

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION

SITE NO. 3, BLOCK B, SECTOR 18-A MADHYA MARG, CHANDIGARH

Petition No. 53 of 2022

Date of Order: 17.03.2023

Petition under Section 86 (1)(f) of the Electricity Act, 2003 read with Article 13 of the Power Purchase Agreement (PPA) dated 01.09.2008.

AND

In the matter of: Talwandi Sabo Power Limited. Mansa-Talwandi Sabo Road, Village: Banawala, District: Mansa, Punjab-151302.

...Petitioner

Versus

Punjab State Power Corporation Limited. Through its Chief Engineer (Thermal Designs), T-2 Shed, Shakti - Vihar, PSPCL, Patiala, Punjab-147001.

....Respondent

Commission: Sh. Viswajeet Khanna, Chairperson
Sh. Paramjeet Singh, Member

TSPL: Sh. Venkatesh, Advocate

PSPCL: Ms. Poorva Saigal, Advocate

ORDER

1. Talwandi Sabo Power Limited (TSPL) has filed the present petition seeking declaration that the issuance of Notification dated 23.01.2020 issued by the Government of Punjab is a 'Change in Law' event as envisaged in Article 13 of the Power Purchase Agreement dated 01.09.2008, effective from date of its issuance and has sought the consequent relief/compensation along with its carrying cost. The submissions of TSPL are summarized as under:

1.1 TSPL has setup its coal based Thermal Power Project on BOO basis under Case 2 of the Tariff Based Competitive Bidding

Guidelines. Its units achieved Commercial Operation on 05.07.2014, 25.11.2015, and 25.08.2016, respectively. The PPA executed with the respondent PSPCL provides for Change in Law as hereunder:

“Article 13 CHANGE IN LAW

13.1 Definitions

In this Article 13, the following term shall have the following meanings:

13.1.1 *“Change in Law” means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid deadline:*

- (i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law ...*

...

13.2 Application and Principles for computing impact of Change in Law

While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such change in Law has not occurred.

a) ...

b) Operation Period

.....

Provided that the above mentioned compensation shall be payable only if and for increase / decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a Contract year.

13.3 **Notification of Change in Law**

13.3.1 *If the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.*

13.3.2

13.3.3 *Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:*

(a) the Change in Law; and

(b) the effects on the Seller of the matters referred to in Article 13.2

13.4 **Tariff Adjustment Payment on account of Change in Law**

13.4.1 *Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from:*

(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the law or Change in Law; ..

Further, the “Law” and the “Indian Governmental Instrumentality” has been defined in the PPA as under:

“Law means, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission.”

“Indian Governmental Instrumentality means the GOI, Government of Punjab and any ministry or, department or board or agency other

regulatory or quasi-judicial authority controlled by GOI or Government of the State where the Procurer and Project are located and includes the Appropriate Commission”

As the definition of Law contained in the PPA includes all laws, including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law. The above provision for Change in Law in the PPA covers any change in the cost or revenue due to change in law.

1.2 It is relevant to highlight that:

- a) The Government of India had enacted the Northern India Canal and Drainage Act, 1873 (**1873 Act**) to inter-alia regulate irrigation, navigation and drainage and to use and control for public purposes the water of all rivers and streams flowing in natural channels, and of all lakes and other natural collection of still water. Thereafter, on 17.08.1978, the Government of Punjab issued Northern India Canal and Drainage Rules, 1878 (**1878 Rules**), whereby water charges were levied amounting to Rs. 3.00 per 2500 cubic feet for supply of water in bulk. Thereafter, after a lapse of 125 years, the Government of Punjab in exercise of its powers under Section 75 read with Section 36 of the 1873 Act issued a Notification dated 13.05.2003, revising the canal water rates to Rs. 32 per 2500 cubic feet as against Rs. 3 per 2500 cubic feet stipulated under the 1878 Rules. This increase works out to 966% (approx.) and on an annual basis it works out to 1.912% per year. The aforesaid Notification dated

13.05.2003 was in force and prevailing as on the Cut-off date being 21.07.2007. Subsequently, on 06.11.2012, the Government of Punjab issued another Notification dated 06.11.2012, exercising its powers under Section 75 read with Section 36 of the 1873 Act revising the water charges for water supply in bulk to industries to Rs. 48 per 2500 cubic feet, with an escalation of 2% per year.

- b) An Agreement for Supply of Water dated 20.05.2014 was executed between TSPL and the GoP. Pertinently, Clause 2(e) of the said agreement stipulated the manner of levy of water charges in the following terms:

“e) The water charges will be levied as the commercial rates decided by the Government from time to time.”

- c) Subsequently, by Notification dated 23.01.2020, the Government of Punjab, Department of Water Resources (Irrigation Works Branch), in exercise of its power conferred by Section 75 read with Section 36 of the Northern India Canal and Drainage Act, 1873, revised the Canal/River Water Charges in Punjab to Rs.1,000 per 100 cubic meter (Rs. 707.50 per 2500 cubic ft.) in respect of “Industry, Power Plant and Bulk Users”. The issuance of the said Notification effectively resulted in an increase in water charges from Rs.55.18 per 2500 cubic feet (i.e., Rs.77.99 per 100 cubic meter prevailing water charges as per notification dated 06.11.2012) to Rs.707.50 per 2500 cubic feet (i.e., Rs.1000 per 100 cubic meters), which works out to an unprecedented escalation of around 1183.64%. The summary of the historical revisions in water charges are as follows:

Particulars	Notified Water Charges
Notification dated 07.08.1878	Rs. 3 per 2500 cubic ft.
Notification dated 13.05.2003	Rs. 32 per 2500 cubic ft.
Notification dated 06.11.2012	Rs. 48 per 2500 cubic ft. (escl. of 2% per year)
Notification dated 23.01.2020	Rs. 707.50 per 2500 cubic ft. (Rs. 1000 per 100-meter cube)

d) Accordingly, the Petitioner notified the aforesaid Change in Law event to the Respondent PSPCL vide its letter dated 30.01.2020. However, vide response dated 31.03.2020, the Respondent PSPCL pointed out that water charges do not constitute "Change in Law" relying upon the judgment dated 13.11.2019 of Hon'ble APTEL in Appeal No. 136 of 2016. Therefore, the Respondent purported to reject the claim made by the Petitioner.

e) Hence, a dispute has arisen between the Petitioner (Generator) and the Respondent (Distribution Licensee PSPCL). The present petition is being filed before the Commission seeking adjudication of the disputes that have arisen between the parties.

1.3 It is submitted that, Under the Constitution of India, water is a matter included in Entry 17 of List-II (State List) and as per Article 246(3) the State Legislature has the exclusive power to make laws in respect of matters enumerated under List II. Notification by an Indian Government Instrumentality includes the Government of Punjab as per Article 1 of the PPA, thus the Notification dated 23.01.2020 squarely falls under the definition of Law thereof. A bare reading of the Notification dated 23.01.2020 would show that the same has been issued in exercise of powers under the 1873 Act.

1.4 It is relevant to note that as per the RfP, the deadline to submit the Bids was fixed as 23.06.2008. As per Article 13.1.1, any event in the nature of an enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law, which occurs after the cut-off date i.e., 7 days prior to the deadline, would constitute “Change in Law” for the purposes of the said Article. If this is made applicable to the present case, it is evident that that Notification dated 23.01.2020 which essentially amends the Notification dated 06.11.2012 by revising the water charges, which satisfies the requirements to be Law in terms of the definition thereof contained in Article 1 of the PPA.

1.5 There cannot be underlying assumption in law that the generators expected to know of the future exorbitant increase in water charges. At the time of bidding, the Bidder was only required to keep in mind the extant laws that were in force at that time which in the present case are the 1873 Act, 1878 Rules and the Notification dated 13.05.2003. The fact that the water charges were revised only once in 2003 that too after a gap of 125 years from the promulgation of the 1878 Rules was also a relevant factor at the time of submission of bid.

1.6 Article 13.2 of the PPA stipulates that the purpose of compensating the Party affected by such Change in Law is to restore, through Monthly Tariff payment, the affected Party to the same economic position as if such Change in Law has not occurred. Undisputedly, the effect of the Notification dated 23.01.2020 is that it increases the cost to the Seller / Petitioner manifold inasmuch as the increase is from Rs. 55.18 per 2500

cubic feet (Rs.77.99 per 100 cubic meters) to Rs. 707.50 per 2500 cubic feet (Rs. 1000 per 100 cubic meters) which is an unprecedented increase of 1183.64%, as a result of the change in legal regime. Also, the increase in cost is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a Contract Year, as pointed out by the Petitioner in its Letter dated 30.01.2020.

1.7 Article 13.3.1 stipulates that if the Seller / Petitioner is affected by Change in Law in accordance with Article 13.2 and wishes to make a claim, it shall give notice to the Procurer of such Change in Law as reasonably practicable after becoming aware of the same. Immediately upon the Notification dated 23.01.2020 issued by the Government of Punjab coming to the knowledge of the Petitioner, the Respondent PSPCL was notified of the Change in Law event by the Petitioner vide its letter dated 30.01.2020. Not only did the Petitioner send a copy of the Notification dated 23.01.2020, it was also stated as under:

“Revision of these charges would result into additional recurring expenditure for generation of power and are estimated to be in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a Contract Year. We are in process of assessing the financial implication for the additional Water Charges to be paid by TSPL in view of aforementioned notification. The same would be informed to PSPCL in due course of time.

.....

Kindly treat this as the notice for “Change in Law” under Article 13.3 of the PPA.”

Therefore, the conditions stipulated under Article 13.3.1 read

with Article 13.2 (b) of the PPA stood complied by the Petitioner.

- 1.8** Further, the Petitioner is also entitled to carrying cost for the period when the Petitioner has incurred the additional expenditure till it is reimbursed by the Respondent. It is only then that the purport of Article 13 would be fulfilled, and the Petitioner would be put in the same economic position as if such Change in Law had not occurred. It is submitted that carrying cost is in the nature of compensation for money denied at the appropriate time, as held by Hon'ble Courts in catena of judgements.
- 2.** In the hearing for admission, held on 16.11.2022, the Commission observed that the issue raised in the petition is similar to the issue raised in petition no. 50 of 2020 filed by M/s NPL, which has already been decided vide Order dated 06.08.2021. The counsel of TSPL sought time to examine the issue for arguing the matter. The same was allowed by the Commission; however in the hearing held on 08.12.2022, the Ld. Counsel for the petitioner, without referring to the observation made by the Commission, reiterated its prayer for admission of the petition. After hearing the petitioner, the Commission ordered as under:

“The issue raised in present petition is similar to the issue raised in petition No. 50 of 2020 which has already been decided by the Commission vide Order dated 06.08.2021. Notice be issued to PSPCL to file its reply on the admission of the petition within two weeks with a copy to the petitioner.”

- 3.** The respondent PSPCL submitted its reply on 27.01.2023. While reiterating its submissions as made in Petition No. 50 of 2020 filed by NPL, PSPCL submitted as under:

3.1 The same issue, namely, the purported Change in Law relief in

respect of the increase in water charges pursuant to the Notification dated 23.01.2020 had been already considered by the Commission in the case of another Generator Nabha Power Limited (**NPL**) in Petition No. 50 of 2020. The relevant extracts from the Order dated 06.08.2021, *inter-alia*, reads as under:

“1.6 The petitioner has prayed to:-

(i) Declare that the issuance of the Notification dated 23.01.2020 under the Northern India Canal and Drainage Act, 1873 is a “change in law” event in accordance with Article 13 of the Power Purchase Agreement dated 18.01.2010, and that the Petitioner is entitled to relief there under;

(ii) Direct the Respondent to compensate the Petitioner on account of additional expenditure incurred by the Petitioner due to increase in water charges by way of adjustment in the tariff and in addition also allow interest/carrying cost from the date of impact till reimbursement by the Respondent;

.....

....., the Commission is of the view that the petitioner is not entitled for any compensation towards increase in water charges.”

NPL has filed an Appeal bearing No. 286 of 2021 challenging the Order passed by the Commission. However, no stay has been granted and the decision dated 06.08.2021 continues to govern the liabilities. Accordingly, PSPCL submits that the issue regarding increase in water charges and the implications in terms of the PPA has already been decided by this Commission in the case of NPL and shall squarely apply to the present case of TSPL as well.

3.2 In any event, PSPCL submits that:

a) The water charges are an input cost and should have been

factored in the tariff quoted by TSPL and does not come within the purview of Change in Law. Further, an '*unprecedented*' increase in water charges is not a ground for seeking compensation from PSPCL. Even otherwise, the revision of water charges in the present matter was not unprecedented. Earlier also, on 13.05.2003, the State Government had revised the rate for water from Rs. 3 per 2500 cubic feet to Rs. 32 per 2500 cubic feet, which amounts to an escalation of around 966 per cent. Thus, even before submitting the bid and/or executing the PPA, TSPL was aware of such an increase in water charges from time to time. It ought to have factored the same in its quoted tariff. Accordingly, TSPL's omission to factor in escalation in water charges based on the available statistics at the time of submitting its bid, estop TSPL from claiming Change in Law.

- b) Clause 2.7.1.4 (3) of the RfP provides that all costs involved in procuring the inputs must be reflected in the Quoted Tariff. Despite the knowledge of the possibility of escalation of water charges under the Northern India Canal and Drainage Act, 1873, TSPL did not quote escalable charges. Accordingly, TSPL cannot now claim compensation on account of increase in water charges being a Change in Law event. The contention of TSPL that any cost not foreseen by TSPL has to be allowed as change in law, is contrary to the basic purpose and intent of a competitive bid. TSPL was free to bid any tariff and had undertaken the risk of loss or gain. Having hedged out other bidders on the basis of its bid, TSPL cannot now seek additional compensation because it may incur cost other than those assumed. TSPL is seeking to convert a tariff

adopted through competitive bid into a cost plus determination under Section 62 of the Electricity Act, 2003.

- c) It is submitted that where certain costs are part of the basic price, the same have to be incorporated in the tariff being quoted during the bidding process. Since it was the discretion of TSPL to quote any tariff, TSPL was also liable to accept the risk of any loss and/or the reward of any benefit that may follow. If, at a belated stage, TSPL is allowed to pass the costs of increase in water charges to the Procurers, then the entire Competitive Bidding Process will lose its sanctity. Even Hon'ble APTEL has not allowed changes in basic price to be change in law but has only allowed taxes and duties, etc. as change in law as they are not part of basic price.
- d) In this regard, this Commission and Hon'ble APTEL in a catena of judgments have observed that change in input cost such as water charges does not fall within the scope of Change in Law. Similar to GMR Kamalanga Energy Limited, Sasan Power Limited and ACB India Limited, TSPL is a competitive bid project under Section 63 of the Electricity Act, 2003 and similar to them, TSPL was also required to quote an all-inclusive tariff. In fact, Sasan Power Limited is also a Case 2 project. Therefore, the decisions in these cases would squarely apply to the present case.
- e) Accordingly, on 31.03.2020, PSPCL replied to TSPL's Notice of the alleged Change in Law stating that the same is contrary to the conditions stipulated under the PPA. Further, PSPCL clarified that the revision in water charges being input costs were to be accounted for by the bidder while quoting its bid, and therefore, does not amount to a Change in Law in terms

of the PPA. PSPCL's letter dated 31.03.2020, *inter-alia*, reads as under:

- “1. The notice received from you is not in conformity with the conditions stipulated in Article-13 of PPA, specifically Articles 13.2(b) and 13.3.3.*
 - 2. Revision of water charges are not "Change in Law". The water charges are input costs which were to be accounted for by the bidders and not eligible under Change in Law.*
 - 3. The above has also been held by Hon'ble Tribunal vide Order dated 13.11.2019 in Appeal No. 136 of 2016, upholding the order of the Central Electricity Regulatory Commission in case of Sasan Power Limited.*
- As such, your subject cited claim is not justified, hence, hereby rejected.”*

3.3 Further, since the petitioner is not entitled to any Change in law relief, on account of the impugned increase in water charges, there is no question of any Carrying Cost for the same.

- 4.** On 27.02.2023, the petitioner filed the rejoinder to the PSPCL's reply dated 27.01.2023. Wherein, while reiterating its submissions made in the petition and emphasizing on issue of impugned change in water charges being a "Change in Law" under the PPA, it further pleaded as under:

4.1 PSPCL's contention that water charges are input costs and are part and parcel of the O&M expenses, which are already factored in while quoting tariff is completely misplaced and devoid of any merits.

- a) The exponential unprecedented increase in water charges could not have been foreseen by the Petitioner. Hon'ble

APTTEL in its Judgment dated 14.08.2018 passed in Appeal No. 119 of 2016 titled "*M/s Adani Power Rajasthan Ltd. vs. Rajasthan Electricity Regulatory Commission*" held that the increase in input costs for power generation is covered under the 'Change in Law' provisions of the PPA. The relevant paragraph of the Judgment passed by the Hon'ble APTTEL is reproduced herein below:

"15(iv)., as decided in the preceding paragraphs the change in taxes/ duties etc. which leads to increase in input costs for power generation is covered under the Change in Law provisions of the PPA. Accordingly, the changes in Clean Energy Cess and Central Excise Duty which could not be envisaged at the time of cut-off date are Change in Law events and APRL is to be compensated for the same."

- b) Also, the exclusions of 'Change in Law' event under Article 13 of the PPA does not include change in input costs, meaning thereby, in terms of Article 13.1.1 of the PPA, a change in input costs has not been excluded from being considered as a "Change in Law" event. In this regard, reliance is placed on the Judgment of the Hon'ble Supreme Court in *Energy Watchdog vs. Central Electricity Regulatory Commission*, (2017) 14 SCC 80, whereby the Hon'ble Supreme Court has held that for the operation period of the PPA, compensation for any increase/decrease in cost to the Seller shall be determined and be effective from such date as decided by the Ld. Central Electricity Regulatory Commission. The Hon'ble Supreme Court *vide* the said Judgment has not excluded input costs from the applicability of the 'Change in Law' provision of the PPA.

4.2 PSPCL's reliance upon the Judgments of Hon'ble APTEL in its reply is bad in law:

a) In reference to Appeal No. 195 of 2016 dated 27.05.2019 titled "*GMR Kamalanga Energy Ltd. vs. CERC & Ors.*"; Appeal No. 193 of 2017 dated 21.12.2018 titled "*GMR Kamalanga Energy Ltd. vs. CERC & Ors.*"; Appeal No. 111 of 2017 dated 14.08.2018 titled *GMR Warora Energy Limited vs. CERC & Ors.*; and Appeal No. 210 of 2017 dated 13.04.2018 titled "*Adani Power Ltd. vs. CERC & Ors.*", it is submitted that the above projects are Case-1 Projects, wherein all the arrangements including initial consents related to development and operation of project is the responsibility of the developer. Whereas, the petitioner is a Case-2 Project, wherein initial consents as defined in the PPA are arranged by the Procurer/ Respondent including inter alia arrangement of water linkage with charges required to be paid as per Act/Rules & Regulations of Govt. of Punjab. Therefore, the presumption of taking into account the increase in water charge could not have been attributable to the Petitioner.

b) PSPCL has raised a specific plea by relying upon the judgment of Hon'ble APTEL passed in Appeal No. 136 of 2016 "*Sasan Power Limited v. CERC & Ors.*". However, in the said case:

(i) The applicable water charges underwent 6 escalations/changes prior to the bid-cut off date. Thus, the water charges had showed an increasing trend. Whereas, in the present case, prior to the Bid cut-off date, i.e., 18.06.2008, the applicable water charges were increased/revised only once in 125 years. Therefore, the

water charges had not shown any increasing trend.

(ii) Secondly, the Notification therein is based on the premises of the Madhya Pradesh Irrigation Rules, 1974 framed by the Government of Madhya Pradesh. However, in the instant case, the Notification in question was based on the 1873 Act.

c) It is a well settled principle of law that even a slightest difference in facts, shall have a different bearing on the outcome of the case in hand. In this regard, reliance is placed upon the Judgment of the Hon'ble Supreme Court of India in the matter of Haryana Financial Corporation and Anr v. Jagdamba Oil Mills and Anr **(2002) 3 SCC 494**. The relevant extracts of the said Judgment are reproduced herein:-

"19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark upon lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes."

4.3 Further, with regard to the Judgment of this Commission dated 06.08.2020 passed in Petition No. 50 of 2020 in case of Nabha Power Limited (**NPL Judgment**), it is submitted that the case of the Petitioner is premised on different facts and circumstances. Also, it is denied that this Commission *vide* NPL Judgment has

held that the Generator is not entitled to any compensation for increase in water charges. Therefore, the Petitioner deserves adjudication of the present Petition, without being guided or being confined by the NPL Judgment, taking into consideration the facts in hand of the Petitioner. Thus, the Petitioner deserves the right to be heard in the facts and circumstances of in the present case. In this regard, reliance is placed upon the Judgment passed by the Hon'ble Supreme Court in "*Sayeedur Rehman vs. State of Bihar*", (1973) 3 SCC 333, wherein the Hon'ble Supreme Court has held as follows:

"11.This unwritten right of hearing is fundamental to a just decision by any authority which decides a controversial issue affecting the rights of the rival contestants. This right has its roots in the notion of fair procedure. It draws the attention of the party concerned to the imperative necessity of not overlooking the other side of the case before coming to its decision, for nothing is more likely to conduce to just and right decision than the practice of giving hearing to the affected parties."

5. The Commission heard the parties on 01.03.2023, wherein the Ld. Counsel for the parties addressed arguments based on their written submissions. The Commission, after hearing the matter, reserved the order.

6. Findings and Decision of the Commission

The Commission has carefully gone through the petition, reply by PSPCL, rejoinder by the Petitioner TSPL and the arguments thereon by the parties. The petition is for seeking the declaration that increase in water charges, vide Notification dated 23.01.2020 issued by the Government of Punjab, is a "Change in Law" event under Article 13 of the Power Purchase Agreement executed between the parties. The findings and decision of the Commission are as under:

6.1 The Commission notes that the issue of change in water charges vide impugned notification dated 23.01.2020, raised earlier by M/s Nabha Power Limited in petition No. 50 of 2020, has already been adjudicated upon and decided by the Commission as under vide Order dated 06.08.2021:

“4.1 Nabha Power Limited (NPL) is seeking declaration that the issuance of notification bearing No. 10/110/2012-IW(2)/88/1 dated 23.01.2020 by the Govt. of Punjab (GoP) under the Northern India Canal and Drainage Act, 1873 is a “change in law” event in accordance with Article 13 of the Power Purchase Agreement (PPA) dated 18.01.2010, and directions to PSPCL to compensate it on account of the same.

.....

4.5 The Commission is of the view that the above judgments by Hon'ble APTEL dated 27.05.2019 in the matter of GMR Kamalanga Energy Ltd Vs CERC & Ors and in the matter of Sasan Power Limited Vs CERC dated 13.11.2019 are squarely applicable to the instant case as the issue raised therein was also the claim for consideration of increase in water charges by the State Governments of Odisha and Madhya Pradesh, under the concept of “change in law”. Moreover, the Project of Sasan Power Limited was also awarded through Case 2 competitive bidding.

The Commission is not inclined to agree with NPL's contention that the judgments passed by Hon'ble APTEL are not binding on the Commission. NPL's argument that said judgments have been issued in ignorance of the statutory provisions of the competitive bidding guidelines, judgments of Hon'ble Supreme Court and its earlier judgments along with the plea that arguments advanced by NPL in the present case were not raised before Hon'ble APTEL at the time of adjudication of the aforesaid cases is not sustainable. Further, the contention by NPL that the said judgments are pending for adjudication before Hon'ble Supreme Court is also not of

consequence, as no stay Order has been passed by the Hon'ble Supreme Court therein.

In view of the above, it is evident that the issue of consideration of "change in law" due to the increase in water charges by the State Governments already stands settled by Hon'ble APTEL vide its aforementioned orders/ judgments which cannot be discarded as being per incuriam.

4.6 The Commission has also noted that there has been no amendment to the Act in question which would amount to a "change in law". Only the rates being charged have been modified which is a normal process of escalation of charges as in any other input commodity or service to be anticipated and accounted for in the bid by the bidder.

Accordingly, the Commission is of the view that the petitioner is not entitled for any compensation towards increase in water charges."

a) Thus, the submission of the Petitioner, that its case is premised on different facts and circumstances is misplaced. The issue/dispute raised herein is also the same i.e. whether the increase in water charges due to the issuance of Notification dated 23.01.2020 by the Government of Punjab is a "Change in Law" under the provisions of the PPA. Moreover, Article-13 pertaining to "Change in Law" in both the PPAs has identical provisions. The plea that the Commission in the NPL Judgment has not held that the Generator is not entitled to any compensation for increase in water charges is also factually incorrect.

b) As regards the Petitioner's submissions to differentiate its case from the cases decided vide Hon'ble APTEL's Judgments and referred to in the NPL Judgment by the Commission, the issue is examined as under:

- (i) It has been contended that in Case-1 Projects all the arrangements including Initial Consents is the responsibility of the developer. Whereas, the Petitioners project has been setup under Case-2, wherein Initial Consents, including inter alia arrangement of water linkage with charges required to be paid as per Act/Rules & Regulations of Govt. of Punjab, are arranged by the Procurer.

The Commission observes that since the Case-2 projects are required to be setup on a pre-identified site, onus of pre-development activities such as site-identification/land acquisition, water linkage etc. is on the procurer, with the cost of the same transferable to the bidder. However, the onus to maintain and sustain the effect all such Consents is transferred to the Seller/Generator at its own risk and cost, which is evident from the provision of the PPA extracted below,:

“4.1 The Seller’s obligation to build, own and operate the Project

4.1.1 Subject to the terms and conditions of this Agreement, the Seller undertakes to be responsible, at Seller’s own cost and risk, for:

- a) obtaining (other than Initial Consents) and maintaining in full force and effect all Consents required by it pursuant to this Agreement and Indian Law;”*

Thus, as far as the input cost of water used for generation of power is concerned, there is no material difference between Case-1 and Case-2 projects. In both cases, water charges are payable by the generator as per the commercial arrangement entered into between the generator and the

water supplying agency. This is also evident from the Petitioners' own submission reproduced hereunder;

“An Agreement for Supply of Water dated 20.05.2014 was executed between TSPL and the GoP. Pertinently, Clause 2(e) of the said agreement stipulated the manner of levy of water charges in the following terms:

e) The water charges will be levied as the commercial rates decided by the Government from time to time.”

Thus, the Commission does not find any merit in the argument professed by the Petitioner in trying to differentiate its case and facts from those of NPL already examined in the NPL judgment.

- (ii) On the issue of the Case-2 project of M/s Sasan Power Limited decided by Hon'ble APTEL in Appeal No. 136 of 2016, it was submitted that the applicable water charges therein underwent 6 escalations/changes prior to the bid cut-off date, whereas in the petitioners' case water charges were increased/revised only once in 125 years prior to the bid cut-off date of 18.06.2008. It was also pleaded that the Notification therein is based on the premise of the Madhya Pradesh Irrigation Rules, 1974 framed by the Government of Madhya Pradesh, whereas the Notification in question in the present Petition is based on the 1873 Act.

The Commission observes that the Petitioners' contention citing difference in the number of escalations in water charge is not relevant or legally sustainable. It does not qualify as a 'Change in Law' under the PPA. Further, its contention that the Notification therein was based on the Rules framed by

the Government of Madhya Pradesh, whereas the impugned Notification is based on the 1873 Act, also does not hold any merit as the Rules are also subordinate legislation meant to define how the Act will be implemented. Notifications under the Rules or the provisions of the Act do not automatically become amendments to the Act or Rules, so as to be considered 'Change in Law'. In fact, all executive decisions by the Government are given effect to through notifications and do not become change in laws.

The Petitioner has also tried to contest that a change in input costs is not excluded and is covered under the 'Change in Law' provisions of the PPA. The Commission refers to the relevant extracts of Hon'ble APTELS judgment dated 13.11.2019 in the case of Sasan Power Ltd Vs CERC & Ors (Appeal No. 136 of 2016 and Batch), relied upon in this Commission's NPL Judgement:

"17.12.7 In a host of judgments of this Tribunal in various cases, it has been held that the increase in input cost cannot be allowed as Change in Law and, hence, we hold that changes in water charges are not eligible for compensation under Change in Law....

23.1.4... b) Regarding increase in water charges on account of Notification dated 21.04.2010 issued by the Government of Madhya Pradesh, we are of the opinion that the same falls under input costs category. Therefore, no compensation shall be entitled to the Appellant on this account."

Thus, the Commission is of view that the Petitioners' said contention is not maintainable as the same is squarely covered in the above referred Judgment by Hon'ble APTEL.

6.2 The Petitioner has tried to emphasize upon the definitions of ‘law’ and ‘Indian Government Instrumentality’ in the PPA.

The Commission has perused the said definitions. It is clear that the notifications mentioned under the definition of ‘law’ relate to ‘Rules, Regulations, Decisions and Orders of the Appropriate Commission’ under any law including Electricity Laws, Statutes, Ordinance, Regulation, Notification or Code, Rule or their interpretation by any Government Instrumentality which covers Gol, GoP, any Ministry, Department, Board, Agency, other Regulatory or Quasi-Judicial Authority controlled by Gol, GoP or the Appropriate Commission. These definitions relate to Statutes, Rules, Regulations or Orders of the Commission and not notifications by the Department dealing with changes of rates for Government or Departmental Services/materials such as water charges etc. The change of rates is a revision of utility charges and only a change in input cost.

The Commission also notes the Agreement for Supply of Water dated 20.05.2014 executed by the Petitioner with the GoP, which states: “The water charges will be levied at the commercial rates decided by the Government from time to time”. This agreement was signed by the Petitioner knowing fully that for use of water, commercial rates will be charged as decided by the Government from time to time. It is the revision of rates akin to any utility.

Thus, the Petitioners plea that said notification issued by the Government is in effect a ‘Change in Law’ is factually incorrect and cannot be sustained.

6.3 The Petitioner has also emphasized that it could not have anticipated in advance the changes in rates of water when bidding for the project.

The Commission is of view that this is a fallacious argument since that is precisely what a bidder was expected to do when putting on a bid in a competitive bidding process. The Petitioner was free to bid any tariff. The RfP document specifically provided that all costs involved in procuring the inputs must be reflected in the Quoted Tariff. As such, the Petitioner was required to quote an all-inclusive tariff.

Further, as pointed out by the respondent PSPCL, the Petitioner also had an option for quoting escalable capacity charges which it consciously chose not to exercise. A prudent bidder would address the risk in increase of input costs by suitably quoting an escalable component of capacity charge or consciously choose not to do so by otherwise factoring in all anticipated costs in the quoted bid. The quantum of escalation in charges, at 1183% as per petitioner's assertion, is also irrelevant. It is not a valid argument legally, since the quantum of escalation is not the issue and does not qualify as a 'Change in Law' under the PPA. As observed in the previous para, revision of the water rates is like the revision of any utility rates. Having hedged out other bidders on the basis of its bid, the Petitioner is not entitled to subsequently claim additional returns and compensation by citing increase in input costs on account of change in water charges. Profit and loss are an integral part of any business venture and this was a risk knowingly taken by the Petitioner. The contention of the Petitioner that this cost escalation could not be foreseen by it and has to be allowed as a 'Change in Law'

is contrary to the very intent of a competitive bidding process. If allowed, it would tantamount to converting a competitively discovered tariff into a cost plus tariff as correctly argued by the Respondent PSPCL.

As discussed above, the Petitioner has failed to establish any substantial fact or law point to differentiate or distinguish itself from the merits of the issue as already analysed and decided by the Commission in the NPL Judgment referred to above.

The petition does not merit to be admitted and is therefore dismissed in terms of the above observations and the Commission's Order dated 06.08.2021 in Petition No. 50 of 2020.

Sd/-

(Paramjeet Singh)
Member

Sd/-

(Viswajeet Khanna)
Chairperson

Chandigarh

Dated: 17.03.2023