change in source of coal to other country, HBA Price will be replaced with relevant coal indices as mutually agreed.

84. Prayas has submitted that the Supplemental PPAs have an arbitrary clause for allowing upto 10% increase over and above the HBA price for a derived GCV of coal. There is no reason or justification for such tolerance, since the relief is essentially for coal procured from Indonesia. If the project procures coal from any country other than Indonesia, no relief is applicable. Hence, the tolerance limit of 10% over and above the Indonesian HBA price should not be allowed. This is particularly when even HPC Report does not have any provision for such tolerance limit. In its submission filed on 2.1.2019, GUVNL has provided an illustrative calculation of the computation of the ceiling price for 5200 GCV & 4500 GCV coal quality. The same is produced below:

	Particulars	5200 Kcal / Kg	4500 Kcal / Kg
A	HBA as per formula	77.76	63.97
B	HBA as per formula + 10% thereon (USD/ MT)	77.76 + 7.78 = 85.54	63.97 + 6.40 = 70.36
C	HBA on proportionate basis (110 / 6322 * 5200/4500 (USD/ MT)	(110 / 6322)*5200 = 90.48	(110 / 6322)*4500 = 78.30

Prayas has submitted that when the ceiling is calculated without the 10% mark-up, it is lower than the calculation in Row C by around 16% for coal with GCV of 5200 kcal/kg and 22% in case of coal with GCV of 4500 kcal/kg. Prayas has further submitted that in order to minimise the cost impact on consumers, the ceiling should be computed as per the HBA formula without the 10% mark-up.

85. The Petitioner has submitted that the Supplemental PPAs stipulate tolerance of 10% over HBA price derived with adjustments of not only proportionate GCV but also adjustments on account of moisture, Ash and Sulphur. Quality adjustment formula for moisture, Ash and Sulphur has been discontinued by the Indonesian Government since more than one and half years. Currently, trades are taking place at a premium over the HBA prices duly adjusted for quality of moisture, Ash and Sulphur. In any case, HBA price + 10% tolerance is capped at HBA price worked out on proportionate basis with reference to HBA Index. Thus, HBA price as per supplemental PPAs shall be always equal to or less than HBA price worked out on proportionate basis with reference to GCV. The Petitioner has submitted that since the procurer is involved at every stage of procurement of imported coal through tendering process, the apprehensions of the Consumer Groups in this regard are without any basis and does not deserve any consideration.

86. We have considered the submissions on the issue. We note that the tolerance limit is for the specific purpose of quality control after taking into account the prevalent trade practices in imported coal and is therefore, not allowed in case of coal imported from the mine of the Project Developer or its Affiliates. Clause 3.2.4 of the Supplemental PPAs clearly provides that "HBA price + maximum tolerance shall not be higher than the HBA coal price worked out on proportionate basis with reference to HBA Index." Therefore, the HBA price as per the Supplemental PPAs shall always be equal to or less than HBA price worked out on proportionate basis with reference to HBA index. Further, the FOB price of imported coal for the month shall be lower of (i) actual FOB price of consignment; or (ii) HBA Price worked as per formula for billed GCV plus

maximum 10% tolerance on HBA Price; or (iii) HBA Price worked out on proportionate basis with reference to HBA Index for 6322 GCV coal. Moreover, the Procurer is involved in the procurement process of imported coal as is evident from the provisions of Clause 3.2.4 (II)(c) of the Supplemental PPA as extracted below:

“(c) Seller shall procure imported coal only through competitive bidding process after seeking approval of Procurer for Tender document and shall also seek approval of rate discovered from Procurer.”

In our view, the formulation in Supplemental PPAs as regards LPPF takes care of the interest of the consumers, especially when the Petitioner will be involved in the procurement process of imported coal by APMuL.

87. As regards the “transportation and other charges”, Prayas has submitted that ocean freight and Port/Fuel Handling has been considered as per lower of actuals or rates at Annexure B of Supplemental PPAs and there has been no consideration of the parameters assumed by the Project Developer. Further, there is no rationale for additional other charges i.e. sampling, inspection etc. which are part of port/fuel handling charges. In response, the Petitioner has submitted that the tariff quoted by APMuL has no breakup of Ocean Freight and Port Handling Charges. Therefore, while FOB is linked to the benchmark index, the other components Ocean Freight and Port Handling Charges are benchmarked to CGPL tariff which was finalized by PFC after negotiations at the time of Bidding. Even in these parameters, the consumer interest is safeguarded since the ocean freight payable as per the Supplemental PPAs is less than the Ocean Freight which was allowed by the Commission in the earlier proceedings.

88. We have considered the submissions of Prayas and the Petitioner. As regards the suggestion of Prayas that the bid parameters for ocean freight charges and Handling charges should be considered, we note that the Project Developer had quoted only capacity charges and energy charges without any break-up and therefore, there is no basis to consider the bid assumptions of Project Developer for the purpose of deciding the landed cost of imported coal in the present case. As regards the submissions of Prayas that sampling, inspection etc. which are part of fuel handling charges are part of Port/Fuel Handling Charges, we notice that Prayas has not given any basis for this assumption. In the Supplemental PPAs, the following arrangements for other charges have been provided for:

“Other Charges (Sampling, Inspection, Customs Clearance and Forwarding Agency Charge):

Actual or 3% of CIF, whichever is lower- Seller to tie up services (Sampling, Inspection, Customs clearance and Forwarding Agency Charge) through competitive bidding with approval of tender documents from Procurer & seek approval of discovered rate from Procurer.”

We are of the view that sufficient safeguard mechanism has been built through the involvement of the Petitioner in the procurement process. In any case, the charges claimed are as per actuals or 3% of CIF, whichever is lower. Prayas has not been able to point out any fault with the formulation which has been taken as per CGPL bid.

(E) Specific Conditions with regard to Energy Charge

89. The specific conditions for computation of FOB price of coal in the Supplemental PPAs are as under:

(II) Specific Conditions

- (a) The Ceiling Price for HBA Index will be fixed for 5 years at a time, with the first 5 year period commencing from the Amendment Effective Date and the

last such 5 year period ending on the Expiry Date even if the last period is less than 5 years. The Ceiling Price will be reset and recalibrated for the next five year period, as per the following methodology:

(i) If the HBA Price at any time during the relevant 5 year period, exceeds the Ceiling Price specified for the said relevant 5 year period, then the Ceiling Price for the subsequent 5 year period will be increased by a percentage factor equivalent to the percentage increase in domestic CIL coal price (FOR) for linkage coal (Average price of G-7 to G-14 grade of coal used for power generation), during the corresponding 5 year period. The principle is that the imported coal Ceiling Price should move in tandem with domestic coal price increase.

(ii) If the HBA Price does not at any time during the relevant 5 year period, exceed the Ceiling Price specified for the said relevant 5 year period, however, if the average HBA Price during the relevant five year period is higher than the average HBA Price during the immediately preceding five year period, the Ceiling Price for the relevant 5 year period shall be increased by a percentage factor equivalent to the lower of:

(x) the percentage increase in domestic CIL coal price (FOR) for linkage coal (Average price of G-7 to G-14 grade of coal used for power generation), during the 5 year period corresponding with the relevant 5 year period; or

(y) escalation in the HBA Index over the relevant 5 year period

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

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

(b) Seller agrees that in case HBA Index of Indonesian coal exceeds 110 USD/MT or Revised Ceiling Price as determined every 5 years, Seller shall bear the differential cost and continue to supply power under the PPA & Supplemental Agreement.

(c) Seller shall procure imported coal only through competitive bidding process after seeking approval of Procurer for Tender document and shall also seek approval of rate discovered from Procurer.”

90. Prayas has submitted that reset of ceiling price has been linked to domestic coal price increase, in certain conditions. During last five years from October 2013 to

September 2018, the increase in domestic price is around 35%. Therefore, the reset value of ceiling price would be \$ 110 increased by another 35% (domestic increase component) aggregating to about \$ 160 approximately which is absolutely excessive. There is no logic and justifications for keeping such provisions for allowing reset of ceiling price. Further, domestic coal prices in India are deregulated and do not reflect international coal prices and thus, have no direct connection with prices of imported coal. Prayas has further submitted that there should not be any resetting of ceiling price for at least 10 years from the date of Supplementary PPA becoming effective. After this 10 year period, there should be more realistic formulae to revise the ceiling price, if required. Prayas has submitted that the ceiling price being one of the most important mitigation factors, the same should be applied for the entire duration.

91. The Petitioner in its affidavit dated 2.1.2019 has given the illustration of resetting of ceiling price as under:

“i) HBA price any time in five years period say Oct 2018 - Sep 2023 is higher than 110 USD / MT considered in 2018, then the ceiling price for subsequent 5 years i.e. Oct 2023- Sep-2028 shall be increased by % increase in domestic coal price during Sep 2023 compared to domestic coal price of October - 2018 for G - 7 to G - 14 grade CIL coal since ceiling of USD 110 / MT is taken considering prevalent HBA rate. i.e. for e.g. if, during Oct 2018 - Sep 2023, the HBA exceeds 110 USD/MT at any time and the increase in domestic CIL coal price during Sept - 2023 in comparison Oct 2018 is say 10% (assuming weighted average CIL price for G - 7 to G - 14 coal upto railway siding is 2100 / MT in Oct-18 and it increases to Rs. 2310 / MT in Sept - 23) , then ceiling of 110 USD / MT shall be increased by 10% to arrive at the ceiling for Oct 2023- Sep-2028 and the ceiling would become 121 USD / MT.

ii) The second situation operates in case where HBA price during relevant 5 year period i.e. Oct 2018 - Sep 2023 does not increase beyond 110 USD / MT even once but the average HBA price during relevant period i.e. Oct 2018 - Sep 2023 is higher than the average HBA for previous 5 year period i.e. Oct 2013 - Sept 2018, then ceiling HBA of 110 USD / MT shall be increased by the % lower of (i) increase in CIL domestic coal price during 5 year period as above or (ii) average increase in % HBA price during Oct 2018 - Sep 2023 over Oct 2013 - Sept 2018.

e.g. The present ceiling is 110 USD / MT

Assuming the following:

Increase in CIL coal price is say 10% as above

Average HBA price during Oct 2013 - Sep 2018 is 75 USD / MT and during Oct 2018 - Sep 2023 will be say 90 USD / MT, the average increase in HBA price would be @ 20%.

Accordingly, the ceiling price for Oct 2023 - Sep-2028 would be 121 USD/MT (i.e. $110 + (110 * 10\%)$)

iii) In case the above two conditions does not arise in the period of Oct 2018 - Sep 2023, then the HBA ceiling of 110 USD / MT shall remain unchanged, i.e. the ceiling for the period from Oct 2023 - Sept 2028 shall remain at 110 USD / MT.”

92. A perusal of the relevant clause 3.2 in the Supplemental PPAs and the Illustration above reveals that the formulae provide for adequate safeguards to the procurer in the matter of procurement of imported coal. This is the ceiling price and the mechanism to link to the domestic coal price is to ensure that an unfettered fuel price pass through on account of volatility of imported coal price is not given to the generator. The generator continues to carry the fuel price risk in case the actual price goes above such ceiling price. The Commission does not find any ground to interfere in this formulation.

(F) Sharing of Mining Profits

93. Clauses 3.3.1 and 3.3.2 of the Supplemental PPAs deal with adjustment of mining profits as under:

“3.3.1 Notwithstanding anything to the contrary contained in the PPA, the Procurer shall, with effect from the Amendment Effective Date, be entitled to receive, and the Seller shall provide, a discount for pass through of the Mining Profits, determined in the manner set out herein below, subject to a floor as explained in Annexure C hereto.

"Mining Profit" shall mean the profit earned by the Seller and/or its Affiliate from the mining operations of the coal mines owned by it in Indonesia, proportionate to the quantum of coal being supplied from such owned mine, for operations of the Seller's

power generation Project in India or sold to third party and shall be computed in accordance with the methodology specified in Annexure - C

3.3.2 The discount equivalent to the Mining Profit shall be passed on by the Seller by way of reduction in the Monthly Bill issued by the Seller.”

94. Prayas has submitted that the floor price of Re. 0.05 per kWh for sharing of mining profits is low without any basis or rationale for such computation. Prayas has further submitted that the floor price of Re. 0.15/kWh suggested for mining profit for CGPL should be applied to the PPAs being considered in the present petition. It has been further submitted that the total quantum of the increased price for the coal exported by the mining company minus any additional taxes or royalties payable to the Indonesian Government is an extra income in the hands of the mining company and should be adjusted in favour of the Procurers towards reduction of the energy charge.

95. We find that the floor price recommended by the HPC and accepted by the Government of Gujarat in its GR is same i.e. 5 paise/kWh. If the actual Mining Profit is less than this floor price, then the generator would still be obliged to give this minimum discount. Prescribing a floor price is in consumer interest. Further, the Petitioner in its written submissions has submitted that the illustrations submitted by the Petitioner on 2.1.2019 based on specific request of Prayas indicates that mining profit is not restricted to 5 Paise/kWh which is only a floor price and it can go upto 14 Paise/kWh. Since the HPC has made a detailed exercise to arrive at the mining profits from the coal mines of APMuL and CGPL after taking into account all relevant factors and has suggested a floor price of 5 paise/kWh in case APMuL and 15 paise/kWh in case of CGPL, and the recommendations have been accepted by Government of Gujarat, we find no rationale to fix the floor price at 15 paise/kWh in case of APMuL as suggested by Prayas.

Further, as submitted by the Petitioner, there are adequate possibilities that the mining profit can go higher than floor price of 5 paise/kWh.

(G) Foreign Exchange Rate Variation

96. In the Supplemental PPAs, it has been mentioned that the FOB Price for Imported Coal shall be the lower of actual price or the HBA Price determined in Indian Rupees at Exchange Rate. Accordingly, Foreign Exchange Rate Variation has been factored in the energy charge as part of the package deal between the Petitioner and APMuL.

97. Prayas has submitted that Clause 4.3 of the Guidelines notified by the Central Government under Section 63 of the Act provides that the Exchange Rate fluctuation is to the account of the generator i.e. the Project Developer in this case. Prayas has further submitted that the status of the Guidelines viz-a-viz the powers of the Commission have been considered by the Hon'ble Supreme Court in Energy Watchdog Case and in para 20 of the said decision, Hon'ble Supreme Court has ruled that "it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used". Therefore, it is not permissible for anyone to act or plead or seek or allow any amendment to the PPAs contrary to the terms specified in the Statutory Guidelines. Prayas has further submitted that the Hon'ble Supreme Court has clearly held in Numaligarh Refinery Ltd. Vs Daelim Industrial Co. Ltd. [(2007)8 SCC] and Alopi Prasad Vs Union of India [AIR 1960 SC 588] that the Foreign Exchange Rate Variation cannot be a ground for granting any relief. The Consumer Group has also submitted that Hon'ble High Courts in Commissioner of Income Tax Vs Priyanka Gems [(2014) 367 ITR 575 (Guj) at para 32] and Cairn UK Holdings Limited Vs Director

of Income Tax [(2013) 359 ITR 268 (Delhi) at Para 29] have also dealt with the importance of prudence in hedging the foreign exchange risks. Prayas has also submitted that the Supplemental Agreements providing for the Exchange Rate Variation to be allowed to Project Developer which has the implication of allowing increase in tariff is not legal and is liable to be rejected as being contrary to law. In this connection, the judgments in India Thermal Power Ltd. Vs State of MP [(2000) 3 SCC 379], Adani Power Ltd. Vs Gujarat Electricity Regulatory Commission [(2016) 15 SCC 665] and BSS Projects (P) Ltd. Vs Government of India [2011 SCC Online AP 826] have been relied upon.

98. We have considered the submissions as noted above. FERV is defined as “Exchange Rate” in the supplemental PPAs. The Exchange Rate is used in the calculation of landed price of primary fuel (LPPF) which is the imported Indonesian coal in the present context. Furthermore, the Exchange Rate is also used in the determination of the Mining Profits which is being passed on to the procurer in the form of a discount in the energy bills, as specified in clause 3.3 of the Supplemental PPAs. Therefore, the Exchange Rate is used in the context of determination of LPPF and the discount on account of Mining Profits. In this connection, it is relevant to refer to paragraph 8.4.4 of the HPC report, which clearly states as under:

“... the fuel cost will be made fully pass through **on landed cost basis** and these Projects **will not have any margin/loss on account of fuel prices.**”

Further, in the GR dated 1.12.2018, Resolution (ii) clearly states as under:

“..... it is decided that the tariff will be adjusted considering **actual fuel cost** based on the superior of actual parameters or normative parameters as per the Regulation of the

Appropriate Commission subject to ceiling of HBA Index of 110 USD/MT for 6322 Kcal/Kg coal on monthly basis.”

99. Thus, in the HPC Report and GR of 1.12.2018, the objective of the rehabilitation package is to ensure that the fuel cost of imported coal is a pass through and that the generators are reimbursed the actual landed cost paid by them and nothing more or less than such actual landed cost. Therefore, the Exchange Rate is required to be used for calculation of such actual landed cost of Indonesian imported coal to ensure that no margin/loss accrues to the generators. In addition, the HPC report and the Government of Gujarat policy GR make it clear that while the procurers are assuming the risk on fuel cost, such pass through is not unfettered, as the fuel cost pass through is subject to a cap. Thus, certain residual risk remains with the generators in case the actual fuel price exceeds the prescribed caps. To enforce this obligation, the Exchange Rate has been used to ensure that the procurer does not pay higher than the actual landed cost of fuel and the generators are reimbursed the actual cost they incur subject to the cap on procurement of fuel.

100. The formula for calculation of LPPF is given at clause 3.2.4 of the Supplemental PPAs which provides that the FOB price for imported coal will be the lower of actual price or HBA price determined in Indian Rupees at Exchange Rate. Since the reimbursement of LPPF is to be made by the procurer in Indian Rupees at actual and on landed cost, it is logical that foreign currency charges are converted into Indian Rupees. Once it is accepted that the fuel price of imported coal will be reimbursed to the generator at actuals such that the generator does not make any margin or loss on the fuel price, then the only logical sequitur is that the charges have to be converted into Indian Rupees. The legal propositions and judgments cited by Prayas are not applicable

to the issue under consideration in this order. The judgment in Energy Watchdog case states that the Commission can exercise its regulatory powers consistent with Competitive Bidding Guidelines where they exist. The Consumer Groups have submitted that as per the Competitive Bidding Guidelines, the tariff should be designated in Indian Rupees and any foreign exchange risk shall be borne by the generator. This provision is applicable when the Seller is required to quote the tariff. In the present case, tariff has already been discovered through competitive bidding. However, on account of Indonesian Regulations, the Petitioner and APMuL have entered into Supplemental Agreements to make energy charge pass through including the FERV. Therefore, the provisions of Clause 4.3 of the Guidelines will not come on the way of making FERV a pass through in Supplemental Agreement. The PPAs are statutory contracts only to the extent the Guidelines are incorporated in the PPAs which is the finding in the India Thermal and BSS Projects cases cited above by the Consumer Groups. We find that clause 4.3 of the Guidelines relied upon by the Consumer Groups in support of its arguments relating to FERV, are not incorporated in the PPAs nor in the proposed Supplemental PPAs. Therefore, on the Consumer Groups' own arguments and contentions, it is clear that the PPAs do not provide for any restriction, statutory or otherwise, on amendment of the PPAs that permit FERV pass through. In Numaligarh Case, the Hon'ble Supreme Court has held that foreign exchange rate variation cannot be allowed in fixed price contract. In Alopi Pershad Case, Hon'ble Supreme Court held that sudden depreciation of currency is not covered under force majeure. These judgments are not applicable as the FERV is made a pass through as part of a complete package to rehabilitate the project through the mutual agreement between the Petitioner and APMuL.

101. Similar considerations and arguments would apply to the application of the Exchange Rate while calculating the Mining Profits. A perusal of the clauses 3.3 read with Annex C of the Supplemental PPAs makes it clear that the entire profits being earned by the mining company in relation to the coal committed for the power plant, will be passed on to the procurer in the form of a discount. Therefore, the Mining Profit has to be per force converted into Indian Rupees and this can be done only by applying the Exchange Rate.

102. The provision of Exchange Rate is usual and customary in cross border contracts where the ultimate quantification is to be done in a specified currency, in this case in Indian Rupees. The Commission is of the view that the provision brings predictability and avoids possible future disputes on the issue of fuel price to be paid to the generator in Indian Rupees and the quantification of discount on account of Mining Profit and therefore, finds no ground to interfere with the decision of Government of Gujarat.

(H) Untied Capacity offered to the Procurer

103. Clauses 3.4 of the Supplemental PPAs deal with untied capacity offered by APMuL in respect of both Phases of the Project. In respect of Bid 01 PPA, the Seller has offered 200 MW untied capacity (Units 1 to 4) which the Petitioner has agreed to purchase from the date of approval of the Supplemental PPA till the 25th anniversary of the commercial operation of Unit 4 and to that extent the contracted capacity would stand increased by such additional capacity. The energy charge for the additional contracted capacity shall be determined as per clause 3.5.3 of the Supplemental Agreement and the capacity charge for the additional contracted capacity shall be Rs.

0.9905/kWh being the levelised capacity charge for the balance term of the Bid 01 PPA. In respect of Bid-02 PPA, the untied capacity offered and agreed to be purchased is 234 MW and similar provisions have been made as in case of Bid-01 PPA except that the capacity charge for additional capacity is Re 1/kWh. In both cases, the capacity charge for the additional capacity is not subject to the discount of Rs.0.20/kWh and the energy charge shall not have the discount of mining profit.

104. Prayas in its reply dated 7.1.2019 has submitted that excess capacity offered should also be on the same terms and conditions. Prayas has further submitted that the need and appropriateness of the excess capacity needs to be evaluated in terms of the Procurer's overall demand and supply situation as well as cost effectiveness of other sources. The Petitioner in its rejoinder dated 16.1.2019 has submitted that the HPC Report, GR dated 1.12.2008 and the Supplemental PPAs form part of the diverse components of the rehabilitation plan and the same needs to be interpreted holistically in order to implement the same in larger public interest. APMuL in its written Submission has submitted that the current market rates are higher as demonstrated in the HPC report and APMuL is giving up its right to sell the excess capacity at higher rates. In our view, GUVNL is getting additional capacity of 534 MW under both PPAs as per the terms and conditions contained in clause 3.4 of the Supplemental PPAs. HPC Report in para 7.4.7 states as under:

"7.4.7 From an analysis of the data of energy purchase and the corresponding variable cost provided by GUVNL, it is clear that even after considering the actual coal cost, the entire power from these projects gets scheduled. Therefore, there is no question of lack of competitiveness of these Projects in future on account of pass through of increased energy charge. The Procurers and Consumer Representatives have also expressed similar views during meetings of the HPC. It was also pointed out by one of the

Consumer Representatives that the capacity charge under these PPAs is very competitive and therefore, the Discoms should not lose these PPAs.”

Therefore, the provisions of the Supplemental PPAs with regard to additional capacity do not require any interference.

(I) Extension of the term of the PPAs

105. Clause 3.5 of the Supplemental PPAs deal with the extension of the terms of PPAs beyond the contracted period of 25 years. The said provision in case of Bid-01 PPA is extracted as under:

“3.5 Extension of Term of the PPA

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

3.5.2 The Parties agree that the extension of the PPA as aforesaid, shall be on the same terms and conditions as contained in the PPA, subject to the following conditions in relation to the Extension Period

3.5.3 For the Extension Period, the Tariff shall be determined as follows:
"Extended Term Tariff" shall mean the sum total of Energy Charge & Capacity Charge as worked out for the Extended Term

Where:

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

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

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

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

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

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

Where:

AUX = Lower of actual or normative auxiliary energy consumption of 9% as specified in the Tariff Regulations as defined herein.

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

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

GHR = Lower of actual or Gross station heat rate of 2340 in kCal per kWh as specified in the Tariff Regulations as defined herein.

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

For the avoidance of doubt, the Capacity Charge for Extended Term shall not be subject to adjustment towards Rs. 0.20 / Kwh and Energy Charge for Extended Term shall not have discount for pass through of the Mining Profits as specified in Clause 3.3 of this Supplemental Agreement.

- 3.6 Notwithstanding anything to the contrary contained in the PPA, it is agreed between Parties that in the 10th Contract Year from the date of signing of this Supplemental Agreement, if Seller's Energy Charges for respective Contracted Capacity under this Supplemental Agreement is higher than marginal coal based thermal power stations having 50% schedule or immediate below, as the case may be, during the previous Contract Year under Merit Order of Procurer, Procurer shall have a right to terminate the PPA & Supplemental Agreement for the Contracted Capacity and / or Additional Contracted Capacity as defined above. In the event of termination pursuant to this clause, neither Party shall be liable for any damages or penalty of any kind to the other Party.
- 3.7 It is clarified that the provisions dealing with Change in Law under the PPA dated 06.02.2007 shall continue to apply including in respect of Additional Contracted Capacity. The impact of additional expenditure to be incurred towards compliance of

the Ministry of Environment, Forest & Climate Change Notification dated 7.12.2015 are not included in the tariff as per this Supplemental Agreement and any impact thereof on tariff and operational parameters shall be considered pursuant to approval of Appropriate Commission.”

Similar provisions have been made in respect of Bid-02 PPA except the GSHR and Aux which have been fixed at 2274 Kcal per kWh and 6.50% respectively.

106. It is evident from the above that the Petitioner has the discretion, and not the obligation to extend the term of the PPA by 10 years for the contracted capacity as per the tariff specified in the said Regulations.

107. The Prayas has submitted that the term of the PPAs should be extended from 25 years to 40 years and the tariff during the extended period should be on the basis of either the same capacity charges as on the last year of the original 25 year PPA, or on the basis of only the Renovation & Modernisation capital cost to be serviced during the extended period with O&M expenses, interest on working capital as per the then applicable Tariff Regulations of the Commission and incentive and disincentive at 90% target availability. The Petitioner has submitted that HPC in its report has recommended that the PPA tenure may be extended by 10 years, with the option being available to the procurers and the said recommendation has been included in the supplemental PPAs under Article 3.5 thereto, which states that the procurer (Petitioner herein) shall have the right, but not the obligation to extend the term of the PPA by 10 years. The Petitioner has submitted that in the Supplemental PPAs, the capacity charges for the extended term of the PPAs are considered as the last year's capacity charges. Additionally, R&M expenses are allowed to the

extent required, which are also allowed subject to the approval of this Commission based on the prevailing Regulations at that point of time.

108. We have considered the submissions as made above. We find that the proposed amendments already provide that the term of the PPA extension of 10 years is to be at the same capacity charge as in the last year of the original 25 year PPA plus R&M costs, if incurred and as approved by the Commission. Therefore, the R&M costs, if any, incurred after 25th year would be determined by the Commission based on the Regulations applicable at that time. This provision is transparent and fair since the R&M costs are payable if incurred by the generator for efficient operation of the plant. Further, the option to extend the term of the PPA by 10 years is at the discretion of the petitioner/procurer and we do not find any fault in such a formulation. As regards the suggestion of Prayas to extend the PPA terms by another 5 years i.e. upto 40 years, we are of the view that the Supplemental PPAs in clause 3.5.1 clearly provides that “any extension for a period other than 10 years, as above, shall be with the mutual consent of the parties” Therefore, the PPA provides for extension beyond 35 years with mutual consent of the parties, for which the parties may be required to re-assess and re-evaluate the situation prevailing at that time depending on diverse considerations, such as demand and supply situation, technical state, efficiency and availability of the plant, market conditions with respect to alternate sources of energy including renewable energy and other such factors.

Issue No.4: Whether the alternative suggestions made by the Consumer Groups can be considered?

109. Prayas has vociferously argued that hardships should be considered with overall tariff neutrality under the long term PPAs. Prayas has submitted that the appropriate manner in which the hardship of a generator, if necessary, should be addressed would be to consider that the generator gets financial accommodation, but at the same time the overall financial outflow to the procurers over the remaining period of the PPA remain neutral. Prayas has suggested the following measures for revenue neutrality or mitigating factors for consideration while increasing the energy charges to the generator:

- (1) Refinancing of loan and spreading of the loan repayment over a longer period;
- (2) Allocation of domestic coal;
- (3) Residual value of the generating station (including the land) at the end of the entire tenure to be adjusted against the increased tariff paid with carrying cost;
- (4) Reduction in return on equity of the Project Developer;
- (5) Sharing of financial burden by the Promoter;
- (6) Miscellaneous suggestions/Objections

Suggestion No.(1): Refinancing of loan and spreading of the loan repayment over a longer period

110. Prayas has submitted that refinancing and spreading the loan repayment over a longer period with consequent spread of interest burden and depreciation over a longer period, will mitigate the cash flow impact on the generators and is a better option than the revision of tariff. The Petitioner has submitted that this aspect has already been considered by the Lenders and was found that extension of repayment tenure would

result in increase of interest amount on overall basis and thus the cost would become higher on an NPV basis.

111. The HPC in para 5.7.2 of the Report has noted that after the promulgation of Indonesian Regulations, the price of Indonesian coal continued to rise as a result of which the financial viability of the project got severely impacted resulting in significant losses from the year 2013 onwards. The lenders had already provided additional funding for overdue creditors, increase in working capital limits and waiver from debt service reserve account creation and the financial covenant testing. In paras 5.7.4 and 5.7.6, the HPC has observed as under:-

“5.7.4 Thus, while the lenders have always provided support to the Projects, the existing unviable operations are leading to these project accounts facing severe stress, which may lead to these accounts turning into NPAs thereby increasing the provisioning requirement for the lenders.

5.7.6 In view of the foregoing, the lenders submitted that the net worth is already wiped out for these Projects, and they are primarily managing to survive on additional fund infusion by promoter groups. There is likelihood of further erosion in the credit worthiness of the Generators and the Projects may become non-performing thereby leading to further significant losses being borne/to be borne by the lenders. The lenders further stated that they are handling various stressed accounts in the power sector due to multiple reasons and therefore, it would be desirable to resolve the issues pertaining to these Projects with some efforts, rather than pushing them towards insolvency.”

In light of the above analysis of HPC with regard to the unviable operation of the project, and taking note of the fact that lenders have already provided support to the project in the past and are keen on resolution of the issues affecting the project on sustainable basis, we feel that restructuring and refinancing of the loan may not yield any positive result.

Suggestion No (2): Allocation of domestic coal

112. The Consumer Groups have submitted that the Project Developer, the Petitioner and Government of Gujarat should pursue for the allocation of domestic coal. Additionally, in case the Project developer has been granted any coal block for development, coal produced from such sources should be utilized, if the end-use plant identified for the block in question is yet to be made operational. The Petitioner has submitted that as per the findings of NTPC (technical consultant to the Working Group Committee Report) which have been recorded in the Working Group Committee Report, the power plant of Respondent No.1 cannot be operated on domestic coal.

113. We have considered the submissions as noted above. The Working Group in its findings has recorded the technical due diligence carried out by NTPC as Independent Technical Consultant. This has been considered by HPC in paragraph 4.3.1 of the report where the HPC has relied upon the technical due diligence undertaken by NTPC. Para 4.3.1 of the HPC Report is extracted as under:

“4.3.1.....However, In relation to usage of domestic coal, it was submitted by the Generators that the Projects were designed for usage of imported coal and that domestic coal can be used only subsequent to making suitable changes to these Projects, which will involve incurring significant additional capex. It was also highlighted that the possibility of usage of domestic coal will require rigorous study/analysis of various parameters including safety concerns for boiler due to higher ash content of domestic coal. Further, in the technical due diligence, it was also stated that in order to assess possibility of blending of domestic coal, the Original Equipment Manufacturers (OEMs) need to be comprehensively consulted for revisiting boiler capability, design adequacy a& Engineering Scale Plan (ESP) design as various parameters like volume heat loading, area heat loading, tube metal temperature etc. are required to be reassessed. All of these would also affect the performance parameters and contractual warranties in relation to the equipment. In effect, it was discovered that it would be extremely difficult to operate the Projects on domestic coal.”

In light of the categorical finding of HPC based on the technical due diligence, we do not find any justification to agree with the suggestion of the Consumer Group with regard to use of domestic coal.

Suggestion No (3): Residual value of the generating station (including the land) at the end of the entire tenure to be adjusted against the increased tariff paid with carrying cost.

114. Prayas has submitted that the utilisation of the residual value of the generating station (including the land) at the end of 35/40 years should be adjusted against the increased tariff paid with carrying cost. The Petitioner has submitted that the tenure of the PPA is already being increased by 10 years at the discretion of the Petitioner and there is further scope of extension of PPA if mutually agreed by the parties. Therefore, adjusting the residual value with tariff is not appropriate.

115. We have considered the submissions. The proposition that the residual value should be adjusted against the increased tariff with carrying cost does not appear to be based on sound logic. This argument is based on the assumption that as and when the Petitioner would stop buying power from APMuL, all assets of the generating station would be only scrap. We note that the Supplemental PPAs have a provision of extending the PPAs by 10 years at the discretion of the Petitioner. Further, the PPAs may be mutually extended by additional period. Therefore, if the option is not exercised or exercised for a particular term, we do not see the possibility of the project being sold at scrap value. Thus, the proposition of the Consumer Group is too speculative and without any sound basis. Further, the suggestion of Consumer Group proposing to adjust the residual value of the generating station against the increased tariff with carrying cost tantamount to treating the increased tariff as a debt to be recovered from the generator with interest at the end of the extended life of the PPAs is not a commercially acceptable proposition.

Suggestion No (4) Reduction in return on equity of the Project Developer

116. Prayas has submitted that the Project Developer should sacrifice a part of its return on equity in the project. The Petitioner has submitted that the return on equity of the project in question has already been written off. Moreover, the past losses are also being absorbed by the generators.

117. We have considered the submissions as made above. The HPC in paras 8.8.2, 8.12.1 and 8.12.3 has analysed the financial position of the projects, including the financial losses already incurred by the generators and has concluded that the equity in these projects has effectively been written off and that the Developers are not in a position to earn any return on their equity invested in the capacities covered by these PPAs. Further, as per para 8.16 of the report, the proposed amendments to the PPAs only ensure that no further losses are suffered by the projects. The rehabilitation package being implemented is designed to ensure that the promoters do not suffer further cash losses, while continuing to operate the Plant for the residual life of the PPAs and extended period of the PPAs, if any. There is no further scope for reduction in return of equity of the project developer.

Suggestion No.5: Sharing of financial burden by the Promoter

118. The Consumer Groups have submitted that Adani Enterprises Limited was the bidder in both Bid No. 1 and Bid No. 2 initiated by the Petitioner pursuant to which the PPAs dated 6.2.2007 and 2.2.2007 were entered into. The bids were submitted based on the financial qualification of Adani Enterprises Limited which is the Holding Company of APMuL, the Project developer. In addition to the above, the Project Developer had relied on the Fuel Supply Agreement dated 8.12.2006 entered into between Adani

Power and Adani Enterprises Limited with amendments made thereto for procurement of imported coal. Adani Enterprises Limited in turn had agreements with various companies in Indonesia for procurement of coal. The Consolidated CSA dated 26.7.2010 between the Project Developer and Adani Enterprises Limited *inter-alia*, specifically provide as under:

“10.5 Other Charges

Except as specifically set out in this Agreement, all direct and indirect costs for the supply, delivery and transport of Contract Quality of Standard Coal to the Port of Discharge (including all transportation, weighing, sampling, insurance, handling and mining cost and all taxes) shall be borne exclusively by the Supplier.”

According to the Consumer Group, any change in the price of coal is required to be borne by Adani Enterprise Limited as per the provisions quoted above.

119. The Consumer Groups have submitted that the Project Developer and Adani Enterprises Limited had not only the full knowledge of the Indonesian Regulations providing for the contemplation of the Government of Indonesia to specify Bench Mark prices, but also expressly dealt with the consequences, namely, that the charges will be borne by Adani Enterprises Limited. It is incumbent on Adani Enterprises Limited, the Holding Company also to take the burden of the increased price of coal imported. The Consumer Groups have further submitted that Adani Enterprises Limited and Adani group, including Adani Ports, should take the burden of substantial part of the increased price payable by Adani Power (Mundra) Limited for imported coal. The Petitioner has submitted that the promoters have already absorbed the past losses and are also sharing the mining profits. With respect to the submission of the consumer groups qua contribution of and sacrifice by the promoter (in this case Adani Enterprise Limited), the

Petitioner has submitted that the promoters have already incurred significant losses in mitigating the hardships being faced by the said projects. The promoters are also sharing their mining profits in order to minimize the increase in tariff for the consumers. As per the rehabilitation package, the promoters are contributing or sacrificing the following (in addition to the absorption of past losses):

- (a) Sharing of mining profits.
- (b) Additional capacity at the same tariff thereby foregoing higher tariff for the said additional capacity.
- (c) Extension of PPA term at the same tariff thereby foregoing the opportunity to earn more revenue.
- (d) Discount of 20 paise/kWh in capacity charge for the balance term after servicing the debt.
- (e) Increase in availability from 80% to 90% without any additional burden to consumers.

120. We have considered the submissions. The HPC report in para 8.12 has extensively dealt with this issue. HPC report has further noted that promoters contribution in APMuL in Phase I, II, III and IV till 31.3.2018 is Rs.13,320 crore. The Report notes that the accumulated losses of APMuL till 31.3.2018 is Rs. 9473 crore and considering the accumulated losses till 30.9.2018, it will be even more. These losses have been funded by additional contributions made by the Promoters. The Report

further emphasizes that the losses that have been incurred by the Promoters of the project is substantially higher than the liquidated damages payable by them had the Project Developer opted for for termination under the respective PPAs. HPC has further noted that this shows the commitment on the part of promoters to continue with the project. HPC in para 8.12.3 has noted that at the present level of debt and equity, the normative capacity cost of the capacity covered under Bid-01 and Bid-02 PPAs is very high and the quoted fixed tariff is lower than the capacity cost (excluding ROE) as per the table quoted below:

Name of the Project	APMuL
O&M Cost	0.29
Secondary Fuel	0.03
Interest on term loan	0.53
Interest on Working Capital	0.10
Depreciation	0.36
Capacity Cost (excluding RoE)	1.32
Quoted Fixed Tariff	1.14/1.00
Shortfall in Capacity cost	0.18/0.32

HPC has further noted that the quoted fixed tariff is not sufficient for the capacity cost excluding RoE. HPC has concluded that the Promoters are not in a position to earn any return on their equity invested in the capacity covered in the PPAs. After taking into consideration the detailed analysis by HPC as accepted by Government of Gujarat and after taking note of the sacrifices made by the Promoters in the form of sharing mining profit, offer of untied capacity to the Petitioner, the extended tenure of the PPAs and absorption of past losses, we agree with the analysis and findings of the HPC that the promoters are not in a position to make any further sacrifices.

121. The essence of the submissions of the Consumer Groups is that the continuing cash flow mismatches must be subsidized by AEL (i.e. the promoter company of the Developer operating the power plant in question), and that no burden of tariff increase should be put on the consumers. Similar submission has been made in respect of Adani Ports which is operating the Mundra Port. Such a recommendation, in our opinion, is neither logical nor legally feasible. As pointed out by the counsel for the Petitioner in the course of arguments, AEL is a listed company and is regulated by SEBI and the public shareholders of AEL are the stakeholders of AEL who have an equally strong claim on the financial performance of AEL. In our view, it is legally not feasible for the Commission to direct another legal entity to share the financial burden of APMuL. Similar principle applies to Adani Ports also.

(6) Miscellaneous Suggestions/Objections:

122. One of the objections is that HPC has exceeded its mandate and relief should be limited to the extent of Indonesian Regulations only and should not be extended to other elements. The mandate of the HPC has been stated in the Government of Gujarat GR dated 3rd July 2018 constituting the HPC which is extracted below:

Resolution:

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

.....

Suggestive terms of reference of High Power Committee:

- (i) The Committee should examine and analyse all the relevant documents related to the Projects;

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

Thus, the mandate given to the HPC vide GR dated 3.7.2018 was, inter alia, for suggesting “sustainable solution(s) – for resolving the issue”. HPC submitted its recommendations which have been accepted by the Government of Gujarat. The terms of reference were framed by Government of Gujarat, and upon submission of the Report, the same has been accepted by Government of Gujarat. In our view, Government of Gujarat is the appropriate authority to decide whether or not the recommendations of the HPC were according to its terms of reference assigned to it.

123. Another objection of the Consumer Groups is that the consideration of 6322 GCV coal is incorrect and the HPC ought to have considered the GCV of the actual coal as fired in the past 6 months. The Petitioner has submitted that the reference to 6322 Kcal GCV of coal is due to the fact that the HBA index is published only for 6322 GCV coal and it is for this reason that the proposed Supplemental PPAs provide for an adjustment of the HBA Index price for 6322 Kcal GCV of coal consumed by the generator. In our view, this formulation is consistent with international coal trading and pricing

methodologies and the eventual price for the coal consumed by the generators will be determined on the basis of the GCV of such coal consumed. Therefore, we find no infirmity in the formulation.

124. The Consumer Groups have submitted that the rebate on early payment on energy charges should not be excluded. We notice that the rebate on payment of capacity charges continues in the Supplemental PPAs. The energy charges will be reimbursement on actuals on landed cost basis. Rebates largely address the cash flow issues and since both generator and procurer have agreed to the arrangement, this objection has no basis.

125. The Consumer Groups have expressed apprehensions that if the petition is allowed, then it would open floodgates for similar petitions. In our view, this cannot be a ground for opposing the present petition, or for that matter any petition. If the Petitioner is legally entitled to the relief, then such a theoretical possibility cannot be the basis to deny such a relief. In any case, each case will have to be examined on its own merits.

126. Submission has also been made that the generator APMuL is the subject matter of an investigation by DRI on allegations relating to over invoicing of imported coal. These allegations are of no relevance in the present proceedings. The law will take its own course in those investigations.

Finding on the Supplemental PPAs

127. The Commission has in the preceding paragraphs dealt with all the diverse objections, suggestions and comments from the Consumer Groups.

128. Some of the salient features of the HPC recommendations and Government of Gujarat policy GR are reproduced below:

- (a) The HPC was constituted pursuant to a policy direction of the Government of Gujarat as contained in the GR dated 3rd July 2018. The members of the HPC are eminent persons, drawn from the fields of judiciary, banking and power sector, whose credentials are unquestionable. The GR constituting the HPC sets out the policy imperatives prompting the Government of Gujarat to set up the HPC and also sets out the mandate and terms of reference for the HPC.
- (b) The terms of reference include identification of the hardships being faced by the concerned Projects on account of change in Indonesian Regulations as well as subsequent judgments, i.e. primarily the litigations culminating in the judgment in Energy Watchdog Case; and upon identification of the hardships make recommendations for “sustainable” solutions for resolving the issue and measures for overall reduction in the cost of generation of power in the interest of consumers.
- (c) The HPC, after detailed study and intensive consultations with diverse stakeholders, made its recommendations vide report dated 3rd Oct 2018. The key analysis and recommendations are contained in Chapter X of the report.
- (d) The HPC has elaborately articulated the approach, methodology and philosophy adopted by it, while making its recommendations. The key aspect that has been reiterated by the HPC is that consumer interest has been the paramount consideration. The HPC has undertaken a detailed and comprehensive analysis

of the legal, regulatory, technical, commercial, sectoral, financial and other related aspects. The analysis is based on data and numbers made available by diverse stakeholders including Consumer Groups and also as available in the public domain.

(e) The HPC has categorically concluded that the consumer and public interest will be best served by salvaging these projects. The HPC has also concluded that if urgent action is not taken, then it would inevitably lead to closure of these projects, which is not in the larger interest of the consumers. The detailed analyses and data relied upon by the HPC to arrive at these conclusions are captured in; inter alia, Chapter VII of the report. It is notable that several stakeholders, including some consumer groups, also echoed the views that these projects are required to be salvaged.

(f) Pursuant to HPC recommendations, the Government of Gujarat vide its policy GR dated 1st December 2018, accepted the HPC recommendations, with certain further modifications. One of the clear stipulations in the HPC report as well as the Government of Gujarat policy GR is that the consequential amendments that may be required to be made to the PPAs, should be filed before the Commission for approval. Therefore, both the HPC and the Government of Gujarat have categorically taken a stand that the policy for rehabilitating the projects needs to comply with the legal and statutory requirements under the Electricity Act, 2003.

(g) The key features of the HPC recommendations and the Government of Gujarat policy GR are that the proposals are for a comprehensive package to effect a

financial and commercial re-structuring of the PPAs and projects, in order to ensure that the projects become viable on a sustainable basis. In implementing such rehabilitation package, the diverse interests of the stakeholders have been balanced in a reasonable manner and the consumer interest, as defined and articulated in Chapter VII, is served with the lowest possible tariff.

- (h) The HPC has recognized the stakeholders as (i) procurers and consumers, (ii) Lenders, (iii) Government, and (iv) generators and their promoters. The HPC has, in an elaborate manner, analysed the interest of these diverse stakeholders, and thereafter has taken a holistic view balancing the diverse and at times conflicting interests. This fine balance achieved through the comprehensive package is not tainted by arbitrariness, lack of application of mind and unreasonableness nor it is contrary to the statute.
- (i) Significantly, the HPC recommendations and the Government of Gujarat policy GR are consistently focused on protecting the consumer and public interest, viewed from macroeconomic perspective.
- (j) The HPC has also made a detailed analysis of the applicable legal, regulatory, financial and commercial framework, including the IBC regime, availability of imported coal and pricing trends, alternate technical and technology constraints on the projects as well as the transmission systems and has modulated its recommendations accordingly.
- (k) It is acknowledged upfront by the HPC as well as the Government of Gujarat policy GR that the rehabilitation of the plants will entail increase in tariffs for

consumers. However, such increase in tariffs can be mitigated to a certain extent through other means, including reduction in capacity charges due to Lenders' sacrifice, passing on of Mining Profits by generators that have captive coal mines in Indonesia and by making available additional untied capacity to the procurers. In addition, increased availability at no additional capacity charge, as well as the option to increase the PPA terms, are also designed to mitigate to the extent possible, the impact on tariffs.

129. The Government of Gujarat has taken a policy decision by enunciating through GR dated 1.12.2018 a package to rehabilitate the imported coal based stressed power projects located in the State. Based on the GR, the Petitioner and the generator have finalized the Supplemental PPAs, which have been submitted for approval of the Commission. The Commission is strongly of the view that to see whether the package meets the test of public interest, various provisions of such Supplemental PPAs should be examined in their entirety and as a package instead of singling out such provisions and examining each individually and separately. Nevertheless, the Commission has examined some of the provisions individually for which objections have been raised by the Consumer Groups. However, the Commission reiterates that such an approach is not an appropriate one, as it does not give a complete picture and tends to lead to distorted results. The bedrock of the test of public interest as enunciated in the Act, Tariff Policy, 2016 and various judicial pronouncements is balancing the interest of consumers and generators as a whole.

130. On an analysis of the HPC Report, Government of Gujarat GR dated 1.12.2018 and the Supplemental PPAs, it emerges that the rehabilitation package seeks to

delicately balance conflicting stakeholder interests in a pragmatic and commercially sustainable basis. Most importantly, it emerges clearly that even after implementing the rehabilitation package and the consequential increase in tariffs, these projects will continue to be competitive, will be high in merit order and certainly cheaper than any replacement capacity. If these projects are not rehabilitated, the closure could be imminent and permanently leading to a significant loss of generation capacity in the Western Region that cannot be compensated from other generation sources at a matching tariff. The consequent demand and supply mismatch could have adverse impact on the economic growth of the State of Gujarat, since this capacity constitutes a significant proportion of its energy basket. It has not been disputed by any stakeholder, including Consumer Groups, that even with full pass through of the fuel prices, these projects will continue to be competitive and cheaper than alternate sources, including any replacement capacity which in any case will take several years to come on stream, if at all. Further, these projects are efficient, on super critical technology and are base load plants and therefore, it makes economic sense to keep them operationalized. In sum, the Supplemental PPAs entered into by the Petitioner and Respondent No.1 in the light of the HPC recommendations and the Government of Gujarat GR dated 1.12.2018 are in the public interest designed to meet the long term energy requirement of the consumers of Gujarat at a competitive price.

131. In the light of the above analysis, the Commission in exercise its powers under Section 79 (1) (b) of the Act read with Article 18.1 of the PPAs approves the Supplemental PPAs to Bid-01 PPA and Bid-02 PPA. It is further clarified that the

illustrations submitted by the Petitioner vide its affidavit dated 2nd January 2019 shall be read into and shall form an integral part of the Supplemental PPA.

132. Petition No. 374/MP/2018 is disposed of in terms of the above.

sd/-
(I.S. Jha)
Member

sd/-
(Dr. M. K. Iyer)
Member

sd/-
(P.K. Pujari)
Chairperson