

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

**Petition No. 1 of 2021**  
**Date of Order: 13.10.2021**

Petition under Sections 86(1)(a), 86(1)(b) and 86(1)(f) of the Electricity Act, 2003 and Article 13 read with Article 17.3.1 of the Power Purchase Agreement executed by the petitioner and Punjab State Power Corporation Limited (PSPCL) (erstwhile Punjab State Electricity Board (PSEB) dated 01.09.2008 seeking relief on account of a 'Change in Law' viz. the introduction of Goods and Services Tax Laws at the Central and State levels, resulting additional recurring and non-recurring expenditure in the form of an additional tax burden on the petitioner thereby changing its economic position.

In the matter of : Talwandi Sabo Power Ltd. Village Banwala,  
Talwandi Sabo Road, District Mansa, Punjab-  
151302  
... Petitioner

Versus

Punjab State Power Corporation Ltd. The Mall,  
PSEB Head Office, Patiala, Punjab-147001.  
... Respondent

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

**Order**

Talwandi Sabo Power Limited (TSPL) is maintaining and operating a 3X660 MW (1980 MW) coal based thermal power station at Banwala, Talwandi Sabo in the state of Punjab and has filed the

present petition seeking relief on account of a 'Change in Law' viz. the introduction of Goods and Services Tax Laws at the Central and State levels, resulting additional recurring and non-recurring expenditure in the form of an additional tax burden on TSPL thereby changing its economic position.

## **2.0 TSPL's Submission**

2.1 TSPL has submitted that in the year 2007, PSEB intended to set up a power project in District Mansa, Punjab and Talwandi Sabo Power Limited was incorporated as a Special Purpose Vehicle (SPV) to act as its authorized representative for carrying out the various pre-bid obligations. Talwandi Sabo Power Limited invited bids on 25.09.2007, in terms of the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees dated 19.01.2005, for setting up of the project. The procedures of International Competitive Bidding in terms of Resolution No.23/11/2004-R&R dated 19.01.2005, Ministry of Power, Government of India, were followed in the selection process. Pursuant to the aforesaid bid, Sterlite Energy Limited (SEL) emerged as the successful bidder and the entire shareholding of Talwandi Sabo Power Limited was transferred by PSEB to SEL by way of a Share Purchase Agreement (SPA) executed on 01.09.2008. Further, on the same date, TSPL and PSEB executed the Power Purchase Agreement, hereinafter refer to as the PPA dated 01.09.2008. The nature of the tender was such that a special purpose vehicle would be created for implementation of the project and therefore the power purchase agreement envisaged an O&M Contract and an Operator(s) which is a prudent utility practice followed throughout the industry for the successful operation of the power plant.

2.2 That promulgation of Integrated Goods and Services Tax, 2017; the Central Goods and Services Act, 2017 and the Punjab State Goods and Services Act, 2017 with effect from 01.07.2017 is a 'Change in Law'. The aforesaid Laws, applicable to the petitioner, have replaced various Central and State Tax Laws after the relevant date mentioned in the Power Purchase Agreement dated 01.09.2008, resulting in additional recurring and non-recurring expenditure in the form of tax burden to the petitioner.

2.3 That as per Article 1.1 of the PPA "Law" means, 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. Further, as per Article 1.1 of the PPA "O&M Contract" or "O&M Contracts" *means the contract/s* entered into by the Seller with the Operator or Operators, if any. "Operator" or "Operators" means one or more contractors appointed as operator of power generation facilities of the Power Station, pursuant to an O&M Contract, if any. Article 4.1 of the PPA provides that the owner of the project is responsible for fulfilling all its obligations under the PPA throughout the term of the PPA. Article 7 of the PPA provides that parties had to comply with the applicable law as amended from time to time regarding operation and maintenance of the Power Station and all other matters incidental thereto. The object of any restitutionary provision is to provide for changes that arise from unforeseen events such as Change in Law resulting into change in economic position. Therefore, the only line of enquiry

should be as to whether such a change has occurred necessitating restitution and if yes, what's the impact of the same. The additional taxes are collected by the State for the benefit of the citizenry at large and therefore the State should compensate TSPL for the additional taxes being borne by it.

2.4 That Article 13 of the PPA pertaining to change in law reads as under:

*“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 of (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement, or (iv) any change in the (a) Declared Price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RfP or (c) the cost of implementing Environmental Management Plan for the Power Station (d) Deleted but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.*

13.1.2: “Competent Court” means:

*The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.*

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) *Construction Period*

*As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:*

*For every cumulative increase/decrease of each Rs.25,00,00,000/- (Rupees Twenty Five Crore) in the Capital Cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall be an amount equal to 0.267% (percentage zero point two six seven) of the Non Escalable Capacity Charges. Provided that the Seller provides to the Procurer documentary proof of such increase/decrease in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply.*

*It is clarified that the abovementioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of Rs.25,00,00,000/- (Rupees Twenty Five Crore).*

(b) *Operation Period:*

*As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Central Electricity Regulatory Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable law.*

*Provided that the abovementioned 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 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to the Procurer under this Article 13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.*

*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; or*

*(ii) the date of order/judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.*

13.4.2 *The payment for Changes in Law shall be through Supplementary bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff'...*

2.5 That the bid deadline, as mentioned in Article 13 was 23.06.2008 as per Clause 2.8.1 of the Request for Proposal. Therefore, for any occurrence to fall within the meaning of a Change in Law event under Article 13, the same must occur after the date which is seven days prior to the aforesaid bid deadline, i.e., 16.06.2008. The current GST regime has been implemented from 01.07.2017 - i.e. much after the Cut Off Date.

2.6 That the change of regime in taxation with effect from 01.07.2017 has resulted in an increase in the recurring Operations and Maintenance expenditure incurred by the petitioner and has adversely affected its economic position. TSPL in order to explain the impact of this Change in Law submitted a sample Operation and Maintenance Agreement dated 01.12.2017 between TSPL and one of its operators, Steag Energy Services Private Limited. The aforesaid agreement is an O&M Contract and Steag Energy

Services Private Limited, is an Operator in terms of the definition of the expression Operator as defined in Article 1.1 of the PPA. 'Change in Law' has resulted in change in costs of the electricity sold by it to the Respondent thereby changing its economic position. Therefore, the promulgation of the GST laws entitles it to appropriate compensatory relief in accordance with Article 13 of the PPA.

- 2.7 That prior to the promulgation of the GST laws, the service tax on O&M services was levied at the rate of 12.36%. Since the Change in Law event from 01.07.2017, the said service tax has increased to 18%, thereby increasing the expenditure in relation to O&M activity in excess of the threshold limit as under..

Particulars (in Rupees Lakhs)	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
<b>Actual O&amp;M Cost for TSPL</b>	8700	14800	22586	30231	29776	28424
<b>Actual Basic Service Cost at TSPL (exclusive of applicable Tax) till 2020.</b>	3089	4941	6161	11826	13486	14843
<b>Actual Service Cost at TSPL (inclusive of applicable Tax) till 2020.</b>	3471	5628	7080	13864	15746	17265
<b>Net GST Impact of (18% - 12.36% = 5.64%)</b>				667	761	837

*Note-The nos. mentioned above are based on applicable tax under Service tax regime till 30.06.2017 and under GST regime from 01.07.2017 onwards.*

The net increase in expenditure, since the introduction of the GST Laws till date, is Rs.22,65,00,000/- on the O&M costs till FY 2019-20 and TSPL has submitted a tabular representation of the additional tax expenditure that has resulted till date and shall result over the



next few years, if the GST Laws and rates remain constant. The actual/ Projected Service Cost is lower than the 50% of the total O&M cost as allowed under CERC Tariff Regulations for Unit size 500MW and above. TSPL submitted that it may be paid the lower of the GST impact on Actual Service Cost as incurred by it or the GST impact on Service Cost as allowed by CERC under Tariff Regulations for the relevant period.

- 2.8 That since for the period 2017-18 till 2019-20, the GST impact on Actual Service Cost as incurred by it is lower than the GST impact on Service Cost as allowed by CERC under Tariff regulations for the relevant period, it may be allowed a compensation for Rs.22,65,00,000/- till FY 2019-20. Post this period, the lower of the GST impact on Actual Service Cost as incurred by TSPL or the GST impact on Service Cost as allowed by CERC under Tariff regulations for the relevant period may be paid to it.
- 2.9 That on account of the GST regime, the taxes payable by the seller/Petitioner or in other words, the operational cost of the seller/Petitioner has increased and consequently its revenue has decreased necessitating compensation. As the Change in Law has resulted in an increased cost i.e. change of economic position, TSPL is entitled to restitution in line with the PPA terms. TSPL issued a notice dated 24.05.2018 to the Respondent, as per the requirement under Article 13.3.1 of the PPA informing the Respondent of the Change in Law by the introduction of GST Laws. However, the Respondent has failed to reply to the same till date. Such promulgation/introduction of GST Laws after the Cut Off Date resulting in such aforesaid additional recurring expenditure by it squarely falls under Article 13 of the PPA, and TSPL is entitled for the relief as stipulated thereunder.

2.10 That introduction of GST Laws from 01.07.2017 is a 'Change in Law' event. Further, Article 13.2 of the PPA states that "*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.*" Therefore, the said Article is based on principles of restitution and as such, the compensation must be from the date the Change in Law event occurred. Therefore, as per Article 13 of the PPA, TSPL is entitled to carrying cost for the period when payments were made by TSPL till the time TSPL raises Supplementary Bills.

2.11 That carrying cost is an inherent provision in the PPA as the Change in Law compensation was premised on the underlying principle that the affected party is to be restored to the same economic position as if such change in law has not occurred. The inclusion of carrying cost in the quantum of compensation will ensure that its economic position, despite the passage of time, is at par with what it would have been, had it not been for the Change in Law event and for the same, TSPL has relied on the judgment passed by the Hon'ble Appellate Tribunal for Electricity dated 14<sup>th</sup> September 2019 in Appeal Nos. 202 of 2018 and 305 of 2018 titled Jaipur Vidyut Vitran Nigam Ltd. and Ors. vs. Rajasthan Electricity Regulatory Commission and Anr.

2.12 TSPL has prayed to:

- (a) Declare that the introduction of the Integrated Goods and Services Tax, 2017; the Central Goods and Services Tax,

2017 and the Punjab State Goods and Services Tax, 2017 are each a Change in Law as envisaged in Article 13 of the Power Purchase Agreement dated 01.09.2008 between TSPL and the Respondent's (PSPCL's) predecessor PSEB;

- (b) Direct the Respondent to pay compensation to TSPL for the additional tax burden on Operation and Maintenance expenses incurred by TSPL in terms of the following:
  - i. For the period between FY 2017-18 till FY 2019-20- an amount of Rs. 22,65,00,000/- (Rupees Twenty-Two Crores Sixty Five Lakhs), AND;
  - ii. For the Period starting FY 2020-21 onwards- an amount that is the lower value of either (a) the GST impact on Actual Service Cost as incurred by TSPL OR (b) the GST impact on Service Cost as allowed by CERC under Tariff regulations;
- (c) Direct modification of the tariff and approve the methodology for the same to be paid by the Respondent to TSPL to incorporate and account for the additional tax burden incurred by TSPL due to the introduction of the Integrated Goods and Services Tax, 2017; the Central Goods and Services Tax, 2017 and the Punjab State Goods and Services Tax, 2017;
- (d) Allow TSPL to submit the methodology for tariff change/ calculation in due course of time;
- (e) Grant Carrying Cost on the same basis, rate and principles as Late Payment Surcharge from the date the expense was incurred till the date on which Supplementary Bill is raised;
- (f) Direct the Respondent to reimburse the legal, administrative and any other costs incurred by TSPL in pursuing the instant

petition; and

- (g) Pass any such further orders or directions as this Commission may deem fit and proper, in the interest of justice and equity.

### **3.0 Submissions of PSPCL**

- 3.1 The petition was admitted vide order dated 19.02.2021. Notice was issued to PSPCL. PSPCL filed its reply and submitted that the Petitioner has claimed the impact of GST which came into effect on 01.07.2017. The present Petition has been filed on 12.01.2021 i.e. more than three years after the event. The claim is therefore time barred. PSPCL has relied upon the judgment of the Hon'ble Supreme Court in case of Andhra Pradesh Power Coordination Committee & Others Vs Lanco Kondapalli Power Limited & Others, (2016) 3 SCC 468, wherein it has been held that the underlying principles of the Limitation Act, 1963 are applicable to proceedings before the Regulatory Commission under the Electricity Act, 2003 when it functions as a statutory adjudicatory quasi-judicial / judicial authority in determining all claims and disputes, including those arising out of contract between the licensees and generating companies. Further, there have been laches on the part of the petitioner and the relief claimed by the petitioner cannot be allowed. PSPCL has relied in this regard on the decision in case of Prabhakar Vs Sericulture Deptt. (2015) SCC 1, the decision dated 09.07.2020 in case of Dahiben Vs Arvinbhai Kalyanji Bhanusali (Gajra) (D) thr LRs and others in Civil Appeal no. 9519 of 2019 and Asger Ibrahim Amin Vs LIC (2016) 13 SCC 797, wherein it was held that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first

accrues. Delay defeats equities and a right not exercised for a long time is non-existent.

- 3.2 PSPCL further submitted that the Petitioner has not provided any details with regard to the impact of GST. The Petitioner has not indicated the services for which the tax is being imposed and the only reference is to O&M Contract. The generating stations have already been commissioned and Petitioner is operating the power station. Therefore, the consideration of the period is the operation period after the COD and in respect thereof there are no services which are to be procured on which service tax would be applicable.
- 3.3 That the petitioner issued the notice with substantial delay. The requirement of notice is “as soon as reasonably practicable”. The time taken cannot be considered reasonable by any means. In terms of the PPA, the Commission is required to determine and decide on the change in law and compensation. Therefore, PSPCL could not have made any acceptance of claims or otherwise made any payments without a decision and determination by the Commission.
- 3.4 That the calculations submitted by the Petitioner are without any explanation and cannot be verified. It has been more than three years since the introduction of GST and it is possible for Petitioner to submit the actual details so as to enable PSPCL and the Commission to consider and verify the impact of GST. The impact of changes in taxes, if at all, can be considered and the increase in commercial prices cannot be considered as change in law.
- 3.5 That unlike the requirement for EPC contract under Article 3.1.2(iii)(a), there is no requirement or mandate for O&M Contract under the PPA. It is entirely the commercial decision and expediency of the Petitioner to either undertake the services itself or

to outsource the services. The Petitioner may outsource the services for convenience for reduction in the contract cost. The Petitioner cannot claim any change in the tax payable by it to the Contractor on account of GST Laws under the Change in Law provision of the PPA. The Petitioner is responsible to PSPCL for the due fulfillment of all the obligations assumed under the PPA. PSPCL is not in any manner concerned with the manner in which the Petitioner implements the projects, generates and supplies electricity to PSPCL. That the contention of TSPL that an O&M contractor for service is a prudent utility practice or is followed throughout the industry is also not correct. The decision to operate the power station via a third party is for the commercial convenience of the Generator and not due to any prudent practice. If the intention of TSPL was to save on O&M Costs and benefit itself, TSPL has to bear the consequences of such benefit. The benefit of reduction in costs is not being passed on to the consumers and therefore, the alleged additional for expenditure should not be passed on either. That even assuming, but not admitting, that the costs were lower than those provided under the Regulations of the Central Commission, the same is to the benefit of TSPL as it is now incurring lower costs. However, this benefit is not being passed on to PSPCL as it would have in a competitive bid tariff. Internal costs of the generator are not relevant. TSPL, thus claim alleged higher tax burden from PSPCL since it was their decision for their own convenience to outsource O & M which attracted GST Tax.

- 3.6 That the Petitioner having participated in the bid for setting up the project and for generation and sale of electricity as per the bidding documents, is bound by the all-inclusive tariff bid by the Petitioner duly incorporated in the PPA. There cannot be any claim for

increase in tariff except as authorized under the PPA. It is a settled principle that in a competitive bid project, there are always risks and rewards and both are to the account of the selected Bidder. Neither can PSPCL ask for a decrease in tariff on account of the Petitioner organizing its affairs in a manner which reduces costs or on account of a subsequent event benefitting the Petitioner, nor can the Petitioner ask for an increase in cost for any reason, except as specifically provided in the PPA. PSPCL has relied on the decision of the Central Commission in Petition No. 1/MP/2017 dated 16.03.2018 in the case of GMR Warora Energy Limited and the decision dated 07.02.2019 of the Bihar State Commission in Case No. 30/2018 to support their contention wherein it was held that it is the responsibility of the petitioner to operate the generating station and any increase in service tax on O & M expenses cannot fall within the scope of change in law. The decision to carry out operation and maintenance through any other agency is a commercial decision and any increase in expenditure on this count cannot be considered as a change in law.

- 3.7 That the Petitioner has provided only one agreement which was entered into after the GST provisions had come into effect. The Petitioner, knowingly and willingly, entered into the contract with the full knowledge that it would have to pay the GST. The outsourcing of O&M was a commercial decision undertaken by the Petitioner being well aware that it would attract taxation. All liabilities/advantages associated with outsourcing are to the account of the Petitioner. The justifications given by the Petitioner for outsourcing are not relevant in a competitive bidding scenario.
- 3.8 That the net effect of the introduction of GST and abolishment of cess also needs to be considered. GST is a single tax and replaces

the multiple taxes being imposed earlier. The Petitioner has made no reference to the subsumed taxes, duties or reduction in taxes, duties and cess which have reduced its costs. The water cess has been abolished which has been acknowledged by CGPL. The Petitioner is required to highlight all the taxes which are subsumed in GST or abolished or reduced. The Petitioner should be required to confirm on affidavit that there is no reduction in the costs of the Generators due to the introduction of GST and for any other changes in law in terms of the provisions of Article 13.

- 3.9 That the claim for carrying cost is even otherwise not maintainable. The Petitioner cannot claim carrying cost for the period where there has been a delay and latches on the part of the Petitioner itself. The claim can be enforced only after the decision by the Commission which in turn can only be after the Petitioner has filed the Petition and submitted complete information and not before. Thus, any delay in the determination of the impact of change in law is on account of the Petitioner, as the Petitioner had not filed the Petition and/or not placed the complete information and supporting documents. The Procurers and consumers at large should not be burdened for the delays by the Petitioner. The Petitioner has filed the Petition only in 2021 whereas the GST notifications relate to 2017. The principle that the delays in filing Petition/information would result in denial of carrying cost has been settled by the Hon'ble Tribunal in case of Maharashtra State Electricity Distribution Co. Ltd v. Maharashtra Electricity Regulatory Commission dated 19.09.2007 in Appeal No. 70 of 2007 wherein it has been held that carrying cost will be an additional burden which, in all fairness, should not be imposed on the consumer and has to be on account of the licensee. This decision has been relied on by the Hon'ble Tribunal in other



subsequent decisions in the cases of Torrent Power Ltd v. Gujarat Electricity Regulatory Commission dated 30.05.2014 in Appeal No. 147, 148 and 150 of 2013, Paschim Gujarat Vij Company Ltd and Ors v. Gujarat Electricity Regulatory Commission dated 04.12.2014 in Appeal No. 45 of 2014 and in Order dated 11.11.2011 in OP No. 1 of 2011 in Appeal No. 70 of 2007

- 3.10 That even as a matter of equity or restitution, the burden of carrying cost for the period of delay by the Petitioner cannot be imposed on to the consumers. The rationale and logic behind the above principle as per tariff determination would also apply to the change in law claim, particularly when the reason for carrying cost for change in law has been considered on principles of the same being tariff determination in Adani Power Limited v. Central Electricity Regulatory Commission Appeal No. 210 of 2017. The Hon'ble Tribunal in Punjab State Power Corporation Limited v. Punjab State Electricity Regulatory Commission vide order dated 22.04.2015 in Appeal No. 174 of 2013 has also considered the delay in providing complete documents as a reason for denying carrying cost.
- 3.11 That PSPCL, relying upon the decision in case of Kanwar Singh and Ors. vs. Union of India (UOI), 2005 (82) DRJ 397, 120 (2005) DLT 348 and Budh Ram Vs. Union of India (UOI) and Ors. 2011 SCC online del 1192, has submitted that when a party causes the delay, it cannot then claim interest for such period. It is unconscionable on part of the Petitioner to first delay the filing of the Petition for more than three years and thereafter claim carrying cost and that too at the penal rate of late payment surcharge. The Petitioner is in effect claiming a premium for its own delays.

- 3.12 It was further submitted that carrying cost to be allowed, the same can only be considered for the period from the date of the filing of the Petition and that too on the basis of a simple interest and not as claimed by the petitioner because the Hon'ble Central Commission has consistently applied the principle of carrying cost on actual interest rate or interest on working capital or late payment surcharge whichever is lower.
- 3.13 That the late payment surcharge under the PPA is provided for a default in payment of monthly or supplementary bills. Until the Commission finally determines the issue of 'Change in Law' and computes the compensation for the impact of 'Change in law, if so determined, Petitioner-Generator cannot raise invoices and the liability to make payment by PSPCL does not crystallise or arise. When the payment does not become due at all, there can be no question of any liability of late payment surcharge for such period. PSPCL cannot be made to pay late payment surcharge when there has been no late payment.
- 3.14 It was further averred that in case there is a delay in payment of bill after the due date, late payment surcharge as per Article 11.3.4 would be applicable but this would be after determination of compensation and raising of invoice. However, in the present case, there has been no declaration of change in law, let alone any computation or determination. No invoice has been raised by the Petitioner and in fact cannot be raised. There can be no late payment surcharge for such period.
- 3.15 PSPCL claimed that of carrying cost is based on principle of restitution as decided in case of Uttar Haryana Bijli Vitran Nigam Limited v. Adani Power Limited(2019) 5 SCC 325 which recognized the restitutionary principle in the PPA at Para 11, 13. The said

principle is under Article 13.2. In the present case the restitutionary principle is completely different to the penal rate of interest which is applicable as late payment surcharge.

- 3.16 PSPCL further submitted that while GST is a law after the cut off date but for it to be change in law, the impact has to be seen in terms of business of selling electricity. Where the impact is due to the choice of Petitioner and not by mandate of law/PPA, the same cannot be allowed as a Change in Law. Moreover, the O&M contract was entered into by TSPL only after the GST provisions came into force and there was no such agreement prior to GST coming into force.
- 3.17 PSPCL emphasised that the claim under Article 13 of the PPA is admissible only if the transaction which is assessed for tax, is mandated or required to be performed and not when it is undertaken as a discretionary commercial decision. This is particularly when TSPL has entered into the contract after promulgation of GST.
- 3.18 That TSPL itself has admitted that it is not claiming the impact of GST for the entire O&M Contract but only for the specific service portion of the same and has sought to give a break up of the costs. However, there is no clarity to the same and there is no basis on which such costs are provided. The O&M Contract is one agreement for the operation and maintenance and TSPL has not provided how the break up has been arrived at. TSPL instead of providing the substantiation has merely claimed that it would demonstrate the specific services at a later stage once this Commission has upheld the GST as change in law and TSPL and PSPCL can discuss on reconciliation. TSPL has failed to appreciate that it is this Commission which is required to determine the change in law as well as the amount of compensation to be provided for

such change in law. Further any change in law can be considered only when the law has an impact on the costs and revenue and therefore until the impact can be considered, there can be no mere declaration of change in law. This is clear from Article 13.2 of the PPA mandating that it is the decision is of this Commission and therefore it is necessary for TSPL to place all relevant facts before this Commission so that the Commission may decide on the claim and time of change in law; which is the subject of this petition.

3.19 It was further submitted that TSPL has sought to rely on the definition clauses of the PPA wherein the O&M contract and operator is defined. However TSPL has failed to demonstrate any clause in the terms and conditions contained in the main PPA which refers to or mandates the O&M Contract. The Definition clause by itself does not create any term of the contract nor does it recognize any obligation of the parties. The Clause itself recognizes the reliance on the definition when the terms are used in the Agreement. Unless the term is used in the Agreement, there is no relevance or purpose to the term being defined in the definition clause 1.1.

3.20 PSPCL further submitted that the Central Commission in case of GST for renewable projects had also rejected the claim of change in law for GST on O&M contracts. In Petition Nos. 164/MP/2018 and 165/MP/2018 dated 18.04.2019, the Central Commission had held as under:

*“90. The Commission is of the view that the recurring expenses referred to in Article 12 of the PPAs includes activities like salary, tax expenses, estimated maintenance costs, and monthly income from leases etc. It is apparent that GST will apply in case of outsourcing of the “Operation and Maintenance” services to a third party (if any). The*

*Commission is of the view that outsourcing of the “Operation and Maintenance” services is not the requirement of the PPAs/ bidding documents. The concept of the outsourcing is neither included expressly in the PPAs nor it is included implicitly in the Article 12 of the PPAs. It is pertinent to mention here that TSPL in its petitions has categorically submitted that: “Further, Article 12 also makes it abundantly clear that a statutory change in tax structure made applicable for setting up of Solar Power Projects resulting in an additional non-recurring and recurring expenditure for the Petitioner in the form of escalation of capital cost and operational cost of the Project also qualifies as “Change of law”. The aforesaid additional non-recurring and recurring expenditure has not been factored into the tariff bid by the SPDs at the time of submission, taken into consideration the extant tax regime prevailing at the time.”. The Commission is of the view that in the Competitive Bidding Scenario, the SPDs bid levelled tariff without disclosing the details of the calculations of the project cost. It has already been held by the Commission in the earlier Orders and also appreciated above that it is a pure commercial decision of the Petitioner taken for its own advantage and any increase in cost including on account of taxes etc. in the event the Petitioner chooses to employ the services of other agencies, cannot increase the liability for the Respondents. Therefore, the Commission holds that claim of the Petitioner on account of additional tax burden on operation and maintenance expenses (if any), is not maintainable. This view is in consonance with the view taken by the Commission Order dated 09.10.2018 in Petition No. 188/MP/2017 & Ors. case titled Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors.”*

3.21 PSPCL quoted the following decisions of the Central Commission rejecting the claim of change in law for GST on O&M Contracts:

- Order dated 19.09.2018 in Petition No. 52/MP/2018 in Prayatana Developers Private Limited –v- NTPC Limited and Ors.

- Order dated 09.10.2018 in Petition No.188/MP/2018 and Batch in Acme Bhiwadi Solar Power Private Limited –v- Solar Energy Corporation of India and Ors. Batch.
- Order dated 05.02.2019 in Petition No.187/MP/2018 and Connected Petitions in M/s. Renew Wind Energy (TN2) Private Limited –v- NTPC Limited & Others and Batch.
- Order dated 12.04.2019 in Petition No.206/MP/2018 & connected Petitions in Parampujya Solar Energy Private Limited –v- NTPC Limited & Batch;
- Order dated 30.12.2019 in Petition No.4/MP/2019 & connected Petitions in Parampujya Solar Energy Private Limited –v- NTPC Limited & connected matters;
- Order dated 28.01.2020 passed in Petition No. 67/MP/2019 & 68/MP/2019 in Clean Sustainable Energy Private Limited –v- Solar Energy Corporation of India Limited & ors.; and
- Order dated 27.03.2020 passed in Petition No.388/MP/2018 in Wardha Solar (Maharashtra) Private Limited –v- Solar Energy Corporation of India Limited & Ors.
- Order dated 13.05.2021 in Petition No.73/MP/2020 in SB Energy One Private Limited –v- Solar Energy Corporation of India Limited & Another

#### **4.0 Rejoinder filed by TSPL**

- 4.1 TSPL filed its rejoinder to reply filed by PSPCL reiterating its earlier submissions. TSPL relied upon judgments passed by the Hon'ble Supreme Court in *Energy Watchdog and Ors. vs. CERC and Ors.* (2017) 14 SCC 80, wherein it has been held that the State Commission will be the Appropriate Commission under the Act to adjudicate disputes in cases where generation and supply of power takes place within one state, therefore, this Commission is the Appropriate Commission and has the jurisdiction to adjudicate upon the disputes which have arisen between TSPL and the Respondent.

4.2 TSPL relying upon the judgment passed by the Hon'ble Supreme Court in case of *Andhra Pradesh Power Co-ordination Committee and Other vs. Lanco Kondapalli Power Ltd.*, (2016) 3 SCC 468 submitted that the provisions of the Limitation Act, 1963 are not applicable to Central or State Commissions under the Electricity Act because they are not courts *stricto sensu*.

TSPL also relied upon the verdict of the Hon'ble Supreme Court in *Suo Motu Writ Petition (C) No 3/2020* titled "*In re: Cognizance for Extension of Limitation*" has extended the period of limitation for the period expiring between 15<sup>th</sup> March 2020 to 14<sup>th</sup> March 2021. Moreover, the Hon'ble Supreme Court *vide* its order dated 27<sup>th</sup> April 2021 has extended the period of limitation till further orders. These orders cover limitation periods prescribed across all laws, whether general or special and whether condonable or not and applies to all courts, tribunal and other authorities. Accordingly, the passage of this duration will not be reckoned as far as the alleged delay in filing of the present Petition is concerned. Therefore, the averment by PSPCL regarding delay in filing of Petition or it being barred by limitation is not tenable.

4.3 TSPL submitted that as per Article 13.2 (b) of the PPA, the impact of Change in Law can be claimed in the operational period when the threshold for the same is more than 1% of the Letter of Credit for a Contract Year it is clear that at the time of promulgation of GST Laws in July 2017, its Plant was in operation mode and the plant had commissioned by September 2016.

4.4 That while entering into the PPA, the parties had foreseen that the nature of work in the plant is such that a need may arise to outsource the O&M services to an independent contractor with the expertise of handling the same and due to the nature of the services

required in the power plant, therefore, the outsourcing of O&M services is an inherent feature of the PPA. TSPL has an inherent right under the PPA to operate the plant as per its requirement and the same has been agreed to by PSPCL.

- 4.5 TSPL submitted that it cannot be the case of PSPCL that irrespective of the change in the costs on account of Change in Law, the tariff shall remain unchanged. The argument of PSPCL that outsourcing the services of an O&M Contractor is only on account of commercial consideration is incorrect. There are various reasons for outsourcing, including but not limited to, technical expertise and experience available with TSPL and the Operator as well as flexibility in operations etc. The argument advanced by PSPCL that had TSPL chosen to get the services of the O&M Contractor since the start of the commercial operations and maybe on a smaller scale, it would have considered the contention of TSPL of Change in Law; however, said argument of PSPCL is not supported by any legal proposition or provisions of the PPA. TSPL submitted that PSPCL has an inherent right to adopt the operation philosophy as per its requirements and the external environment. TSPL stated that it is not asking for any increase in the O&M Cost on account of change in operations cost as is the case made out by PSPCL but only on account of the increased tax burden on O&M Cost due to the implementation of the GST Laws. The Hon'ble Appellate Tribunal for Electricity in JSW Energy Ltd. vs. MERC and Anr, Appeal No. 354 of 2017 had set aside the order of the Hon'ble Maharashtra Electricity Regulatory Commission denying O&M expenses on account of Change in Law to the JSW Energy. The Hon'ble MERC in Adani Power Maharashtra Ltd. vs. MSEDCL, Case No. 2 of 2014 had held the increase in Service Tax rate to be



a “Change in Law” event and allowed the same for both Construction and the Operation Period.

- 4.6 That outsourcing service(s) related to successful operation of the power plant to a contractor is a prudent utility practice followed throughout the industry. The Hon’ble Supreme Court in Uttar Haryana Bijli Vitran Nigam Limited and Anr. vs. Adani Power Limited and Ors., (2019) 5 SCC 325 wherein the Change in Law Clause was identical to the one in the present matter, had held that the Change in Law Clause in the said case envisaged an in-built Restitutionary Principle which must restore the affected party to the same economic position as if such Change in Law had not occurred.
- 4.7 That PSPCL has mentioned in its reply that the Carrying Cost shall be payable at the rate of 9% per annum compounded annually as held by the Hon’ble Supreme Court in Jaipur Vidyut Vitran Nigam Limited and Ors. vs. M/s. Adani power Rajasthan Limited and Ors., 2020 SCC OnLine SC 697. TSPL further submitted that the reduced rate of interest/Late Payment Surcharge in the aforesaid case was granted by the court considering the totality of the facts of the aforesaid case, in order to do complete justice and to reduce the liability of the appellants in the aforesaid case. Therefore, in light of the admission of PSPCL that Carrying Cost is payable, Carrying Cost in the form of Late Payment Surcharge is to be paid to it in line with the PPA terms, as prayed in the Petition.
- 4.8 That there are stark differences between the GMR Warora Energy case and the present case. GMR Warora Energy is a case 1 project whereas the instant matter pertains to a case 2 project. GMR Warora Energy case pertains to the impact of service tax instead of GST Laws.
- 4.9 That the petitioner had given the notice of ‘Change in Law’ to the

respondent on 24.05.2018 but the respondent chose not to raise any concern till date.

- 4.10 That PSPCL is entirely misplaced when it assumes that TSPL is claiming relief on the whole O&M component. TSPL is not claiming relief on the whole O&M component but only on the service cost component, which is only a part of the whole O&M Contract. The claim is only limited to the impact of change in tax regime vis-à-vis the implementation of GST Laws on the service cost component. PSPCL's reliance on the Solar Power Developers' cases is completely misplaced as TSPL PPA is completely different in language, and further because the present case pertains to a Thermal Power Plant and not a Solar Power Plant. PSPCL seems to suggest that this case should be decided on the basis of some other PPAs altogether instead of the TSPL PPA. Further, PSPCL has set on the principle of "*privity of contract*" by applying alien terms of some other Solar Power Developers' PPA to the present dispute.
- 4.11 That the Solar Power Developers' PPAs relied upon by the Respondent are extremely narrow- they don't even mention the word restitution and there is no mention of relief during the phases of Construction and Operating Period separately. The entire issue of compensation is left to the discretion of the Appropriate Commission. In the present case, restitution and compensation during the Operating Period is a vested right as per the agreement, it is not so in case of the Solar Power Developers' PPAs. PSPCL's reliance on the Solar Power Developers' cases is therefore, misplaced.

4.12 TSPL in its submissions dated 10.06.2021 submitted that TSPL PPA specifically contemplates a separate O&M Contract and an O&M Operator, which the PPAs of the Solar Power Developers don't. Further, the Hon'ble CERC, while refusing the relief during the Operating period under the Solar Power Developers' PPAs had explicitly noted that "...*there is no other significant activity covered by O&M for a solar plant...*" which forms the rationale for not granting relief to the Solar Power Developers. Thermal Power Plants on the other hand, are totally distinct from the Solar Power Plants in this respect, and this principle doesn't apply to Thermal Power Plants at all.

4.13 TSPL submitted that PPA specifically contemplates a separate O&M Contractor and an O&M Operator for this TSPL relied on the case of Coastal Gujarat Power Limited vs. CERC and Ors., Appeal Nos.172 of 2017 and 154 of 2018 when in its held that the Change in Law shall be applicable with respect to the services of the third-party contractors engaged by the Thermal Power Producer for Operation and Maintenance of the Plant as long as the PPA does not prohibit the same. TSPL submitted that the Hon'ble APTEL in JSW Energy Ltd. vs. MERC and Anr. Appeal No.354 of 2017 had set aside the order of the Hon'ble Maharashtra Electricity Regulatory Commission, holding that the Hon'ble MERC committed a grave error in not allowing the O&M charges on account of Change in Law. The Ld. in Adani Power Maharashtra Limited vs. Maharashtra State Electricity Distribution Company

Limited, Case No.2 of 2014 had held that the increase in rate of Service Tax from 10.3% to 12.36% is Change in Law and any change/ amendment/inclusion or promulgation of tax which was not present as on the cut-off date would amount to Change in Law as long as it the seller incurs an additional expenditure on account of the same.

- 4.14 TSPL submitted that the service cost component refers to the Operation and Maintenance of the Plant, including but not limited to costs for handling, storage and unloading of coal and secondary fuel, handling and disposal of waste, maintenance of green belt and landscaping, facility management of guest house and offices, security, industrial safety, getting approval sand permits, and costs pertaining to the handling and disposal of ash and all such activities required for safe, smooth and continuous operations of the Plant as per the prudent utility practices. It is further submitted that the principles of computing impact of Change in Law are already provided under Article 13.2 of the PPA which act as a guiding principle for the Commission for determining a Change in Law event. TSPL further submitted that it has been outsourcing its services on an individual basis even before the implementation of GST Laws. TSPL has provided the following two agreements as an example to demonstrate that it had been outsourcing its services much before the GST Laws were implemented:
- a. O&M Service Agreement dated 15<sup>th</sup> December 2014 entered between TSPL and Simar Infrastructures Ltd.

for Maintenance of Boiler and Ash Handling Plant and for providing Operators for Operations Assistance of the Plant. TSPL further submitted that as per Annexure 19.4 of the said agreement, the Service Tax on the outsourced services was to be paid by it to the contractor in addition to fee payable to it by TSPL.

- b. Maintenance Service Agreement dated 15<sup>th</sup> December 2014 entered between TSPL and Rotodyne Engineering Services Pvt. Ltd. for mechanical maintenance of Turbine and Associated Auxiliaries and Water System Maintenance. TSPL submits that per Annexure 19.4 of the said agreement, TSPL was liable to pay Service Tax to the maintenance contractor on the outsourced services in addition to the fee payable to it by TSPL.

4.15 TSPL submitted that the advertisement issued by it in the Economic Times newspaper's print edition dated 29.05.2017 inviting Expression of Interest for handling the entire O&M services of its Plant which shows that it had intended to outsource the O&M services of its Plant before the implementation of the GST Laws. Therefore, the Respondent is patently incorrect in suggesting that TSPL entered into an overarching O&M Contract after GST Laws came into effect, as TSPL had set about identifying the O&M contractor much before the GST Laws kicked in. In any case, the services were being outsourced to several contractors during the pre-GST period as well.

4.16 TSPL further submitted that any Thermal Power Producer pays Service Tax on the services procured for the Plant and therefore, for any increase in rate of Service Tax after the

cut-off date it is entitled to the compensation on account of the same. Similarly, for increase in the effective rate of taxation on account of the implementation of the GST Laws after the cut-off date, TSPL is entitled to compensation. Both Service Tax, as it was and GST, as it is payable on the services component. Any increase in rate of these taxes amounts to Change in Law. Therefore, the Petitioner ought not to be discriminated against as long as it is an admitted position that the effective rate of taxation did group from 12.36% to 18%. Since the increase in the rate of Service Tax has been upheld as Change in Law event, this Commission should also uphold increase in the rate of taxation due to imposition of GST Laws as Change in Law.

4.17 TSPL in its submission dated 24.06.2021 submitted that notwithstanding outsourcing of services for Operation and Maintenance of the Plant by the Generating Company in the *Coastal Gujarat case (Supra)*, Change in Law relief was allowed for the increase in tax on services during the Operating Period. In that case, the services in question were rendered during the Operating Period, and in the present case also, TSPL is seeking relief on account of taxes paid as a part of services rendered during the Operating Period. In fact, in the present case, the PPA explicitly recognizes an O&M Contract and an O&M Operator, which other PPAs don't. TSPL further stated that the from a bare reading of the paragraph, it is clear that the objection taken by the Respondent DISCOMs in the Coastal Gujarat case (supra) was *"that the operation and maintenance of the plant is the responsibility of the appellant and if the appellant seeks to employ services of other agencies, the same cannot increase the liability of the Procurers;*

*this was a commercial decision and choice of the appellant”, and the very same objection has been taken in the instant case, and it ought to be rejected on account of the binding APTEL dicta.*

## **5.0 Reply of PSPCL to the Rejoinder**

5.1 PSPCL has submitted in its reply to the rejoinder that the decisions relied upon by TSPL are not attracted to the facts of the present case. TSPL provided in its rejoinder a break up of O&M Cost and service cost and had contended that it is not seeking the GST for the entire O&M contract but for specific services. However TSPL has not substantiated which service or even the basis of the break up. Further, the service portion of O&M contract is, as submitted hereinabove, due to the decision of TSPL to outsource O&M, being aware of the tax implications.

5.2 PSPCL mentioned that TSPL itself has stated that it would provide the information and details after the in principle declaration of the Change in Law and thus admitted that it has not provided the comprehensive details. This shows inadequate and insufficient data was provided by TSPL. PSPCL further submitted that petitioner is not entitled to carrying cost for the period of delay which is due to their own laxity.

5.3 PSPCL quoted that the Central Commission in case of Coastal Gujarat Power Limited (CGPL) had recognized that there can be no carrying cost due to delays by CGPL in filing the Petition. Reference is made to the Order dated 25.01.2021 in Petition No. 404/MP/2019:

*“65. .... However, in the foregoing paragraphs, we have observed that so far as its claims towards increase in service tax is concerned, there is a delay on the part of the Petitioner in filing this Petition vis-à-vis occurrence of Change in Law events and, therefore, on these claims, the Petitioner will be*

*entitled to carrying cost only from the date of filing of the Petition. Thus, while the claim of the Petitioner as regards increase in rate of service tax is not time-barred, the carrying cost on the claim can be paid only when the Petitioner has filed this petition. Once a supplementary bill is raised by TSPL in terms of this order, the provisions of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within Due Date.”*

- 5.4 The Respondent has conceded that consideration of the carrying cost would be acceptable at 9% interest rate on the basis of decision of the Hon'ble Supreme Court in Jaipur Vidyut Vitran Nigam Limited & Ors. -v- M/s. Adani Power Rajasthan Limited & Ors., 2020 SCC On Line SC 697 dated 31.08.2020 in Civil Appeal No. 8625-8626 of 2019.
- 5.5 That the Central Commission in its Order dated 17.09.2018 laid down the principle of allowing carrying cost, had held that the rate of carrying cost, is to be determined based on the lower of the actual bank rate of interest, interest on working capital etc. The Central Commission has consistently applied the above principle of carrying cost in other matters:
- i. Order dated 25.01.2021 in Petition No. 404/MP/2019;
  - ii. Order dated 29.03.2020 in Petition No. 327/MP/2018 along with IA No. 87/2018;
  - iii. Order dated 28.01.2020 in Petition No. 118/MP/2015 and a connected matter;
  - iv. Order dated 21.01.2020 in Petition No. 124/MP/2019;
  - v. Order dated 12.06.2019 in Petition No. 118/MP/2018; and
  - vi. Order dated 11.03.2019 in Petition No. 249/MP/2018
- 5.6 PSPCL stated that since TSPL has given up its claim for carrying cost as late payment surcharge, hence they are not entitled for the



same. PSPCL further submitted that no other costs such as legal or administrative costs can be considered and such claims are vague and unsubstantiated. No such cost has been allowed by Central Commission or Hon'ble Tribunal in any change in law claim.

**6.0** After hearing both the parties on 07.07.2021, Order was reserved.

## **7.0 Observations & Decision of the Commission**

The Commission has examined the petition, the reply submitted by PSPCL, rejoinder filed by TSPL, additional affidavits and other documents adduced on the record and after hearing the counsel for the parties decides as under:

### **i) Jurisdiction**

The jurisdiction to decide any dispute regarding the Power Purchase Agreement dated 01.09.2008 between the petitioner and the respondent lies with the Punjab State Electricity Regulatory Commission. The present petition has been filed under Section 86 (1) (f) of the Electricity Act 2003. The Hon'ble Supreme Court has held in Energy Watchdog and Ors. Vs. CERC and Ors. (2017) 14 SCC 80, that the State Commission will be the appropriate Commission under the Act to adjudicate disputes in cases where generation and supply of power takes place within one state. In the present case the generation and supply of power takes place in the State of Punjab, therefore, the Commission has the jurisdiction to adjudicate upon the disputes which have arisen between the petitioner and the respondent.

### **ii) Whether the Claims of the Petitioner are time-barred**

The Petitioner's claim is in respect of the Notification of GST applicable with effect from 01.07.2017. The Petitioner had out

sourced O&M contract to Steag Energy Services Private Limited with effect from 01.12.2017. The cause of action as per the PPA is Change in Law, that is occurrence of the event of enactment of any law. The Petitioner has filed this petition after three years from the date of occurrence of the event i.e 01.07.2017. Although the petition was filed in 2021, the three years period expired on 01.07.2020, though beyond limitation however, in the light of the Hon'ble Supreme Court of India Order dated 27.04.2021, which extended the period of limitation due to the prevailing COVID pandemic till further orders, the Commission condoned the delay and admitted the petition.

**iii) Whether the petitioner is entitled for compensation on O&M Expenses on account of Change in Law.**

While TSPL has pressed its claim for compensation on account of impact of change in law on introduction of GST, PSPCL disagreeing with TSPL's assertion has argued quite logically and reasonably that TSPL has nowhere accounted for the benefits accruing to it due to taxes and duties etc. which have been subsumed with GST.

The Commission is of the view that this being a project implemented through a Competitive Bid by the Petitioners, the bids for tariff were made without disclosing the details of the calculations of the project cost. Further, in a competitive bidding project, risks, losses, gains and rewards all are to the account of the bidder. Accordingly, tariff and conditions thereto cannot be changed post facto after the bid except as per the terms of the contract enshrined in the PPA.

It will be relevant to examine Article 1.1 & 7 of the PPA which read as under:

Article 1.1 of the PPA stipulates as under:

*“The terms used in this Agreement, unless as defined below or repugnant to the context, shall have the same meaning as assigned to them by the Electricity Act, 2003 and the rules or regulations framed there under, including those issued/framed by Appropriate Commission (as defined hereunder), as amended or re-enacted from time to time”.*

Further, Article 7 of the PPA stipulates as under:

*“Article 7: Operation and Maintenance*

*The Parties shall comply with the provisions of the applicable Law including, in particular, Grid Code as amended from time to time regarding operation and maintenance of the Power Station and all matters incidental thereto, Provided however the Seller shall not schedule the Maintenance Outage of the Unit when another Unit of the project is shut down or expected to be shut down except under Force Majeure or when the operation of Unit is not permissible due to technical considerations.”*

The Clause itself recognises the reliance on the definition when the terms are used in the agreement entered into by the parties. Unless the terms are used in the agreement, there is no relevance to the terms defined in Article 1.1 of the PPA. However, the petitioner has failed to demonstrate any clause in the main PPA, whereby terms and conditions are agreed which refer to or mandate an O & M contract. Thus, if any O &M contract is executed, the same could be for the petitioner's own expediency or its commercial interest and only the petitioner has to bear the consequences for the same.

The Commission agrees with the assertion of the respondent, PSPCL that Article 1.1 of the PPA, merely pertains to the definitions

of O&M contract/contracts, operators and operating procedures like other definitions which cannot be directly or indirectly linked with Article 7 (which is silent regarding outsourcing of the O&M services). The definition clause simply defines what O & M contracts if used in other clauses of the PPA. However, a definition cannot be construed to empower the petitioner to outsource O & M services of the Power Station.

The petitioner has not provided any details with regard to the impact of GST. The Generating Station has already been Commissioned and Power Station is in operation. Moreover, the petitioner has only provided one agreement ( O & M Agreement), which was entered into only on 01.12.2017, whereas GST Laws were notified earlier and had come into effect on 01.07.2017. Further, there was no O & M of the contract prior to the O & M agreement dated 01.02.2017 for similar services which have now been outsourced to M/s Steag Ltd. The O & M contract dated 15.12.2014 relates to ash handling and water system for which the petitioner has not sought any relief. Petitioner is wrongly claiming that there was an existing O & M contract of the services of the nature undertaken by Steag Energy Services (India) Private Limited from the beginning till 01.09.2017. M/s Sepco China was an EPC contractor for the establishment of the power project. The obligation of Sepco continued even after commissioning of the project till the power project was finally handed over by Sepco to TSPL. It is clear that outsourcing of O & M contract to Steag Energy Services occurred only after the date of taking over of the plant by TSPL from Sepco and not before. Till then there was no question of appointing any other operator or maintenance agency for the operation of the power plant by

outsourcing. This also implies that operation and maintenance of the project was carried out by the petitioner on its own and not by seeking assistance of any outsourced agency. Thus the imposition of GST laws would not in any way change the cost of business of selling electricity by the petitioner as the O & M of the plant was being maintained by the petitioner itself. It could have carried on doing O & M in house as earlier without outsourcing. Thus deciding to outsource O & M is a business, commercial decision taken by the petitioner which has attributed the impact of GST. Having taken this unilateral business decision to outsource O & M services it is unreasonable on the part of TSPL to expect PSPCL and the down the line consumers to pay the additional cost of the GST linked consequences of their commercial decision.

The engagement of third party O & M services is not requirement of PPA. It is a commercial decision of TSPL for its own advantage. The outsourcing contract was entered after GST Law came into force. No detail of tax saved which they were paying earlier and which has since been subsumed on account of introduction of GST law has been placed on record. Therefore, the Commission holds that claim of petitioner on account of additional tax burden on operation and maintenance services is not maintainable. The petitioner knowingly and willingly entered into the contract with full knowledge that it would have to pay the GST. The impact of GST was not from 01.07.2017 but only due to O & M agreement entered later on 01.12.2017. The impact of GST is entirely due to the conscious decision of the petitioner and was not by mandate of law/PPA and the same cannot be allowed as a Change in Law. TSPL has relied on the decision in case of Coastal Gujarat Power Limited Vs CERC

and Ors passed by the Hon'ble Appellate Tribunal in support of its contention that outsourcing O & M services is not a bar for change in law relief during the operating period. However, in CGPL's case the third party rendered the services under the EPC contract, which is covered by the Works Contract Services. The works contract relates to the contract for establishing the project or facilities and the installation of capital assets. In the present case, the issue is O & M services post construction which deal with day to day operations and management of facilities. The EPC contract relating to the construction stage is different and distinct from the O & M contract relating to the day to day operation of the power plant. Further, in CGPL's case the Tribunal has referred to a clause in the Model PPA as part of RFP which was subsequently deleted in the final PPA. However, no such omission has been pointed out by TSPL in the present case. Moreover in CGPL's case the works contract had been entered into prior to the increase in taxation; where as in present case, TSPL had knowingly entered into an O & M contract with full knowledge of GST laws. Therefore, the decision in CGPL case is not attracted to the facts of the present case. The case law(s) cited and relied upon by TSPL that introduction of GST Laws is a 'Change in Law' is not relevant to the facts of the present matter.

The reliance placed by TSPL on the decision of the Hon'ble Tribunal in the case of JSW Energy Ltd Vs Maharashtra Electricity Regulatory Commission is also misplaced. In the said case the dispute was whether the appellant can be restored to the same economic position due to the Change in Law impact on coal being utilized for purposes of auxiliary power consumption. However, in

the present case the issue is to determine whether the GST attracted due to the O & M contract signed by the petitioner can be considered to be 'Change in Law' at all, considering the facts and circumstances of the present case.

We agree with the findings of the Central Commission vide Order dated 16.03.2018 in case of GMR Warora Energy Limited relied upon by PSPCL, which address the present issue directly, wherein it has been held as under.

*"150. The matter has been examined. The Petitioner has claimed increase in Service Tax on O&M contracts based on the Notifications dated 17.3.2012 and 19.5.2015 (in respect of MSEDCL PPA), Notification dated 19.5.2015 (in respect of DNH and TANGEDCO PPAS) in addition to the levy of Swachh Bharat cess and Krishi Kalyan Cess on such services. The Petitioner has not submitted any information of the contracts affected by service tax. Even otherwise, the decision to carry out operation & maintenance through any other agency is a commercial decision and any increase in expenditure on this count cannot be considered as a change in law. In our view, it is the responsibility of the Petitioner to operate the generating station and any increase in service tax on O&M contracts cannot fall within the scope of change in law. Hence, the relief sought for by the Petitioner under this head is not allowed."*

Further, the decision dated 07.02.2019 passed by the Bihar State Electricity Regulatory Commission in case No. 30 of 2018, in Case No. 30 of 2018 relied by PSPCL is also squarely applicable to the facts of the present case wherein it has been held as under:

*"6.11 From the perusal of the Article 4.1.1 (b) & (c) of the PPA, it is evident that the petitioner (SPD in the PPA) shall be responsible for not only designing, constructing, erecting, commissioning, testing and completing of the project & also continuance of supply of power to the Discoms throughout the terms of agreement. Therefore, it is but natural that O&M services of the project shall be the responsibility of the petitioner (SPD). The petitioner has outsourced O&M services to his parent company which has GST implications. Respondent BSPHCL has argued that engagement of 3rd Party vendor for O&M services is not a requirement of PPA. It is the commercial decision of the petitioner to engage 3rd party vendor for O&M services provider for its own advantage. Any increase in cost due to this decision of the petitioner is entirely attributable to them. Hence, no relief on this score can be provided. The Commission accepts the contention of the respondent and is not satisfied with counter argument of the petitioner that 3rd party vendor does not disentitle the petitioner from claiming changes in law relief under PPA in view of the provisions of the PPA.*

*"6.12 Since the principal claim of the petitioner for relief arising out of Change in Law event has found to be non-maintainable the question for granting other two consequential reliefs namely carrying cost and legal and administrative expenses incurred on filing of this case does not arise".*

The Commission agrees with the submission made by PSPCL that the decision of the Generator to engage a third party vendor or outsource for operation and maintenance is its pure commercial decision and additional tax burden due to such decisions cannot be passed on to the procurers and consumers.



Further more as per Article 13.3 of PPA, a notice was required to be given to the Respondent. Article 13.3 of the PPA is as under:

*“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.”*

However, the Petitioner only sent a letter dated 24.05.2018 which did not provide any details within the meaning of Article 13.3 of the PPA. Hence it cannot be considered a notice under Article 13.3. Thus, it is held that no valid notice was given by the petitioner regarding their claim of change in law linked costs.

The claim of the petitioner for carrying cost is also not maintainable since the primary claim of ‘Change in Law’ is not tenable. Also, delay/latches are attributable to the petitioner. The Petitioner has filed the present petition in the year 2021 whereas notification of GST on which the claim is based, relates to the year 2017, which has not even been suggested by the required documentation. The petitioner is praying that first the Commission should in principle agree to the assertion that the claim of the petitioner is a change in law after which the petitioner and respondent could be directed to reconcile the details which would be subsequently provided by the petitioner. This whole argument is illogical and untenable. Since the main claim fails and delays are attributable to the petitioner, the issue of surcharge on penal interest does not have any merit.

The principal claim of the petitioner for relief arising out of the Change in Law event has been found to be not maintainable; thus there is no question of granting any other consequential reliefs namely impact of GST Laws more than 1% of the Letter of Credit, carrying cost, late payment surcharge, legal, administrative and other costs on filing the case.

The petition is accordingly dismissed.

Sd/-

(Paramjeet Singh)  
Member

Sd/-

(Anjuli Chandra)  
Member

Sd/-

(Viswajeet Khanna)  
Chairperson

Chandigarh  
Date: 13.10.2021

