

**PUNJAB STATE ELECTRICITY REGULATORY COMMISSION**  
SITE NO. 3, BLOCK B, SECTOR 18-A MADHYA MARG, CHANDIGARH

**Petition No. 50 of 2020**  
**Date of Order: 06.08.2021**

Petition under Section 86(1)(b) read with 86(1)(f) of the Electricity Act, 2003 and Article 13 of the Power Purchase Agreement dated 18.01.2010 (PPA), for the approval and consequent compensation due to a 'Change in Law' event, viz., the increase in water charges payable under the Northern India Canal and Drainage Act, 1873 vide notification dated 23.01.2020, impacting the revenues and costs of the petitioner during the Operating Period under the PPA.

In the matter of: Nabha Power Limited, Aspire Tower, 4th Floor,  
Plot No. 55, Industrial and Business Park,  
Phase-I, Chandigarh -160 002.

....Petitioner

Versus

Punjab State Power Corporation Ltd., through its  
Engineer-in-chief Thermal Designs, PSPCL,  
Shed No. T-2, Thermal Design Complex,  
Patiala-147001

...Respondent

Present: Sh. Viswajeet Khanna, Chairperson  
Ms. Anjali Chandra, Member  
Sh. Paramjeet Singh, Member

**ORDER**

Nabha Power Limited (NPL) has filed the present petition 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 revising the water charges for supply of water to

industries is a “change in law” event under article 13 of the PPA and for consequent compensation on account of the same.

1.1 NPL has submitted that Power Purchase Agreement (PPA) was executed with Punjab State Power Corporation Limited (PSPCL) on 18.01.2010 for sale of power from its 2x700 MW Rajpura Thermal Power Project. The Unit No. 1 and Unit No. 2 of the project achieved Commercial Operation date on 01.02.2014 and 10.07.2014 respectively. The Govt. of Punjab issued notification No. 14/22/94-IW(2)/1040 dated 13.05.2003 under section 75 read with section 36 of the Northern India Canal Drainage Act, 1873 revising the canal water rates for supply in bulk to industries and consequently levied water charges amounting to Rs. 32 per 2500 cubic feet. The notification dated 13.05.2003 was prevailing as on the cut of date i.e. 02.10.2009 which is seven days before the bid deadline of 09.10.2009 and was considered accordingly by the bidder. The Govt. of Punjab issued notification No. 10/110/12-IW(2)/3895 dated 06.11.2012 revising the water charges for water supply in bulk to industries to Rs. 48 per 2500 cubic feet with a 2% escalation per year. Subsequently on 23.01.2020 the Govt. of Punjab issued the notification dated 10/110/2012-IW(2)/88/1 revising the water charges to Rs. 1000 per 100 cubic meters which has resulted in an increase in water charges from Rs. 55.14 per 2500 cubic feet to Rs. 707.92 per 2500 cubic feet which is equivalent to an unprecedented increase of around 1182.78% between 2012 and 2020. The 2020 notification was issued after the cut-off date. The 2020 notification is a modification of the 2012 notification, which are Laws as per

the PPA. Accordingly, the issuance of the 2020 notification is a “change in law” event in terms of Article 13.1.1(i) of the PPA.

1.2 NPL submitted that ‘Law’ as defined under the PPA, is an inclusive definition and *inter alia* includes any regulation, notification and rule of an Indian Governmental Instrumentality which has the force of law. Article 13 of the PPA executed between the parties clearly envisages compensation to be made to the Petitioner due to any increase in the cost to the Petitioner, which shall be determined and given effect to from the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law.

1.3 That, as per the proviso to Article 13.2 (b) of the PPA, during the Operating Period, the Petitioner is entitled to tariff adjustment for any change in law (to put the affected party in the same economic position as if such “change in law” had not occurred), provided that the impact of the said “change in law” is more than 1% of the aggregate of Letter of Credit amount in a Contract Year. The 2020 Notification has been issued during the Operating Period as the COD of the last unit of the Project was achieved on 10.07.2014. PSPCL has only provided a fortnightly Letter of Credit for Rs. 162.65 Crore. The change in law event has resulted in an increase in cost to the Petitioner which is approx. Rs. 17.5Crore per year (considering 80% PLF of the Project), which is more than Rs 1.62 Crore, calculated @ 1% of the Letter of Credit. Therefore, the Petitioner clearly satisfies the 1% threshold limit prescribed under Article 13.2 (b) of the PPA. Accordingly,

the Petitioner is entitled to compensation in the form of an upward tariff adjustment for “change in law” in accordance with Article 13 of the PPA.

- 1.4 That the Petitioner, vide notice dated 12.03.2020, informed the Respondent about the occurrence of a change in law event under Article 13 of the PPA and requested the Respondent to take necessary action, i.e., compensate the Petitioner. However, the Respondent vide its reply dated 31.03.2020 arbitrarily and erroneously rejected the Petitioner’s claim. PSPCL has rejected the claim of the petitioner relying upon the judgment passed by the Hon’ble APTEL in case of Sasan Power Limited vs. Central Electricity Regulatory Commission wherein it has been decided that water charges are input costs which were to be accounted for by the bidders and are not eligible under change in law. The contention of PSPCL is misplaced and erroneous. A project developer, such as the Petitioner, cannot be expected to build in such a significant increase in costs as part of the operation and maintenance expenses of the Project based on a mere possibility that water charges may be revised at a future date, that too by presuming a future law which did not exist. The requirement of having an escalation provision in the bid was only for the purpose of giving effect to the gradual increase of input costs due to inflation and the said requirement cannot be construed to mean that the Petitioner was required to factor in all possible future amendments in Law and provide for the same. Article 13 of the PPA does not place any restriction or provide for exclusion of any type of revenue or

costs from the ambit of Change in Law. It is settled law that parties are bound by the express terms of the contract, which are to be interpreted as per their literal meaning in the absence of any specificity. In the present case, the express provisions of Article 13 of the PPA are unambiguous

1.5 That the water charges in the State of Punjab are governed and determined by the Northern India Canal and Drainage Act 1873. Section 31 of the Act, provides that in the absence of a written contract, every supply of canal water shall be deemed to be at the rates and subject to the conditions prescribed by the rules made by the State Government which are to be published in the Official Gazette, whereupon such rules shall have the force of law. It is a matter of record that there is no such contract between the Petitioner and the State Government.

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; or
- (iii) In the alternative, direct the Respondent to pay the Petitioner a lump sum amount as an annual compensation, towards the

additional expenditure incurred by the Petitioner annually due to increase in water charges along with interest/carrying cost from the date of impact till reimbursement by the Respondent;

- (iv) Issue appropriate directions for securing and realization of the pass-through as claimed by the Petitioner; and
- (v) Pass such other or further order(s) as the Commission may deem just and equitable in favour of the Petitioner, in the facts and circumstances of the case.

The petition was admitted vide Order dated 16.02.2021.

2.0 PSPCL filed its reply to the petition and submitted that the water charges are an input cost during the operating period and are part of O&M charges, which are factored in while quoting the tariff. Such changes in input costs cannot be considered or allowed as change in law. The changes in water rates are a part of normal cost charges as a part of commercial arrangement and not due to any change in law. The increase or decrease in such costs from time to time by such entities supplying water or goods or any services are a part of normal business practices and are not a result of any change in law.

2.1 That the obligation to procure all inputs is that of NPL and it was upto NPL to consider and factor in all costs and projected charges while quoting its bid. By seeking compensation for such increase in water charges, the petitioner cannot attempt to negate the process and sanctity of a competitive bid under Section 63 of the Electricity Act, 2003. The bid for capacity and variable charges has no meaning if the changes in price of inputs such as water are

to be considered as change in law. As a part of competitive bid, the petitioner had the option to quote escalable charges. NPL participated in the bid being aware of the possibility of escalation as per the decision of the Government under an existing Act. Therefore, it is not open to NPL to claim increase in price of water at this stage.

2.2 PSPCL further submitted that the contention of NPL that any cost not foreseen by NPL has to be allowed as change in law is contrary to the basic purpose and intent of a competitive bid. NPL was free to bid any tariff. And open and transparent bid postulates the willingness of the bidder to accept the risk of loss or the benefits of gain. Having hedged out other bidders on the basis of its competitive bid, NPL cannot now seek additional compensation on the ground that it may incur additional costs than assumed by it during the bidding process. NPL is seeking to convert a tariff accepted by it through a competitive bid into a cost plus determination under Section 62 of the Act. If all costs are to be passed on to the Procurers than there was no reason to go through a competitive bid process. In this regard, PSPCL asserts the relevant provisions of RFP which are reproduced as under:

*2.7.1.4 The Bidder shall take into account the following while preparing and submitting the financial bid.*

.....

*3. The Quoted Tariff in Format 1 of Annexure 4 shall be an all inclusive tariff and no exclusions shall be allowed. The Bidder shall take into account all costs including capital and operating costs, statutory taxes, duties, levies while quoting such tariff. Availability of the inputs necessary for generation of power should be ensured by the Seller at the Project Site and all costs involved in procuring the inputs (including statutory taxes, duties,*

levies thereof) at the Project Site must be reflected in Quoted Tariff.

....

2.7.2.1 *The Bidder shall make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid. While submitting the Bid the Bidder shall be deemed to have inspected and examined the site conditions (including but not limited to its surroundings, its geological condition, the adequacy of the road and rail links to the Site and the availability of adequate supplies of water), examined the laws and regulations in force in India, the transportation facilities available in India, the grid conditions, the conditions of roads, bridges, ports, etc. for unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power. Accordingly, the Bidder acknowledges that, on being selected as Successful Bidder and on acquisition of the Seller, the Seller shall not be relieved from any of its obligations under the RfP Project Documents nor shall the Seller be entitled to any extension of time or financial compensation by reason of the unsuitability of the Site for whatever reason*

2.7.2.2 *In their own interest, the Bidders are requested to familiarize themselves with the Electricity Act, 2003, the Income Tax Act 1961, the Companies Act, 1956, the Customs Act, the Foreign Exchange Management Act, IEGC, the regulations framed by regulatory commissions and all other related acts, laws, rules and regulations prevalent in India. The Procurer/ Authorised Representative shall not entertain any request for clarifications from the Bidders regarding the same. Non-awareness of these laws or such information shall not be a reason for the Bidder to request for extension of the Bid Deadline. The Bidder undertakes and agrees that before submission of its Bid all such factors, as generally brought out above, have been fully investigated and considered while submitting the Bid.*

2.3 PSPCL has submitted that the issue of “change in law” in respect of increase in water charges has already been settled by Hon’ble APTEL vide order dated 27.05.2019 in the case of

GMR Kamalanga Energy Limited v. Central Electricity Regulatory Commission in Appeal No. 195 of 2016 wherein it has been held that the appellant was not entitled to any compensation towards increase in water charges. Further, in case of Sasan Power Limited v. Central Electricity Regulatory Commission in Appeal No. 136 of 2016 and Batch, Hon'ble APTEL has held vide order dated 13.11.2019 that changes in water charges are not eligible for compensation under "change in law".

2.4 That the "change in law" clause in the PPA of NPL is similar to the "change in law" clause mentioned in the PPA of GMR Kamalanga and Sasan Power Limited which were under consideration in the above said Appeals. In fact, Sasan Power Limited is also a Case 2 project. Therefore, the above decision in the case of GMR Kamalanga Energy Limited and Sasan Power Limited in regard to the claim of "change in law" in respect of water charges would squarely apply to the present case. In case of Sasan Power Limited in Appeal No. 136 of 2016, the Hon'ble Tribunal has specifically held that changes in base prices would not be considered as "change in law" and only changes in taxes etc would be considered for change in law. Apart from the above, in various decisions of the Hon'ble Tribunal on "change in law", a basic distinction defined by the Hon'ble Tribunal is that where the charges are part of the basic price, the same are to be incorporated in the bid and any change in such price cannot be considered as "change in law". However, if the charges are in the nature of taxes and duties which are not included in the base price, the same are considered change in law. Further, the Hon'ble

Tribunal relied on the Letter dated 27.08.2018 issued by the Ministry of Power under Section 107 which relates to pass through of changes in domestic duties, levies, cess and taxes and as per this letter the appellant GKEL was held to be entitled to increase in the cost freight on account of levying of development surcharge and busy season surcharge, which were not part of basic price of coal.

2.5 PSPCL submitted that the unprecedented increase mentioned is not a valid ground to claim compensation. The Hon'ble Supreme Court in Energy Watchdog v. Central Electricity Regulatory Commission cited as (2017) 14 SCC 80 had rejected the claims based on unprecedented increase in price of coal/fuel. The increase in water charges are similar to normal escalation in any other input cost and bidders are expected to have accounted for the same in their bid. The purpose of the clause restoring the affected party to the same position as if no change had taken place is invoked while providing for the consequences mentioned in the PPA itself. This is clear from the fact that Clause 13.2 provides 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. Thus, the principle of compensation is limited to the extent contemplated in Article 13 and not otherwise. The provisions of Clause 13.2 of the PPA cannot be invoked to determine whether there is a "change in law" within the scope of Clause 13.1. This has also been recognized by the Hon'ble Tribunal in Adani Power Limited v. Central Electricity

Regulatory Commission in Appeal No. 210 of 2017 in its order dated 13.04.2018 wherein it has been held that “Article 13.2 cannot be used to expand the scope of Article 13.1 which was consciously agreed by the Appellant.”

2.6 That there is no “change in law” event qua the current petition and therefore the issue of cutoff date is not relevant. Article 13.2 of the PPA would only apply when there is a “change in law” event under Article 13.1. Thus, in this case, the same has no applicability. The computation of the 1% of the aggregate of Letter of Credit amount in a Contract Year and the contention on exceeding such threshold is incorrect.

2.7 That in any long-term contract, it is to be anticipated that the prices of inputs required would change and the same has to be accounted for in the competitive bid. The purpose of a competitive bid is precisely to freeze the price for the distribution company against any such possible changes. The bidders take the risk and reward of any such price fluctuations. PSPCL has further submitted that NPL has filed the Petition only on 21.12.2020 even though the claim is for notification dated 23.01.2020. The carrying cost, if any, can only be claimed for the period after filing of the Petition. The delay in filing of the Petition is attributable to NPL.

3. NPL filed its rejoinder to the reply filed by PSPCL reiterating its earlier submissions and denying the assertions made in the reply. It has been further submitted that Article 13 of the PPA is comprehensive, explicit, precise, and unambiguous and defines the occurrence of a “change in law” event and provides for the consequences thereof. Article 13.1.1(i) of the

PPA specifically includes 'enactment', bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law as a change in law event. Further, the 2020 Notification is modification of the Law and thus, a "change in law" event as per Article 13.1.1 (i) of the PPA, and not Article 13.1.1(iv) of the PPA, as contended by PSPCL. Further, since Article 13 of the PPA is an exhaustive provision therefore, extraneous considerations cannot be applied at the time of interpretation or in giving effect to the same. Article 13.1.1 explicitly provides the specific situations/events, which are excluded from constituting a "change in law" event, i.e., (i) change in any withholding tax on income or dividends distributed to shareholders of the seller, or (ii) change in respect of UI charges or frequency intervals by an Appropriate Commission.

3.1 That the exclusions of "change in law" event under Article 13 of the PPA do 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. NPL relies upon the Hon'ble Supreme Court's judgment dated 11.04.2017 in the matter of Energy Watchdog v. Central Electricity Regulatory Commission & Ors., (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 Central Electricity Regulation Commission. Thus, 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. Further, Article 18.4.1 of the PPA stipulates that the terms of the PPA are the final expression of an agreement and are also the complete and exclusive statement of the terms of the present commercial arrangement between NPL and PSPCL. The same has also been admitted by PSPCL in paragraph 3 of the Reply, wherein it has been specifically stated that the claim for “change in law” has to be considered only in terms of Article 13 of the PPA. Accordingly, since the 2020 Notification is a modification of Law, input costs have not been excluded from the ambit of the “change in law” provision under Article 13.1.1 of the PPA.

3.2 That PSPCL’s contention that changes in water charges payable by NPL are the result of a commercial operation and aspects of business risk which is required to be factored in while submitting bids is wrong and per se bad in law. As per Article 1.1 of the PPA, ‘Law’ means, all laws including Electricity Laws in force in India and further includes all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them. The 2020 Notification is ipso facto applicable on all the industries, power plants and bulk users in the State of Punjab from the date of the Notification (enforcement) having the force of law and therefore, cannot be termed as ‘commercial arrangement’ between NPL and the Government of Punjab, as alleged by PSPCL.

3.3 That as per the Electricity Act, 2003 there are two modes for determination of tariff for supply of power to distribution

licensees, namely Section 62 and Section 63. It is a matter of record that the tariff for NPL's Project has been discovered and adopted under Section 63 of the Electricity Act, 2003, wherein tariff is determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government. Further, the Ministry of Power, Government of India vide Resolution No. 23/11/2004-R&R (Vol.II) dated 19.01.2005 notified the Guidelines for Determination of Tariff through a Bidding Process for Procurement of Power by Distribution Licensees ("Bidding Guidelines") in exercise of its power under Section 63 of the Electricity Act, 2003. In this regard, Clause 4.7 of the Bidding Guidelines states that any "change in law" impacting cost or revenue from the business of selling electricity to the procurer with respect to the law applicable on the date which is 7 days before the last date for RFP bid submission shall be adjusted separately. Thus the Bidders had to consider the laws prevalent as on the cut-off Date for submission of their bids, and any impact on cost or revenue due to "change in law" is required to be adjusted separately in terms of the "change in law" provision. The provisions of the PPA are to be read along with the provisions of the RFP, and the RFP cannot be read in isolation.

- 3.4 That PSPCL's reliance upon the judgments GMR Kamalanga Energy Ltd. v. Central Electricity Regulatory Commission & Ors., Appeal No. 195 of 2016 dated 27.05.2019; Sasan Power Limited v. Central Electricity Regulatory Commission & Ors., Appeal No. 136 of 2016 dated 13.11.2019; GMR

Kamalanga Energy Ltd. v. Central Electricity Regulatory Commission & Ors., Appeal No. 193 of 2017 dated 21.12.2018; GMR Warora Energy Limited v. Central Electricity Regulatory Commission & Ors., Appeal No. 111 of 2017 dated 14.08.2018; and Adani Power Ltd. v. Central Electricity Regulatory Commission & Ors., Appeal No. 210 of 2017 dated 13.04.2018 by way of its reply is bad in law. It is settled law that the decisions rendered by a coordinate Bench is binding on the subsequent Benches of equal or lesser strength. Further, it is also an equally settled position of law that when a court acts in ignorance or forgetfulness of a previous decision of its own or of a court of coordinate jurisdiction or some statutory provisions, such judgment is said to be per incuriam. The petitioner further submitted that the Hon'ble Appellate Tribunal for Electricity whilst rendering its decision in the aforesaid cases has acted in ignorance of:

- i) The Bidding Guidelines, which is a statutory document issued under Section 63 of the Electricity Act, 2003. Clause 4.7 of the Bidding Guidelines specifically provides that the Bidders had to consider the laws prevalent as on the Cut-Off Date for submission of their bids, and any impact on cost or revenue due to "change in law" is to be adjusted separately;
- ii) The Hon'ble Supreme Court's judgment dated 11.04.2017 in the matter of Energy Watchdog vs Central Electricity Regulatory Commission & Ors., reported as (2017) 14 SCC 80, held that while determining the consequences of change in law parties shall have due regard to the principle that the purpose

of compensating the party affected by such “change in law” is to restore the affected party to the economic position as if such “change in law” has not occurred; and 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 Central Electricity Regulation Commission.

- iii) Its own judgment dated 12.09.2014 in Wardha Power Company Ltd. v. Reliance Infrastructure Ltd. & Ors., Appeal No. 288 of 2013 held that there is no co-relation of the base price of electricity and computation of compensation because of Change in Law, and that the compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the “change in law” event and in judgment dated 19.04.2017 in Sasan Power Ltd. v. Central Electricity Regulatory Commission & Ors., Appeal No. 161 of 2015 has held that the provisions of the Request for Proposal cannot override the right of a party seeking claim due to occurrence of “change in law” event under a binding contract and if an event qualifies to be a “change in law” event then the compensation must be awarded, otherwise “change in law” clauses will become redundant and otiose.

- 3.5 That the judgments relied upon by PSPCL in its Reply are not binding on this Commission since the same are per incuriam, having been issued in ignorance of the statutory

provisions of the Competitive Bidding Guidelines and the judgments of the Hon'ble Supreme Court and the earlier judgments of this Hon'ble Tribunal. Moreover, the Hon'ble Tribunal's judgments dated 27.05.2019 in Appeal No. 195 titled as GMR Kamalanga Energy Ltd. v. Central Electricity Regulatory Commission & Ors., and judgment dated 14.08.2018 in Appeal No. 111 of 2017 titled as GMR Warora Energy Limited v. Central Electricity Regulatory Commission & Ors. are subjudice and pending for adjudication before Hon'ble Supreme Court.

The learned counsel for both parties were heard. They reiterated at length the above arguments. After hearing the parties on 26.05.2021, the Commission reserved its order.

#### **4. Observations and Decision of the Commission.**

The Commission has carefully gone through the petition, reply filed by PSPCL, rejoinder filed by NPL, arguments made by the parties during the hearings and their written submissions regarding the same. The findings and decision of the Commission is as under:

- 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.
- 4.2 PSPCL is opposing the NPL's claim with the contention that, the issue of "change in law" in respect of increase in water

charges has already been settled by the Hon'ble APTEL vide Order dated 27.05.2019 in case of GMR Kamalanga Energy Limited Vs CERC (Appeal No. 195 of 2016) and Order dated 13.11.2019 in case of Sasan Power Limited Vs CERC (Appeal No. 136 of 2016 and Batch).PSPCL also pleaded that the water charges are an input cost, as these are being paid for procuring water as an input for generating power during the operating period and constitutes a part of the O&M charges, which is factored in by the bidder while quoting the acceptable tariff. The increase or decrease in prices from time to time by such entities supplying water or goods or any other services are a part of the business aspects and are not a result of any change in law. The rates payable for such inputs have to be assessed and estimated by the bidders and provided for in the quoted tariff including any possible changes in the price for such inputs. It was for NPL to account for the input costs while quoting its bid as per Clause 2.7.1.4.(3) of RfP which specifies that *"The Quoted Tariff in Format 1 of Annexure 4 shall be an all-inclusive tariff and no exclusions shall be allowed."*The contention of NPL is contrary to the basic spirit and intent of a competitive bid as the bid had the option to quote escalable charge and NPL was free to bid any tariff and take the risk of loss or gain.

4.3 Before proceeding further, the Commission finds it appropriate to examine the extracts of judgments by various Hon'ble Courts cited by NPL in its submissions:

- a) Hon'ble Supreme Court judgment dated 11.04.2017 in the matter of Energy Watchdog Vs CERC & Ors (2017) 14; wherein it has been held as under:

*“53.Both the letter dated 31st July, 2013 and the revised tariff policy are statutory documents being issued under Section 3 of the Act and have the force of Law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, 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, the affected party to the economic position as if such change in law has not occurred. Further, 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 Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would.”*

**The Commission observes that Hon’ble Supreme Court in the aforementioned judgment has dealt with the determination of consequences of change in law and compensation thereof on account of reduced quantity/shortfall of domestic coal, which is not the issue in the instant case.**

b) Hon'ble APTEL judgment dated 12.09.2014 in Appeal No. 288 of 2013 (Wardha Power Company Limited Vs Reliance Infrastructure Limited) wherein Hon'ble APTEL held that:

*“24. We find that as per the provisions of the PPA, there is no co-relation of the base price of electricity quoted by the Seller and computation of compensation as a consequence of Change in Law. The compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the Change in Law. The minimum financial impact to qualify for claim of compensation is also linked to the increase in expenses/decrease in revenue of the seller.”*

The Commission observe that the Hon'ble APTEL has concluded the said judgment under the following headings:

***“35. SUMMARY OF OUR FINDINGS:***

***(A) Compensation for change in tax on coal under “Change in Law”***

***(B) Change in custom duty on imported coal”***

Thus, the issues dealt therein are the determination of consequences of change in law and compensation thereof on account of change in tax and customs duty on coal, which is not the issue in the instant case.

c) Hon'ble APTEL judgment dated 19.04.2017 in Appeal No. 161 of 2015 (Sasan Power Ltd Vs CERC &Ors) wherein Hon'ble APTEL held that:

*“44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as a Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read together. If an event qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant. But this will of course depend on facts and circumstances of each case. Facts of each case will have to be carefully studied before granting such a relief. It is rightly pointed out that in Wardha Power Company Limited, this Tribunal has rejected the obligation of any escalable index or indexing of cost of fuel in order to determine the compensation due on account of Change in Law, Sasan will have to be compensated keeping the law in mind.”*

**The Commission is in agreement with the observation that the compensation shall follow if an event qualifies as a “Change in Law” depending on the facts and circumstances of each case. However, Hon’ble APTEL in the aforementioned judgment has dealt with the determination of consequences of change in law and compensation thereof on account of difference in the rate**

of statutory taxes (Sales Tax, Excise Duty and MAT), which is not the issue in the instant case.

4.4 The Commission also refers to the following judgments of Hon'ble Courts cited by PSPCL in its submissions

a) Hon'ble APTEL judgment dated 14.08.2018 in GMR Warora Energy Ltd Vs CERC & Ors (Appeal No. 111 of 2017); has held as under:

"13.

*A.xiv. We consider that similar issues have been decided by this Tribunal in the Adani Judgment.....*

*Sizing Charges*

*.....*

*xviii.....the case is that CIL has changed the sizing charges for coal for sizes, which already existed as specified by the Gol. The change in sizing charges of coal by CIL is part of coal pricing mechanism. Further, in terms of the RFP, APRL was required to quote an all inclusive tariff including coal costs in escapable/non-escapable components based on the risks perceived by APRL. Accordingly, this contention of APRL is misplaced.*

*.....*

*xxiv....We observe that APRL was supposed to consider all the cost inputs for generation of power in its bid as per the RFP.....*

*.....*

*xx. In any case the bidder is not eligible for compensation due to change in base price of coal as it has already inbuilt in its bid the perceived risks.....*

The Commission observes that Hon'ble APTEL in the aforesaid judgment had decided that the bidder is not eligible for compensation due to change in base price of coal as it has already inbuilt the perceived risks in its bid.

b) The Hon'ble APTEL in its judgment dated 27.05.2019 in GMR Kamalanga Energy Ltd Vs CERC &Ors-Appeal No. 195 of 2016 and 193 of 2017, has held as under:

*“47. Coming to water charges, the Appellants contend that since it is introduced by the Government of Orissa which is also an Indian Governmental instrumentality, and if the amendments are after cut-off date resulting in increase in cost, the same has to be allowed as change in law, rejecting the opinion of CERC that it is an input cost in terms of 2.7.2.4.*

*....*

*70. Then coming to levy of water charges, apparently, the present tariff was based on competitive bidding. It is the contention of the Appellants that the notification issued by the Government of Orissa wherein water charges were increased has to be treated as “change in law” event, as such increase in water charges increases cost in the business of generation of electricity for supply to the procurers. Apparently, water charges were consistently held as operating cost incurred for procuring water during operation period. In terms of PPA, bidder has to make independent enquiry and satisfy itself with respect to the details like*

*information, inputs, conditions and circumstances and all such factors that may have effect on the quote in the bidding. In competitive bidding process, bidder is required to quote an all inclusive tariff including capital cost, operating cost etc. In that view of the matter, we are of the opinion that the Appellant is not entitled for any compensation towards increase in water charges...”*

**The Commission notes that Hon’ble APTEL in the aforesaid judgment has decided that the Appellant is not entitled for any compensation towards increase in water charges with observation that water charges were consistently held as operating cost incurred for procuring water during operating period and in a competitive bidding process bidder is required to quote an all-inclusive tariff including capital cost, operating cost etc.**

c) Hon’ble APTEL judgment dated 13.11.2019 in Sasan Power Ltd Vs CERC &Ors -Appeal No. 136 of 2016 and Batch, wherein it has been held as under:

*“17.12.6 We are inclined to agree with the views of the Central Commission that changes in base prices are not eligible for compensation under change in law and only the new taxes and/or levies or changes in existing in taxes and/or levies applicable on the base price of inputs are allowed for compensation under Change in Law.*

*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....*

*17.12.8...We are of the view that a prudent bidder would address the risk in increase of input cost by suitably quoting an escalable component of capacity charge. A similar case came up before this Tribunal in Appeal No.195 of 2016 and decided vide its judgment dated 27.05.2019 that there cannot be any compensation on account of increase in rate of water charges. Therefore, this issue, i.e. Issue (B) is partially decided against the Appellant i.e. increase in water charges, being input cost, not allowed as compensation to the Appellant...*

.....

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.”*

**The Commission notes that Hon’ble APTEL in the aforesaid judgment has held that changes in water charges are not eligible for compensation under “Change in Law” with observation that in a host of judgments of the Tribunal in various cases, it has been held that the**

**increase in input cost cannot be allowed as “Change in Law”.**

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.**

The petition is disposed of in terms of above.

Sd/-  
(Paramjeet Singh)  
Member  
Chandigarh

Sd/-  
(Anjuli Chandra)  
Member

Sd/-  
(Viswajeet Khanna)  
Chairperson

Dated:06.08.2021