

“21.13. Adjustment of Transmission Charges based on Availability:

In the case where the actual availability of the Supplier at Delivery Point is less than the Normative Availability during a month, then Supplier shall be obliged to bear the cost of actual applicable transmission charge for the respective month for shortfall i.e. difference between Normative Availability & Actual Availability.”

- 14.7.7. The Objectors have submitted that in case of utilisation of inter-state transmission network the transmission charge and losses are leviable as per the CERC (Sharing of Inter-state Transmission Charges and Losses) Regulations, 2020 which provides that it shall be applicable on withdrawal charges of the State. Thus, the CTU transmission charges shall be the same for each generator/bidder connected with CTU connectivity irrespective of the location of the generator/bidder.
- 14.7.8. It is further submitted by the Objectors that PGCIL raises the invoices of transmission charges towards drawee utility. Hence, such charges are payable by the Utility (Petitioner) and not the generator. Therefore, PSA be modified to state that transmission charges shall be paid by the Petitioner itself and generator should not require to pay the same. The aforesaid would make the document aligned to presently applicable Rules/Regulations. The agreement cannot be contrary to applicable Rules and Regulations.
- 14.7.9. It is submitted that as far as objective proposed by the Petitioner for aforesaid deviation stating that the same is for evaluation of bid is concerned, the Petitioner may consider applicable CTU charges and losses for the project connected with CTU network and the same shall be pre specified by the Petitioner (for non-Gujarat STU connected plants) for arriving at landed cost of power while evaluating the bids. It also support the suggestion with regards to delivery point for CTU connected generator as inter-connection point with ISTS transmission system at plant end while evaluating the bids based on landed tariff at GETCO periphery.
- 14.7.10. We have considered the submissions of the parties. We note that the Petitioner has proposed the deviation in the bid documents with regard to transmission charges and transmission losses specified in the bid documents on the ground that the

proposed deviation will bring the parity amongst the bidders connected at different places i.e. at CTU level and STU level and factor the transmission charges and losses applicable as a part of tariff in bid evaluation by considering all bidders at parity at same point of supply. The Petitioner has recognised the aforesaid provision is deviation from the CERC (Sharing of inter-state Transmission Charges and Losses) Regulations, 2020 and the Supplier shall require to pay the transmission charges on behalf of the Utility/Petitioner. But the same is desired to follow by way of amendment in that clause with consideration that the quoted tariff by the bidders with consideration of payment of inter-state transmission charges and losses payable by them as part of quoted tariff and the same be paid by the Petitioner as 'Procurer' as part of the tariff. Thus, it is one type of reimbursement to the bidders who are supplying power from inter-state generating station with utilisation of the inter-state transmission network wherein the payment of transmission charge and losses be paid by the bidder/generator reflected in supply of power at common/single point of supply by all bidders. The aforesaid deviation proposed by the Petitioner to evaluate all bids of power supply tariff at one point of supply i.e. GETCO/STU inter-connection point. With consideration of above we are of the view that deviation sought by the Petitioner in MBD is with a view to evaluate the bid received from the bidder at par as far as supply of energy by the bidders at same point of supply GETCO/STU interconnection point, which is necessary for bid evaluation. The transmission charges/losses shall be adjusted in the quoted tariff and such transmission charge and losses be pre-specified by the Utility. Any subsequent changes in the transmission charges and losses of the CTU network considered by the bidders while quoting tariff be reimbursed by the Petitioner comparing with consideration of the quoted tariff components of the relevant bidder.

- 14.7.11. We further note that in case the Supplier/Seller declare less availability than normative availability to the Utility in such case the cost of shortfall in availability other than normative availability, transmission charge for same be on the Supplier. If the Supplier reduces the normative availability during the month, the applicable transmission charge burden for such shortfall would be passed on to the Supplier and not on the Petitioner. The aforesaid contentions of the Petitioner seems valid

on the ground that the deviation from the normative availability declared by the generator affects the transmission cost also, as the transmission charges payable by the Utility/Petitioner are higher in such case for which it is not responsible. We also note that the transmission charge and/or losses burden on the Petitioner/Procurer shall not come on the Procurer/Petitioner in case of non-availability, less availability qua normative availability of power supply from the Supplier/generator to the Petitioner for which the Petitioner is not responsible with consideration of provision of bid documents. In such case of non-availability/less availability of power supply due to default of the generator/Supplier, the licensee/Petitioner is not burdened for the transmission charge and losses and ultimately consumers who are not responsible for it. Accordingly, we decide to approve the proposed deviations by the Petitioner.

14.8. The Supply Contract (PSA - Clause 3.1) and Extension of Contract Period (Clause 3.2 - PSA)

14.8.1. Now we deal the deviations sought by the Petitioner in Clause 3.1, 3.2 of the PSA combinedly as they are interconnected

14.8.2. The clause 3.1 of the MBD provides that to not earlier than “3 years and no later than 2 years” prior to completion of the contract period, Utility and Supplier are entitled to issue notice for extending the Contract Period by 5 years. The Petitioner has submitted that the Contract Period under the proposed tender being 15 years, the above time period with regard to extension has been reduced to “not earlier than “1 year and no later than 6 months”. It is submitted that the fuel being arranged by Petitioner (Utility), the proposal of extension, if any, would be required to be initiated by the Petitioner taking into consideration the power requirement & fuel availability and therefore the provision regarding entitlement of Supplier seeking extension in contract period has been deleted.

14.8.3. While Clause 3.2 of the MBD provides that in case the contract is not extended by Utility, it shall pay damages to Supplier on lump sum basis at the rate of fixed charge for the foregone period (i.e. period not extended). The Petitioner has proposed deviation in the aforesaid provision stating that in the bid to be invited by the

Petitioner (Utility), the contract period is pre-defined i.e. 15 years and extension in contract period is allowed upto 5 years subject to PSA provisions. Further, as the fuel is arranged by the Utility under SHAKTI Scheme and operational projects are also allowed to participate, any extension would be contingent to coal availability, operational factors relevant at that time and power requirement of the Petitioner. Accordingly, the above clause 3.2 of the MBD has been deleted in order to avoid cost implication on Utility in the event of non-extension of contract period.

- 14.8.4. The Objectors have objected the proposed deviation in Article 3.1 and 3.2 of the PSA proposed by the Petitioner stating that the deviation sought by the Petitioner is in favour of Utility and against the objective of the Electricity Act, 2003 which provides for balancing of interest between power Supplier and Utility.
- 14.8.5. It is submitted that the Petitioner should not bind the Supplier forcefully to extend the contract period by further period of 5 years. The extension of contract period should be extended only by mutual agreement between Petitioner as well as Supplier.
- 14.8.6. We have considered the submissions made by the Petitioner and Objectors. As the Petitioner sought deviation in Clause 3.1 and 3.2 of the PSA of MBD, it is necessary to refer the same.

“3.1 The Supply Contract

3.1.1 Subject to and in accordance with the provisions of this Agreement, Applicable Laws and the Applicable Permits, the Utility hereby awards to the Supplier the supply contract set forth herein including the right and authority to utilise the Allocated Coal for producing electricity at the Power Station for supply thereof to the Utility (the “Supply Contract”) for a period of [__ (___)]⁶ years commencing from the Appointed Date, and the Supplier hereby accepts the Supply Contract and agrees to implement the same subject to and in accordance with the terms and conditions set forth herein.

Provided that the Utility shall, at any time no earlier than 3 (three) years, but no later than 2 (two) years prior to completion of the aforesaid Contract Period of [__ (___)] years, upon issuing a notice to this effect to the Supplier, be

entitled to an extension of 5 (five) years in the Contract Period under and in accordance with the provisions of Clause 31.4.

Provided that the Supplier shall, at any time no earlier than 3 (three) years, but no later than 2 (two) years prior to completion of the aforesaid Contract Period of [__ (___)] years, upon issuing a notice to this effect to the Utility, be entitled to an extension of 5 (five) years in the Contract Period under and in accordance with the provisions of Clause 31.4.

[Provided further that the Utility shall arrange for the extension of the Fuel Supply Agreement commensurate to the period of extension of this Agreement to ensure continuous coal supply.].....

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3.2 Extension of Contract Period

3.2.1 In the event that extension of the Contract Period shall have become due under and in accordance with the provisions of this Agreement, the Supplier shall, on receiving a notice from the Utility, extend the Supply Contract in accordance with the provisions of Clause 3.1.1.

3.2.2 Notwithstanding anything to the contrary contained in this Agreement, save and except the extension of Contract Period specified in the Proviso of Clause 3.1.1 and in Clause 31.4, in the event that extension of the Contract Period due to the Supplier in accordance with the provisions of this Agreement is not granted by the Utility for any reason, the Utility shall, within 30 (thirty) days of the expiry of this Agreement, pay to the Supplier a lump sum amount computed in accordance with this Clause.

3.2.2 in lieu of the Fixed Charge that would have been payable to the Supplier if the Contract Period were extended in accordance with this Agreement. For computation of the aforesaid lump sum amount payable hereunder, the Fixed Charge due and payable for and in respect of the last month of the Contract Period shall be deemed as the base and the amount so determined shall be reduced by 5% (five per cent) for the following month and the same

computation shall be repeated for every subsequent month for the purposes hereof. For the avoidance of doubt and by way of illustration, if the Fixed Charge for the last month of the Contract Period is Rs. 1 crore (Rupees one crore) and the period of foregone extension is 2 (two) months, the amount payable for and in respect of the first and second months shall be a sum of Rs. 95 lakh (Rupees ninety five lakh) and Rs. 90.25 lakh (Rupees ninety point two five lakh) respectively. It is further clarified that payment for a part month shall be computed on a proportionate basis. The Parties further agree that the payment of such amount shall be deemed to form part of the Secured Obligations and may be recovered by the Supplier under and in accordance with Article 23.

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14.8.7. It is also necessary to refer Clause 31.4 of the PSA, which reads as under:

“31.4 Extension of Contract Period

Notwithstanding anything to the contrary contained in this Agreement, the Utility may, at any time no earlier than 3 (three) years but no later than 2 (two) year prior to completion of the Contract period, by a notice issued to the Supplier in accordance with the Proviso of Clause 3.1.1, require an extension of the Contract Period as specified therein, and in the event of such extension, the Contract Period shall be deemed to be extended accordingly. Provided, however, that in the event an extension is not sought hereunder, the Utility shall pay to the Supplier the Termination Payment computed in accordance with the provisions of Clauses 31.3.2. For the avoidance of doubt, the Parties agree that in the event of an extension hereunder, the provisions of this Agreement, save and except the provisions for extension under Clause 3.1.1, shall apply mutatis mutandis to the extended Contract Period.”

14.8.8. As per Clause 3.1 of PSA of MBD, the Utility to execute power Supply Contract for utilisation of allocated coal for producing electricity at the power station of the Supplier for specified period. The first proviso provides that Utility shall at any time but not earlier than 3 years and not later than two years prior completion of the

contract period upon issuing the notice the Supplier extend the contract period of 5 years in accordance with Clause 31.4 of the PSA. Similarly, the Supplier also at any time not earlier than 3 years but not later than 2 years prior to completion of the contract period by issuing notice to the Utility is entitled to extend the contract period of 5 years in accordance with provisions of Clause 31.4.

- 14.8.9. The last proviso of the said clause also provides that Utility shall require to arrange for fuel by extension of the Fuel Supply Agreement for the period of extension of Power Supply Agreement from the commencement period of extension.
- 14.8.10. Clause 3.2.1 provides that in the event of extension of contract period notice received from the Utility by the Supplier, the supply period be extended as per the provision of Clause 3.1.1.
- 14.8.11. Clause 3.2.2 provides that as per the proviso of Clause 3.1.1 of the Supply Agreement a notice received from Supplier for extension of agreement to the Utility and Utility shall not grant the extension within 30 days of expiry of the agreement, Utility shall be liable to pay lumpsum amount computed in accordance with Clause 3.2.2 in lieu of the fixed charge that would have been payable to the Supplier if the contract period were extended in accordance with provisions of PSA. It is also states that the parties agreed that the payment of such amount shall be deemed to form part of Secured Obligation and may be recovered by the Supplier as per Article 23.
- 14.8.12. Thus, the aforesaid provision provides extension of contract period desired by the Utility (Procurer) as per Clause 3.1.1 where an extension is automatically for the period as per the notice issued by the Utility. While in case of extension of contract period desired by the Supplier under proviso of Clause 3.1.1 and 31.4 in that condition the extension needs to granted by the Utility within 30 days, failing which it attracts payment of lumpsum amount towards fixed charge in accordance with Clause 3.2.2.
- 14.8.13. Clause 31.4 provide that for extension of contract period, the Utility may, at any time not earlier than 3 (three) years but not later than 2 (two) year prior to completion of the Contract period issue notice to the Supplier in accordance with Clause 3.1.1 and in the event of such extension, the Contract Period shall be deemed to be

extended accordingly. However, in the event an extension is not sought, the Utility shall pay the Supplier termination payment computed in accordance with Clause 31.3.2.

- 14.8.14. The aforesaid provisions in the PSA state that right of extension of the contract is available to the Supplier as well as the Utility for the agreement executed between the parties. The Petitioner has proposed to reduce the time limit of “not earlier than 3 year and no later than 2 years prior to completion of contract period” to “not earlier than 1 year and not later than 6 months prior to completion of contract period” with consideration of the power requirement and fuel availability.
- 14.8.15. The fuel arrangement and its extension to be initiated by the Petitioner. The Petitioner has proposed that the extension for entitlement of Supplier for extension of agreement period has been deleted which seems valid for the reason that the fuel arrangement needs to decide by the Utility with consideration of power requirement and fuel availability. It is premature to consider the availability of fuel and requirement of power at the end period of the agreement of 15 years in the present case. Hence, we are of the view that the deletion of the provision of the Supplier seeking extension of the contract period seems valid and accordingly we approve the deviation proposed by the Petitioner in Clause 3.1, i.e. Supply Contract provided in PSA.
- 14.8.16. Now, we deal with the deviation sought by the Petitioner in Clause 3.2 of the PSA stating that the same be deleted. The reason advanced by the Petitioner that the bids are to be invited for 15 years of contract period and the same can be extended for 5 years as per the proviso in the PSA. Moreover, the fuel is to be arranged by the Utility under SHAKTI scheme and operational projects are also allowed to participate. We note that any extension in the agreement would be contingent to availability of coal, operational factors, requirement of power by the Petitioner at that time are relevant factors.
- 14.8.17. Clause 3.2.1 provides for extension of contract period in case of advance notice issued by the Utility as deemed extension, while clause 3.2.2 provides the extension of the agreement in case of advance notice issued by the Supplier to the Utility. In

case of notice issued by the Utility for extension of agreement, the agreement is deemed as extended by the Supplier under Clause 3.2.1 of the agreement. While in case of notice issued by the Supplier to the Utility under Clause 3.2.2 of the PSA, the Utility shall require to confirm the same within 30 days. In case Utility for any reason does not grant extension, the Utility shall require to pay the lumpsum amount to the Supplier for the extension period as compensation.

14.8.18. The present Petition filed by the Petitioner for procurement of power from the Supplier/generator against the allocation of coal under SHAKTI policy to the Petitioner Utility. The period of agreement is for 15 years between the Utility and Supplier. The Petitioner has requested that extension of agreement be undertaken at the end period of the agreement i.e. last year of the agreement. In the present case it is undisputed that the generation of energy is dependent on availability of coal to the Petitioner at the end of the allocation of coal under SHAKTI policy. Moreover, the requirement of power at the end of agreement period is premature to forecast at present with consideration of variance in the demand of consumers, competition in the market as well as the different options of generation available at that time. Further, the technological advancement as well as penetration of renewable energy and storage also affecting the generation requirement from the fossil fuel like coal. Hence, we are of the view that the proposed deviation by the Petitioner that the extension of the agreement by the Supplier deemed as extension of the contract is not valid. Further, the aforesaid Clause also compel the distribution licensee to arrange for coal or require to pay compensation as provided in Clause 3.2.2 read with Clause 31.4. The burden of such compensation is ultimately on the consumers only. Hence, we decide that the proposed deviation by the Petitioner for deleting the proviso of Clause 3.1.1 (Supply Contract) and extension of contract provided under Clause 3.2 seems valid.

14.8.19. We also note that the contention of the Objectors that Model Bidding documents balance the interest of generator as well as licensee. Hence, it is necessary to protect the interest of generators as well as licensee, because in the proposed deviation sought by the Petitioner in Clause 3.1 mandates the Supplier for extension of the agreement on issuance of notice for extension of agreement by the Utility. The aforesaid provision provides for extension of agreement rights to the Utility only

and not Supplier, seems valid because the extension of the original agreement is dependent on the availability of coal arranged by the Petitioner. Hence, in case of non-availability of coal it is not possible to extend the agreement by way of providing coal and availing generation / supply against it. We therefore decide that the contentions of the Objector against the same are not valid and acceptable and hence, the same are rejected.

14.9. Conditions Precedent (Clause 4.1 – PSA)

- 14.9.1. The Petitioner has proposed deviation in aforesaid provision of MBD which provides that Conditions Precedent are required to be satisfied by the Supplier within a period of 180 days from the date of signing Power Supply Agreement (PSA).
- 14.9.2. The Petitioner has submitted that Ministry of Environment, Forest and Climate Change (MoEF), Govt. of India vide notification dated 07.12.2015 has notified revised environment norms were to be complied originally by Dec 2021 / March 2022 by thermal power plants. The emission norms compliance timelines has been thereafter extended by MoEF upto 2023 / 2024.
- 14.9.3. Further, it is stated that various operational projects are anticipated to participate under the bid to be floated by the Petitioner. As the level of compliance met by various projects could be different based on technology and CAPEX incurred, the tariff component to be quoted by any bidder would be contingent to cost incurred, if any.
- 14.9.4. Hence, in order to remove anomaly towards the same, the Petitioner has incorporated an additional clarification as Point (J) under Clause 4.1.3 (Conditions Subsequent to be satisfied by Supplier within 180 days from date of signing PSA) regarding an Undertaking to be submitted by Bidders for compliance to norms, permits and guidelines as notified by Govt. of India as on Bid Due Date including revised norms specified by Ministry of Environmental and Forest, Govt. of India vide notification dated 07.12.2015 & subsequent amendments thereof. It has been clarified that the Petitioner (Utility) shall not be liable for any cost implication towards thereof. The draft of Undertaking would be shared by the Petitioner to

maintain uniformity inter-se amongst bidders while submission of such Undertaking.

- 14.9.5. The Petitioner has proposed to include the following New Clause 5.10, Impact of additional expenditure due towards compliance to revised Environmental norms in the PSA.

“It is to clarify that any impact on Tariff on account of compliance to environmental norms as applicable / notified as on Bid Due Date shall be on account of the Supplier at all times during the contract period and the same shall not qualify for adjustment in Tariff under Change in Law provisions.”

- 14.9.6. The Objectors have submitted that the following clarification be inserted under the said Clauses to avoid ambiguity and disputes:

- *The compliance towards revise norms specified by Ministry of Environmental and Forest, Government of India vide Notification dated 07.12.2015 and subsequent amendments thereof shall be done as per the schedule prescribed by statutory body/Government of India vide Notification dated 31.03.2021.*
- *Any amendment or revision of the environment norms or introduction of any new norms after bid due date shall be claimable under the Change in Law/other applicable provisions of the PSA by generators.*

- 14.9.7. We note the submissions made by the parties on the aforesaid provisions pertaining to the ‘Conditions Precedent’ to be fulfilled by the Supplier consists of the fulfilment of Environmental Norms by the Supplier with consideration of Ministry of Environmental Forest, GoI Rules, Notifications etc. specifically the reference taken by the Petitioner is of Notification dated 07.12.2015. The Petitioner has contended that the bids may be submitted by some of the operational projects also and the time limit for compliance of Environmental norms is extended upto the year 2023/2024 by MoEF. Hence, to avoid the doubt and disputes, the Clause 5.10 is proposed to be added in the PSA clarifying that any impact on tariff on account of compliance of Environmental norms applicable/notified as on bid due date shall be on account of Supplier for all time during the contract period and no tariff adjustment under the provisions of Change in Law be permitted. Thus, the Change

in Law, if any, occurred after bid submission date due to change in Environmental norms etc. and its impact on tariff, the same needs to be factored by the bidder/Supplier and no compensation against such Change in Law is permitted in future. The aforesaid change provides the clarity that the bidder/Supplier shall be required to factor the impact of change in Environmental Law affecting the power plants and its impact on tariff while bidding in the tender upto bid submission date. Moreover, we clarify that any Change in Environmental norms notified/made by the competent authority/Government after Bid Due Date that shall be required to be complied by the selected bidder to generate and supply power to the Petitioner and which qualify as 'Change in Law' in terms of provisions of the PSA shall be permitted as Change in Law and tariff adjustment as per the provisions of PSA. Thereby, the disputes amongst the bidder/Supplier and Procurer, i.e. Petitioner be avoided by incorporating the aforesaid provisions. Hence, we decide to approve the New Clause 5.10, Impact of additional expenditure due towards compliance to revised Environmental norms in the PSA as under:

"It is to clarify that any impact on Tariff on account of compliance to environmental norms as applicable / notified as on Bid Due Date shall be on account of the Supplier at all times during the contract period and the same shall not qualify for adjustment in Tariff under Change in Law provisions. However, any Change in Environmental norms notified/made by the competent authority/Government after Bid Due Date that shall be required to be complied by the selected bidder to generate and supply power to the Petitioner and which qualify as 'Change in Law' in terms of provisions of the PSA shall be permitted as Change in Law and tariff adjustment as per the provisions of PSA."

14.10. Fixed Charge for supply prior to COD (PSA – Clause 14.1.2)

- 14.10.1. Now we deal with the deviation sought in above clause of MBD pertaining to the event of COD, if it is achieved prior to the Scheduled Completion Date, the Supplier shall be paid 70% of Base Fixed Charge for such period (for maximum 365 days).
- 14.10.2. The Petitioner has proposed deviation in the said clause stating that the fuel arrangement under the agreement is based on the coal allocation from CIL /

subsidiaries. Accordingly, the date of commencement of supply would be as indicated by Petitioner prior to the Bid Due Date, based on commencement of coal supply under linkage. Accordingly, the above provision with regard to payment of fixed charge for supply prior to COD has been deleted.

14.10.3. There are no comments of the Objectors on aforesaid deviation sought by the Petitioner.

14.10.4. We note that the arrangement of coal in the present case is of the Petitioner. The allocation of coal is dependent on CIL and its subsidiaries. Hence, date regarding the availability of coal and supply under linkage would be needed to be indicated by the Petitioner with consideration of the availability of coal and its linkage as may be intimated by CIL / subsidiaries. Hence, the COD of the Plant, if any, achieved by the generator/Supplier, in that case the generation from coal is not possible and it affects the licensee and ultimate consumer by way of payment of 70% of Base Fixed Cost as per the Model Bid Documents. Hence, we decide to approve the deviation sought by the Petitioner.

14.11. **Open Capacity (PSA - Clause 18.4):**

14.11.1. The Petitioner has proposed deviation in aforesaid Clause of MBD pertaining to 20% of Contracted Capacity & Committed Capacity shall be Open Capacity under the Power Supply Agreement i.e. available to the Supplier for generation and supply of electricity to any other person.

14.11.2. The Petitioner has proposed the deviation that under the bid, the concessional fuel from Coal India / Subsidiaries is being arranged & allocated by the Petitioner with allocation from SHAKTI Scheme. Accordingly, concept of Open Capacity from Power Plant at the disposal of Supplier has been deleted in order to ensure availability of contracted capacity with the Petitioner (Utility) and prudent use of concessional fuel.

14.11.3. There is no objection on aforesaid deviation sought by the Petitioner. The Petitioner has proposed the deviation with consideration that the fuel supply arrangement be made by it from the coal allocated under SHAKTI scheme to the Petitioner and the

Supplier shall require to generate the electricity and supply it to the Petitioner from utilisation of the coal provided by the Petitioner which is received by it. Hence, the contracted capacity by the generator is linked with the fuel supply provided by the Petitioner for generation and supply. Hence, the Clause regarding 20% of the contracted capacity shall be Open Capacity provided in Clause 18.4 of the PSA of MBD is not relevant but against the very purpose of the generation and supply of electricity from the coal allocated under SHAKTI scheme to the Petitioner. Hence, we decide to approve the deviation proposed by the Petitioner.

14.12. Substitute Supply (PSA – Clause 18.6):

- 14.12.1. The original clause of MBD pertains to Availability of Power Station to be reduced due to Scheduled / Unscheduled Maintenance or Force Majeure by the Supplier with prior consent of the Utility, which consent, the Utility may deny or accept with conditions, supply electricity from any alternative source, including Merchant Capacity, if any, and such supply shall, for payment of Fixed Charge and Fuel Charge be deemed to be supply under the Agreement wherein the Petitioner has proposed deviation.
- 14.12.2. The Petitioner has proposed deviation in the aforesaid provision stating that under Clause 2.7 of RFQ it has incorporated additional condition regarding the ineligibility for certain Projects/ Bidder with whom litigations of the Petitioner are pending.
- 14.12.3. In line with the same, under above Clause 18.6, the Petitioner has added clarification that it may deny to accept supply from such alternative source which is ineligible in accordance with Clause 2.7 of RFQ and therefore the same shall not be considered as compliance for the purpose of determination of availability and payment of Fixed Charge.
- 14.12.4. The Objectors have contended that there is discrepancy in the submissions of the Petitioner in the main Petition and draft bid documents enclosed with the Petition. In the Petition, the reference to Clause 2.7 of the RFQ has been given while in draft bid documents the reference to Clause 2.2.2 of the RFQ as per the terms of PSA substitute supply (alternate source of supply) is permitted under specific cases such as force majeure or in case of plant under maintenance restriction to supply from

sources which are not qualifying under RFQ condition is not a valid argument because the Petitioner must be concerned with procuring continuous power supply rather than being worried about from where the power is supplied, more so because it is the same tariff as applicable to the original source. Further, contract period is envisaged as 15 years, hence any restriction for such long period is not in the interest of both the parties.

- 14.12.5. The provision for substitute supply in case of delay in COD is not applicable to the project already commissioned. The Objector submitted that with regard to delay in COD there can be situations wherein supply cannot be commenced due to reasons beyond control of the Supplier.
- 14.12.6. We have considered the submissions made by the parties. We note that the Petitioner has also proposed deviations in Clause 2.7.2 (c) of RFQ pertaining to Right to accept or reject all applications/bids wherein the Petitioner has proposed that the applicant having litigation with some generators for non-fulfilment of contractual obligations and the same are pending before various forums. Any such Supplier/generator allowed to participate may affect the rights/obligation of the Petitioner. Accordingly, so far as the submission by the Petitioner that such generator also needs to be restricted to utilise the coal allocated under SHAKTI scheme as alternate source for generation of electricity and power supply to the Petitioner is concerned, we clarify that the aforesaid issue is already discussed and decided by the Commission with regard to Right to accept or reject all applications/bids wherein the Petitioner having litigation with generator(s) in above para of this Order shall be applicable in such case also.
- 14.12.7. In so far as generation & supply of power by other Supplier/generator(s)/bidder(s) not having pending litigation before any forum with the Petitioner desires to supply power to the Petitioner as alternate source of power supply from the coal received by the Petitioner under SHAKTI scheme utilised for generation & supply of electricity from generating plant(s) of such Supplier(s)/generator(s)/bidder(s), the Petitioner (Procurer) may allow to generate the electricity from the coal received under SHAKTI scheme by the Petitioner under present bidding documents from generating plant(s) of the said Supplier(s)/Generator(s)/Bidder(s) with a condition

that the available power supply from such generating plant(s) shall be at the discovered tariff under the present bidding process specified in the relevant PSA or at tariff rate lower than said discovered tariff stated in relevant PSA that is agreed for such supply of power by the Supplier(s)/Generator(s)/Bidder(s) to the Petitioner/Procurer. The Petitioner shall decide about the substitution of supply at the earliest and approach this Commission for approval of such substitution of power supply as per terms and conditions of PSA which shall be subject to approval of the Commission. Necessary Application/Petition for such approval be filed by the parties immediately.

14.13. Termination due to failure to achieve Financial Closure (PSA – Clause 20.2):

- 14.13.1. The aforesaid clause of MBD provides that in the event of Financial closure does not occur within the timelines provided (180 days from signing of PSA), Agreement shall be deemed to have been terminated by mutual agreement. Further, Utility shall be entitled to encash the Bid Security.
- 14.13.2. The Petitioner has proposed deviation in the said clause stating that Bid Security (Rs 5 Lakh / MW) submitted by Bidder shall remain valid for period of 180 days (inclusive 60 days claim period). Further, successful bidders shall be required to submit Performance Security (Rs 30 Lakh / MW) upon which Bid Security submitted will be released by Utility. Accordingly, considering the timelines of events, in the above clause regarding encashment of Bid security upon failure to achieve financial closure, the term “Bid Security” has been modified to “Bid Security / Performance Security, as the case may be” to safeguard the interest of the Petitioner (Utility).
- 14.13.3. There are no comments received on the aforesaid deviations sought by the Petitioner. The aforesaid deviations sought by the Petitioner is to safeguard the interest of the Petitioner to see that the timeline of events specified for achieving financial closure are met and also ensure that the project comes as well as performs as per the terms of the bid documents and agreements. Hence, we decide to approve the aforesaid deviation sought by the Petitioner.

14.14. Billing & Payment (Clause 21.10 – PSA) and Discount for early payment (Clause 21.12 – PSA)

14.14.1. The aforesaid clause of the MBD states regarding monthly invoice to be raised by the Supplier by 5th day of the month. Utility is entitled to 1% rebate for payment within 5 days of submission of invoice. MBD does not provide clarification with regard to Regional Energy Account & State Energy Account which is essential for energy accounting and settlement. Further, there is no mention of Supplementary Invoice towards Change in Law, other claims etc. Hence, the Petitioner has proposed deviation in the said clause as stated in earlier para of this Order:

“21.10 Billing and Payment

21.10.1. Commencing from the month following the month in which COD occurs, the Supplier shall, upon issuance of Regional Energy Account (REA) / State Energy Account (SEA) certifying the availability and energy scheduled for such and each succeeding month (or, if such day is not a Business Day, the immediately following Business Day), submit in triplicate to the Utility, an invoice in the agreed form (the Monthly Invoice) signed by the authorised signatory of the Supplier setting out the computation of the Fixed Charge and Fuel Charge to be paid by the Utility to the Supplier in respect of the immediately preceding month in accordance with the provisions of this Agreement. The Supplier may raise the Monthly Invoice through email (during office hours of Utility) / courier / hand delivery. In case, the Monthly Invoice is raised through email, it shall be ensured that the original invoice is received by the Utility within 5 working days from the date of invoice raised. In case of non-receipt of original invoice as per above timelines, the date of receipt of Invoice shall stand revised to the date of receipt of original invoice by Utility. In case of receipt of invoice through email after office hours of Utility, the next day shall be considered as the date of receipt of invoice. Either Party may raise an Invoice on the other Party (Supplementary Invoice) for payment / adjustment / recovery in accordance with the provisions of this Agreement.

21.10.2. The Supplier shall, with each Monthly Invoice submit, (a) a certificate that the amounts claimed in the invoice are correct and in accordance with the provisions of the Agreement; (b) proof of Availability for the period billed, comprising evidence

of communications regarding the extent of Non-Availability from time to time; (c) official documents in support of the variation in WPI as specified in Clause 21.3; (d) detailed calculations of the Fixed Charge for Availability in accordance with this Article 21; (e) detailed calculations of the Fuel Charge, in respect of the electricity dispatched, computed in accordance with Article 22; (f) detailed calculations of the Incentives and/or Damages in accordance with Clause 21.6; (g) details in respect of taxes/duties payable/reimbursable in accordance with the provisions of this Agreement; (h) details of the Fixed Charge to be adjusted by the Supplier in respect of sale of power to Buyers; (i) details in respect of Damages or Incentives payable in respect of Key Performance Indicators in accordance with the provisions of Article 17; G) adjustments, if any, on account of revision of the inter-state transmission charges referred to in Clause 5.5 and in accordance with Clause 21.13; (k) proportionate adjustment on account of inter-state transmission losses to be determined in accordance with Clause 5.6; and (l) the net amount payable under the Monthly Invoice (m) Coal consumption & receipt statement in accordance with the provisions of Article 17.

21.10.3. The Utility shall, within 30 (thirty) days of receipt of a Monthly Invoice in accordance with Clause 21.10.1 (the "Payment Due Date"), make payment of the amount claimed directly, through electronic transfer, to the nominated bank account of the Supplier, save and except any amounts which it determines as not payable or disputed (the "Disputed Amounts"). The aforesaid Payment Due Date shall also be applicable for the Supplementary Invoice. It is to clarify that Date of receipt of Invoice shall be considered as T0 and Due Date for Payment shall be T0+30 days.

21.10.4. All Damages and any other amounts due and payable by the Supplier in accordance with the provisions of this Agreement may be deducted from the Tariff due and payable to the Supplier and in the event the deductions hereunder exceed the Tariff in that month, the balance remaining shall be deducted from the Tariff due and payable to the Supplier for the immediately following month."

14.14.2. The Petitioner has proposed deviation in the aforesaid provision stating that in order to provide clarification with regard to raising of Monthly Invoice /

Supplementary Invoice and discount for early payment, following modifications have been carried out by Petitioner:

- (i) Clarification regarding Regional and State Energy Account for raising of Energy Invoices.
- (ii) Definition added: Supplementary Invoice - means an Invoice other than a Monthly Invoice raised by any of the Parties in accordance with provisions under this Agreement.
- (iii) Clarification: The Payment Due Date of 30 days applicable to Monthly Invoice shall also be applicable for the Supplementary Invoice.
- (iv) Modification: 2% rebate shall be allowed to the Petitioner towards discount for early payment for payment within 7 working days from the Date of receipt of Invoice (T0+ 7 days)
- (v) Clarification: Discount for early payment (2%) shall not be applicable on the invoices raised on account of Change in Law relating to taxes, duties, cess etc.
- (vi) Modification: Supplier may raise invoices via email shall during office hours subject to submission of original invoice to the Petitioner within 5 working days.

14.14.3. The Objectors have submitted that the SBD/MBD are drafted by the MoP after due consultation and consideration. Therefore, modifying parameters which have commercial implication should not be permitted. Further, increase in discount and qualifying days would lead to factoring the impact by the bidders in their tariff bid, which ultimately lead to higher tariff discovery.

14.14.4. The deviation sought by the Petitioner by way of clarification regarding Regional Energy Account and State Energy Account for raising invoices seems valid as the energy accounting for inter-state generator is carried out at regional level and reflected in State Energy Account. Similarly, for all the intra-state generators, the energy accounting to be carried out at State level. Hence, raising of energy invoices in above cases needs clarity to avoid any ambiguity in the same. Further, the proposed definition of Supplementary invoice also provides clarity regarding the incidence when the supplementary invoices is to be raised by the parties other than monthly invoices. Moreover, it is clarified that the payment due date of 30 days also applicable for the Supplementary invoices.

- 14.14.5. The modification for prompt payment i.e. within 7 working days from the date of receipt of invoices proposed by the Petitioner also seems valid as the Supplier/generator is eligible to receive early payment against the monthly invoices and it will be beneficial in the working capital requirement etc. The early payment assures the liquidity and revenue return of the Supplier/generator.
- 14.14.6. The mode of raising the invoices is also proposed to be allowed by e-mail within 5 working days by the Supplier. It provides conveniency to the party as well as the Supplier is also able to receive the bill invoices at the earliest from the Procurer/Petitioner.
- 14.14.7. The contention of the Objector that the provision in the bid documents with regard to discount terms provided with consideration of the consultation process carried out by the MoP while finalizing the Standard Bid document and the modification have commercial implication and it reflect as impact on the tariff and discovery of tariff may be higher is concerned, the said argument is not accepted as the guidelines issued by Ministry of Power, GoI itself provides that the deviation, if any, desired by the Procurer and the same shall be subject to approval of the Commission. Hence, the MoP has envisaged deviation in the bid documents be allowed with consideration of need of the parties. The deviations also require to be approved by the Appropriate Commission and in this case the Appropriate Commission is this Commission. Hence, the contention of the Objector that deviation should not be allowed is not accepted. Further, the contention of the Objector that the proposed modification having commercial implication as the discount rate proposed is 2% instead of 1% as per SBD/MBD is concerned and the payment timeline increased from 5 days to 7 days is concerned, we note that the discount of 2% instead of 1% proposed by the Petitioner helpful to obtain higher rate of rebate for early payment made against bill invoice with consideration of financial aspect of the licensee. The generator is benefited by receiving payment early as same is helpful to reduce working capital etc. Similarly, increase in period from 5 days to 7 days provide certain flexibility to the Petitioner for verification of bill invoices, its date and confirmation of the same and approval from the concerned competent authority as being Government Company. It is undisputed that the

generator to be benefitted by way of receiving early payment against the bill invoices. Moreover, in so far as increase from 5 to 7 days is concerned, the same is as per prevailing practice for long term agreement by the Petitioner. Moreover, the contention of the Objector that aforesaid deviation lead to higher tariff discovery is concerned we are of the view that the discovery of tariff in the competitive bidding happens with consideration of different factors by the bidders where the aforesaid deviation will have what impact is premature to consider. Hence, we decide to approve the aforesaid provisions sought by the Petitioner.

14.15. **Station Heat Rate (Clause 22.1 – PSA)**

- 14.15.1. The Petitioner has proposed deviation in the aforesaid clause of the MBD pertaining to Station Heat Rate (SHR) whereby SHR is to be pre-specified by the Utility while inviting the bids based on which the bidders would require to quote their Tariff. Further, as a part of compliance towards achieving Commercial Operation, projects / units would be required to demonstrate fulfilment of SHR by performance tests which shall be considered successful only in case tests establish that SHR is equal to or lower than SHR pre-specified by Utility (upto 2% variation allowed).
- 14.15.2. The Petitioner has submitted that as per MBD, SHR is to be considered after accounting for applicable dedicated transmission losses and Auxiliary consumption.
- 14.15.3. It is also stated that the prospective bidders have submitted that it would not be feasible to achieve the pre-specified SHR i.e. 2350 kcal/kwh by old/ operational plants as the same is after considering the Auxiliary consumption and dedicated transmission losses. Considering the same, bidders have requested to increase the SHR upto 2500 kcal / kwh to enable participation from sub-critical units and provide level playing field.
- 14.15.4. The Petitioner has proposed deviation in the aforesaid provision stating that as per the Bid documents, all plants (irrespective of commissioning status) would be required to demonstrate that the actual SHR is equal to or below the pre-specified SHR by the Petitioner while inviting the bids after carrying out the stipulated tests. The PSA also provides for adjustment in fixed charge in case of variation in SHR with

reference to pre-specified / actual SHR in accordance with the provisions of the PPA.

- 14.15.5. As per the provision of MBD, the Petitioner is required to pre-specify the Station Heat Rate for the purpose of participation by the prospective bidders. In order to encourage better participation from all categories of units including sub-critical units, the Petitioner has pre-specified the SHR as 2450 kcal/kwh, which shall have to be taken into consideration by the bidders while submitting their bids.
- 14.15.6. The Objectors have submitted that it may not be possible for the operational power station to meet the specified heat rate of 2450 kCal/kWh within the allowable limits. The Station Heat rate of 2450 kCal/kWh is net heat rate considering auxiliary power and transmission losses which will have implication on the fixed charges as per provision of clause 21.2.3 of the PSA. The Objectors have submitted that the Commission may consider Station Heat Rate (SHR) of 2500 kCal/kWh which will capture the impact of increase in auxiliary consumption due to installation of environmental control system.
- 14.15.7. We have considered the submissions of the parties. We note that the objections raised by the Objectors that the SHR be considered as 2500 kCal/kWh for the operational power station since while determining the SHR, the auxiliary consumption and transmission losses also required to be considered. In so far as same is concerned, we note that the SHR proposed by the Petitioner with consideration of the auxiliary consumption as well as transmission losses and also the power plants require to demonstrate the same in Performance test of unit.
- 14.15.8. Further, we note that the aforesaid deviation sought by the Petitioner, based on the MBD, wherein; the pre-specified SHR is 2350 kCal/kWh with consideration of auxiliary consumption and dedicated transmission losses. The Petitioner has proposed the same with considering higher SHR of 100 kCal/kWh, i.e. as 2450 kCal/kWh for encouraging participation amongst the bidders including subcritical units also. The SHR of 2350 kCal/kWh specified in the MBD by MoP is with consideration of the various aspects. Further, any increase in the SHR affect the energy charges payable by the licensee and ultimately to the end consumers. It is

necessary to balance the interest of all stakeholders consisting of licensees, generator and consumers. The larger participation amongst the bidders is helpful to discover the competitive tariff to the Petitioner. The SHR of the plant is one of the key factor for deriving the energy charge rate. As the fuel is provided by the Petitioner and the generator/Supplier shall require to generate the electricity by utilisation of same in an efficient and economical manner and supply the energy generated from it to the Petitioner Utility. Hence, we decide to approve the deviation proposed by the Petitioner with a view that participations and competition amongst the bidders is preferable to derive and discover the competitive lowest tariff. The contention of the Objectors against it is not acceptable and therefore rejected. We decide to approve the deviations sought by the Petitioner.

14.16. Determination of Gross Calorific Value (Clause 22.3 – PSA)

- 14.16.1. The aforesaid clause of the MBD state with regard to weighted average GCV of fuel received at power station shall be considered as average GCV which would be worked out based on classification provided by CIL under FSA for computation of Fuel Charge for payment.
- 14.16.2. The Petitioner has proposed deviation in the said Clause stating that as per the tender documents, for the purpose of fuel cost working the GCV as well as coal cost as specified under the FSA shall be applicable at all times and any additional burden in this behalf shall have to be borne by Supplier at all times. However, there is no provision under PSA with regard to adjustment GCV towards variation due to storage.
- 14.16.3. Further, it is stated that as per CERC Tariff Regulations 2019-24, for Energy Charge working, Calorific value of coal is worked out based on Weighted Average GCV of coal as received less 85 Kcal/Kg on account of variation during storage at generating station. Accordingly, Petitioner has proposed to allow the similar adjustment to the tune of 85 kcal/kg towards GCV adjustment in line with CERC Regulations for variation due to storage at generating station.
- 14.16.4. **The Objectors have suggested as under:**

- The provision if retained, would defeat the purpose of actual fuel cost pass through. Moreover, on account of the same, it will result into less participation or bidders will factor the impact in the tariff, which would lead to higher bids.
- This would not be in the interest of GUVNL or end consumers.
- Reference may be drawn to the judgment of Hon'ble Supreme Court in Nabha Power Limited v. Punjab State Power Corporation Limited & Anr., (2018) 11 SCC 508.
- It is also to be noted that the Hon'ble Madhya Pradesh Electricity Regulatory Commission in Petition No. 36 of 2009 has also allowed deviations in order to decrease risk and get competitive tariff.
- The coal is being arranged by the Utility under Para B (iv) of SHAKTI Policy. Thus, there is a high possibility of the coal coming from a basket of mines located at different regions and different quantum, having different GCV and different distances for transportation.
- Thus, any change in composition or supply quantum will, consequently, affect Coal cost. Therefore, the Fuel Charge provisions be modified to make them on a Weighted Average basis with weight being mine wise quantum.
- Further, in order to avoid disputes and serve the intent of fuel cost pass through, all GCV measurements should be on as received basis and this should be explicitly specified in the PSA.
- GCV should be measured by a govt. notified entity at TPP rather than relying upon GCV Specified by CIL.
- MoP's Case 4 bidding guidelines provide that determination of GCV should be on 'as received basis'.
- Since the coal source for all bidders will be the same, GUVNL should prespecify the ex-mine cost of coal and GCV of coal to be considered by all bidders in the bid. This will allow for a more competitive bidding.

14.16.5. The Petitioner has proposed deviation in the aforesaid clause of the MBD stating that for the purpose of fuel cost working GCV and cost of coal specified under FSA shall be applicable. It is also stated that the deviation with regard to adjustment of GCV variance due to storage is not provided. However, relying on CERC Tariff Regulations 2019-24 the energy charge, calorific value of coal on weighted average

as received less 85 kCal/kg be allowed as variance during storage at generating station.

- 14.16.6. The contention of the Objectors that the aforesaid deviation sought by the Petitioner needs to revisit and keep the original clause of the SBD on ground that the coal received from the various mines by the Petitioner under SHAKTI scheme. Moreover, the different location, different GCV of coal received by the Petitioner. Its quantum is also vary from mine to mine. Hence, weighted average GCV needs to consider to meet out the requirement of pass through fuel price. Further, the GCV of coal be considered as the receipt of the coal GCV at receiving end based on the GCV measure by Third Party Person (TPP) instead of GCV specified by CII. Further, MoP case IV bidding provides the GCV should be on received basis. Since coal source for all bidders will be same the Petitioner should pre-specify the ex-mine cost of coal and GCV of coal considered by all bidders in the bid. It will allow more competition.
- 14.16.7. We have considered the arguments extended by the parties. We note that there are certain clauses in the bidding documents that do not serve its intent of ensuring fuel cost pass through. We are further aware that the power sector has been plagued with many disputes regarding fuel cost recovery. We feel to avoid such scenario going forward in the interest of all stakeholders and that clarity needs to be provided in the bidding documents.
- 14.16.8. We are therefore, of view that the bidding documents explicitly state that GCV to be used for the purpose of computation of fuel charge shall be GCV of coal on “as received basis” at power station and with further adjustment of 85 kCal/kWh for stacking losses.
- 14.16.9. We also note that the fuel supply may be available from different coal mines having different GCV of coal, distance of coal mines etc. In such situation it is better to consider weighted average cost of the coal with consideration of its quantum received, price, GCV etc. to meet out the intent of the fuel cost pass through adequately.
- 14.16.10. We are of the view that the fuel charge is under pass through mechanism. It is better that Utility should pre-specify ex-mine cost of coal and GCV to be considered by the

bidder while quoting their bid. It provides uniformity of consideration of fuel parameters by the bidder and bring the clarity about the changes if any, occurred in above parameters in future litigation matters also.

14.16.11. The Objectors have relied on decision of Hon'ble Supreme Court in *Nabha Power Limited v. Punjab State Power Corporation Limited & Anr.*, [(2018) 11 SCC 508] and decision of *Madhya Pradesh Electricity Regulatory Commission in Petition No. 36 of 2009*. The relevant portion of decision of Hon'ble Supreme Court in case of *Nabha Power Limited v. Punjab State Power Corporation Limited & Anr.*, [(2018) 11 SCC 508] is reproduced below:

".....

52. Schedule 7 of the PPA provides for tariff payment and its computation. The monthly energy charges form part of clause 1.2.3 of the 7th Schedule. This clause is extracted as under:

"1.2.3 Monthly Energy Charges

The Monthly Energy Charges for Month "m" shall be calculated as under:

$$MEP_n = AEOM \times MEP_n$$

Where:

AEOM is the Scheduled Energy during the month m (in kWh)

Monthly Energy Charges

$$MEP_n = \frac{NHR_n \times F^{COAL}}{PCV_n}$$

where,

NHR_n is the Net Heat Rate for the Contract Year in which month "m" occurs expressed in kCal/kwh and is equal to the Quoted Net Heat Rate of the Contract Year in which month "m" occurs, as provided in Schedule 11.

F^{COAL} is the weighted average actual cost to the Seller of purchasing, transporting and unloading the coal most recently supplied to and at the Project before the beginning of month "m" (expressed in Rs./MT in case of domestic coal)

PCV_n is the weighted average gross calorific value of the coal most recently delivered to the Project before the beginning of month "m" expressed in kcal/kg."

(emphasis supplied)"

53. The variable component of F^{COAL}_n refers to the 'actual' cost to the seller/appellant of the three components, i.e., (a) purchasing; (b) transporting; and (c) unloading the coal. The first respondent is thus right that there may be different aspects before the coal is used in the plant which are not required to be reimbursed by the first respondent. The illustrations given by the first respondent are of sizing of coal, crushing of coal, sprinkling and moisturisation of coal for stacking and storage, etc. being activities required to be undertaken prior to generation. Thus, there is no hesitation in our concluding that in view of the specific formula provided, only three aspects relatable to coal would determine the particular coefficient.

54. These three expressions are thereafter followed by the stipulation that the coal has to be recently supplied "to and at the project." The question is, what is the meaning of this expression? The word 'to' obviously would have reference to transporting while the word 'at' would have relationship with unloading since it would be 'transporting to' and 'unloading at'. Any other construction will fail to make grammatical sense. Not only that, all the three, i.e., purchasing, transporting and unloading, have a reference to "the Project." Thus, the definition of F^{COAL}_n is the weighted average actual cost incurred by the appellant of purchasing the coal and transporting it to the project site and thereafter unloading the coal at the project site. The fact that the property in coal passed on to the appellant vis-à-vis SECL, on delivery being taken at the mine-end would not change the definition of coal pricing as is required for the purposes of calculation of the tariff.....

.....

66. Now turning to the other aspect of the GCV of the coal. If the issue is one of SECL billing for higher Calorific Value while actually supplying a low Calorific Value of coal, that would be a matter between the appellant and the SECL and the first respondent cannot be blamed for the same. That does not take away from the application of the formula for energy charge which provides for PCV_n as the weighted average Gross Calorific Value delivered to the project. This Calorific Value of coal would have to be, thus, on the same parameter determined at the project site.

67. On behalf of the first respondent an endeavour has been made to make a distinction between 'at the site' and 'to the project' in the definition of F^{COAL}_n and PCV_n . However, this is not of much assistance to the first respondent, in our view, as delivery 'to the project' could only mean 'at the site of the project'. It cannot be at the mine site. In fact, this is a fundamental issue where the first respondent seems to be altering the basic concept of the formula by seeking to replace the wordings in the formula relatable to the project-site to the mine-site.

68. In view of our discussion we have no hesitation in concluding that the point at which the Calorific Value of the coal is to be measured is at the project-site. The plea of the first respondent that there is no such methodology of measuring the Calorific Value at the project-site is belied by the sample reports of different financial years filed by the appellant along with the synopsis, which itself referred to the joint sampling and testing of the coal received and is duly signed by both sides. It is surprising how such a bald denial was made despite the position existing at the site. These sample reports are for years 2014, 2015, 2016 and 2017.

69. We are, thus, of the view that the reading of the energy formula leads to only one conclusion that all costs of coal up to the point of the project site have to be included and the Calorific Value of the coal has to be taken as at the project-site.
.....”

14.16.12. The clauses stated in the bidding documents by the Petitioner are consist of the provision with regard to GCV as decided in case of Nabha Power Vs. Punjab SPCL by Hon'ble Supreme Court wherein Hon'ble Supreme Court has interpreted with regards to calorific value is to be measured at project site be considered for applicable by deciding the fuel cost. In the said decision Hon'ble Supreme Court has decided that the three components which are receivable as part of fuel cost by the project developer are (i) weighted average Gross Calorific Value of coal delivered at project site (ii) transportation cost of fuel and (iii) washing of coal cost. The Petitioner has also in the clause 22.2.1 in the PSA stated about the fuel charge comprise of (a) Rs. ___ and paise ___ per kWh on account of cost of fuel, (b) Rs. ___ and paise ___ per kWh on account of transportation (for distance of ___ kilo meters and (c) Rs. ___ and paise ___ per kWh on account of washing. Thus, the aforesaid provisions are seems similar to the disputes between Nabha Power and Punjab SPCL case wherein Hon'ble Supreme Court has held that the cost of fuel be decided based on the cost of fuel received at the project site of the Supplier. The Petitioner has suggested to determine the GCV of fuel received during the month at the power station less 85 kCal/kg on account of variation during the storage at generating station shall be reckoned as the average GCV for the purpose of fuel surcharge.

14.16.13. The Petitioner has in the said clause 22.3 of the PSA, i.e. Article 22 pertaining to fuel charge specified the mechanism for determination of GCV, necessary provision for collection of sample methodology for determining GCV as received basis at power

station, permissible losses, sampling mechanism, inspection right of Utility for verification of records etc. and in case of any dispute with regard to GCV etc. if any arise resolution of it specified.

14.16.14. The Objectors had contended that the clause 22.3.8 is not in consonance with the other provisions of the Clause 22 of the PSA, wherein it is provided that the cost of fuel be pass through is concerned, we are of the view that Article 22.3.8 specifies that in case of any inconsistency between Article 22 and other provisions of the Clause 22.2.3/ the FSA or AFSA shall in respect of price of fuel or GCV thereof any additional burden in this behalf be at all times be borne by the Supplier. The Article 22.2.3 of PSA provides that the amount payable for fuel is based on the landed cost of such fuel. Thus, when the landed cost of fuel in accordance with provision of Article 22 of PSA receivable by the Supplier/generator the question of the cost of fuel pass through provided in the bidding documents is not affected in any manner.

14.16.15. Considering the above, we decide to approve the deviations sought by the Petitioner.

14.17. Additional Fuel Supply Agreement (AFSA) - (PSA - Clause 22.9)

14.17.1. The Petitioner has proposed deviation in the aforesaid Clause of MBD pertaining to the event of Fuel Shortage, Supplier shall make best efforts to tie up additional source of fuel supply and transportation to meet Fuel Shortage through AFSA. The Supplier shall, with the concurrence of Utility submit the AFSA for review and approval of the Appropriate Commission.

14.17.2. The Petitioner has proposed deviation in the aforesaid Clause stating that the tie up of additional fuel under AFSA would necessitate analysis and evaluation of landed cost by the Petitioner (Utility) in addition to terms of fuel supply to confirm the prudent practice in coal procurement. Accordingly, the above clause has been modified providing that Supplier shall submit AFSA for review and concurrence of the Petitioner (Utility) and thereafter Petitioner (Utility) shall submit AFSA for review and approval of the Commission.

- 14.17.3. The Objector has contended that the Petitioner has proposed approach would be time consuming. In the meantime, due to a coal scarcity, generation and availability will be impacted. Therefore, GUVNL should provide clarity on the above and Generator should not be penalized for the same.
- 14.17.4. It is also suggested that under Article 22.10 of the PSA, the fixed charge payment proposed to be restricted to 70% in case of non-availability due to AFSA not approved in full or part by the Commission or Utility is concerned, the Objector has suggested that arrangement of the coal is the duty of Utility; hence, Supplier cannot be held accountable for taking risks related to shortfall in coal. Further, denial of AFSA by Utility or the Hon'ble Commission cannot be a ground to reduce the fixed charge recovery of the Supplier. Hence fixed charges shall be payable at 100% by the Utility.
- 14.17.5. We have considered the submissions of the parties. We note that present bids invited by the Petitioner from the Suppliers/generators to supply the electricity generated from the coal allocated under SHAKTI scheme to the Petitioner. Thus, the prime responsibility of providing fuel accepted by the Petitioner Utility. The aforesaid provisions of the bidding documents state that in case of shortage of fuel the Supplier shall with concurrence of the Utility and approval of the appropriate Commission make best efforts to tie up additional source of fuel supply and transportation of it to meet out shortage through AFSA. The proposed deviation by the Petitioner that any tie up of additional fuel under AFSA should require analysis and evaluation of landed cost by the Petitioner (Utility) to confirm the prudent practice in coal procurement seems valid as the final impact of the cost of procurement of fuel and its transportation be on Utility and ultimately on consumers of the licensee. In case the power/electricity available at cheaper rate than the procurement price of fuel, and its transportation and generate electricity from it, in that case it is desirable to procure power from cheaper source than the procure fuel from alternate source and generation the electricity from it having higher cost. Moreover, an approval of the Commission is also necessary on such alternate fuel arrangement if any, made by the Supplier to verify and approve such procurement of coal with consideration of its GCV, transportation cost, and finally

impact on the energy charge as well as tariff payable by the licensee and ultimately consumers of the licensee area. Hence, the proposed deviations are seems valid.

14.17.6. So far as the objection of the Objectors that the approval of the Petitioner as well as the Commission is time consuming is premature. In case of the shortage of fuel and its impact on generation and its availability affecting to the Supplier/generator either party have right to approach the Commission for dispute if any in such condition. Hence, the aforesaid contention of the Objectors are not acceptable and the same are rejected and we approve the deviation proposed by the Petitioner.

14.17.7. In case of emergency which are temporary in nature say for period not more than 3 months in a year when the availability of fuel for generation is not available or possible from the linkage coal of the Procurer provided to the generator, in such exceptional condition this provision be apply.

14.17.8. The duration between the non-availability of fuel to period of fuel made available by the Petitioner (Procurer), though the project developer/generating plant was ready for generation but due to non-availability of fuel and pending approval of the Commission the generator may not be able to generate the electricity though it may ready for generation and also ready to arrange for an alternative fuel but not able to generate and supply the electricity to the Petitioner. We note that if the generation cost of electricity is cheaper than the tariff discovered under the competitive bidding or lower than it in that case it is desirable to optimum utilisation of generating assets as commercial principle. Therefore, we are of the view that in such conditions as stated above generator/Supplier may be allowed to generate the electricity with available fuel if any, with consideration of the pricing of such electricity be not exceed the ceiling price as discovered under competitive bidding for the said generating plant. Further, the generator/Supplier get approval from the Petitioner i.e. Power Procurer for limited period stated as above within one (1) month and also immediately approach the Commission for approval of alternative mechanism for procurement of fuel and approval of additional fuel supply agreement.

14.18. **PSA – Clause 24.2.2 – Settlement of UI charges:**

- 14.18.1. The aforesaid clause of the MBD state that Utility shall have the first right to Despatch, in the form of UI, any surplus electricity generated from the entitlement of the Utility in the Contracted Capacity by utilizing the allocated Fuel.
- 14.18.2. The Petitioner has proposed deviation in the said provision stating that Unscheduled Interchange (UI) has been replaced with Deviation Settlement Mechanism (DSM) by the CERC, the term has been appropriately modified. Further, the above provision regarding first right to dispatch has been deleted as power under UI / DSM cannot be scheduled to Utility as per prevailing norms.
- 14.18.3. The aforesaid deviation sought by the Petitioner is valid with consideration of the CERC Regulations and Commission Orders/Regulations. It is in line with the prevailing CERC Regulations. Moreover, there is no objection on the aforesaid deviation sought by the Petitioner. Hence, we decide to approve the same.
- 14.19. **PSA – New Clause 24.5 added – Proportionate Availability:**
- 14.19.1. The Petitioner has submitted that the cases wherein entire installed capacity of any unit(s) is not tied up with Utility under PSA, there is a need to have an appropriate mechanism so as to ensure that the Supplier makes available to the Utility capacity proportionate to the contracted capacity out of the installed capacity at all times.
- 14.19.2. The Petitioner has proposed to incorporate 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.
- 14.19.3. The Objectors have contended that the PSA provides that Supplier is to maintain normative availability of 90% and in case of not meeting the same, the fixed charges are reduced and damages at the rate of 25% of fixed charges are also to be deducted for any reduction below the availability of 85%. As the aforesaid provision is there, there is no apparent need for the Petitioner to incorporate additional Clause as is

proposed since its interest are adequately protected in case of Supplier failing to meet the normative availability requirements.

- 14.19.4. We have considered the submission of the parties. We note that the Clause 24.5 of the PSA states about proportionate availability declaration by the Supplier. The Petitioner has proposed the same as under:

“24.5. Proportionate Availability

24.5.1. The Supplier shall comply with the provisions of the applicable Law regarding Availability including, in particular, to the provisions of the ABT and Grid Code relating to intimation of Availability and the matters incidental thereto.

24.5.2. In case the Contracted Capacity of a Unit/Contracted Capacity as a whole is a part of the installed capacity of a power station; in the event of Availability from the Project in a Settlement Period being less than 100%, the capacity available to Utility for despatch shall be reduced proportionately. However, the Supplier has the option to offer more than such reduced capacity for despatch by Utility but not lower than such "Proportionate Availability". The Supplier shall prove such Proportionate Availability by using readings of meters at Generators for each Settlement Period and Energy Output of the Project up to Contracted Capacity.

24.5.3. In case the Supplier fails to establish Utility's proportionate right as per provisions of this Agreement, the Supplier shall be liable to be penalised. Such penalty shall be higher of: (a) twice the Fixed Charge; and (b) the entire sale revenue accrued from Buyers. For the avoid of doubt, no Fixed Charge or any amount in lieu thereof shall be due or payable to the Supplier for and in respect of any electricity sold hereunder. In case the Supplier is unable to maintain the schedule for ensuring proportionate availability specifically due to restrictions imposed by Regulatory Authority, the Utility may, upon request of the Supplier relax the applicability of provisions of Proportionate Availability.”

- 14.19.5. Therefore, it is necessary to clarify that in the event when the availability declared by the Supplier from the unit/generating plant less than 100% in that case the scheduled despatch shall be required to reduce proportionately by declaring

availability to the Utility/Petitioner. The proposed deviation sought by the Petitioner is necessary to balance and to avoid future litigations regarding the diversion of energy by declaring lower availability to the Petitioner (Utility) whenever the declared availability is less than 100% by the generator/Supplier. Because in such situation the right on energy generated from the unit/plant must be in proportionate to the rights of the Utility of such plant as per PSA. It also restrain the Supplier/generator to diversify the share of the energy of the Utility/Petitioner.

14.19.6. The contention of Objector that the Supplier shall require to maintain normative availability of 90% and in case of non-meeting the same fixed charge reduced and damages at the rate of 25% of fixed charge also be deducted for reduction below the availability of 85% is concerned, the said provision is with regard to the 100% payment of fixed charge linked with the availability needs to declare by the generator/Supplier and failure to achieve the availability stated above and the availability reduced the penalty be imposed also as specified in Clause 24.5.3. The aforesaid clause is not state with regard to proportionate share of the Utility/Petitioner who sign PSA with the generator/Supplier for supply of power from the coal of SHAKTI scheme provided by the Petitioner. The proportionate availability is different and distinct from the normative availability and reduction in normative availability. It is necessary that the share of the Utility/Petitioner be maintained during the contracted period in proportionate to the agreement signed between the parties in the unit/generating plant. Hence, the contention of the Objectors are not acceptable and the same are rejected.

14.19.7. In view of above, we decide to approve the deviation sought by the Petitioner to add new clause 24.5 with regard to proportionate availability in the PSA.

14.20. **PPA – Article 28 – Force Majeure**

(i). MBD Clause 28.4 & 28.7

14.20.1. The Petitioner has proposed deviation in Clause 28.4 and 28.7 of the MBD. Clause 28.4 of the PSA 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. While 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.

14.20.2. The Petitioner has proposed deviation in the said clauses with submissions stated below:

(a) It is proposed that Clause 28.4 be deleted as under Clause 28.4 of PSA state 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.

(b) Clause 28.7 state 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 proposed 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.”

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

(ii). The Petitioner has also proposed deviation in Clause 28.11 of the MBD.

14.20.4. Clause 28.11 of MBD state regarding 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.

14.20.5. The Petitioner has 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 this 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.

14.20.6. Based on above, the Petitioner has proposed deviation that the Provision 28.11 – Relief for unforeseen events has been deleted by the Petitioner in its bid documents.

14.20.7. The Objectors have taken following objections on the deviation sought by the Petitioner:

Re. Political Event :

- Political events such as nationalization, expropriation, unauthorized refusal of permit, etc., are beyond the Supplier's control and which are caused by Govt. Body. For such cases, SBD rightly provide protection to Supplier.
- Provision provided Supplier & Utility an avenue to seek relief when an event is not covered under provisions of PSA, particularly force majeure.
- The deviation is unbalancing the risk framework.
- Supplier may not be able to sustain its operations and become NPA, which is ultimately impacts the consumer as it is consumer's money invested through banks.

Re. Unforeseen Events :

- Provision regarding unforeseen events was included in SBD following years of litigation and sought to incorporate lessons learnt from the past.
- It was to address the issues in Case 1 Bidding document.
- Rather than avoiding litigation it will increase it. Provision provided for mutually reconciliatory mechanism.

14.20.8. We have considered the rival contentions of the parties. We note that the force majeure clause provided in the Article 28 of the PSA to dealt with the events which

may qualify as force majeure or beyond the control of the parties and what are actions needs to be taken by the parties and what are the remedies available in such events.

14.20.9. The Petitioner has proposed deviation in Article 28.4 of the PSA consist of Clause stating that Change in Law, only if consequences thereof cannot be dealt with and in accordance with the provisions of Article 34 and its effect, in financial terms, exceeds the sum specified in Clause 34.1 be deleted on a ground that making any events of change in law for which its consequences are not specified in Article 34 and its financial effect in 34.1 be qualify as political event under force majeure lead to condition that the Change in Law event be converted as political event and it qualify as force majeure event by allowing such provision the risk pose towards unfettered cost claimed and it would dilute the sanctity of tariff based competitive bidding. Moreover, it will also lead to dispute pertaining to interpretation of the qualifying criteria of 'Change in Law' and if it is not fall in Change in Law than qualify as Political Event of Force Majeure. Thus, the said provision provides that the event of change in law not dealt in financial terms in Article 34 be qualify as force majeure event of Political Event and accordingly, the treatment of force majeure be available to the parties. The aforesaid provision lead to disputes between the parties with regard to that though the event is change in law but not qualify for financial compensation etc. It may be qualify as political event of force majeure and accordingly the remedy seek by the party under such clause. Hence, to avoid such eventuality the proposed deviation by the Petitioner seems valid.

14.20.10. The contention of the Objectors that the modification in the Clause regarding political event like nationalisation, expropriation, unauthorize refusal of permit etc. by the Government body are beyond the control of Supplier is concerned the aforesaid provisions are not link with Article 28.4 which proposed to delete by the Petitioner because the Change in Law event which is not qualify for reimbursement to either party as per the financial terms as specified in the Clause 34.1 of PSA be considered as Political Event. Thus, the aforesaid provision state that the event which is Change in Law be treated as Force Majeure event of Political Event in a situation when such Change in Law is not qualify financial compensation under Article 34.1 of the PSA. Thus, the Objectors contentions with regards to not allow

the deviations sought by the Petitioner on a ground that it affect by way of risk allocation is not valid. Further, the event specified by them are whether qualify as Change in Law or not is subject matter of interpretation in a given case which is premature. Hence, we are of the view that the contention of Objector are not accepted and we approve the deviation sought by the Petitioner in Clause 28.4 of the MBD as suggested by it.

14.20.11. The Petitioner has proposed deviation in Article 28.7 of the PSA of the MBD stating that the political event under force majeure is specified under business associated risk and allowance pass through of cost for consequence of such risk to Utility may affect the interest of the consumers. It also result into litigation/demand of the Supplier relief under such Clause. Therefore, the Petitioner has proposed occurrence of political event for force majeure cost shall be borne by the Supplier. The Objectors have contended that it will unbalance the risk allocation. Moreover, the cost of political events may not be sustained operation and ultimately the project become NPA and the objective of the Petitioner to protect the consumers interest in terms of ensuing continuity of power supply is defeated and in case of NPA it affect the consumers money that has been invested through banks is affected is concerned, the said arguments are not acceptable on a ground that the provision of 28.7 state that in case of political event of force majeure the impact of financial effect be compensated by the Utility though they are not responsible for it. It is burdensome on the licensee and ultimate consumers. In the political events occurrence the cost attributable on it be if pass on to the licensee/Utility than in such event the additional burden without receiving power supply etc. be on the licensee and ultimate consumers. The allocation of cost/risk on political event if on the Supplier, the Supplier try to avoid any such eventuality or take necessary action to avoid such eventuality. Merely, the risk of political events of force majeure on the licensee/Utility the Supplier not take any action or step to avoid such events as it know that any risk or political events burden on the licensee or Utility and any loss or financial aspect arise from it be passed through to Utility and ultimately on consumers, the Supplier may not serious on such events occurrence. The political events define in the clause also wide and some conditions are between Supplier and other parties and there is no role of the Utility. It is one type of the responsibility of

the Supplier to whom duty cast upon to perform and achieve the COD and run the plant as per terms of contract. Hence, we are of the view that the proposed deviation by the Petitioner seems valid and the arguments of the Objectors are not acceptable and the same are rejected.

14.20.12. The Petitioner has stated for deviation in Article 28.11 of PSA pertaining to relief for unforeseen events is concerned, the aforesaid provisions provides that any such event if occur it can be referred to conciliation tribunal for adjudication and to decide the disputes if amicably not settled. The aforesaid provisions is against the provision of the Act which provides that in case of any disputes between the licensees and the generators the same can be adjudicated by the Commission or referred to Arbitration. To adjudicate the dispute if any arise between the licensee and the generator with regard to power supply agreement it must be referred to the appropriate Commission u/s 86 (1) (f) of the Electricity Act, 2003 in this case it is this Commission. Further, there are various provisions like Change in Law, Force Majeure etc. where the pass through of cost mechanism is provided and such matter may be referred to the Commission is provided. The impact of such eventuality is not defined but need to evaluate by the expert body like Commission. Hence, we are of the view that the proposed deviation by the Petitioner is with consideration of keep the Clause in consonance with the provisions of the Act and also to protect the interest of the parties. The objections of the Objectors that such clause incorporated with consideration of past experience and it lead to litigation etc. is concerned, we note that unforeseen events are not defined in the documents. Further any event is qualify as unforeseen event or not is also one of the issue needs to decide by the concerned authority with adjudicating such matter and deciding the same. Moreover, the specific provision for change in law and force majeure event etc. are provided in the bid document under which parties have right to approach the Commission for protection of their rights as well as their interest. By not keeping such clause it lead to further disputes / litigation between the parties and affecting to the end consumers. Hence, we decide to approve the aforesaid deviations sought by the Petitioner.

14.21. PSA – Article 30 – Suspension of Supplier’s Rights

- 14.21.1. The aforesaid provision of MBD states 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.
- 14.21.2. The Petitioner has proposed deviation in the said Clause stating that 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.
- 14.21.3. Considering the above, the Petitioner has proposed the deviation that 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).
- 14.21.4. There is no objection on the aforesaid deviation sought by the Petitioner.
- 14.21.5. The aforesaid deviation sought by the Petitioner that the provision with regard to payment of 20% of fixed charge during suspension period be deleted seems valid as during the period of suspension on occurrence of Supplier default, the Supplier is not able to declare the availability due to non-generation of electricity from the coal received allocated to the Petitioner under SHAKTI scheme. Hence, the question of the fixed charge payment does not arise. Considering the above, we decide to approve the aforesaid deviation sought by the Petitioner.

14.22. **Change in Law (PSA – Article 34)**

- 14.22.1. Article 34 of the 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, the Supplier be placed in the same financial position as it would have enjoyed had there been no such Change in Law.
- 14.22.2. Further, MBD provides that Parties shall endeavour to establish a Net Present Value (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.

- 14.22.3. The Petitioner has proposed the deviation stating 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.
- 14.22.4. 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.
- 14.22.5. In view of the same, the Petitioner has proposed 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.
- 14.22.6. Further, the Petitioner has added clarification that the Supplier shall not in any manner be entitled to claim any amount towards carrying cost till the time this 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 the Supplier before the Commission for approval of Change in Law and avoid cost implication under claim seeking carrying cost.
- 14.22.7. The Objectors have contended that the deviation sought by the Petitioner may not be approved and they had made following submissions:

Re. Taxes :

- Most of the Change in Law claims arise out of change in taxes or levies. Therefore, exclusion of the same is unwarranted.

- GUVNL has proposed modification of CIL clause for inclusion of introduction/modification/changes in rates of safeguard duty, antidumping duty and custom duty levied, in PPAs to be executed under Government of Gujarat's ("GoG") policy for development of Small Scale Distributed Solar Projects (SSDSP) 2019.

Re. Prior adjudication by the Commission :

- Proposal in violation of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021.
- Rules provide that Change in Law claims to be settled mutually and that the Commission is only to verify the calculation of Change in Law impact.

Re. Carrying Cost and principle of restitution :

- Contrary of MoP - Rules and SBD.
- PPAs signed during 2006-07 also contains provision of restitution.
- Ultimate objective of GUVNL is to avoid carrying cost, one way or other.
- Proposed that reimbursement be made immediately to avoid carrying cost.

Re. Increase in threshold limit for claim of CIL :

- Increase in threshold limit would lead to increase in burden since carrying cost would become applicable from the date of Change in Law event and would continue till Supplier is compensated.

14.22.8. We have considered the submissions made by the parties. We note that the Objectors have vehemently opposed the deviation in Change in Law provision of PSA proposed by the Petitioner. The Objectors have submitted that the proposed deviation is in violation of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 issued by Ministry of Power. The Rules issued by the Ministry of Power needs to be followed in letter and spirit both. The proposed deviation lead to condition of removal of principle of restitution and rewrite the entire provision in essence. It also excludes the provision of Change in Taxes. The proposed threshold limit for framing Change in Law is doubled compared to Standard Bidding Documents. The Objectors have also stated that to avoid the carrying cost burden

in case of Change in Law the impact of the same be passed on immediately. To avoid the burden of carrying cost even if any matter of litigation taken place, if the Utility continue to pay the impact of Change in Law, there will be no burden of carrying cost. Thereafter, if the decision in matter of disputes between the Utility and Supplier is in favour of Utility, the generator shall be liable to repay the amount along with the carrying cost. Thus, the consumer interest in both cases in terms of avoidance of carrying cost, continue to be protected while at the same time generator interest will also balance.

14.22.9. Per-contra, the Petitioner has submitted that modification/deviation prayed by it in the Change in Law provision is in line with the provisions contained under existing long-term PPAs and in order to simplify the mechanism for taking into consideration the impact of Change in Law to avoid any unfettered impact on tariff due to NPV calculation. The Petitioner has further submitted that the NPV methodology is time consuming and will lead to dispute and further the consideration of all generating station will be different. The Petitioner has shown its disagreement with the suggestions/objections of the Objector to commence the Change in Law compensation immediately stating that why the consumer should be burdened with a non-adjudicated Change in Law claim.

14.22.10. We are of the view that Change in Law provision is perhaps one of the important provision of the PSA and hence, the Clause needs to be comprehensive, adequately balanced and equitable with consideration of the provisions of the Act as well as Rules made under it. We note that some of the deviations sought by the Petitioner are largely making the provisions balanced in favour of Utility and it is also against the rules framed under the Act.

14.22.11. The provisions of Change in Law incorporated in the bid documents with consideration to protect the interest of the Utility and generator/Supplier. The impact of any Change in Law occurring after signing of the agreement and during the tenure of the agreement, then in that eventuality the impact of such Change in Law needs to effect at the earliest. The Change in Law provision incorporated in the PSA relying on principle of restitution in contract. The impact of Change in Law lead to financial hardship to the generator/Supplier or it lead to reduction in cost of

project or tariff beneficial to the licensee. Therefore, as a principle of restitution, the financial impact needs to pass on earliest. The Change in Law provision provided in the agreement is to avoid future financial impact to either party due to any enactment, modification, alteration in the law as defined in the aforesaid provision happening after signing of the PPA as per the terms of the agreement. It is kept in the agreement to balance the financial interest of the parties and avoid any financial impact to the parties.

14.22.12. The Petitioner has relied on the earlier agreements of 2006-07 is concerned, we note that the aforesaid agreements were signed when there were no SBD/MBD. Further thereafter the Ministry of Power, GoI have made various amendments in the guidelines for competitive bidding. Moreover, the Government of India has also made certain rules like late payment charges, timely recovery of cost due to Change in Law etc. needs to consider while preparing the bidding documents. Hence, the reliance of the Petitioner on the earlier agreement provisions are not acceptable.

14.22.13. We note that the Ministry of Power has framed the Electricity (Timely recovery of cost due to Change in Law) Rules, 2021 on 22.10.2021. As per provisions of aforesaid Rules, the Change in Law, if any occurred, the impact of the same needs to pass on immediately with consideration of mutual discussion between the parties. Further, in any event of dispute the same needs to be adjudicated by the Appropriate Commission. Hence, the timely recovery of the financial impact due to Change in law required to pass on to concerned beneficiary as per aforesaid Rules to compensate the affected party so as to restore such affected party to the same economic position as if such Change in law had not occurred. We are of the view that the aforesaid notification issued by Ministry of Power under the provisions of Electricity Act, 2003 on 22.10.2021 needs to give effect in the provision of PSA while making deviation. Any deviation against the aforesaid Rule is not permitted. Hence, the provisions of deviation sought by the Petitioner needs to align with the aforesaid Rules.

14.22.14. We clarify that the Change in Law taking place after bid due date as specified in the bidding documents shall only qualify for adjustment in tariff as per the other provisions of the bidding documents as approved in this Order.

14.22.15. We also decide that in case of Change in Law provision claimed by either Procurer or Supplier, they shall approach the Commission for approval of such claim, immediately preferably within 1 month from the date of Change in Law claimed by them.

14.22.16. The Petitioner is directed to ensure that the Change in Law provision be in accordance with the provision of the Electricity Act, 2003 as well as the Rules/Regulations notified under it. The Commission has observed that the principle of economic/financial restitution as also provided under the Electricity (Timely recovery of Costs due to Change in Law) Rules, 2021 is to be retained in the bidding document. The impact of Change in Law be worked out with consideration of parameters as specified in the PSA/agreement subject to ceiling for such parameters in the Regulations specified by Appropriate Commission. Accordingly, the bidding documents be aligned with the provisions of the Electricity Act, 2003, Central Government Rules specified above and decision mentioned in this Order.

14.23. Dispute Resolution (PSA – Article 36)

14.23.1. The aforesaid provision of the MBD states that 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 the 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.

14.23.2. The Petitioner has proposed deviation in the said provision stating that in order to ensure that any dispute if not resolved amicably through Conciliation, be taken up before Appropriate Commission i.e. this Commission for adjudication. The 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.

14.23.3. There is no objection against the aforesaid deviations sought by the Petitioner. We note that as per Section 86 (1) (f) of the Electricity Act, 2003 any disputes between the generator and licensee be adjudicated by this Commission. Hence, the deviation sought by the Petitioner seems valid and the same is approved.

14.24. PSA – Article 38 – Miscellaneous – Delayed Payments

14.24.1. The Petitioner has submitted that Ministry of Power has notified the Electricity (Late Payment Surcharge) Rules, 2021 on 22.02.2021. As per the said Rules, all such PPAs executed after the date of notification of Rules shall incorporate provisions with regard to rate of interest for late payment surcharge.

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

14.24.3. The Objectors have submitted that Clause 38.4.2 needs to be aligned with the Late Payment Surcharge Rules, 2021 dated 22.02.2021, which consist of procedure for curtailment of power supply to Utility apart from increase in Surcharge rate by 0.5% every month as a consequence of non-payment of dues to generator. The Petitioner has adopted the surcharge provision in its favour as it provides ceiling on the late payment surcharge rate. The PSA should be aligned with Late Payment Surcharge Rules, 2021 as this will be applicable for all the contracts from the date of notification of said rules.

14.24.4. The Objectors have also contended that in Article 38.4.3 of the PSA needs to specify that the monthly charges shall include charges related to Change in Law raised through Supplementary bill.

14.24.5. We have considered the submissions of the parties. We note that the aforesaid Article 38.4 state about the Delayed Payment Charges. We also note that Ministry of Power, GOI has notified the Electricity (Late Payment Surcharge) Rules, 2021. The aforesaid Rules are applicable to Power Purchase Agreement, Power Supply Agreement and Transmission Service Agreement and have come in force from date of notification i.e. from 22.02.2021.

14.24.6. The Rules framed under the Act needs to be considered and apply in the aforesaid agreements signed between Utility and generators/Supplier. The Petitioner has sought deviation in the aforesaid Clause of MBD stating that the deviation be made out to incorporate the changes in accordance with the Electricity Late Payment Surcharge Rules, 2021. The Objectors have stated that the deviation sought by the Petitioner needs to be aligned with provision of the Electricity Late Payment Surcharge Rules notified by the Ministry of Power, Government of India.

14.24.7. We note that the Petitioner has submitted that the aforesaid provisions incorporated in the bid documents align with the Electricity Late Payment Surcharge Rules, 2021 notified by the MoP, GoI. Thus, the Petitioner has on affidavit admitted that the aforesaid deviation are in consonance with and as per the Electricity Late Payment Surcharge Rules, 2021 notified by the MoP, GoI. Hence, we record the aforesaid submission of the Petitioner and decide and direct that the deviation approved in the aforesaid provision must be as per the provision of Electricity Late Payment Surcharge Rules, notified under the Electricity Act, 2003. Accordingly, aforesaid deviation is approved.

14.25. **PPA – Schedule J – Default Escrow Agreement & Schedule K – Deed of Hypothecation**

14.25.1. The Petitioner has submitted that it has signed Default Escrow Agreement(s) & Deed(s) of Hypothecation with various Private Project Developer with whom PPAs have been signed pursuant to Competitive Bidding in 2007 & 2010.

14.25.2. In order to have uniformity with regard to the modality of creation of charge over revenues and operation of escrow account for discharging the liabilities arising out of secured obligation inter-se various projects, it is 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.

14.25.3. The Objectors have contended that an effective Payment Security Mechanism (PSM) is important. Restricting the payment security mechanism to only undisputed

amount will in effect defeat the very purpose of PSM. Since, the Utility may dispute all amount and hence, rendering the PSM of no use. Hence, such restriction should be removed.

- 14.25.4. The LC amount should cover Supplementary bill towards Change in Law along with monthly invoice. The amount of LC should be equal to 20% of annual revenue to be realised by Supplier from GUVNL under the agreement. The LC should cover fixed charge, fuel charge as well as Supplementary invoice raised for Change in Law.
- 14.25.5. The Supplier should raise invoice for preceding month and the due date of invoice shall be after 30 days from invoice date. Thus, there is already a lag of 2 months. The default in payment obligations by Utility which Supplier would not be able to recover from LC would lead to higher risk of working capital of Supplier.
- 14.25.6. We have considered the submissions of the parties. We note that the proposed deviation by the Petitioner is based on the Default Escrow Agreement and Deed of Hypothecation with various Private Project Developers signed by the Petitioner in pursuant to Competitive Bidding in 2007 and 2010 and desire to continue with the same in the proposed agreement with generators who will be selected under the competitive bidding carried out by the Petitioner and accordingly the necessary modification in Clause 23.1.1 of the PSA is carried out by the Petitioner.
- 14.25.7. The Objectors contended that the restrictions if any be put up with regards to payment security mechanism pertain only to undisputed amount only. If it is made applicable for entire bill invoice amount, then it affect the very purpose of the Payment Security Mechanism since the Utility may dispute all amounts and hence, rendering the PSA of no use. Therefore, such restriction should be removed. We are of the view that for disputing any bill amount it is necessary to raise such dispute by the Utility with consideration of law as well as contractual terms between the parties. Further, it cannot provide unfettered power to the Utility to raise the dispute on bill invoices and withheld the bill amount of the generator/Supplier wherein there is no dispute. Even if such act is done by the Utility then generator/Supplier has right to approach this Commission for such dispute. Hence, the contention of the Objectors are not accepted and the same are rejected.

14.26. Other project specific modifications:

14.26.1. The Petitioner has also proposed project specific deviations in the bid documents 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

14.26.2. The deviation pertaining to delivery point is already dealt in earlier para of this Order. Hence, the same is not repeated for sake of brevity.

14.26.3. So far as obligation of open access is concerned, the same is linked with the delivery point. As decided in earlier para that the delivery point is GETCO/STU periphery network at Gujarat, the Open Access from the generating stations connected with other STU up to CTU network and further upto the Gujarat STU network is the responsibility of the Supplier as decided in earlier para of this Order.

(ii) Lowest Landed Tariff after including cost towards transmission cost to be considered for the purpose of bid evaluation & selection.

14.26.4. The criteria for consideration of transmission losses and transmission cost to be factored as a part of tariff are already decided in earlier para of this Order. Hence, while determining the landed cost the same needs to be factored by adding the cost of generation etc. Hence, the lowest landed cost tariff be evaluated with consideration of the applicable charges consisting of the transmission loss and transmission charges in addition to charges/tariff of energy at Supplier bus bar by the generator. The said deviation seems valid. Hence, we decide to approve the same.

(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.

14.26.5. The Scheduled Supply Commencement date is linked with the allocation of coal from the CIL / subsidiaries under SHAKTI scheme to the Petitioner. The linkage of coal is one of the important item while deciding the Scheduled Supply date of generation by the Supplier. The definition provided in Article 39 of the PSA state that it is from the September 2023.

14.26.6. The Objectors have suggested that the Supplier shall require to submit an application for open access to concerned authorities in prescribed time limit. Moreover, the grant of open access by the concerned authorities is one of the important factor in the Scheduled Supply Commencement Date. Hence, the deviation proposed needs to be modified with consideration that the Supplier shall require to file an application for open access to the concerned authorities in time be the condition which needs to be linked with Scheduled Supply Commencement Date definition.

14.26.7. We have considered the submissions of the parties. We note that the open access needs to obtained in such cases by Supplier/Utility. In such situation the Scheduled Supply Commencement Date needs to be linked with the Open Access application and grant of it by the concerned authorities. Accordingly, the aforesaid deviation be incorporated in the bid documents as approved.

(iv) Compliance / activities to be carried out by projects which are already operational as on Bid Due Date .

14.26.8. The aforesaid issue is already dealt in earlier para of this Order, where it is discussed and decided about the new projects as well as existing projects who require to comply with the norms specified by the Government Authorities as on bid due date. Accordingly, the deviation is approved.

(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)

14.26.9. The aforesaid deviation sought by the Petitioner is to provide clarity regarding the projects which may participate in the bidding process may be new projects or existing projects that have achieved commercial operation. The aforesaid provision is necessary with consideration of the terms of the agreement and life of the plant. Hence, we decide to approve the same.

14.27. **Objection / Suggestion for allowing Generators having own coal availability.**

14.27.1. Before parting we deal with the contention raised by some of the Objectors that the power procurement proposed in the bidding documents specifically from the bidder(s) who are having power plant or set up power plant to generate the electricity from the linkage coal under B (I), B (III), and B (IV) of SHAKTI scheme (Scheme for Harnessing and Allocating Koyala Transparently in India). The Objectors have stated that there are some other generators who are having coal linkage other than SHAKTI Scheme or they are receiving the coal from their own sources. Such generator(s) be also allowed to participate in the bidding process so that the competition amongst the power generators occurs and competitive power price is discovered under such mechanism. Restriction on such generator to participate is against the spirit of the Act. Hence, the mandatory provision of utilization of fuel under SHAKTI scheme provided in the bidding documents be removed. Per contra, the Petitioner has contended that the present Petition filed by them is specifically for utilization of coal linkage received by the Petitioner under from Ministry of Coal, Government of India for utilization of same to generate electricity from it for meeting out the demand of the Petitioner.

14.27.2. We have considered the submissions made by the parties. We note that the Petitioner has approached the Ministry of Coal, GoI for allocation of coal to meet out the demand of the consumers of the subsidiary distribution licensees of the Petitioner in the State of Gujarat by utilization of the coal allocated to them. The request of the Petitioner being accepted by the Ministry of Coal, GoI and coal allocated to the Petitioner for utilization and generation of the electricity from it to meet out the demand of the consumers and licensees. Thus, it is mandatory for the Petitioner to utilize the allocated coal for generation of electricity from it and such power be supplied to the consumers of the licensee area. In absence of same, the

allocated coal shall not be utilized by them. The contention of the Objector is that the generator(s) who are having their own source of coal/fuel be permitted to participate in this bid. In that case the relevance of utilization of allocated coal to the Petitioner is not fulfilled which may cause failure in off taking the availability of coal/fuel allocated if generator who are having their own source be permitted. The Petitioner may be deprived from the power in order to meet out their consumer demand. Further, the condition proposed in the bid documents by the Petitioner is in consonance with allocation of the coal by the Ministry of Power, Government of India. Hence, we are of the view that there is no force in the submissions of the Objectors and same is rejected.

15. The Objector APP has separately stated and proposed modification/objections in certain Articles of the bid documents. In so far as said modifications/objections are concerned, they are connected with the deviations in various clauses of Bid documents sought by the Petitioner and the Commission has already dealt with in earlier paras. Hence, no repetition made.

ORDER

16. Considering the above, present Petition is partly allowed.
- 16.1. The deviations in the Model Bidding Documents (MBD) sought by the Petitioner are partly allowed and the Petitioner shall modify certain deviations sought by them according to this Order as stated above in this Order.
17. We order accordingly.
18. With this order present Petition stands disposed of.

Sd/-
[S. R. Pandey]
Member

Sd/-
[Mehul M. Gandhi]
Member

Sd/-
[Anil Mukim]
Chairman

Place: Gandhinagar.
Date: 01/08/2022