

**PUNJAB STATE ELECTRICITY REGULATORY COMMISSION  
SCO NO. 220-221, SECTOR 34-A, CHANDIGARH**

**Petition No.38 of 2011  
Date of Order: 01.10.2012**

In the matter of: Petition under Section 86(1)(f) of the Electricity Act, 2003 in relation to disputes arising under the Power Purchase Agreement dated 18.01.2010 (PPA) between the petitioner herein – Nabha Power Limited and the Punjab State Electricity Board (PSEB), which stands substituted by Punjab State Power Corporation Limited (PSPCL) as the successor entity on unbundling of PSEB  
**AND** Failure and/or refusal of PSPCL to accept the petitioner's claim for 'Change in Law' under Article 13 of the PPA on account of change in the applicable seismic zone of the Project site from zone III to zone IV and allow consequential adjustment in the tariff and extension of time for achieving the Scheduled Commercial Operation Date (SCOD) under the terms of the PPA.  
**AND** Failure and/or refusal of PSPCL to accept the petitioner's claim for 'change in law' under Article 13 of the PPA on account of change in earlier approved location of the railway siding and other related railway infrastructure for the Project after the execution of the PPA and allow consequential adjustment in the tariff under the terms of the PPA.

AND

In the matter of: 1. Nabha Power Limited, S.C.O. 32, Sector 26-D, Madhya Marg, Chandigarh-160019.  
2. L&T Power Development Limited, Powai Campus, Gate No.1, C Building, 1<sup>st</sup> Floor, Saki Vihar Road, Mumbai-400072.

VERSUS

Punjab State Power Corporation Limited  
through Engineer-in-Chief (Thermal Designs), Patiala

Present: Smt.Romila Dubey, Chairperson  
Shri Virinder Singh, Member  
Shri Gurinderjit Singh, Member

**ORDER**

This petition has been filed by Nabha Power Limited (NPL), petitioner No.1 and L&T Power Development Limited (LTPDL), petitioner No.2, in the matter of 2x700 MW Rajpura Thermal Power Project (Project) under Section 86(1)(f) of the Electricity Act, 2003 in relation to disputes arising

under the Power Purchase Agreement dated 18.01.2010 (PPA) between Nabha Power Limited, petitioner No.1 and erstwhile Punjab State Electricity Board (PSEB), now substituted by Punjab State Power Corporation Limited (PSPCL) as the successor entity after unbundling of PSEB. The petitioners have stated that NPL had been initially set up as Special Purpose Vehicle (SPV) by PSEB for development of the Project at village Nalash, near Rajpura, District Patiala. The entire shareholding of NPL was transferred to LTPDL after having been selected as the successful bidder for the development of the project through NPL. LTPDL participated in bidding under Case 2 and emerged as successful bidder. Prior to taking over NPL, LTPDL was primarily involved in all the activities related to bidding for the project and interaction with PSEB.

2. The erstwhile PSEB, intending to procure power through competitive bidding under section 63 of the Electricity Act, 2003 (hereinafter referred to as the "Act") and the "Guidelines" for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees, 2005" issued by the Ministry of Power, Government of India ("Guidelines"), decided to invite bids (under case-2) from power developers to set up the Project. In terms of the Guidelines, the PSEB incorporated the SPV to act as its authorized representative. Accordingly, on 10.06.2009 NPL acting as a authorized representative for PSEB and on behalf of PSEB, issued Request for Qualification ("RfQ") and Request for Proposal ("RfP") for procurement of power on long term basis from power station to be set up at village Nalash, near Rajpura, District Patiala, Punjab. The bid was invited in accordance with the Guidelines. It is to be noted that PSEB was the sole procurer under the PPA and it had set up NPL as its wholly owned subsidiary to act as its authorized representative for carrying out pre-bid obligations on behalf of PSEB in relation to the project. NPL prior to its acquisition by the petitioner No.2 was only a shell company which did not have any independent existence separate from PSEB.

The petitioner No.2, LTPDL was selected as successful bidder and in terms of bid documents it was called upon by erstwhile PSEB to acquire 100% shareholding in NPL. The PPA setting out the terms and conditions for the construction, operation and maintenance of the project, sale of contracted capacity and supply of the electricity by petitioner No.1, NPL (Seller) to respondent erstwhile PSEB (Procurer) was signed between NPL and PSEB on 18.01.2010.

3. The petitioner has submitted that the dispute relating to PPA has arisen between the petitioners and respondent on account of failure and/or refusal of PSPCL to accept the petitioner's claim for 'Change in Law' under Article 13 of the PPA on two counts:

- (i) On account of change in the applicable seismic zone of the project site from zone III to zone IV and allow consequential adjustment in the tariff and extension in time for achieving the Scheduled Commercial Operation Date ("SCOD") under the terms of PPA, and
- (ii) On account of change in earlier approved location of the railway siding and other related railway infrastructure for the project after the execution of the PPA and allow consequential adjustment in the tariff under the terms of the PPA.

4. The petitioners have submitted regarding change in applicable seismic zone for the project site briefly as under:-

- (i) A clear representation and guidance had been issued to all bidders in the RfP that "The area falls within the seismic zone III as per IS: 1893 – 2002 Part 1." Detailed Project Report (DPR) also declared that "the power station is located in zone III as per IS 1893 Part 1 (latest)". The draft PPA attached with RfP also specified that "The area falls within seismic zone III as per IS 1893-2002 Part 1".
- (ii) Based on the aforesaid clear and unambiguous representation and declaration, LTPDL made an assessment of required

design and structural specifications for the project and on that basis estimated the cost of the project while quoting the tariff at the time of bidding.

- (iii) The petitioner No.1, NPL carried out a detailed engineering of the project including civil and structural design based on seismic zone III requirements. During review of the said design, it came to the notice of the petitioner No.1 that project site does not fall in seismic zone III but falls in seismic zone IV. NPL took up the matter with IIT, Roorkee vide letter dated 10.08.2010 and it was confirmed by IIT Roorkee vide letter dated 10.08.2010 that 'the project site falls in seismic zone IV as per seismic zoning map of IS-1893 (2002).
- (iv) NPL re-worked all the designs and drawings for the project as per the applicable parameters for structures/buildings situated in seismic zone IV. The design/re-engineering was completed by February 2011 and cost impact was worked out and it was found that it was required to incur additional capital expenditure of Rs.51.38 crore including interest during construction ("IDC") @ 12% plus applicable taxes and duties.
- (v) NPL, petitioner No.1 requested PSPCL, the respondent vide letter dated 17.02.2011 to consider its claim for tariff adjustment on account of change in capital cost of the project under Article 13 of the PPA and requested the respondent to treat the letter dated 17.02.2011 as notice under Article 13.3.1 of the PPA. PSPCL replied vide letter dated 25.02.2011 and requested NPL to submit the authentic map as per IS 1893-2002 Part I showing that project site falls in seismic zone IV. PSPCL also asked the petitioner No.1 to justify its claims in view of various provisions of project documents namely, Sr.No.4 under notes at page 2 of RfQ, clause 2.7.2.1 of RfQ, Articles 5.2 and 13.3 of PPA. NPL supplied vide letter dated 10.03.2011 an authentic map provided by Building Materials and Technology Promotion Council ("BMTPC") an organization under the Ministry of

Housing and Urban Poverty Alleviation, Government of India, which shows that project site falls in seismic zone IV. The respondent vide letter dated 29.03.2011 called upon NPL to get the verification of the applicable zone to the project site done by the Bureau of Indian Standards ("BIS") New Delhi. BIS vide its letter dated 06.04.2011 noted that site specific detailed investigation should be undertaken for special structures and clarified that BIS does not carry out site specific studies. NPL in order to confirm the issue has obtained and reviewed Punjab Earthquake Hazard Map as per vulnerability Atlas of India, 2006 provided by BMTPC vide letter dated 07.03.2011, which confirmed that project site does not fall on the border line of seismic zones III and IV but clearly about 25 km inside the seismic zone IV.

- (vi) NPL, petitioner No.1 again requested respondent vide letter dated 19.04.2011 for tariff adjustment on account of 'Change in Law' provision under Article 13 of PPA supporting its case with documents. The petitioner No.1 did not receive any response from the respondent till the filing of the petition.
- (vii) The petitioner submitted that case of change of seismic zone from zone III to zone IV squarely meets the requirement of 'Change in Law' as per Article 13 of the PPA. Therefore requested the Commission to adjust the tariff in the manner provided under Article 13.2 (a) as the petitioner is entitled to retain the same economic position as if such 'Change in Law' has not occurred. Article 13.2 (a) provides that:

".....For every cumulative increase / decrease in each Rs.16,50,00,000/- (Rupees Sixteen Crore Fifty Lakhs) in the Capital Cost over 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 Procurers 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.....”

- (viii) The petitioner further submitted that in view of facts and circumstances of the case, the petitioner No.1 is also entitled to an extension of time under Article 4.5 of the PPA such that the SCOD for the project is postponed to the extent of five months taking into account period lost by the petitioner No.1 in redesigning the project parameters and corresponding postponement of ordering of equipment due to change in applicable seismic zone. Delay has been caused due to default of the Procurer/respondent.
- (ix) The petitioners state further that they reserve the right and crave leave to initiate any other appropriate legal proceedings for redress in accordance with law.

5. The petitioners have submitted regarding change in Location of Dedicated Freight Corridor (DFC) Line and related railway infrastructure as under:

- (i) That Power Finance Corporation (PFC) was consultant to PSEB for the development of the project. PFC awarded the consultancy assignment to RITES Limited to carry out fuel transportation studies for the project. Final Feasibility Report for Coal Transportation Study for the project was submitted by RITES in December 2008. In terms of clause 1.4 (B) (7) (iii) of the RfP, the Feasibility Report 2008 prepared by RITES was made available to the prospective bidders. The petitioner submitted that ‘in principle’ approval of railway siding was conveyed to NPL by Northern Railway (NR) vide Dy.COM./Planning letter No.86-T/377/TGP/Nabha dated 05.11.2008 based on Feasibility Report submitted by RITES. As per 2008 Report, the cost of setting up the railway siding arrangement was estimated as Rs.317.09 crore. Relying upon

this estimated cost, the petitioner No.2 structured its bid as the petitioner No.2 was not expected and/or required to carry out independent assessment of railway siding in view of the 2008 Report and 'in principle' approval of the same.

- (ii) NPL, petitioner No.1 appointed L&T's Railway Business Unit ("L&T-RLBU") as the contractor for the design, engineering, construction and commissioning of railway siding. NPL and L&T-RLBU approached the Northern Railway at Divisional Office Ambala in March, 2010 to discuss details of railway siding. According to NPL, the railway officials informed them that Eastern DFC (double lines) is planned north of the existing railway line from Shambhu station to Sirhind station. The petitioners have further stated that a meeting took place on 03.09.2010 between NPL and Northern Railway and new conditions were imposed by NR in order to prepare the DPR for the railway siding. One of these conditions was ".....an additional flyover in the down direction to cater for the DFC (2 lines). The Up side flyover would also have a provision for the 2 lines of the DFC". These were additional requirements over and above the 'in principle' approval according to the petitioners. RITES was, therefore, again approached by NPL for review and update of the 2008 Feasibility Report. RITES furnished the Review Report dated January, 2011 ("2011 Report") to L&T – RLBU vide letter dated 06.01.2011. The petitioners have annexed two schematic plans showing the 'additional work' to be carried out. The petitioner has submitted that 'additional work' involves one major bridge on the main line (UP, DN and two DFC lines) and another major bridge to be constructed to pass through the two DFC lines. The bridges now require greater height clearance and further track length and earth work have also increased. There are additional provisions/modifications at Sarai Banjara station. The cost estimate as per 2011 Report has been assessed at Rs.473.83

crore resulting into an increase of Rs.156.74 crore (473.83-317.09). By adding IDC @ 12%, total cost increase works out to be Rs.178.11 crore plus applicable taxes and duties.

- (iii) The petitioners submitted that the additional conditions and/or modifications imposed by the Railways amounts to 'Change in Law' in terms of Article 13.1 of the PPA. Therefore an increase in capital cost due to 'Change in Law' qualifies for tariff adjustment as defined in Article 13.1.1 (iii) of the PPA.
- (iv) The petitioners have submitted that they had notified the Respondent (PSPCL) about this enhanced cost of the project vide letter dated 17.02.2011 as a notice in terms of Article 13.3.1 of the PPA and had requested to process the claim of tariff adjustment in terms of Article 13.4.1 (i) of the PPA.
- (v) The Respondent vide letter dated 04.03.2011 requested petitioner No.1 to furnish the RITES Report 2011 which was supplied by the petitioners vide letter dated 15.03.2011. The Respondent replied vide letter dated 05.04.2011 that the 'Change in Law' provision of PPA will not be applicable to the present case of NPL. The petitioner again wrote a letter dated 11.04.2011 and explained the entire factual position/basis of its claim for adjustment of tariff under the 'Change in Law' provisions of PPA. The petitioners have submitted that till the date of filing of petition no response to the letter dated 11.04.2011 has been received by them.
- (vi) The petitioners have submitted that in terms of Article 17 of the PPA, if parties are unable to amicably settle their differences, disputes/claims can be referred to dispute resolution through arbitration in terms of Article 17.3 of PPA. However Supreme Court in case of Gujarat Urja Vikas Nigam Vs. Essar Power Limited had held that all disputes between generating companies and licensees have to be adjudicated by the appropriate Electricity Regulatory Commission or by arbitrators



appointed by such Commission under Section 86 (1) (f) of the Electricity Act, 2003.

6. The petitioners have prayed before the Commission to :
- (a) allow tariff adjustment in terms of the formula stated under Article 13.2 (a) on account of increase in capital cost of Project by Rs.51.38 crore (including IDC @ 12%) plus applicable taxes and duties as indicated in paragraphs 11 of this Petition due to change in seismic zone of the Project Site from Zone III to Zone IV,
  - (b) direct the SCOD of the Project shall be extended by a period of five months on account of redesigning and consequential delays in reordering of equipment for the Project as a result of change in seismic zone from zone III to zone IV,
  - (c) allow the tariff adjustment in terms of the formula stated under Article 13.2 (a) on account of increase in the capital cost of the Project by Rs.178.11 crore (including IDC @ 12%) plus applicable taxes and duties as indicated in paragraph 29 of this Petition due to additional conditions and/or modifications of the 'in principle' approval granted by the Railways for the railway siding and the other railway related infrastructure for the Project,
  - (d) issue directions that the parties shall carry out consequential amendment(s) to the PPA,
  - (e) award cost in favour of the petitioners,
  - (f) pass such other and further orders/directions as the Commission may deem appropriate in the facts and circumstances of the case.

7. The petition was admitted vide Order dated 31.5.2011 and PSPCL was directed to file reply by 12.7.2011. PSPCL however filed reply by way of affidavit of C.E./ARR & TR vide memo

No.5628/Sr.XEN/TR-5/476 dated 25.7.2011. PSPCL has submitted as under:-

- (i) Regarding change in seismic zone from zone III to zone IV
  - (a) The erstwhile Punjab State Electricity Board (PSEB) (now succeeded by Punjab State Power Corporation Limited (PSPCL) after unbundling w.e.f. 16.4.2010, respondent herein) invited competitive bids (under case 2) as per section 63 of the Electricity Act 2003 (Act) and “Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees, 2005”. The bidding documents included RfQ, RfP and draft PPA. The petitioner No.2 LTPDL and other bidders were required to give the offer as per terms and conditions contained in the bid documents. Pursuant to the bidding process so conducted by the respondent, the petitioner No.2 was selected as successful bidder for setting up the generating station at Rajpura in the State. The petitioner No.2 was to take over the entire shareholding of petitioner No.1 and consequently the rights and obligations under the PPA to develop the generating station and supply electricity to the respondent.
  - (b) The bid documents contained following provisions relevant to the issues involved in the petition:
    - (i) S.No.4 under NOTES at Page No.2 of RfQ:  
*“While this RfQ has been prepared in good faith, neither the Procurer nor their employees or advisors make any representation, or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omissions herein, or the accuracy, completeness or reliability of information, and shall incur*

*no liability under any law, statute, rules or regulations as to the accuracy, reliability or completeness of this RfQ even if any loss or damage is caused by any act or omission on their part.”*

(ii) Clause 2.7.2.1 of RfP :

*“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”.*

(iii) Article 5.2 of PPA:

*“The Seller acknowledges that, before entering into this Agreement, it has had sufficient opportunity to investigate the Site and accepts full responsibility for its*

*condition (including but not limited to its geological condition, on the Site, the adequacy of the road and rail links to the Site and the availability of adequate supplies of water) and agrees that it shall not be relieved from any of its obligations under this Agreement or be entitled to any extension of time or financial compensation by reason of the unsuitability of the Site for whatever reason.*

*The State Government authorities would be implementing the resettlement and rehabilitation package ("R&R") in respect of the Site for the Project, for which the costs is to be borne by the Seller. The Procurer shall endeavour to ensure that the State Government implements such R & R ensuring that land for different construction activities becomes available in time so as to ensure that the Power Station and each Unit is commissioned in a timely manner. Assistance of the Seller may be sought, which he will provide on best endeavour basis, in execution of those activities of the R & R package and as per estimated costs, if execution of such activities is in the interest of expeditious implementation of the package and is beneficial to the Project affected persons".*

The petitioner No.2 had accepted unconditionally the above stipulations contained in the RfQ, RfP and draft PPA in his bid.

- (c) The responsibility to acquaint and verify all details regarding the project site was on the bidders as per bid documents. The petitioner No.2 had no right to decide on the design or structural specifications or assess cost associated thereto based on the statements contained in

the bid documents without independently satisfying itself about the specific seismic zone wherein the project site was situated.

- (d) The respondent submitted that they made attempts to understand the grievances of the petitioner through letter dated 25.02.2011 and other letters but never admitted the claim of the petitioners under 'Change in Law' as per Article 13 of the PPA. The claim of the petitioner is misconceived. The provisions relating to 'Change in Law' has no application to the claim made by the petitioner. There has been no change in seismic zone through any change in the Regulations of Govt. of India changing the seismic zone of project site from zone III to zone IV. The applicable seismic zone remained the same. There has been no false representation by the respondent about the seismic zone. The statement about the seismic zone as III was made with a clear stipulation as contained in the bidding documents and petitioner No.2 was put to clear notice that it should not go by only the statements in bid documents but should make independent inquiries and investigations before bidding. As such, the responsibility of verifying and confirming the correct seismic zone was on the petitioner No.2.
  - (e) The respondent submitted that in view of above stated position, there has been no 'Change in Law' as defined in Article 13 of the PPA and the petitioners are not entitled to any change in tariff and any extension of time for the Scheduled Commercial Operation Date of the Project.
- (ii) Regarding change in location of DFC line and related railway infrastructure, the respondent in its reply has submitted:
- (a) The bidding documents cast a clear responsibility on the bidders to acquaint itself about the transport requirements

of the project and site conditions. The respondent provided to the bidders a copy of the RITES Report 2008 for fuel transportation to the Project. The report was made available with clear disclaimers. The railway transportation was a part of the project development. It is not in the form of a provision of law that is subject to change from time to time for being covered under Article 13 of the PPA.

- (b) The respondent submitted that estimated cost for railway siding and infrastructure included in the RITES report was only indicative. The report itself stated that the estimate of cost was only abstract, not based on detailed engineering and would be subject to revision on account of various factors including the Dedicated Freight Corridor (DFC) envisaged by Indian Railways.
- (c) The RITES Report of December, 2008 recognised that Indian Railways are planning to build a DFC on the route Ludhiana-Ambala-Khurja-Kanpur-Mughalsari-Sonnagar and develop the feeder routes. It was also provided that when the DFC is constructed, the route for movement may be a different route. The following were specifically provided in the said report:
  - (i) The cost estimate is prepared on the then present prevailing rates for manpower/materials. This may require minor modifications at the time of Detailed Engineering.
  - (ii) The cost does not include any additional works which may crop up during construction period.
  - (iii) Payment to any other government agency for any work, which may be required to be carried out in connection with the construction of siding.

- (d) The respondent further submitted that no specific line or facilities were definitively identified in the Report of 2008 of RITES. On the other hand, the report was only a feasibility report and not a final study. The report itself recognized additional requirements at the time of construction. The 'in principle' approval of the Railways in the year 2008 does not specifically identify the route and exact engineering of loops, bridges etc. It only provides the minimum requirement which itself implies that there would be upward revisions. In any case, the 'in principle' approval can not be construed to be final approval and there is no basis for the petitioners to claim that the bid was based on the 'in principle' approval and the RITES report of 2008.
- (e) The respondent has further submitted in its reply that the cost estimates of the construction are irrelevant in the case of competitive bidding under Section 63 of the Electricity Act 2003, there being no cost plus tariff determination. Any increase or decrease in the actual cost apart from being denied is irrelevant and can not be claimed by the petitioners when the entire responsibility to verify about the site conditions, transportation facilities was of the bidders with no liability of the respondent.
- (f) The respondent specifically denied any delay on the part of the respondent in dealing with the matter.

8. The petitioners filed a detailed parawise rejoinder to the reply of the PSPCL vide Ref: NPL/PSERC/38/001 dated 15.09.2011. The petitioners interalia submitted that:

- (a) Among the data to be prepared by the Procurer as part of the preliminary activities under the Competitive Bidding Guidelines, an obligation has been specifically

imposed on the bidders to verify the geological data through their own sources *“as the geological risks would lie with project developer”*. Therefore, it is submitted that the disclaimer relied upon by the respondent could at best be confined to geological risks and can not be extended to cover the seismological risks. It is important to note that the risk that has been put on the project developer (petitioners) under the Competitive Bidding Guidelines is confined to geological risk. The petitioners submitted that the other data (hydrological, meteorological, seismological etc.) prepared by the Procurer did not constitute mere information to the bidders, which are subject to the disclaimer clauses referred by the respondent. These are part of the preparatory activities undertaken for the development of the Project. Therefore, they can not be covered by the general disclaimer that has been provided either under the RfQ or under clause 2.7.2.1 of the RfP or Article 5.2 of the PPA and any such extension of the disclaimer would amount to a deviation from the Competitive Bidding Guidelines.

- (b) The petitioners reiterated that the respondent made an express, unambiguous and specific representation in the RfP, DPR and PPA (draft and final) in relation to the seismological data prepared as part of the Project preparatory activities. It is necessary to highlight that the DPR was prepared by the consultant (Power Finance Corporation) and sub-consultant (Desein Private Limited) and was submitted to the Respondent (PSEB) in June 2008. As mentioned earlier in the Petition, that the DPR also provided that ‘the power station is located in zone III as per IS:1893 Part 1 (Latest). Further, it is



relevant to highlight that DPR is part of the project development activities and is envisaged to be carried out by the Procurer in terms of the Competitive Bidding Guidelines. The defence that the respondent has raised in its reply has the effect of nullifying the sanctity of the information/data provided in the DPR and for that matter in any reports/data/information provided by the respondent as part of the project development process. In other words, the respondent has stated that there is no sanctity of any documents prepared and provided by it to the bidders or any representation made to the bidders as part of the bidding process. Such a contention is beyond any pale of logic.

- (c) The petitioners have referred to relevant paras 3.2 (1) of competitive bidding guidelines which reads:-

*“3.2 (1) In order to ensure timely commencement of supply of electricity being procured and to convince the bidders about the irrevocable intention of the procurer, it is necessary that various project preparatory activities are completed in time. For long term procurers from hydroelectric projects or for projects for which pre-identified sites are to be utilized (case 2), the following project preparatory activities should be completed by the procurer, or authorized representative of the procurer simultaneously with bid process adhering to the milestones as indicated below:*

*“.....vi) Requisite hydrological, geological, meteorological and seismological data necessary for preparation of Detailed Project Report (DPR), where applicable : These should be available before the issue of RFP. The bidder shall be free to verify geological data*

*through his own sources, as the geological risks would lie with the project developer.”*

From the above, the petitioner has submitted that as part of preliminary activities, data to be prepared by the procurer/respondent under the competitive bidding, an obligation has been specifically imposed on the bidders to verify the geological data through their own sources as the geological risks would lie with the project developer. The petitioners have submitted that the disclaimers relied upon by the respondent could at best be confined to geological risks and can not be extended to cover seismological risks. The petitioners reiterated that they have valid, genuine and maintainable claim for tariff escalation under the ‘Change in Law’ provisions in terms of Article 13 of the PPA and also for extension of time of SCOD of project as the representation of the respondent that project site fell within seismic zone III has turned out to be incorrect and had to be revised on the basis of the subsequent confirmation from the relevant authorities.

(d) The petitioners have submitted regarding issue of increase in cost of railway siding that the 2008 Report prepared by RITES was provided to bidders in terms of clause 1.4 (B) (7) (iii) of the RfP and was part of the preparatory activities undertaken by the respondent. These preparatory activities were carried out by the respondent as part of the project development activities and towards execution of the project. The 2008 Report was prepared by RITES in a period of 18 (eighteen) months as consultant to erstwhile PSEB. It would be unreasonable to require bidders to re-do the same exercise all-over again in a short period of four months ( period available to the bidders between issue of RfQ/RfP and submission of bids). The petitioners submitted that in view of above, the clause 2.7.2.1 of the RfP and Article 5.2 of the PPA or any other clause requiring independent verification by the bidders can not be relied upon by the

respondent as a disclaimer in relation to the information provided in 2008 Report of the RITES.

(e) The 2008 Report prepared by RITES and duly approved by the Northern Railway was very much part of the development work that was already undertaken by the respondent and not a meaningless redundant exercise undertaken by the respondent at the cost of successful bidder as the entire cost paid to the Power Finance Corporation amounting to Rs.13.15 crore towards consultancy fee, was charged to the successful bidder as part of SPV transfer cost of Rs.536.17 crore.

(f) The RITES Report 2008 has mentioned in para 7.1 that 'This estimated cost, may require minor modifications at the time of detailed engineering'. The petitioner has submitted that there is change in the cost amounting to Rs.156 crore plus applicable taxes and duties due to change in scope of work of railway siding, which can not be interpreted as minor modification. The petitioners have submitted that the claim is covered under 'Change in Law' on account of the additional conditions and/or modifications imposed by the Railways vide Minutes of Meeting held on 03.09.2010 between the representatives of Nabha Power Limited and the Northern Railway officials vide which new layout requirements were imposed by the Railways to cater to the change in DFC. These conditions constituted a departure from the approved 2008 Report and 'in principle' approval, conveyed by Northern Railway. As there was change in the consent, the same would qualify a 'Change in Law' in terms of Article 13.1 of the PPA. The petitioners have submitted that PSPCL was trying to put forth a very hyper-technical reading of 'Change in Law' provision under the PPA and same can not be accepted as the Article 13.1.1 (iii) covers change in any consent, approval or licences as one of the sub-set of 'Change in Law'. The petitioners have submitted that

the submissions made by the respondent in reply are vague and misleading and therefore be rejected with exemplary costs.

9. The Commission heard the arguments of the counsel of the petitioner on 27.09.2011 and directed the petitioner to file following information by 15.11.2011:-

1. Entire correspondence including minutes of meetings held between Railways and Nabha Power Limited post PPA.
2. Reply of Member/Traffic Railways to the letter dated 21.5.2010 from Chief Secretary, Government of Punjab.
3. Full Review Report submitted by RITES to the petitioners duly authenticated (extract filed as Annexure P/22 with the petition).
4. Authenticated Detailed Project Report submitted to the Bankers for loan.
5. Impact of increased expenditure claimed by NPL on tariff :-
  - (a) On evaluated levelised tariff of Rs.2.89/kwh adopted by the Commission in its Order dated 14.7.2010 in Petition No.8 of 2010
  - (b) year-wise tariff as per Schedule 11 of PPA
6. Why Survey of India maps were not referred to or a direct contact established with it by the developer of the status of L&T at the time of submission of bid/designing the plant for seismic zone-III.
7. Time frame for implementation and commissioning of the Dedicated Freight Corridor (DFC) authenticated by Railways.

10. Meanwhile the respondent PSPCL submitted a sur-rejoinder vide C.E./ARR & TR No.5906/Sr.Xen/TR-5/476 dated 21.10.2011 as reply to the new aspects raised in the rejoinder dated 15.9.2011 of the petitioner and submitted:-

- (i) Regarding seismic zone

- (a) That the petitioners can not rely on some vague provisions of the Competitive Bidding Guidelines and contend that it was responsibility of the respondent to collect the seismological, hydrological, meteorological and geological data before issue of the RfP. The terms of PPA and other bidding documents can not be denied by the petitioners on this basis. Once the PPA has been entered into, its terms govern the rights of the parties.
- (b) The petitioner can not assert that there was no obligation on the part of the petitioner to verify the data as per the provisions of the Guidelines.
- ii) Regarding RITES REPORT, 2008 on DFC.
  - (a) The responsibility of rail connectivities being solely that of the petitioners, therefore, there can be no claim against PSPCL on this account.
  - (b) No specific lines or facilities were identified in the RITES REPORT 2008 which was only a feasibility report. The report itself implies that minimum requirements have been considered and there can be only upward revision of the same. It was responsibility of the petitioners to verify the details before bidding.
  - (c) Clause 3.2 of the Competitive Bidding Guidelines mentions about the preparatory activities and should not be confused with express provisions of PPA, being irrelevant. Similarly clause 2.3 and 5.16 of the Guidelines provides for bidding process and are irrelevant as far as the obligations of the petitioner under express provisions of PPA and bid documents.
  - (d) The tariff determination through competitive bidding route under section 63 of the Electricity Act 2003 was being sought to be converted to a cost plus tariff

determination under section 62 of the Act by lodging successive claims, which can not be allowed.

11. The petitioners filed the information demanded by the Commission in its Order dated 30.09.2011 vide Ref: NPL/PSERC/38/005 dated 24<sup>th</sup> December 2011 and submitted :

- (i) Correspondences including minutes of meetings held between Railways and Nabha Power Limited (“NPL”)/L&T’s Railway Business Unit (“L&T-RLBU”) post PPA;
- (ii) Reply of Member/Traffic Railways to the letter dated 21.05.2010 from Chief Secretary, Government of Punjab;
- (iii) True copy of the full review Report submitted by RITES to the petitioners;
- (iv) True copy of the DPR;
- (v) Impact of increased expenditure claimed by NPL on evaluated levelised tariff as adopted by the Commission and year wise tariff as per Schedule II of PPA;
- (vi) Letter stating reasons on account of which NPL was not required to refer to the Survey of India map or establish direct contact with it at the time of submission of bid/designing the plant on the basis of PSPCL’s declaration stating the project site falls in seismic zone III; and
- (vii) Document providing tentative timeframe for completion of Dedicated Freight Corridor.

12. The Commission further directed the petitioners to file following clarifications/additional information vide Order dated 16.01.2012.

- a) Break-up of Components of Project cost given at page 319 of the written submissions filed by the petitioners on 24.12.2011.
- b) Extent of the involvement of the respondent PSPCL in discussions with Railway Authorities and the DFCCI.
- c) Basis of the Railway Siding work allotment by the petitioner to the L&T Railway Business Unit i.e. invitation of competitive bids/otherwise.
- d) Copy of the assurance given by the Railway Authorities for transportation of coal from the coal mines (SECL) to the power plant as provided in the RfP documents at page 108 of the petition.
- e) Comparative statement indicating the detailed 'scope of work' and 'cost estimates' as considered in RITES Review Report of Jan. 2011 and Feasibility Report of Dec. 2008.
- f) Confirmation that the 'scope of work' and the 'cost estimates' considered in the RITES Review Report of Jan. 2011 are in line with DPR approved by the Railways at page 43 of the written submissions filed by the petitioners on 24.12.2011.

13. NPL filed the clarifications/information in compliance to Order dated 16.01.2012 of the Commission vide Ref: NPL/PSERC/38/009 dated 14<sup>th</sup> February 2012 and submitted the following:

- (a) Break-up of components of project cost given vide written submissions dated 24.12.2011.
- (b) Copy of letter dated 21<sup>st</sup> May 2010 from the Chief Secretary, Government of Punjab to Member-Traffic, Railway Board to show the extent of involvement of PSPCL in discussions with Railway Authorities and the DFCCI.
- (c) Regarding basis of the Railway siding work allotment to L&T Railway Business Unit i.e. invitation of competitive bids / otherwise, NPL submitted that as per the office memorandum

of the Ministry of Power dated 14<sup>th</sup> December 2009 regarding the revised mega power project policy, the developer of a mega power project is not required to further adopt international Competitive Bidding (ICB) for arranging supplies for such project, if the requisite quantum of power has been tied up or the project has been awarded through tariff based competitive bidding. The definition of "Project / Power Station" under PPA would include the 'Railway Siding' and therefore in view of the above exemption, the developer is free to award the contract for the Railway Siding without following ICB. The petitioner, however, added that claim regarding increase in Railway Siding cost is based on the cost estimate provided by an independent agency, namely RITES (a Govt. of India enterprise).

- (d) Assurance given by the Railway Authorities for transportation of coal from coal mines (SECL) to power plant in the form of Ministry of Railways letter dated 8<sup>th</sup> June, 2007 alongwith Minutes of Meeting dated 31<sup>st</sup> May 2007.
- (e) As regards the comparative statement indicating the detailed 'scope of work' and 'cost estimates' as considered in the RITES Review Report of Jan. 2011 and Feasibility Report of Dec. 2008, the petitioner submitted that same is available as Annexure P/22 at page 365 of the petition.
- (f) With regard to confirmation that the 'scope of work' and the 'cost estimates' considered in RITES Review Report of Jan 2011 are in line with DPR approved by Railways, the petitioners submitted that total cost as per Report of January 2011 is Rs.453.83 crore (excluding the cost of service road, Rs.20 crore, which is not included in DPR) and the cost as per DPR approved by Railways is R.492.57 crore.



14. PSPCL filed additional affidavit dated 05.03.2012 of Chief Engineer/Thermal Designs in response to submissions dated 24.12.2011 and 14.02.2012 filed by the petitioners in compliance to Orders of the Commission regarding costs and expenses incurred by the petitioners. PSPCL submitted that details provided by the petitioners were their own internal reports and respondent, PSPCL, denied it for want of knowledge. PSPCL submitted that the basic issue is the admissibility of any claim on account of increase of cost on the part of the petitioners because of site, geographical and other conditions for development of the project, when there were specific provisions in the bid documents that there would be no such financial liability of the respondent on account of such factors. Details do not answer this objection of the respondent.

15. The arguments of the petitioners and respondent were heard on the issue of change of seismic zone III to seismic zone IV for the project site on 13.03.2012 and 22.05.2012 and both parties concluded the same in so far as the issue of change of seismic zone is concerned. The parties were directed to file the written submissions in this respect vide Order dated 01.06.2012. The arguments of the petitioners and respondent were heard on the issue of Railway Siding on 17.07.2012 and both parties were directed to file written submissions by 30.07.2012 vide Order dated 19.07.2012. NPL, petitioner No.1, filed written submissions dated 21<sup>st</sup> June 2012 vide Ref: NPL/PSERC/38/013 dated 21.06.2012 in respect of issue of change of seismic zone and written submissions dated 6<sup>th</sup> August 2012 in respect of issue of claims related to 'Railway Siding' vide Ref: No.NPL/PSERC/38/016 dated 06.08.2012. PSPCL filed written submissions vide C.E./ARR & TR memo No.5632/TR-5/476 dated 01.08.2012 in respect of both issues namely:

- (a) Change in the applicable seismic zone of the project site and

- (b) Alleged change in Railway approval resulting in change in line and increase in cost thereon.

16. The Commission after considering the written submissions of the petitioners and respondent closed the hearing of the petition vide Order dated 30.08.2012 and reserved the final Order.

**17. Findings and Decision of the Commission:**

The Commission has gone carefully through the pleadings and arguments of the parties. After going through the petition, reply thereof, rejoinders, additional submissions and written arguments filed by the petitioner and the respondent, the Commission gives its findings on the two issues as under:

- 1) Claim related to Change in Seismic Zone of the Project site from Zone-III to Zone-IV

The Commission is of the view that the petitioner ought to have exercised due diligence while submitting its bid for the project especially when there had been specific disclaimers in the RfQ, RfP, PPA as well as the fact that the information in respect of Seismic Zone of an area is readily available. The petitioners have not brought out the circumstances that prompted them to check on the correctness of the Seismic Zone of the project site after signing of the PPA. The check exercised by the petitioners with regard to the same was in fact required before the bidding. No malafide or fraud or willful default or unlawful gain has been attributed to the respondent. The petitioners have argued that the respondent can not take benefit of the general disclaimers. However, it has not been brought out by the petitioners as to under what circumstances these disclaimers would apply. The Commission finds that the competitive bidding process was initiated by the respondent for procurement of power in accordance with the

bidding Guidelines issued by the Government of India (GoI). The RfQ itself stated that the Procurer does not accept any responsibility or liability, whatsoever, in respect of any statements or omissions, or accuracy, completeness or reliability of information in the said RfQ and shall incur no liability as to the same even if any loss or damage is caused by an act or omission on its part. The RfP requires the bidder to make independent enquiry and satisfy itself of all the required information, inputs, conditions and circumstances and factors that may have any effect on his bid. The bidder is deemed to have inspected and examined the site conditions, the laws and regulations in force in the country, the transportation facilities available, grid conditions, conditions of roads, bridges, ports etc. and 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. Further it has been stated in the RfP 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. Further the PPA provides that before entering into this Agreement, the Seller had sufficient opportunity to investigate the site and accepts full responsibility for its condition and agrees that it shall not be relieved from any of its obligations under this Agreement or be entitled to any extension of time or financial compensation by reason of the unsuitability of the site for whatever reason.

In view of the above provisions in the bidding documents, the petitioners were required to exercise due caution while making a commitment at the time of bidding for the project. It is understood that the intention behind the aforementioned clauses in the Standard Bidding Documents, RfQ, RfP and the PPA is to discourage the successful bidder, from raking up issues after signing the PPA and

should exercise due diligence at the bidding stage itself, to avoid delay in the execution of the project(s). Of course, in certain circumstances remedies are available in the PPA signed in the cases of allotment of projects through competitive bidding process, but undue advantage of such clauses in the PPA can not be allowed. The Commission also feels that the purpose of competitive bidding process under Section 63 of the Electricity Act, 2003 would not be served if all purported post bidding additional costs are to be passed on to the Procurer as in the cases where the Appropriate Commission(s) are mandated to determine the tariff under Section 61 and 62 of the Act. In the competitive bidding process, the risk is balanced with respect to any decrease or increase in the costs to the bidder, post the stage of finalization of the bids and signing of the PPA. Mostly, the Procurer is seldom in a position to claim any relief due to decrease in project cost after signing of the PPA.

In fact, in this case, there has been no change in law as claimed by the petitioner. The project site has remained factually in the same Seismic Zone both at pre-bid and post-bid stage. It is not a case where the site was actually in a different Seismic Zone prior to the bidding and changed to a different Seismic Zone after signing of the PPA. It appears to be a case of genuine mistake on the part of the Procurer, which the Commission feels, is amply covered by the disclaimers in the RfQ, RfP and PPA as brought out above. The judgement of the Hon'ble Gujarat High Court (AIR 1973 Guj 34) is not applicable in this case as the petitioners are not the defrauded parties. The Commission finds no relevance to the reference of Commission's Orders dated 11.6.2007 and 2.1.2008 by the petitioners. The former was with regard to allowing application of the provisions of clause 3.2 of the bidding Guidelines upto the stage of issuance of RfP and the latter for allowing deviations in the timelines for some of the preparatory activities required to be completed by the procurer prior to the bidding process.

In the light of the above, the Commission is not inclined to allow the prayer of the petitioner for allowing any increase in capital cost of project and/or tariff adjustment on this account, extend the SCOD of the project or any amendment to the PPA on account of the purported change of Seismic Zone of the project site.

2) Claim related to alleged 'Change in Law' in case of approval for Railway siding

The Commission notes that the claim of the petitioner is based on alleged change of consent between the 'In principle' approval accorded by the Northern Railway on 05.11.2008 on the basis of feasibility report submitted by the RITES, a GoI enterprise under its Ministry of Railways. The petitioners' argument is that it relied upon this report as the same was meant to be relied upon by the petitioners. Subsequently the alignment of proposed DFC was stated to have changed and consequently there was addition of many major works such as track length, loop for alignment, earthwork and number of bridges. Pursuant to this, the feasibility report 2008 was reviewed by the RITES and changes introduced were captured in the Review Report 2011. The sum and substance of the petitioners' arguments is that the approval of the Northern Railway dated 05.11.2008 was meant for development of the railway siding, which is an integral part of the project as contemplated in the PPA. Therefore any change in such consent falls within the framework of the 'Change in Law' provision set out in Article 13.1.1 of the PPA. The petitioners have further argued that change in the scope of work is on account of change in the consent of the Railways which falls under 'Change in Law' provision of PPA. According to the petitioners, the disclaimer clauses viz Sr.No.4 under Notes at Page No.2 of RfQ, clause 2.7.2.1 of the RfP and Article 5.2 of the PPA have no bearing on the 'Change in Law' provision of PPA under Article 13.1.1. The fact that cost estimate was stated by the RITES in its Report, 2008 as abstract or indicative does not mean that petitioners are

precluded from invoking 'Change in Law' provision. The petitioners have argued that claim under 'Change in Law' provision is not violative of the spirit of the competitive bidding route adopted for development of project under case 2 model. The moot point is whether any change in scope of work at the stage of detailed engineering/construction/development of the project qualify to be covered under 'Change in Law' provision of the PPA. The Commission has a view that the change in any consent, approval or licence obtained for the project referred to in Article 13.1.1 (iii) refers to the statutory approval or consent or licence and does not refer to any other commercial or operating approval which is not as per statutory requirement. The point becomes more clear from the perusal of the term 'law' as defined in PPA which is reproduced below:

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

The clause 'Change in Law' has to be interpreted with reference to the term 'Law' as defined in the PPA and in no other way. Without doubt the 'in principle' approval, RITES feasibility Report 2008 and Review Report 2011, do not answer to the definition of Law and any change in the 'indicative' cost estimate for railway siding having changed/increased in the Review Report of the RITES does not qualify to be covered under 'Change in Law' provisions under Article 13 of the PPA.

The Commission, therefore, comes to the conclusion that claim on account of change in the location of railway siding and other related railway infrastructure due to change in the scope of work

indicated in the RITES Report 2011 and 'in principle' approval of Northern Railway for railway siding and final scope of work as per proposed changes in layout of DFC and consequent increase in cost of railway siding etc. does not merit to be allowed, as the 'Change in Law' clause of PPA is not attracted in the case of the petitioners. The claim of the petitioners to allow the increased cost of railway siding or re-determination of tariff fails as the project has been awarded to the petitioner through competitive bidding under Section 63 of the Electricity Act, 2003. The Commission is of the view that any adjustment of increase/decrease of cost on account of any change in scope of work during detailed engineering of the project and allowing the same in tariff may be possible in cost plus tariff determination under Section 62 of the Act, but certainly does not qualify under Section 63 except in case of 'Change in Law' which as discussed above is not applicable in the present case. The Commission, therefore, has no option except to reject it.

In view of the foregoing findings, the Commission holds that the claim of the petitioners on account of alleged change in seismic zone from zone III to zone IV for the project site and claim on account of increase in cost of railway siding can not be accepted.

The petition is accordingly dismissed. No costs allowed.

**(Gurinderjit Singh)**  
**Member**

**(Virinder Singh)**  
**Member**

**(Romila Dubey)**  
**Chairperson**

**Chandigarh**  
**Dated:**