

that the Supplier makes available to the Utility capacity proportionate to the contracted capacity out of installed capacity at all times.

Revised: Accordingly, the Petitioner has incorporated a new provision as Clause 24.5 regarding Proportionate Availability which is in line with the existing PPA signed by the Petitioner through competitive bidding. This clause provides for proportionate availability declaration to Utility by Supplier under the agreement and details of penalty applicable in case of failure of Supplier to supply power from the Contracted Capacity.

(t). PPA – Article 28 – Force Majeure

(i). MBD Clause 28.4 & 28.7:

Clause 28.4 provides that any event of Change in law for which if consequences cannot be dealt with in accordance with Article 34 (Change in Law) and its effect in financial terms exceeds the sum specified (in Clause 34.1) shall be considered as Political Event under Force Majeure.

Clause 28.7 provides that upon occurrence of a Political Event, all Force Majeure costs attributable to Political event shall be reimbursed to Supplier by the Utility.

Revised: The details of modifications carried out by the Petitioner are as under:

With regard to Clause 28.4, it is modified stating that making eligible any such Change in Law event by considering it as a Political Event of Force Majeure would pose risk towards unfettered cost claim and may dilute the sanctity of tariff based competitive bidding. Accordingly, to avoid any interpretational disputes, it is proposed to delete the above provision.

With regard to Clause 28.7, it is modified stating that nature of events specified under Political Event (under Force Majeure) are business associated risks and allowing pass through of cost for consequences of such risk to Utility (GUVNL) may affect the interest of consumers. Moreover, it may result into litigations / demand by Supplier seeking relief. Therefore, GUVNL has taken a deviation and clarified that

such costs shall be borne by Supplier only. The modifications in the clause are as under:

“(b) upon occurrence of a Political Event, all Force Majeure Costs attributable to such Political Event shall be borne by the Supplier.”

Consequentially, Clause 28.7.2 linked with the payment liability of Utility has been deleted.

(ii). MBD Clause 28.11:

Relief for Unforeseen Events provides that upon occurrence of an unforeseen event, parties may refer the matter to Conciliation Tribunal for appropriate relief / remedy including costs, expense, revenues of Power Station etc.

Revised: The Petitioner submitted that Petitioner’s Bid documents have various provision(s) to deal with Change in Law, Force Majeure as well as pass through of various costs. Further, as per the Bid documents, any dispute not settled amicably has to be taken up before the Gujarat Electricity Regulatory Commission for adjudication. Accordingly, allowing mitigation relief for unforeseen events by referring the matter to Conciliation Tribunal would be in contravention to the provision of the tender documents. Further, such avenues for claims may lead to disputes/litigation with consequential impact including cost on Petitioner and ultimately on end consumers.

Accordingly, the Provision 28.11 – Relief for unforeseen events has been deleted by the Petitioner in its bid documents.

(u). PSA – Article 30 – Suspension of Supplier’s Rights

MBD: Clause 30.1.2 provides that during the period of Suspension (due to Supplier default), the Utility shall pay to the Supplier 20% of the Fixed Charge for Contracted Capacity.

Revised: The above clause is with regard to suspension owing to Supplier default. Upon occurrence of Supplier default, Utility shall be entitled to suspend all rights of

Supplier under FSA to produce electricity. As per the provision of PSA, Supplier can revoke the suspension by curing the default within 90 days of suspension by Utility.

In view of the above, the provision with regard to payment of 20% of fixed charge during suspension period has been deleted to avoid cost implication on the Petitioner (Utility).

(v). Change in Law (PSA – Article 34)

MBD: – provides that if as a result in Change in law, in case Supplier suffers an increase / reduction in costs or reduction / increase in net after-tax return or other financial burden, the aggregate financial effect of which exceeds the higher of Rs. 1 Crore and 0.1% of the Capacity Charge in any Accounting Year, place the Supplier in the same financial position as it would have enjoyed had there been no such Change in Law.

Further, MBD provides that Parties shall endeavour to establish a NPV of the net cash flow and make necessary adjustments in costs, revenues, compensation or other relevant parameters, as the case may be, so as the NPV of the net cash flow is the same as it would have been if no Change in Law had occurred.

Revised: The Petitioner submitted that cost reimbursement as well as adjustment for arriving at Net Present Value may lead to complexity and dispute in methodology for calculation. Further, the bids being invited by Petitioner are having two part tariff wherein Fixed Charges quoted are indexed with Wholesale Price Index (WPI) variation while Fuel price quoted would be subject to variation as per change in domestic coal price and change in railway transportation freight in accordance with conditions specified under PSA. In addition, the bids are also being solicited from operational projects with merchant capacity and therefore arriving at a NPV of the net cash flow for the purpose of adjustment in cost, revenue etc. for operational projects would be complicated and inaccurate.

Accordingly, it would be prudent to have in place a simplified mechanism for taking into consideration the impact on account of change in law in order to avoid any unfettered impact on tariff due to NPV calculation and cost adjustment thereof.

In view of the same, Petitioner has taken a deviation and modified the Change in Law provision in line with the provision being adopted under PPA signed with projects based on Competitive Bidding in 2006-07.

Further, Petitioner has added clarification that the Supplier shall not in any manner be entitled to claim any amount towards carrying cost till the time the Gujarat Electricity Regulatory Commission has determined and approved the impact due to Change in Law qualifying under the PSA. The same will ensure timely filing of Petition by Supplier before GERC for approval of Change in Law and avoid cost implication under claim seeking carrying cost.

(w). Dispute Resolution (PSA – Article 36)

As per the MBD, any dispute, if not settled mutually shall be referred to Conciliation and then Arbitration. While any dispute under applicable laws if required to be adjudicated by the Commission, be submitted before Commission. Further, Clause 36.5 provides that in the event of constitution of a statutory tribunal or other forum with powers to adjudicate upon disputes, all disputes shall be referred to adjudication by such tribunal instead of Arbitration or Appropriate Commission.

Revised: In order to ensure that any dispute if not resolved amicably through Conciliation, be taken up before Appropriate Commission i.e. Gujarat Electricity Regulatory Commission for adjudication, Petitioner has taken the deviation and deleted the provision with regard to arbitration. Further, the Clause 36.5 regarding adjudication by statutory tribunal has also been deleted in view of prevailing norms of the Electricity Act 2003 regarding adjudication of disputes by Appropriate Commission.

(x). PSA – Article 38 – Miscellaneous – Delayed Payments

Ministry of Power has notified the Electricity Late Payment Surcharge Rules 2021 on 22.02.2021. As per the Rules, all such PPA executed after the date of notification of the Rules shall incorporate provisions with regard to rate of interest for late payment surcharge.

Accordingly, Petitioner has appropriately modified the Clause 38.4 of the PSA – Delayed Payments as per the above Rules notified by Ministry of Power.

(y). PPA – Schedule J – Default Escrow Agreement & Schedule K – Deed of Hypothecation

Petitioner has signed Default Escrow Agreement & Deed of Hypothecation with various Private Projects Developers with whom PPA has been signed pursuant to Competitive Bidding in 2007 & 2010.

In order to have uniformity with regard to the modality of creation of charge over revenues and operation of escrow account for discharge the liabilities arising out of secured obligation inter-se various projects, the Petitioner has proposed that earlier Petitioner's format of Escrow Agreement & Hypothecation Deed may be adopted and incorporated in the present Bid documents with required modifications. Further, the provision 23.1.1 of the PSA has been appropriately modified as per the terms of Escrow Agreement and Deed of Hypothecation.

(z). Other project specific modifications:

In addition to above deviations / modifications, the Petitioner has carried out minor project specific modifications in the bid documents for ensuring clarity in operational aspects, the details of which is as under:

- (i) Obligation of Open Access, Supply of contracted capacity at Delivery Point
- (ii) Lowest Landed Tariff after including cost towards transmission cost to be considered for the purpose of bid evaluation & selection
- (iii) Definition to Scheduled Supply Commencement Date has been incorporated – as Petitioner would be requiring power from a particular date which would be as per confirmation from Coal India regarding commencement of coal supply

- (iv) Compliance / activities to be carried out by projects which are already operational as on Bid Due Date
- (v) Clarification with regard to applicability of provisions under the tender documents for both category of projects i.e. Type 1 (units that are commercial operationalized on or after 01.01.2013) and Type 2 (New Projects that are yet to be commercially operationalized)

2.20. In accordance with the Ministry of Power Guidelines, the Petitioner has filed the present Petition for approval of bidding documents and the deviations to the Guidelines for initiating the tender process.

2.21. It is submitted that the Commission may accord approval to the Draft Bidding Documents along with the proposed deviations as well as modifications in order to enable the Petitioner to initiate the process of inviting tender.

3. The matter was kept for hearing on 07.03.2022. The Commission passed Daily Order dated 14.03.2022 and directed the Petitioner to issue Public Notice in two daily newspaper, one English newspaper and one vernacular language i.e. Gujarati having wide circulation in the State/National level, stating that the Petitioner has filed this Petition before the Commission for approval of deviations from the Ministry of Power Guidelines dated 06.03.2019 for long term procurement of electricity from power stations set up on Design, Build, Finance, Own & Operate (DBFOO) basis and to upload the Petition with all the documents on its website.

4. In compliance to the aforesaid directives, the Petitioner issued Public Notice dated 21.03.2022 in two Daily Newspapers i.e. Gujarati Newspaper - Sandesh, and English Newspaper - Indian Express dated 21.03.2022. The Petitioner has also uploaded the Petition on its website as directed by the Commission. Thus, the Petitioner has complied with the directions given by the Commission vide Daily Order dated 14.03.2022. The aforesaid Petition with all the documents was also uploaded on the website of the Commission for inviting comments and suggestions on it.

5. The Petitioner has received objections / suggestions in the Petition from the following Objectors.
- (i). Jindal India Thermal Power Limited
 - (ii). Adani Power Ltd.
 - (iii). Sadbhavna Charitable Trust
 - (iv). Association of Power Producer

6. The objections raised by the Objectors in brief are as under:

(i) Fuel for participation:

The Objectors have submitted that the Present condition of sourcing coal from SHAKTI Scheme will lead to very high variable cost for many generators. Accordingly, Bidder should be allowed to source coal from (a) Arranged by Petitioner under SHAKTI Scheme (b) arranged by Generator under their existing Fuel Supply Agreement, existing linkage under SHAKTI scheme or future tie up under SHAKTI Scheme or (c) Arranged by Generator under e-auction coal or anywhere from the market.

- a) The right of a generating company to arrange coal from alternate source cannot be curtailed by compelling the bidders to procure coal from the coal block which shall be allocated by MoP under SHAKTI scheme Para B (IV) to GUVNL.
- b) Allowing coal to be used from any source including the SHAKTI coal source of the Petitioner would be the best approach as Petitioner can always compare the most competitive price of power without losing the right to get its own coal used if found competitive.
- c) Compulsorily procurement of coal from the domestic coal linkage allocated to Petitioner under SHAKTI scheme would result in exclusion of principles of fair competition.
- d) Coal mine to be allocated under SHAKTI scheme may be located far away from many power plants which would result into higher transportation cost for such

plants. Only power plants located in proximity of coal source allocated under SHAKTI would benefit.

- e) Bidder should be allowed to source coal from any other source in addition to coal arranged under SHAKTI B (IV) scheme as the same will allow in discovering better competitive price.

(ii) Submission of documents:

The Objectors have requested that operational plants should be exempted from the submission of financing Agreements, financial package, model / documents etc. as these documents are required to see seriousness of developer which in case of operational power plant is already proved.

(iii) Transmission Charges (Clause 5.5 read with 21.13 of PSA):

Draft bid Documents provide that in the instance where actual availability of Supplier is less than Normative Availability, then Supplier shall be obligated to bear the cost of actual transmission charge for the respective month for shortfall between Normative Availability and Actual Availability. In this regard, Objectors have submitted that PGCIL raises invoice of Transmission Charges towards Drawee Utility as per present CERC (Sharing of Inter State Transmission Charges & Losses) Regulation 2020. Accordingly, Generator should not be required to pay the Transmission Charges. Hence, the deviation sought by the Petitioner may not be granted.

(iv) Discount for prompt payment (Clause 21.12 of PSA):

Draft bid Documents provide that in case the Petitioner makes payment towards tariff within 7 days of the date of submission of invoice, it shall be entitled to deduct 2% of the amount by way of prompt payment discount for early payment. In this regard, the Objectors have submitted that increased discount will lead to Bidder in-building the impact of the same in their tariff and may lead to higher tariff discovery. Based on above submissions, the Objectors contended that the deviation may not be granted.

(v) Allocation of Costs arising out of Force Majeure (Clause 28.7 of PSA):

Draft Bid Documents provide that upon occurrence of a Political Event, all Force Majeure Costs attributable to such Political Event shall be borne by the Supplier. In this regard, the Objectors have submitted that all Force Majeure cost attributable to Political Event shall be borne by Petitioner (Utility) and not by the Supplier. Based on above submission, the Objectors contended that the deviation may not be granted.

(vi) Change in Law (Clause 34 of PSA):

The Objectors have submitted that Ministry of Power has specified the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 which provides that Change in Law claims are to be first mutually settled between the parties and the Commission is only to verify the calculation of Change in Law impact. Further, said Rules provide clear timelines within which claims are to be settled and thus burden of any Carrying Cost is also limited. Moreover, the Objectors have suggested to incorporate provision for allowing carrying cost and principle of Restitution by restoring the affected party to same economic / financial position.

(vii) Compliance to norms specified by Ministry of Environment and Forest, Govt. of India:

The Objectors have submitted to incorporate clarification that compliance towards revised norms specified by MOEF, Govt. of India vide notification dated 07.12.2015 and subsequent amendments shall be done as per the schedule prescribed by Statutory Body / Govt. of India vide notification dated 31.03.2021 and any amendment or revision of the environment norms or introduction of any new norms after Bid Due Date shall be claimable under Change in Law provision of PSA.

(viii) Obligation towards open access (Clause 5.1.5 (a) of PSA):

Draft Bid Documents provide that Supplier shall be responsible for making necessary applications and obtain long term open access and non-grant of long term open access shall be mutually decided by Utility and Supplier. In this regard, Objectors have submitted that since approval of long term open access is beyond the control of the Supplier, the obligation of the Supplier shall be limited to make timely application to relevant authorities for grant of Open Access. The aforesaid facts needs to be considered by the Commission prior to approving the deviations.

(ix) Payment of 15% Fixed Charge for delay in COD for reasons attributable to Utility (Clause 14.1.1 of PSA):

Draft Bid Documents provide that in the event Power Station is substantially completed but COD is delayed for reasons attributable to the Utility, 15% of the Fixed Charge shall be due and payable hereunder as if COD has occurred for the Power Station or any Unit thereof, as the case may be, in addition to the extension of Concession Period under and in accordance with the provisions of this Agreement. The deviation sought in aforesaid provision is objected by the Objectors stating that in case of delay in COD of the plant due to reasons attributable to Utility, the Supplier should be immune to such huge risk and receive full capacity charges.

(x) Provision for supply from alternate source by Supplier (Clause 11.2.2 & 11.2.3 of PSA):

Draft Bid Documents provide for supply of power from alternate source by Projects under Type 2 category (new projects that are yet to commercial operationalized) during the period of delay in accordance with conditions stated under PSA. In this regard, the Objector has submitted that even for Type 1 project i.e. already commissioned projects shall have the flexibility to supply power from alternate source and no penalty shall be applicable for the same. Accordingly, the deviation sought by the Petitioner may not be granted.

(xi) Provision for deemed availability in the event of Fuel Shortage (Clause 21.4.2 of PSA):

Draft Bid Documents provide that non-availability arising as a result of shortfall in Minimum Fuel Stock shall be deemed to be available as 70% for the purpose of payment of fixed charges. In this regard, the Objectors have submitted that since fuel is being arranged by the Utility under SHAKTI Policy availability of project shall not be linked to fuel stocks. Further, in the event of non-availability due to shortfall in Minimum Fuel Stock, 100% of fixed charge shall be payable. Thus, the Objectors have opposed the proposed deviation sought by the Petitioner.

(xii) Provision for Payment Security Mechanism (Clause 23.2 of PSA):

Draft Bid Documents provides that Supplier may invoke the Letter of Credit for recovery of due amount (other than disputed amounts) in the event of Utility's failure to pay the Monthly Invoice before the 27th day of the month in which Payment Due Date occurs. In this regard, Objectors have submitted that invocation of Payment Security Mechanism shall not be restricted to undisputed amounts as Utility may dispute all the amounts and hence rendering LC of no use. It is also suggested that LC should cover the Supplementary Bill towards Change in Law and amount of LC shall be equal to 20% of annual revenues to be realized by Supplier. Thus, the Objector has opposed the proposed deviation sought by the Petitioner.

(xiii) Fuel Charge (Clause 22 of PSA):

On the proposed deviation, the Objectors have submitted that Fuel Charge provisions may be modified to calculate the same on Weighted Average Basis to avoid under recovery in cost by Supplier. Further, it is submitted that Weighted average of Gross Calorific Value of fuel on as Received Basis shall be considered and GCV of Fuel shall be determined in accordance with certification provided by Govt. notified Third Party Sampling Agency at Power Station duly adjusted to take into account handling and storage loss at plant.

(xiv) General Principle of Bidding (RFP):

The Objectors have suggested that since coal source is same for all Bidders, Utility may pre-specify the Cost of Coal and GCV to be considered by Bidders along with other details such as Railway siding at loading end in order to ensure objectivity in bid evaluation.

(xv) Station Heat Rate to be pre-specified by Utility (Clause 13.2.1 of PSA):

As per Model Bidding Documents, Station Heat Rate is to be pre-specified by Utility while inviting the bids based on which the bidders would be required to quote their Tariff. The SHR is to be considered after accounting for applicable dedicated transmission losses and Auxiliary consumption. In the draft tender documents, the Petitioner has proposed the SHR at 2450 kcal / kwh towards pre-specified SHR under the PSA. The Objectors have submitted that it may not be possible for operational power station to meet the specified SHR of 2450 kcal/kwh and accordingly it is requested to consider SHR of 2500 kcal/kwh to capture the impact

of increase in auxiliary consumption due to installation of Environmental Control System.

(xvi) In addition to above, various suggestions from the Objectors were received with regard to Delivery Point, right to reject bid from bidders having litigation with Petitioner, right of Utility for extension of contract period by 5 years, compliance to revised MOEF Norms, coal procurement under Additional Fuel Supply Agreement, open access, adjustment of transmission charges etc.

7. In response to aforesaid objections of the Objectors, the Petitioner has responded as under:

7.1. Regarding allowing fuel from sources of coal other than SHAKTI Coal being offered by the Petitioner:

(i) Fuel for participation:

The Petitioner has in response to objections on aforesaid subject matter received from the Objectors submitted that the Ministry of Power vide Office Memorandum dated 03.05.2018 has recommended the Ministry of Coal, Govt. of India to assign coal quantity of 19.712 MTPA (Grade 13) to Gujarat. The Standing Linkage Committee (Long Term), Ministry of Coal has recommended the allocation of 19.712 MTPA (Grade 13) coal to Gujarat. The Ministry of Power vide dated 22.05.2017 has notified SHAKTI Scheme wherein methodology and criteria for allocation of coal to Generator / DISCOMs have been provided. As per Para B (IV) (I) of SHAKTI Scheme notification dated 22.05.2017 regarding earmarking of coal to States, it is specified that States / DISCOMs have to undertake tariff based Competitive Bidding for long term / medium term procurement of power as per the Guidelines issued by the Ministry of Power.

In accordance with the same, Ministry of Power has notified enabling Guidelines dated 06.03.2019 specifying the Model Bidding Documents for tie up of power by DISCOMs through tariff based competitive bidding including under SHAKTI Scheme through e-bidding DEEP Portal developed by PFC Consulting Ltd. Further, as per the Para B (IV) (I) of SHAKTI Scheme regarding offering of allocated linkage coal by State / DISCOMs, existing FSA/LoA holders who participate in the competitive

bidding for PPA and, if successful, shall be required to surrender proportionate quantity of the FSA/LoA for the corresponding tenure.

The Petitioner has invited bids for utilization of linkage coal based on the pre-conditions and modality provided under the SHAKTI Scheme Para B (IV), Ministry of Power Guidelines and Model Bidding Documents notified by Ministry of Power, Govt. of India. Allowing submission of bids from any other fuel source, other than SHAKTI linkage coal allocated to Utility under the aforesaid proposed tender of the Petitioner will be in contravention to the SHAKTI Scheme and Ministry of Power Guidelines. Accordingly, the request may not be accepted.

With regard to the suggestion for allowing other source of coal for participation, the Petitioner has submitted that proposed tender for power tie up through allocation of linkage coal under SHAKTI is to have in place availability of assured supply of coal to the power plants and thereby have continuous power supply to the end consumers of Petitioner for supply period of 15 years. In case, fuel source like e-auction, market based coal etc. are allowed, it may fetch an inherent risk regarding assured supply of coal and may lead to non-fulfilment of supply obligation by Supplier / Generator which would ultimately affect the end consumers of Petitioner. Moreover, the terms, conditions, cost, tenure and quality of coal under different Fuel Supply Agreement / fuel allocation would be entirely different and hence such bids from different source cannot be collated for uniform evaluation along with SHAKTI Scheme coal under a single tender. Further, soliciting bids in such a manner for long term tender may not be prudent and would be in contravention to SHAKTI Scheme and Ministry of Power Guidelines & Model Bidding Documents.

(ii) Submission of documents:

In response to the objections on the above subject received by the Petitioner that operational plants be exempted from the submission of financing package, model / documents etc. as these documents are required to see seriousness of developer which is not the case for operation plant it is submitted that the said requirement of submission of documents is necessary and in accordance with Model Bidding Documents.

Thus, with regard for allowing source of coal from other than SHAKTI Coal being offered by the Petitioner and submission of documents, the Petitioner has submitted that the above provisions adopted by the Petitioner as per the Model Bidding Documents of Ministry of Power is in the interest of Petitioner and consumers at large to ensure availability of power during the contract period without any subsequent implication.

7.2. In respect of other objections / suggestions of the Objectors on the following issues, the response by the Petitioner GUVNL is as under:

(a) Transmission Charges (Clause 5.5 read with 21.13 of PSA):

In response to objections on above, the Petitioner has submitted that Transmission Charge has increased manifold during last few years and the same is sunk cost. There have been numerous instances of discontinuation / reduction of power supply by Generators and non-fulfilment of contractual obligations citing various reasons. However, even in such scenario, the transmission charges towards long term / medium term open access are payable by Procurers to Central Transmission Utility as per prevailing CERC Regulations. Therefore, in order to ensure declaration of obligated capacity by Supplier / Generator at all times, aforesaid provision has been incorporated in the Draft Bid Documents. As per the same, only in the case Availability reduces below normative availability in a month, proportionate transmission charges would be passed on to the Supplier / Generator.

Further, it is submitted that the above provision adopted by the Petitioner is in the interest of consumers at large to ensure availability of power during the contract period without any undue implication towards transmission charges as Cost of Transmission Charges is one of the sub-component of Tariff to be submitted by Supplier / Generator while submission of bids. The Commission vide Order dated 04.08.2021 in the Petition No. 1978 of 2021 filed by the Petitioner for approval of deviations to Model Bidding Documents for Medium Term PPA, after detailed deliberations and taking view of stakeholders has approved the above modality of absorption of transmission charges by Supplier in the bid documents.

(b) Discount for prompt payment (Clause 21.12 of PSA):

In response to objections on aforesaid provision, the Petitioner submitted that the Payment Due Date as per the Bid Documents is 30 days from date of submission of Invoice. In order to enable prompt release of amount, the Petitioner has incorporated the provision for allowing 2% rebate towards payment within 7 working days which is in line with present practice under long term / medium term / short term Power Purchase Agreement.

(c) Allocation of Costs arising out of Force Majeure (Clause 28.7 of PSA):

The Petitioner has submitted that the events akin to Political Event of Force Majeure on account of any Government Instrumentality have been already described under the Bid Documents. In order to avoid any unfettered cost implication on the end consumers of the Petitioner (Utility) on account of such Political Event, the clause has been appropriately modified. It is further submitted that Clause 28.7.1 (a) of the PSA also provides that upon occurrence of a Non-Political Event and Indirect Political Event, Parties shall bear their respective Force Majeure Costs and neither Party shall be required to pay to the other Party any costs thereof.

Accordingly, the modification in the Clause is essential for avoiding the disputes as well as unfettered cost implication. The Commission vide order dated 04.08.2021 in the Petition No. 1978 of 2021 filed by the Petitioner for approval of deviations to Model Bidding Documents for Medium term PPA, after detailed deliberations and taking view of stakeholders has approved the above modification in the bid documents.

(d) Change in Law (Clause 34 of PSA):

The Petitioner in response to above objections submitted that in the Draft Bid Documents, the Petitioner has modified the 'Change in Law' provision in line with provision being adopted under existing long term PPA in order to simplify the mechanism for taking into consideration the impact on account of change in law in order to avoid any unfettered impact on tariff due to NPV calculation and cost adjustment thereof. Cost reimbursement as well as adjustment for arriving at Net Present Value may lead to complexity and dispute in methodology for calculation more particularly when the Petitioner has allowed operational projects to participate under the aforesaid tender. Since, all such operational projects would be

having a differentiated financial and economic position contingent to active / completed contracts under long / medium / short term agreement which would also be further changed in case projects is financially restructured / acquired through NCLT, stressed project etc.

Further, it is submitted that the Change in Law provision incorporated by the Petitioner in line with the present long term agreement is appropriate and will safeguard the interest of Petitioner as well as Supplier in terms of determination, eligibility, computation and approval for change in law.

(e) Compliance to norms specified by Ministry of Environment and Forest, Govt. of India:

In response to above objections, it is submitted that the Petitioner has issued detailed clarification regarding the environment related compliance under Clause 4.1.3 (j) of PSA, Clause 5.10 of PSA 15.11 of PSA and Clause 34.1 of PSA in addition to detailed explanation under Clarification to Queries released by the Petitioner.

(f) Obligation towards open access (Clause 5.1.5 (a) of PSA):

In response to objections received on aforesaid Clause, the Petitioner submitted that the clause is self-explanatory and appropriate clarification to the same has also been released by the Petitioner under “Clarifications Related to Queries Regarding Bidding Document”. Accordingly, no further change is necessitated.

(g) Payment of 15% Fixed Charge for delay in COD for reasons attributable to Utility (Clause 14.1.1 of PSA):

In response to the Objections received on aforesaid Clause, the Petitioner submitted that Clause 29.3 of PSA provides for extension of contract period in the event of delay in achieving COD due to default on account of Utility. The payment obligation of 15% of the Fixed Charges is in addition to the above extension in contract period during which the Supplier would be entitled to receive the Fixed Charges. Therefore, the above provision is in accordance with the Model Bidding Documents of Ministry of Power and does not necessitate any changes.

(h) Provision for supply from alternate source by Supplier (Clause 11.2.2 & 11.2.3 of PSA):

In response to the Objections received on aforesaid Clause, the Petitioner submitted that Type 1 projects being already operational as on Bid Due Date, there is no requirement for such project to undertake commissioning related activities like Type 2 projects. Moreover, COD of the project is contingent to submission of Completion Certificate in accordance with Article 13 & 21 of PSA. Accordingly, no change is necessitated in the Bid Documents.

(i) Provision for deemed availability in the event of Fuel Shortage (Clause 21.4.2 of PSA):

In response to the Objections received on aforesaid Clause, the Petitioner submitted that as per Clause 22.7 of PSA, Supplier is required to maintain stock of allocated coal and fuel from Fuel Supply Agreement, which is sufficient for full production of electricity for a continuous period of 7 days. The maintenance of adequate coal stock being the responsibility of Supplier, no change is necessitated as the provision is as per the Model Bidding Documents of Ministry of Power.

(j) Provision for Payment Security Mechanism (Clause 23.2 of PSA):

In response to the Objections received on aforesaid Clause, the Petitioner submitted that Clause 21.10.3 of PSA provides for payment of only undisputed amounts by Payment Due Date. Further, Clause 21.11 provides that if disputed amount is paid after Payment Due Date, the same shall be considered as delayed payment and interest shall be applicable. Further, the LC to be opened is for an amount equivalent to 20% of annual capacity charges, which is adequate for risk coverage. The same being as per the Model Bidding Documents of Ministry of Power, no change is necessitated.

(k) Fuel Charge (Clause 22 of PSA):

In response to the Objections received on aforesaid Clause, the Petitioner submitted that the provision of GCV working, landed cost of coal working and Fuel Charge working has been provided under the PSA in detail, which is as per the Model Bidding Documents of Ministry of Power. The Petitioner has in the draft documents already proposed to allow adjustment to the tune of 85 kcal/kg towards GCV for variation due to storage at generating station. Accordingly, no further change is necessitated.

(l) General Principle of Bidding (RFP):

In response to the Objections received on aforesaid Clause, the Petitioner submitted that that coal price and GCV would be as per the Letter of Assurance / Fuel Supply Agreement to be issued by Coal India Ltd. / its subsidiaries for allocation of Coal Linkage in accordance with the SHAKTI Scheme of Govt. of India and Ministry of Power Guidelines.

(m) Station Heat Rate to be pre-specified by Utility (Clause 13.2.1 of PSA):

In response to the Objections received on aforesaid Clause, the Petitioner submitted that Model Bidding Documents of Ministry of Power provided reference to Pre-specified SHR in the range of 2300-2350 kcal/kwh. Taking into consideration the requests received during stakeholders consultation process, the Petitioner has increased the threshold limit for pre-specified SHR to 2450 kcal/kwh. Since, making eligible generating units having higher SHR would lead to increased specific coal consumption and encourage inefficiency.

(n) In response to the Objections/suggestions received on other Clauses of the bid documents on which, the Petitioner has not prayed for deviation but the Objectors have suggested the deviation, the Petitioner has submitted that the other Objections were received with regard to Delivery Point, right to reject bid from bidders having litigation with Petitioner, right of Utility for extension of contract period by 5 years, compliance to revised MOEF Norms, coal procurement under Additional Fuel Supply Agreement, open access, adjustment of transmission charges etc. are concerned, the Petitioner stated that the detailed clarification has been incorporated in the Draft Bid Documents regarding above aspects. Further, the Petitioner has also provided details explanation under the Clarification to the Queries released post stakeholders consultation process.

8. The matter was subsequently kept for hearing on 25.04.2022. On that day Mr. K. P. Jangid, on behalf of the Petitioner reiterated the facts as stated in para 2, 5 and 7 above and based on same, the Commission may allow the prayer of the Petitioner and approve the deviation sought by the Petitioner.

9. Ld. Adv. Mr. Venkatesh on behalf of the Association of Power Producers and the representative of M/s Adani Power Ltd. have reiterated the facts stated in para 6 above. In addition to above, they submitted that the Commission may consider the various provisions of the draft documents of the competitive bidding documents wherein the various provisions are incorporated after considering the various decisions of the higher forum in the disputed matters between generators and utilities and try to give effect of the same with consideration of risk allocation amongst the parties and try to balance between the rights and obligations of the generator and licensees so as to avoid the disputes between the generator and licensee. It is incorrect to allow the deviation in favour of either generator or licensee. The Commission may grant the deviation with consideration of balancing the risk allocation between the parties and try to avoid the disputes which may lead on approval of such deviations.
10. Mr. Vishal Raval, on behalf of the Sadbhavna Charitable Trust submitted that the mandatory provision of utilisation of fuel supplied under SHAKTI scheme provided by the Petitioner be removed and allowed the generators across the country to participate in the bid for supply of energy from any coal received by the generator from their own sources. Not allowing the generator to source coal from other sources including coal received by GUVNL may lead to restricting the competition as envisaged in the Electricity Act, 2003. Hence, the Commission may allow the bidder to source coal from any other source in addition to coal arranged under SHAKTI B (IV) scheme by GUVNL, which will be helpful in increasing the competition for power procurement by the Petitioner and it may be helpful to discover lower tariff in competitive bidding.
11. Mr. Sanjay Mittal and Mr. Shivkant, on behalf of Jindal India Thermal Power Limited submitted that bidder should be allowed to source coal from (a) arranged by the Petitioner Utility under SHAKTI scheme or (b) arranged by generator under existing FSA, existing linkage under SHAKTI scheme or future tie up under SHAKTI scheme or (c) arranged under e-auction coal or anywhere from market. It is submitted that by keeping aforesaid mechanism, many generators shall be allowed to participate in the bidding process and lead to discovery of competitive tariff. Also, the various documents required to be submitted as specified in Clause 4.1.3 (D), (E) and (F) be

not applicable for existing operating plant and such plants need to be exempted from submission of such documents to increase competition.

12. Heard the parties. The Petitioner is procuring power from various sources on behalf of State distribution licensee in bulk and supplying the same to the said distribution licensees, which are approved by the Commission.
13. The Petitioner has proposed to procure power of 3000 MW through competitive bidding on Long Term basis from the generating stations set up under DBFOO by providing such Supplier/generator fuel received under SHAKTI scheme by the Petitioner. The Petitioner has also prayed for approving deviation in some of the provisions of Model Bidding Documents (MBD). Hence, it is necessary to refer the relevant provisions in the Act and Regulations/Guidelines notified under it.
- 13.1. In the present Petition, the Petitioner has proposed for procurement of 3000 MW power on Long Term basis through competitive bidding. In support of aforesaid procurement, the Petitioner has submitted that it has worked out the existing power procurement tied up and demand of the consumers in its subsidiary distribution licensees area and anticipated demand in future and corresponding requirement of power in different years. Considering the present status of power supply from various sources, anticipated demand of the consumers and requirement of further power procurement derived from it, the Petitioner has anticipated that there is requirement of power of about 3000 MW or more in future as stated above. Based on above, the Petitioner has sought approval in deviations in the bidding documents and also sought approval of power procurement on long-term basis for a period of 15 years.
- 13.2. As the Petitioner has proposed to procure power on Long-Term basis, it is necessary to refer the relevant provisions in the Act and Regulations/guidelines notified under it.
- 13.3. Section 42 and 43 of the Electricity Act, 2003 which are relevant in this case are reproduced below:

“Section 42. (Duties of distribution licensee and open access): ---