

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 327/MP/2018
Alongwith IA No. 87/2018**

**Coram:
Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member
Shri I.S.Jha, Member**

Date of Order: 1st July, 2019

In the matter of

Petition under Section 79(1)(f) of the Electricity Act, 2003 for claiming compensation on account of occurrence of 'Change in Law' events as per Article 10.1.1 of the Case-1 long-term Power Purchase Agreement dated 27.11.2013 read with Addendum No. 1 dated 20.12.2013 entered into between Dhariwal Infrastructure Limited and Tamil Nadu Generation and Distribution Corporation Limited thereby resulting into additional recurring/non-recurring expenditure by Dhariwal Infrastructure Limited for supply of 100 MW Contracted Capacity from Unit 2 of its 2 x 300 MW coal based thermal generating station located at Tadali, Chandrapur in the State of Maharashtra to Tamil Nadu Generation and Distribution Corporation Limited.

And

In the matter of

Dhariwal Infrastructure Limited
CESC House, Chowringhee Square,
Kolkata-700 001, West Bengal

...Petitioner

Vs.

Tamil Nadu Generation and Distribution Corporation Ltd
6th Floor, Eastern Wing,
144, Anna Salai, Chennai-600 002

..... Respondent

The following were present:

Shri Sanjay Sen, Senior Advocate, DIL
Ms. Divya Chaturvedi, Advocate, DIL
Ms. Srishti Rai, Advocate, DIL
Shri Bhaskar Ganguly, DIL
Shri Aveek Chatterjee, DIL
Shri Ashwin Ramanathan, Advocate, TANGEDCO
Shri Anand K.Ganesan, Advocate, TANGEDCO
Shri S. Vallinayagam, Advocate, TANGEDCO

ORDER

The Petitioner, Dhariwal Infrastructure Ltd., has filed the present Petition seeking relief on account of “Change in Law” events during the “Operation period” of the project.

2. Dhariwal Infrastructure Ltd. was incorporated under the Companies Act, 1956 as a Public limited company to set up a 600 MW Coal based Thermal Power Project (hereinafter referred to as “the Project”) at Tadali, District Chandrapura in the State of Maharashtra. The Project comprises of two units of 300 MW each. Unit-I and Unit-II have been declared under commercial operation on 11.2.2014 and 2.8.2014 respectively.

Background

3. The Petitioner has entered into the following long term PPAs for supply of power from the Project:

- (a) Supply of 100 MW gross power in terms of PPA dated 27.11.2013 (as amended dated 20.12.2013) entered into with Tamil Nadu Generation and Distribution Corporation Ltd'. (TANGEDCO PPA); and
- (b) Supply of 170 MW gross power in terms of PPA dated 26.9.2014 entered into with Noida Power Company Ltd., Uttar Pradesh (NPCL PPA).

4. The Petitioner has sought for the following reliefs under change in law in respect of TANGEDCO PPA:

- (a) Royalty on coal: Contribution towards District Mineral Foundation and National Mineral Exploration Trust;
- (b) Increase in Clean Energy Cess (later named as Clean Environment Cess and subsequently, as State Compensation cess);
- (c) Increase in CG Environment Cess and Vikas Upkar;

- (d) Change in the components for computation of Central Excise Duty leviable on coal;
- (e) Change in effective rate of service tax levied on the Railway Freight;
- (f) Additional cost due to reduction in supply of coal from SECL;
- (g) Increase in busy Season Surcharge on coal transportation;
- (h) Use of blended or washed coal with Ash content not exceeding 34% with effect from 5.6.2016;
- (i) Increase in amount payable towards the Development Surcharge; and
- (j) Introduction of GST w.e.f. 1.7.2017.

5. The Petitioner has also filed IA No. 87/2018 for seeking direction to TANGEDCO to pay the outstanding dues on account of change in law events.

Submissions

6. During the course of hearing on 28.5.2019, learned counsel appearing on behalf of Shri Rama Shankar Awasthi, a consumer representative (hereinafter referred to as 'Shri Awasthi') sought permission for impleadment as a party to the Petition. The Commission vide ROP for the hearing dated 28.5.2019 directed Shri Awasthi to participate in the proceedings and to file its submissions without being formally impleaded as a party to the Petition.

7. The Respondent, Tamil Nadu Generation and Distribution (TANGEDCO), vide its reply dated 3.5.2019 has raised the issue of 'maintainability' of the Petition on the ground of jurisdiction of this Commission, as stated below:

- (a) In the present case, the generator and one of the procurers have chosen the Uttar Pradesh Electricity Regulatory Commission (hereinafter referred to as 'UPERC') under Section 65 (4) of the Electricity Act, 2003 (hereinafter referred to

as the 'Act') and consequently sought determination of tariff as well as change in law before UPERC. Therefore, the present Petition is not maintainable.

(b) Though the Petitioner is supplying power from the same unit of 300 MW to TANGEDCO (100 MW) and NPCL (187 MW), the Petitioner has filed a separate Petition seeking change in law compensation before UPERC with respect to NPCL PPA. Therefore, the present Petition seeking change in law compensation in respect of the very same unit of the generating station is not maintainable as compensation under change in law for a 300 MW unit cannot be determined by UPERC and CERC simultaneously for the same change in law factors/components.

(c) UPERC vide its order dated 5.2.2019 in Petition No. 1235 of 2017 has held that UPSERC has the jurisdiction for determination of change in law in respect of 300 MW unit of the Petitioner.

(d) PPA with NPCL is under Section 62 of the Act, whereas the PPA with TANGEDCO is under Section 63 of the Act. The component of tariff under Section 63 of the Act did not undergo the process of prudent check as required under Section 62 of the Act. There is no composite scheme to the extent the tariff is determined under two different Sections of the Act. A composite scheme can only be in a situation when both the PPAs are under Section 63 and not otherwise.

8. The Petitioner in its rejoinder dated 16.5.2019 to the reply of TANGEDCO has submitted as under:

(a) The Petitioner supplies 100 MW net capacity from Unit-2 to TANGEDCO as per the PPA dated 27.11.2013 read with its Addendum No. 1 dated 20.12.2013. The tariff of such supply was discovered through Case-I competitive bidding carried out by TANGEDCO under the aegis of TNERC. The Petitioner commenced supply of power from Unit-2 to TANGEDCO w.e.f. 16.12.2015 pursuant to operationalization of LTA by PGCIL. The Petitioner is also supplying 170 MW net capacity to NPCL in the State of UP from the same Unit-2 of its generating station and tariff for such inter-State supply is determined under Section 64(5) read with Section 62 of the Act by UPERC. Therefore, in view of the above arrangement of long term power supply to two different beneficiaries located in two different States from the same generating unit and such supplies being governed by binding arrangements, namely long term PPAs, the condition of composite scheme of generation under Section 79 of the Act is attracted with the exception of Section 64(5) of the Act which provides that parties can approach the State Commission

for determination of tariff for a generating company supplying power to the distribution licensee within the territorial jurisdiction of such State Commission. The Hon`ble Supreme Court in Energy Watchdog case has clearly held that composite scheme comes into play as soon as the generating company and distribution licensee are situated in different States, thereby triggering the jurisdiction of this Commission under Section 79 (1) (b) of the Act. The Hon`ble Supreme Court has not specified any other parameter for a generating station to qualify as a composite scheme but only that the power is being generated and supplied to a distribution licensee in an inter-State set up. However, in case of tariff determination under Section 62 of the Act, the jurisdiction, which otherwise lies with this Commission, can be given to the State Commission, having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity, under Section 64 (5) of the Act on application of the parties concerned.

(b) With regard to contention of the Respondent that the present Petition is not maintainable as UPERC is determining the compensation under change in law events for the same change in law components for supply of 170 MW to NPCL from Unit-2 of the generating station from where 100 MW power to TANGEDCO is also being supplied, the Petitioner has submitted that there is no overlapping in determination of compensation under change in law events between supply of 100 MW to TANGEDCO and supply of 170 MW to NPCL. The compensation under change in law claimed for 100 MW supply to TANGEDCO and 170 MW to NPCL will always be distinct as the PPAs have been signed at different point of time. Accordingly, the change in law claims under the instant Petition pertains to supply of 100 MW to TANGEDCO and the outcome of the decision of this Commission shall have bearing only on TANGEDCO and will have no bearing on NPCL. Therefore, NPCL has not been impleaded as party to the present Petition.

(c) The Petitioner has filed the Petition No. 1440 of 2019 before UPERC on 29.3.2019 pursuant to the direction of UPERC dated 5.2.2019. However, the present Petition has been filed before this Commission on 12.10.2018 and at the time of filing the present Petition, the proceedings before UPERC under Petition No. 1235 of 2017 were under progress. Subsequently, UPERC vide its order dated 5.2.2019 approved the tariff for 170 MW supply to UPERC with direction to the Petitioner to approach UPERC with separate Petition for claim under change in law events pertaining to supply of 170 MW to NPCL. UPERC vide its order dated 5.2.2019 has exercised its jurisdiction for determination of tariff and related matter for supply of 170 MW to NPCL under a separate long term PPA and had never passed any direction for determination of compensation on account of change in law events for the entire 300 MW as averred by TANGEDCO. Since the scope of

Petition filed before UPERC and the present Petition are distinct and mutually exclusive, the Petition before UPERC has no relevance in the present adjudication.

9. Shri Awasthi, vide its submission dated 7.6.2019 has submitted as under:
- (a) The jurisdiction to determine tariff for an inter-State supply of electricity between two or more States, only lies with this Commission. However, the Petitioner has taken a stand that UPERC would have jurisdiction under Section 64(5) of the Act, by consent of parties, even when there is an inter-State supply of electricity to more than one State.
- (b) Jurisdiction is a question of law and cannot either be assumed or taken away as per the convenience of the Petitioner. Jurisdiction has been conferred by the Act as interpreted by the Hon`ble Supreme Court. Even assuming without admitting that the State Commission would have jurisdiction under Section 64 (5) of the Act as contended by the Petitioner, it cannot be that the Petitioner at the same time also approaches this Commission instead of the State Commission, namely TNERC with respect to supply of power to TANGEDCO.
- (c) Since the Petitioner`s plant is situated in the State of Maharashtra and supply from the same unit is being made to distribution licensees of two States, namely Tamil Nadu (100 MW) and Uttar Pradesh (170 MW), it is covered by the judgment of the Hon`ble Supreme Court in Energy Watchdog Vs. Central Electricity Regulatory Commission & others [(2017) 14 SCC 80]. Since the Petitioner has a composite scheme for generation and sale of electricity in more than one State, this Commission would have the exclusive jurisdiction to regulate tariff in the matter in terms of Section 79 (1) (b) of the Act.
- (d) The Appellate Tribunal for Electricity (APTEL) in its judgments dated 7.4.2016 in Appeal No. 100 of 2013 (Uttar Haryana Bijili Vitran Nigam Limited Vs. Central Electricity Regulatory Commission and others) and dated 31.10.2018 in Appeal No. 230 of 2017 (KSK Mahanadi Power Company Limited Vs. Andhra Pradesh Electricity Regulatory Commission and others) has held that mere sale of electricity to two or more States would render the transaction within the exclusive jurisdiction of the Central Commission and not that of the State Commission.
- (e) Proviso to Section 64 (5) of the Act applies only in the case of sale by `A` generator located in one State to `A` distribution licensee located in a different State (involving the territories of two States). In such a situation, to avoid an anomaly, the State Commission where the distribution licensee is located would

only replace this Commission to decide the disputes. Section 64 (5) of the Act cannot have a limited application qua only one distribution licensee where the sale from the same generating station as well as generating unit is to more than one distribution licensee.

(f) The Petitioner has contended that there is a mutual consent between the Petitioner and NPCL (both sister companies) to approach the UPERC under Section 64 (5) of the Act. However, the Petitioner has not produced any documents regarding TANGEDCO's consent to approach TNERC or this Commission.

(g) To establish jurisdiction of this Commission or State Commission, the Petitioner has relied upon the Commission's order dated 22.6.2018 in Petition No. 171/MP/2016, order dated 30.4.2019 in Petition No. 289/MP/2019 and order dated 14.5.2019 in Petition No. 77/MP/2018. As per the said orders in case of supply to more than one State, there can be no question of invoking Section 64 (5) of the Act. There is no basis for the contention of the Petitioner that Section 64 (5) can be invoked in case of a tariff determination under Section 62, and not in case adoption of tariff under Section 63 of the Act.

(h) The issue of jurisdiction is pending before the APTEL in Appeal No. 185 of 2019 filed by the Objector where the precise issue of whether the Petitioner can approach UPERC under Section 64 (5) of the Act has been raised. Therefore, any decision taken by this Commission in the present case will directly affect the Objector since it would be cited by the Petitioner even before UPERC to press other change in law claims.

(i) UPERC vide its order dated 20.4.2016 approved the PPA with NPCL on the basis that the entire coal available under the Fuel Supply Agreement to the Petitioner should be used for supply to NPCL. Since the Petitioner has not challenged the above order, the Petitioner has agreed that the entire quantum of coal as available under the FSA is for the supply to NPCL. The Petitioner has apportioned the claims qua change in law of the basis of the capacity tied up with the two States which includes the claim for so called shortage of coal and the same is contrary to the terms of approval of PPA with NPCL. By claiming shortage of coal qua TANGEDCO by apportioning the coal under the FSA, the Petitioner is essentially seeking to bypass the specific condition of approval given by UPERC. Any issues on the coal supply, consumption, norms and parameters would certainly affect the supply to NPCL and the tariff thereof. This Commission first would have to consider the claims for change in law based on the balance coal under FSA, after utilizing for NPCL.

10. In response to Shri Awasthi`s submissions, the Petitioner has mainly submitted as under:

(a) Shri Awasthi has not challenged and/or objected to (i) the jurisdiction of this Commission qua the present change in law claims for the supply of 100 MW of power under the TANGEDCO PPA, and (ii) any relief/ claim sought by the Petitioner with respect to the change in law events under the TANGEDCO PPA. Shri Awasthi has no locus as such in the present proceedings since the outcome of the present proceedings is not going to affect Shri Awasthi in any manner whatsoever. Since the Objector is not even a resident of the State of Tamil Nadu, it is not a consumer of TANGEDCO.

(b) Shri Awasthi has filed its objections without affidavit. As per Regulation 49 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 as amended from time to time, all replies, oppositions, objections, etc. are required to be supported by affidavit in the same manner as in the case of the Petition. In this regard, the Petitioner has relied upon the various judgments of the Hon`ble Supreme Court as well as various other courts, namely: (i) CP John Vs. Babu M. Palissery, [(2014) 10 SCC 547], (II) Shyam Sunder Mishra Vs. Labour Court, Lucknow and other [1999 (3) AWC 2179 (L.B.)], (III) Sri Narian Das Vs. IInd Addl. Distrcit Judge, Moradabad and another [1998 (30 AWC 2071] and (iv) Swaran Kumar Vs. Smt. Parmeshwari, [1977 ACR 318]. Therefore, in the absence of any supporting affidavit, the objections of Shri Awasthi are liable to be rejected.

(c) Since the beneficiaries, namely TANGEDCO and NPCL, of the Unit-2 of the generating station, are located in two different States, namely, Tamil Nadu and Uttar Pradesh and such supplies being governed by separate binding agreements i.e. respective PPA (s), the current scheme of generation and supply of power qualifies as a composite scheme of generation within the meaning of Section 79 (1) (b) of the Act and attracts the jurisdiction of this Commission.

(d) Section 64(5) of the Act is an exception of the jurisdiction of this Commission under Section 79 of the Act, by way of which the parties in mutual consent can approach the State Commission for the determination of tariff for a generating company supplying power to the distribution licensee with the territorial jurisdiction of such State Commission. Accordingly, the Petitioner and NPCL with mutual consent have submitted themselves to the jurisdiction of the

UPERC for determination of tariff in context of NPCL PPA in terms of Section 62 of the Act read with Section 64 (5) of the Act.

(e) The Hon'ble Supreme Court in Energy Watchdog case while interpreting the term composite scheme under Section 79 (1) (b) of the Act has held that CERC has jurisdiction to regulate the tariff of generating stations having a composite scheme for generation and sale of power to more than one State, whose tariff is either determined under Section 62 of the Act or is adopted under Section 63 of the Act. However, in case of tariff determination under Section 62 of the Act, jurisdiction, which otherwise lies with this Commission, can be given to the State Commission, having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity, under Section 64 (5) of the Act upon an application of the concerned parties.

(f) TANGEDCO PPA cannot qualify for jurisdiction under Section 64 (5) of the Act as the said provision is applicable only in context of the PPAs executed under Section 62 of the Act. Since (i) TANGEDCO PPA has been executed pursuant to a competitive bidding under Section 63 of the Act, and (ii) the present scheme of generation of power qualifies as a composite scheme in terms of the Hon'ble Supreme Court judgment in Energy Watchdog case, this Commission alone has the jurisdiction to adjudicate upon the present change in law claims of the Petitioner under TANGEDCO PPA.

(g) With regard to contention of Shri Awasthi that the Petitioner is engaging in forum shopping as it has filed two concurrent Petitions before CERC and UPERC seeking change in law on the same issue qua the same generating unit, the Petitioner has submitted that at the time of filing the present Petition before CERC, the proceedings for determination of tariff for supply of 170 MW to NPCL were under process before UPERC by way of tariff Petition which also included the claims for procurement and use of additional coal and other uncontrollable costs. UPERC vide its order dated 26.3.2018 and MYT order dated 5.2.2019 for the supply of 170 MW to NPCL, *inter alia* directed the Petitioner to approach UPERC with separate Petitions, (i) for its claims under change in law event for supply of 170 MW to NPCL under NPCL PPA, and (ii) for the procurement of additional cost on account of shortage of linkage coal for the financial year 2019-20 also under the NPCL PPA. UPERC has never passed any direction for the determination of compensation on account of change in law events for the entire 300 MW as averred by Shri Awasthi. Since the scope of determination of compensation under above Petitions, namely Petition Nos. 1438 of 2019 and 1440 of 2019 filed before UPERC and the present Petition filed before this Commission, is distinct and mutually exclusive of each other, the outcome of the

decision of this Commission in the present Petition would have a bearing only on the Respondent, TANGEDCO and not on NPCL.

Analysis and Decision

11. The Petitioner has set up a 600 MW thermal power plant at Tadali, Chandrapur in the State of Maharashtra consisting of two units of 300 MW each. The units of the project of the Petitioner were put under commercial operation on 11.2.2014 (Unit-1) and 2.8.2014 (Unit-2) respectively. The Petitioner has the following PPAs/ arrangement to supply power from Unit-2 of the project:

Procurer of Power	Date of execution of PPA	Quantum	Tenure
TANGEDCO	27.11.2013 read with Addendum No. 1 dated 20.12.2013	100 MW (net) capacity	15 years
NPCL	26.9.2014	187 MW (net capacity 170 MW)	25 years

12. The Petitioner has submitted that since it is supplying power to the States of Tamil Nadu and Uttar Pradesh, it has a composite scheme for generation and sale of power to more than one State. Therefore, the Commission has the jurisdiction to adjudicate the present matter under Section 79 (1) (b) read with Section 79 (1) (f) of the Act. The Petitioner has submitted that it has also approached UPERC for determination of tariff for the PPA signed with NPCL under Section 64(5) of the Act notwithstanding the fact that the jurisdiction is otherwise vested in this Commission.

13. The Respondent, TANGEDCO has submitted that since the Petitioner has filed a Petition before UPERC seeking change in law compensation for the 300 MW unit, the present Petition seeking change in law compensation in respect of the very same unit of the generating station is not maintainable. Both the Central Commission and State

Commission cannot simultaneously determine the same change in law events for supply of power from the same generating unit to the distribution companies located in different States. According to TANGEDCO, there is no composite scheme since the PPA with NPCL is under Section 62 of the Act whereas the PPA with TANGEDCO is under Section 63 of the Act. A composite scheme can only be in a situation when both the PPAs are under Section 63 and not otherwise. TANGEDCO has submitted that since the Petitioner has not impleaded NPCL as party to the present Petition, it is not maintainable.

14. Shri Awasthi has submitted that the Petition is not maintainable as the Petitioner has invoked the jurisdiction of the State Commission, namely UPERC and filed Petitions, i.e. Petition No. 1438 of 2019 and Petition No. 1440 of 2019 seeking change in law on similar grounds as have been raised in the present Petition. Shri Awasthi has further submitted that the Hon'ble Supreme Court in Energy Watchdog case has laid down the principle that where a generator supplies electricity to two or more States, jurisdiction cannot be with more than one Regulatory Commission. Since the Petitioner has a composite scheme for generation and sale of electricity in more than one State, the Commission would have the exclusive jurisdiction to regulate tariff in the matter in terms of Section 79 (1) (b) of the Act. Therefore, there is no basis for the contention of the Petitioner that Section 64 (5) of the Act can be invoked in case of a tariff determination under Section 62, and not in case of adoption under Section 63 of the Act. Once the Hon'ble Supreme Court in Energy Watchdog case has laid down and settled the issue of jurisdiction, there can be no mutual consent to oust the jurisdiction of this Commission. In Support of its contention, Shri Awasthi has relied upon the Commission's order dated 22.6.2018 in Petition No.171/MP/2016 (KSK Mahanadi

Power Company Ltd Vs. Madhyanchal Vidyut Vitran Nigam and other), order dated 30.4.2019 in Petition No. 289/MP/2018 (M.B. Power Vs. UPPCL and others) and order dated 14.5.2019 in Petition No. 77/MP/2018 (TRN Energy Pvt. Ltd. Vs. Paschimanchal Vidyut Vitran Nigam Limited) and submitted that in case of supply to more than one State, there can be no question of invoking Section 64 (5) of the Act.

15. We have considered the submissions of the Petitioner, TANGEDCO and Shri Awasthi. The Petitioner has entered into separate PPAs with the TANGEDCO and NPCL for supply of power at different points in time and for different quantum. The PPA with TANGEDCO for supply of 100 MW was executed by the Petitioner on 27.11.2013. Later, Addendum No. 1 dated 20.12.2013 was executed by the Petitioner. TNERC in its order dated 29.7.2016 approved the TANGEDCO PPA and adopted the tariff discovered through the competitive bidding process in terms of Section 63 of the Act. On 26.9.2014, the Petitioner executed PPA with NPCL for supply of 170 MW. UPERC vide its order dated 20.4.2016 approved the NPCL PPA. Subsequently, UPERC in its order dated 5.2.2019 in Petition No. 1235 of 2017 determined the tariff for 170 MW supply to NPCL. The jurisdiction of this Commission to regulate the tariff of the generating companies is derived from Section 79(1)(a) and (b) of the Act and it derives its power to adjudicate the dispute from Section 79(1)(f) of the Act. The said provisions are extracted as under:

“Section 79. (Functions of Central Commission): (1) The Central Commission shall discharge the following functions, namely:-

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating

companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

* * * * *

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;”

16. Under Section 79(1)(b) of the Act, this Commission has the jurisdiction to regulate the tariff of generating companies other than those owned or controlled by the Central Government if those generating companies have composite scheme for generation and sale of electricity in more than one State. The Hon’ble Supreme Court in civil appeals titled Energy Watchdog v. CERC & Ors [2017 (4) SCALE 580] has dealt with the issue of composite scheme under Section 79(1)(b) of the Act as under:

“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in sub-clause(c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission’s jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.”

17. As per the above findings of the Hon’ble Supreme Court, the moment generation and sale of electricity take place in more than one State, this Commission is the appropriate Commission under the Act. In the present case, as stated above, the

Petitioner is supplying power to TANGEDCO in the State of Tamil Nadu and to NPCL in the State of Uttar Pradesh from its power project situated in State of Maharashtra. It has entered into long term PPA dated 27.11.2013 read with Addendum No. 1 dated 20.12.2013 for supplying power from its power plant to Distribution company in the State of Tamil Nadu i.e. TANGEDCO and PPA dated 26.9.2014 for supplying power to the Distribution company in the State of UP i.e. NPCL. It is, therefore, evident that the Petitioner is supplying electricity to more than one State from the same generating station and such supply is governed by separate binding arrangements, namely the PPAs. It is further seen that prior to entering into PPA with NPCL, the TANGEDCO had entered into PPA with the Petitioner on 27.11.2013 read with Addendum No. 1 dated 20.12.2013. The entire scheme of generation and supply of power, therefore, unmistakably indicates that the Petitioner has a composite scheme for generation and supply of power in more than one State.

18. Sub-section (b) of Section 79(1) of the Act provides that this Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State. This provision is unconditional. We do not find any basis for argument of the Respondent as regards requirement that the tariff has to be determined only under Section 63 of the Act for this Section to be applicable. The Hon'ble Supreme Court has ruled in Energy Watchdog Case that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State. It is a cardinal rule of interpretation that the court cannot add words to a statute or read words which are not there in it. The Hon'ble Supreme Court in the case

of Shiv Shakti Co-operative Housing Society v. Swaraj Developers [(2003) 6 SCC 659],
has observed as under:

(j) “It is a well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent.”

19. It is also important to highlight here that similar to the instant case was the case of Adani Power Ltd. (hereinafter referred to as Adani) which had the arrangement to supply power to Gujarat alone prior to entering into PPAs with Haryana Utilities. In fact, GERC had not only adopted the tariff of generating station of Adani but it had also adjudicated certain change in law claims. After Adani approach this Commission pleading composite scheme on account as it was supplying power to GUVNL and Haryana Utilities, this Commission ruled that Adani’s case fulfils the requirement of Section 79 (1) (b) of the Act the moment it entered into PPAs with Haryana Utilities and the jurisdiction came to be vested in this Commission. The Hon’ble Supreme Court in Energy Watchdog case has upheld that Adani has a composite scheme for generation and sale of power in more than one State. Similar is the case with GMR Kamalanga which had a Section 62 PPA with GRIDCO for supply of power from its project in Odisha. Subsequently, GMR Kamalanga entered into Section 63 PPAs with Haryana (through PTC) and Bihar. This Commission held that GMR Kamalanga has a composite scheme for generation and supply of power in more than one State. The jurisdiction of this Commission in GMR Kamalanga case has also been upheld by the Hon’ble Supreme Court in Energy Watchdog case. Further, in Petition No. 289/MP/2018 (MB Power (Madhya Pradesh) Limited v. UPPCL & Ors.) where the Petitioner’s generating company has entered into separate PPAs both under Section 62 and Section 63 with

different State Discoms, this Commission in its order dated 30.4.2019 has held that it is a case of 'composite scheme' for generation and sale of power to more than one State and thereby this Commission has the jurisdiction to adjudicate disputes under the PPAs. In view of this, the argument advanced by TANGEDCO that there is no composite scheme in the present case because the PPA with NPCL is under Section 62 of the Act whereas the PPA with TANGEDCO is under Section 63 of the Act has no merit and it cannot be accepted. For the same reason, TANGEDCO's other objection of not making NPCL a party to the present petition is not sustainable.

20. Therefore, in light of the foregoing and as per the decision of the Hon'ble Supreme Court in Energy Watchdog Case, we are of the view that this Commission has the jurisdiction over the Petitioner's generating station and to thereby adjudicate the disputes raised in the present Petition in terms of Section 79(1)(b) read with Section 79(1)(f) of the Act. Accordingly, the Petition is maintainable.

21. During the course of hearing, the learned counsel appearing for TANGEDCO submitted that in case the Petitioner is supplying power to two States, namely, Tamil Nadu and Uttar Pradesh, then this Commission should have the exclusive jurisdiction. On this basis, TANGEDCO objected to the continuation of Petitions filed by Petitioner before UPERC seeking change in law on similar grounds as have been raised in the present Petition. Sri Awasthi also raised similar contention and submitted that when the power is being supplied from the same generating unit to both NPCL and TANGEDCO, then there is no basis for the Petitioner to approach the UPERC as well as this Commission claiming compensation under change in law. He further argued that when

there is supply to two different States from the very same unit and all the supply being on inter-State basis, all issues would come up before this Commission. In this regard, learned counsel for TANGEDCO relied upon the Commission's order dated 6.6.2018 in Petition No. 305/MP/2015.

22. *Per contra*, the learned senior counsel for the Petitioner submitted that the Petitions before the UPERC have been filed pursuant to Section 64(5) of the Act. Learned senior counsel argued that Section 64(5) is an exception to Section 79(1)(b) since the language used in Section 64(5) is "*notwithstanding anything contained in Part X*" and Section 79(1)(b) falls in Part X of the Act. Therefore, the jurisdiction of the State Commission can be invoked under Section 64(5) of the Act in case where both the Distribution company and the generator agree to the same, notwithstanding that the jurisdiction is with the Central Commission.

23. In order to resolve this controversy, we have to examine the provisions of Section 64(5) of the Act which is extracted as under:

"(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor."

24. As per the above provision, the tariff for any inter-State supply, transmission or wheeling of electricity involving the territories of two States may upon application made by the parties intending to undertake such supply, transmission or wheeling may be determined by the State Commission having jurisdiction in respect of the licensee who

intends to distribute electricity and make payment therefor. It is pertinent to mention that in cases of inter-State supply, the jurisdiction of this Commission gets attracted.

25. The Petitioner has relied upon the observations of the Hon`ble Supreme Court in Energy Watchdog case with regard to the applicability of Section 64(5) in support of its action to approach UPERC for determination of tariff qua the PPA with NPCL. The Hon'ble Supreme Court in Energy Watchdog Case has observed as under:

“27. Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter- State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”

26. In the above para, the Hon'ble Supreme Court has observed that the non-obstante clause in Section 64(5) clearly indicates that in case of inter-State supply, transmission and wheeling, the Central Commission alone has the jurisdiction. Notwithstanding the jurisdiction being with Central Commission, by application of the parties concerned, the jurisdiction can be given under Section 64(5) to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity.

27. Learned counsel for TANGEDCO during the hearing on 28.5.2019 submitted that the Commission in its order dated 6.6.2018 in Petition No. 305/MP/2015 (Adhunik Power and Natural Resources Ltd. vs. WBSEDCL and other) had observed that where the generating company has the PPAs/arrangement to supply power from its project to more than one State including the Home State where the plant is located, this

Commission shall have the exclusive jurisdiction to regulate the tariff in terms of Section 79 (1) (b) of the Act. Therefore, in the present case, this Commission has jurisdiction to regulate the tariff of the Petitioner's project.

28. The Commission observes that in the instant case, the generation and supply of power by the Petitioner involves three States i.e. Maharashtra where the plant is situated and Tamil Nadu and Uttar Pradesh where the power is supplied. Therefore, provisions of Section 64(5) of the Act requiring 'involving the territories of two States' are not attracted in this case and thus, the case falls squarely under Section 79 (1) (b) of the Act.

29. Further, TANGEDCO as well as Shri Awasthi have placed lot of emphasis on the fact that the supply to both TANGEDCO and NPCL are being made by the Petitioner from the same generating unit, namely, Unit-2 of its generating station. In our considered view, this fact has no relevance in deciding the question of maintainability with which the Commission is presently concerned. There is no embargo in the Act, particularly under Section 79(1) (b), that a generating company cannot supply power to different procurers from the same generating unit, especially when such supplies are being made under separate PPAs as in the present case.

30. Shri Awasthi has stated that the issue of jurisdiction is pending before the APTEL in Appeal No. 185 of 2019 filed by it, where the precise issue of whether the Petitioner can approach UPERC under Section 64(5) has been raised. Shri Awasthi has requested to adjourn the present proceedings till the disposal of the said appeal by APTEL.

31. *Per contra*, the Petitioner has submitted that above Appeal No. 185 of 2019 pending adjudication before the APTEL is in relation to the supply of 170 MW of power to NPCL under NPCL PPA wherein the tariff of such sale has been determined by UPERC under Section 62 of the Act. It has stated that Mr. Awasthi has challenged the jurisdiction of UPERC while the present Petition has been filed in terms of provisions of TANGEDCO PPA, there is no scope for stay/ adjournment of the present proceedings.

32. It is noted that the present Petition has been filed for claiming compensation towards certain change in law events in terms of Article 10.1.1 of the TANGEDCO PPA dated 27.11.2013 read with Addendum No. 1 dated 20.12.2013 for supply of 100 MW contracted capacity to TANGEDCO from Unit-2 of the generating station. Since no Appeal is pending before APTEL against the supply of 100 MW of power to TANGEDCO under the TANGEDCO PPA, the contention of Shri Awasthi to adjourn the present Petition is not sustainable.

33. In light of above discussion, we hold that the present petition is maintainable before this Commission. We make it clear that this order is limited to determination of issue of the jurisdiction of this Commission and maintainability of the Petition before this Commission. We have not expressed any view on the merit of the issues raised in the Petition. Accordingly, the Respondent is directed to file its reply on merits, if not already filed, latest by 19.7.2019 with advance copy to the Petitioner who may file its rejoinder, if any, by 31.7.2019. No extension of time for completion of pleadings shall be permitted.

34. Petition No. 327/MP/2018 and I.A. No. 87/2018 shall be listed for hearing on merit in due course for which separate notice will be issued.

Sd/-
(I.S.Jha)
Member

sd/-
(Dr. M.K. Iyer)
Member

sd-
(P.K. Pujari)
Chairperson