

**CENTRAL ELECTRICITY REGULATORY COMMISSION**  
**NEW DELHI**

**Petition No: 239/MP/2016**

**Coram:**  
**Shri P.K. Pujari, Chairperson**  
**Shri A.K. Singhal, Member**  
**Shri A.S. Bakshi, Member**  
**Dr. M.K. Iyer, Member**

**Date of Order: 28<sup>th</sup> of March, 2018**

**In the matter of**

Petition under Section 79 (1) (b) and 79 (1) (f) of the Electricity Act, 2003 for claiming compensation on account of event pertaining to change in laws as per Article 13 of the Power Purchase Agreement dated 26.02.2007 (PPA) executed between the Petitioner and the Respondent.

**And**

**In the matter of**

ACB (India) Ltd.  
C-102, New Multan Nagar  
Rohtak Road, New Delhi-110056

**.....Petitioner**

**Vs**

1. Gujarat Urja Vikas Nigam Limited  
Sardar Patel Vidyut Bhavan,  
Race Course,  
Vadodara 390 007  
Gujarat, India.
2. Chhattisgarh Power Transmission Company Limited  
Vidyut Seva Bhavan,  
Danganiya,  
Raipur (CG) 492013
3. Prayas (Energy Group),  
Unit II A & B, Devgiri,  
Joshi Railway Muesum Lane,  
Kothrud Industrial Area, Kothrud  
Pune, Maharastra-411038

**... Respondents**



**Parties Present:**

1. Shri Sanjay Sen, Senior Advocate, ACBIL
2. Shri Hemant Singh, Advocate, ACBIL
3. Shri Matrugupta Mishra, Advocate, ACBIL
4. Shri Nishant Kumar, Advocate. ACBIL
5. Ms. Ranjitha Ramchandaran, Advocate, GUVNL
6. Ms. Poorva Siagal, Advocate, GUVNL

**ORDER**

The Petitioner, ACB (India) Ltd., has filed the present petition seeking compensation on account of Change in Law events as per Article 13 of PPA dated 26.2.2007 entered into between the Petitioner and Respondent No. 1 for supply of power from the Petitioner's plant.

2. The Petitioner has set up a 270 MW (2x135 MW) coal based Thermal Power Station (hereinafter referred to as the 'generating station') at Korba in the State of Chhattisgarh. The dates of commercial operation of the units of the generating station of the Petitioner are as under:

<b>Unit</b>	<b>Date of commercial operation of the units</b>
I (135 MW)	13.12.2011
II (135 MW)	21.06.2012

**Background of the Case:**

3. In the year 2006, the Respondent No. 1 (GUVNL), initiated a bid for procurement of power under Section 63 of the Electricity Act, 2003. The Petitioner participated in the bidding process for supply of 200 MW from its generating station and the Petitioner was declared as the successful bidder for supply of 200 MW at the levelled bid tariff of ₹2.2491 per Unit.

4. The Petitioner entered into a Power Purchase Agreement on 26.2.2007 (hereinafter referred as "the PPA") for supply of 200 MW power by the Petitioner from its generating station. The Petitioner entered into the following long-term PPAs for supply of power from its Generating Station:

(a) Supply of 200 MW power to GUVNL in terms of the long term PPA dated 26.2.2007 for 25 years. The supply to GUVNL has become effective from 2.1.2012 for Unit-I and from 21.6.2012 for Unit-II.

(b) Supply of 5% to the State of Chhattisgarh in terms of the Power Purchase Agreement dated 5.12.2013 during the useful life of the generating station. The supply to the State of Chhattisgarh has become effective from 30.1.2012.

5. The Petitioner has sought adjustment of tariff on account of the occurrence of Change in Law events due to increase in Water Charges levied by the State Government on account of Change in Law pertaining to change in water rate. The Petitioner has claimed ₹21,77,39,719/- as on 30.9.2016.

6. The Petitioner has submitted that it is supplying power in more than one State. Therefore, the Commission has jurisdiction to adjudicate the present matter under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003.

7. Against the above background, the Petitioner has filed the present petition with the following prayers:-

“(a) Declare and adopt that the following events are Change in Law events within the meaning of Article 13 of PPA dated 26.02.2007:

- (i) Notification dated 21.03.2006 issued by the Water Resource Department, Government of Chhattisgarh;
- (ii) Notification dated 31.05.2010 issued by the Water Resource Department, Government of Chhattisgarh; and
- (iii) Water Supply Agreement dated 04.12.2013 executed between the Petitioner and the Government of Chhattisgarh.

(b) Direct the Respondent to make a payment of ₹217739719/- (Twenty-One Cr. Seventy-Seven lakh Thirty-Nine Thousand Seven Hundred and Nineteen Only) to the Petitioner, which amount has accrued on account of the Change in Law events, till 30.09.2016;

(c) Direct the Respondent to continue to make payments accrued in favour of the Petitioner on account of Change in Law events mentioned in prayer (a), post the filing of the petition, till the validity of the PPA dated 26.02.2007.

(d) in the interim grant prayer (b); and

Pass any other order/ orders as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the instant case.”

8. Notices were issued to the respondents to file their replies to the petition. Replies to the petition have been filed by the Respondent No. 1 (GUVNL) vide affidavit dated 7.9.2017. Prayas was also made a party to this petition to file its reply. However, learned counsel for Prayas submitted that no separate reply is required on behalf of Prayas, as all the issues have already been covered in the reply of GUVNL. The Petitioner vide its affidavit dated 3.11.2017 has filed rejoinder to the reply of GUVNL.

9. The Petitioner, vide RoP of hearing dated 28.9.2017, was directed to file the copy of the PPA executed with Chhattisgarh State Power Trading Co. Ltd. (CSPTCL) to ascertain the composite scheme, and date of commissioning of the units and date of commencement of supply of power to GUVNL and CSPTCL. The Petitioner, vide its affidavit dated 3.11.2017, has filed the information called for.

**Analysis and Decision:**

10. After going through the pleadings on the record and the submissions during the hearing, the following issues arise for our consideration:

- (a) Whether the Commission has the jurisdiction to adjudicate the dispute between the Petitioner and the Respondent with regard to change in law event?
- (b) Whether the provisions of the PPA with regard to notice have been complied with?
- (c) What is the scope of Change in law in the PPA?
- (d) Whether compensation claims are admissible under Change in Law?
- (e) Mechanism for processing and reimbursement of admitted claims under Change in Law.

The above issues have been dealt with in the succeeding paragraphs.

11. The chronological dates of events with regard to GUVNL PPA are as under:

<b>Power Supply to</b>	<b>GUVNL (200 MW)</b>
<b>Cut-off date</b>	26.12.2006
<b>Bid Submission date</b>	3.1.2007
<b>PPA executed on</b>	26.2.2007
<b>Start of supply of power</b>	From 2.1.2012 for Unit-I and from 21.6.2012 for Unit-II

**Issue No. 1: Whether the Commission has the jurisdiction to adjudicate the dispute between the Petitioner and the Respondent with regard to change in law event?**

12. The Petitioner has submitted that it is supplying 200 MW electricity to GUVNL in the State of Gujarat under the long term PPA of 25 years and 5% of the net generated power to the State of Chhattisgarh till the useful life of the generating station. As such evidently, the Petitioner has a composite scheme for generating and sale of electricity in more than one State. Therefore, the Commission has jurisdiction to adjudicate the present matter under Section 79(1) (b) read with Section 79(1)(f) of

the Act. Learned counsel of the Petitioner during the hearing on 10.8.2017 has submitted that the Hon'ble Supreme Court vide judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 has decided the issue of composite scheme.

13. We have considered the submissions of the Petitioner. In addition to the supply of 200 MW to GUVNL, the Petitioner has entered into a long term PPA dated 5.12.2013 with the State of Chhattisgarh for supply of 5% of the net generating power. The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 (Energy Watchdog Vs. Central Electricity Regulatory Commission and others) has held that if a generating company is having a scheme for generation and sale of electricity in more than one State, then it is enough to construe that the generating company is having composite scheme. The Relevant portion of said judgment is extracted 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.”

In the present case, the supply of electricity by the Petitioner to the States of Gujarat and Chhattisgarh is under the Composite Scheme for generation and sale of electricity in more than one State. Accordingly, this Commission has jurisdiction under clause (b) of sub-section (1) of Section 79 of the Electricity Act, 2003. Therefore, any dispute on tariff related matters under the PPAs is vested in this Commission under clause (f) of sub-section (1) of Section 79 of the Electricity Act, 2003.

**Issue No. 2: Whether the provisions of the PPA with regard to notice have been complied with?**

14. The claim of the Petitioner in the present petition pertains to Change in law event related to the PPA dated 26.2.2007. The cut-off date for consideration of any claim for change in law, namely 7 days before the bid deadline, is 26.12.2006. Article 13.3 of the PPA between the Petitioner and the Respondent No. 1 envisages for notification of Change in Law to the Procurer. Article 13.3 of the PPA is extracted as under:

“13.3 Notification of Change in Law

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

13.3.2 Without prejudice to the factor of materiality or other provisions contained in this agreement, the obligation to inform the Procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the seller.

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

- (a) The Change in Law; and
- (b) The effects on the Seller of the matters referred to in Article 13.2.
- (c) The date of impact resulting from the occurrence of Article 13.1.1.”

15. The Petitioner, vide its letter No. ACBIL/GUVNL/16-17/2143 dated 7.4.2016 informed GUVNL about the occurrence of events under Change in Law which was not prevalent at the time of submission of bid and their impact on the supply of power in terms of the PPA within the meaning of Article 13.3.

16. We have considered the submissions of the Petitioner. Under Article 13.3 of the PPA, the Petitioner is required to give notice about occurrence of Change in Law events as soon as reasonably practicable after being aware of such events which occurred after 26.12.2006 (i.e. 7 days prior to the Bid deadline date). The Petitioner has given notice dated 7.4.2016 to GUVNL stating the additional expenditure incurred by it due to such change in law was not prevalent at the time of submission of bid. In the said notice, the Petitioner has apprised GUVNL about the occurrence of Change in Law event and the impact of such event on tariff. GUVNL, in its reply, allegedly did not agree with the change in law event occurred to the prejudice of the Petitioner and failed to appreciate that the change in water charges imposed by the Chhattisgarh Government through issuance of various notification by exercising its statutory power under the relevant Act, falls under the definition of Change in Law as provided under the PPA. The Petitioner has submitted that it is constrained to file the present case due to the level of diligence with which the letter of the Petitioner has been considered and responded to. In view of the above, it can be inferred that Petitioner has complied with the requirement of notice under Article 13.3 of the PPA.

**Issue No.3: What is the scope of Change in law in the PPA?**

17. The claims of the Petitioner are with respect to event under Article 13 (Change in Law) of the PPA. Article 13 of the PPA deals with event of Change in Law and is extracted for reference as under:



## “ARTICLE 13: CHANGE IN LAW

### 13.1 Definitions

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

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

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal of Indian Governmental Instrumentality provided such court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement or (iv) any change in the cost of implementing Environmental Management Plan for the Power Station;

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law.

### 13.2 Application and Principles for computing impact of Change in Law

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

#### **a) Construction Period**

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

For every cumulative increase/ decrease of each Rupees 1.25 lakhs in the per MW capital Cost, in relation to the Installed Capacity, over the term of this Agreement, the increase/ decrease in Non Escalable Capacity Charges shall be an amount equal to zero point two six seven (0.267%) of the Non Escalable capacity Charges. Provided that the Seller provides to the Procurer documentary proof of such increase/ decrease in capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply.

It is clarified that the abovementioned compensation shall be payable to either Party, only with effect from the date on which the total increase/ decrease exceeds amount equivalent to ₹1.25 lakhs in the per MW Capital Cost.

#### **b) Operation Period**



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

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

Further, Article 17 of the PPAs provides that in case of dispute between the parties arising out of claim made by any party for any change in or determination of tariff or any matter relating to tariff. The said Article is extracted as under:

“17.3 Dispute Resolution

17.3.1 Where any Dispute arising from a claim made by any Party for any change in or determination of the tariff or any matter related to tariff or claims made by any party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.”

18. A combined reading of the above provisions would reveal that the Commission has the jurisdiction to adjudicate upon the dispute between the Petitioner and Respondent No. 1 (GUVNL) with regard to Change in Law which occur after the cut-off date which is seven days prior the bid deadline. The events broadly covered under Change in Law are following:

- (a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law, or
- (b) Any change in interpretation of any Law by a Competent Court of law, Tribunal or Indian Governmental Instrumentality acting as final authority under law for such interpretation, or

- (c) Imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier.
- (d) Any change in the terms and conditions or inclusion of new terms and conditions prescribed for obtaining any consents, clearances and permits otherwise than the default of the settler.
- (e) Any change in the tax or introduction of any tax made applicable for supply of power by the Petitioner to GUVNL.
- (f) Such Changes [as mentioned in (a) to (c) above] shall result in additional recurring and non-recurring expenditure by the seller or any income to the seller.
- (g) The purpose of compensating the Party affected by such Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such "Change in Law" has not occurred.
- (h) The Compensation for any increase/decrease in revenue or cost to the Seller shall be determined and made effective from such date, as decided by the Commission which shall be final and binding on both the Petitioner and GUVNL, subject to rights of appeal approval provided under applicable law.

The term "Law" has been defined under Article 1.1 of the PPA as under:-

"Law" mean 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 without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality

pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission.”

The term “Indian Governmental Instrumentality” is also defined in Article 1.1 as under:

“Indian Governmental Instrumentality” shall mean the Government of India, Government of Gujarat, Government where the Project is located and any ministry or, department of or, board, agency or other regulatory or quasi-judicial authority controlled by GOI or Government of Gujarat or Government where the Project is located and includes the Appropriate Commission;”

As per the above definition, law shall include (a) all laws including electricity laws in force in India; (b) any statute, ordinance, regulation, notification, code, rule or their interpretation by Government of India, Government of Gujarat or Government of Chhattisgarh (since the project is located in Chhattisgarh) or any Ministry, Department, Board, Body corporate agency or other authority under such Governments; (c) all applicable rules, regulations, orders, notifications by a Government of India Instrumentality; and (d) all rules, regulations, decisions and orders of the Appropriate Commission. If any of these laws affects the cost of generation or revenue from the business of selling electricity by the seller to the procurers, the same shall be considered as change in law to the extent it is contemplated under Article 13 of the PPA.

#### **Issue No. 4: Whether compensation claims are admissible under Change in Law?**

19. The Petitioner has raised claims under Change in Law in respect of one event, namely, increase in Water Charges. Keeping in view the broad principles discussed above, the claims of the Petitioner are discussed in the succeeding paragraph.

### **Increase in Water Charges**

20. The Petitioner has submitted that as on the cut-off date, i.e. 26.12.2006, the water charges payable by the Petitioner has been subjected to change thereby it qualified to be a Change in Law event within the meaning of Article 13 of the PPA, which resulted in an increase in the expenditure incurred by the Petitioner. As on the cut-off date, the law governing the field of water charges was a Notification dated 21.03.2006, which was issued in suppression of the previous notification dated 30.11.2002. The Water Resources Department, Government of Chhattisgarh in exercise of power under Sections 37 and 40 of the Chhattisgarh Irrigation Act, 1931 (hereinafter referred to as "the Irrigation Act") read with its Rules notified vide Notification dated 21.3.2006 (hereinafter referred to as "2006 Notification"), imposed the water rates on the supply of water for Industrial Purpose, Thermal power and hydro power Projects. As per the 2006 Notification, any entity drawing water from natural/ created own sources for generation of Thermal power purpose, shall have to pay water rate of ₹0.90 per cubic meter of water supplied. The rate notified vide 2006 Notification had come into effect on 1.4.2006. Therefore, the 2006 Notification was the prevalent law at the time of bid submission.

21. The Petitioner has submitted that upon an application being made by the Petitioner, the Water Resources Department, Government of Chhattisgarh, vide letter dated 22.1.2008 communicated it's in-principle approval for the allocation of 10 million cubic meter per annum for the Petitioner's proposed Project to be supplied from Kholar Nala, Saliha Nala and proposed stop dam to be constructed in Ahiran River at the cost of the Petitioner, on such terms and conditions as stipulated in the abovementioned letter. In the same letter, it was further directed that the Petitioner

shall draw water from the proposed reservoir and shall also bear the cost of survey and construction of such reservoir. Thereafter, the Water Resources Department vide Notification dated 31.5.2010 (hereinafter referred to as "2010 Notification") in suppression of the 2006 Notification, revised the water rate from 0.90 to ₹2.00 per Cubic meter for water supply made to thermal power project by the State from natural/ created own sources. The said Notification was made effective from 1.5.2010. Further, the 2010 Notification provided that there will be an annual increase of the water rate @ 15%.

22. On 4.12.2013, the Petitioner executed Agreement for Supply of Water with the Government of Chhattisgarh (hereinafter referred to as the "Water supply Agreement"). Under the Water Supply Agreement, reference has been made to the allotment letter of the Government of Chhattisgarh for supply of water. As per Article 2 of the Agreement, the Petitioner was required to make payment of ₹9.12 per cubic meter for water drawn from the said natural or Govt. water source as per the 2010 Notification with 15% escalation computed from 2010. It is recorded in the Water Supply Agreement that the Petitioner had already made a payment of ₹1,98,42,060 towards water cess and local fund cess for the quantity of water to be drawn by the Petitioner in three months. The Petitioner has stated that before the execution of the Water Supply Agreement, the Petitioner was put under the category of thermal power purpose and drawing water from natural/ created own sources in the notifications referred above. However, upon execution of the Water Supply Agreement by mentioning ₹9.12 per cubic meter as escalated and made applicable as per the 2010 Notification, the Petitioner's project was considered under the category of drawing water from dam/ reservoir. Therefore, only after execution of the Water Supply Agreement, the Petitioner was charged the rate applicable for entities

drawing water from dam/ reservoir whereas before the execution of the aforesaid Agreement, the rate applicable was that of drawing water from natural/ created own sources.

23. Since, under the 2006 Notification, the Petitioner was falling under the category of drawing water from Natural/ created own sources, therefore, it was liable to pay ₹0.90 per cubic meter charges. The Petitioner started getting bills from January 2012 onwards @ ₹2.30 per cubic meter calculated after adding 15% annual escalation on ₹2.00 per cubic meter as provided under 2010 Notification for entities drawing water from natural/ created own sources. Upon the execution of the Water Supply Agreement, the category under which the Petitioner was treated was changed and accordingly, made liable to pay ₹9.12 per cubic meter calculated on 15% annual escalation on ₹6.00 per cubic meter applicable to entities drawing water from dam/ reservoir. The Petitioner has submitted that at the time of submission of bid, the prevalent law was 2006 Notification, which imposed ₹0.90 per cubic meter of water drawn from natural/ created own sources for the purpose of thermal power plant. Accordingly, the Petitioner had factored the above amount while quoting its bid tariff. Under 2006 Notification, there was no provision for escalation though the rates prescribed under the said notification, were subjected to revision after every three years.

24. The Petitioner has submitted that by virtue of the letter dated 22.1.2008, the Government of Chhattisgarh had mandated that the Petitioner shall have to bear the cost of construction of the reservoir and draw water from there only. Therefore, the change in law events coupled with the letters and communication made by the State Government from time to time, exposed the project of the Petitioner to increase in

expenditure from ₹0.90 in 2006 to ₹9.12 in the year 2013 under the Water Supply Agreement after taking into consideration the rate along with 15% escalation clause imposed under the 2010 Notification.

25. GUVNL has denied claim of the Petitioner regarding the payments of water charges under change in law on the following grounds:

(a) Water charges are paid for procuring water as an input for generating power.

Therefore, these are input costs during the operating period which are part of O&M charges which is factored while quoting the tariff. Such changes in input costs cannot constitute or be allowed as change in law.

(b) Section 40 of the Madhya Pradesh Irrigation Act, 1931 provides for supply of water for industrial and other purposes as per the agreement between the State Government and the Company. The Petitioner had executed the Agreement dated 4.12.2013 for supply of water wherein the Petitioner had agreed to pay water charges as consideration for such supply of water. Therefore, the water charges are payable in pursuance to the agreement with the State Government which is a commercial agreement between the Petitioner and the Government. Any change in the price in such commercial arrangements cannot be considered as change in law.

(c) The Petitioner could not have only taken into account the then prevalent rate of water charges at the time of submission of bid without assessing the impact of increase in water charges throughout the contract period. Merely because the Notification dated 21.3.2006 did not provide for escalation does not mean that the water charges will not be increased from the rate then prevalent. The



Petitioner itself has admitted that the notification provided for a revision in the rates after three years.

- (d) The Commission has already dealt with the issue of water charges in its order dated 19.2.2016 in the Petition No. 153/MP/2015 in case of Sasan power limited vs. MPPMCL. Further, the Commission has taken a consistent stand regarding input costs such as transportation costs, price of coal, etc. that are not to be considered as the change in law. Moreover, water charges are paid for procuring water as an input for generating power. Therefore, they are an input cost during the operating period and are a part of O&M expenses and such input costs cannot be constituted or allowed as change in Law. The same decision shall also be applicable in the instant petition.
- (e) The amount of ₹1,98,42,060 is a security deposit for due and proper payment of the water rates and not payment for quantity of water drawn as alleged in the petition.
- (f) The Notification dated 21.3.2006 provided for a revision in the rates after three years. There was no indication, either in law or agreement that there would be no increase in the rates. The Petitioner was aware that the water charges are to be increased from time to time. There is, therefore, no question of any Change in Law of increasing the water charges after the cut-off date.
- (g) The Petitioner has merely furnished the calculation without any supporting documents and has not produced the invoices raised by the Water Resources Department. The Petitioner has also not furnished the details of the quantum of water with reference to what is reasonable and normative.

(h) The Petitioner is not eligible for any carrying cost in terms of the Commission's order dated 16.2.2017 in 1/RP/2016 in Petition No. 402/MP/2014 and order dated 17.3.2017 in Petition No. 157/MP/2015.

26. The Petitioner in its rejoinder dated 3.11.2017 has submitted as under:

(a) As per Article 13 of the PPA, for any increase/ additional expenditure incurred by the generator in relation to its business of selling electricity, as a result of a change in law event, the generator is liable to be compensated to that extent. Therefore, the reference to input cost and the same being part of O&M charges amount to reading into Article 13 of the PPA such terms and conditions, which are *per se* neither existing nor intended. Therefore, the question whether the increase in water charges is covered under Article 13 or not, does not arise. The parties while executing the PPA has inserted words and phrases into Article 13 which are of wider amplitude and the Respondent is restrained from restricting the scope and applicability of such terms and conditions of the PPA through its baseless and irrelevant submissions. Further, a future increase in the incidence of such tax/cess/ levies/ charges cannot at all be factored or contemplated by a bidder while submitting its bid as the same is an executive and legislative decision.

(b) Charge on water was levied by the Water Resource Department, Government of Chhattisgarh. Accordingly, Water Resource Department, Chhattisgarh had been issuing Notifications from time to time in exercise of power under Sections 37 and 40 of the Madhya Pradesh Irrigation Act, 1931. The Notifications issued by Water Resource Department from time to time falls

within the definition of 'Law' as defined under the PPA. Therefore, any change in the water rate by virtue of the above Notifications issued by Water Resource Department, from time to time, is an event of Change in Law, which needs to be taken into cognizance by the Commission while determining both the incidence of change and the consequence thereof under the present petition. The above charges levied by the State Government are statutory in nature.

- (c) Section 40 of the Irrigation Act empowers the State Government to supply water for industrial purpose on the terms and conditions prescribed in the agreement executed between the State Government and the concerned industrial entity. However, the charges for such supply of water shall be fixed in accordance with Rules made there under. Therefore, the Respondent has misconstrued the provisions of MP Irrigation Act and tried to bring an interpretation prejudicial to the interest of the Petitioner. Further, the averment made by the Respondent that the charges are commercial arrangement between the Petitioner and the State Government is wrong and misconstrued.
- (d) The present case is factually different from the case dealt by the Commission vide order dated 19.2.2016 in Petition No. 153/MP/2015. It is a settled principle of law that a judgment shall have precedential value in similar facts and circumstances. Therefore, the above case is not applicable to the facts and circumstances of the present case.
- (e) The Petitioner started getting bills from January 2012 onwards @ ₹2.30 per unit calculated after adding 15% annual escalation on ₹2.00 as provided under 2010 Notification (escalated from ₹0.90 as per the 2006 Notification

which was considered at the time of submission of bid) for entities drawing water from natural/ create down sources. Till December 2013, the Petitioner was charged @ ₹3.05 being categorized as water supplied from natural sources. However, immediately after execution of Water Supply Agreement with Chhattisgarh Govt. dated 4.12.2013, the Petitioner had been put to the category of dam/ reservoir for water charges and started charging at ₹9.12 accordingly. Therefore, the Petitioner has been levied water charges under a category from 2012 till December 2013 and had been subjected to a higher category w.e.f. December 2013.

27. We have considered the submissions of the Petitioner and the respondent. MP Irrigation Act, 1931 provides for fixation of rates of charges for supply of water. As on the cut-off date, i.e. 26.12.2006, as per the Water Resources Department, Govt. of Chhattisgarh Notification No.-1819/7-A/W.R./T.S./I.W.S./02/D-4 dated 21.3.2006, the following water charges for usage of water by Thermal Power Plants were applicable:

Type of Use	Specific Details	Water Rate
Industrial Purpose/ Thermal Power Purpose	A. Government Sources:-	
	1. From Dam/ Reservoir	₹ 3.00 per cubic meter
	2. From Canal System	₹ 3.60 per cubic meter
	B. From Natural/ Created Own Sources	₹ 0.90 per cubic meter

28. Based on the above notification, the Petitioner made an application for sourcing 10.00 MCM of water per year from natural sources (Kholar Nala, Saliha Nala and Ahiran Nadi) and factored ₹0.90 per cubic meter towards water charges, as the rate prevailing at the time of submission of bid. The Water Resources Department, Government of Chhattisgarh, vide its letter dated 22.1.2008

communicated its approval for the allocation of 10 million cubic meter per annum for the Petitioner's proposed Project to be supplied from Kholar Nala, Saliha Nala and the proposed stop dam to be constructed on the river Ahiran at the expense of the Petitioner, on such terms and conditions. In the same letter, it was further directed that the Petitioner shall draw water from the proposed reservoir and shall also bear the cost of survey and construction of such reservoir. Subsequently, Water Resources Department, Government of Chhattisgarh vide its Notification dated 1.5.2010 revised the rate of water charges as under:

Type of Use	Specific Details	Water Rate
Industrial Purpose/ Thermal Power Purpose	A. Government Sources:	
	1. From Dam/ Reservoir	₹6.00 per cubic meter
	2. From Canal System	₹7.00 per cubic meter
	B. From Natural/ Created Own Sources	₹2.00 per cubic meter

29. The above revised rates notified by the 2010 Notification were subject to annual escalation of 15%. The Petitioner started getting bills from January 2012 onwards @ ₹2.30 per unit calculated after adding 15% annual escalation on ₹2.00 as provided under the said Notification for entities drawing water from natural/ created own sources. Till December 2013, the Petitioner was charged @ ₹3.05 being categorized as water supplied from natural sources. However, after the execution of Water Supply Agreement with the Government of Chhattisgarh on 4.12.2013, the Petitioner had been put to the category of dam/ reservoir for water charges and started charging at ₹9.12 per cubic meter.

30. The Petitioner has submitted that at the time of submission of bid, the Petitioner was not aware of the fact that there would be future escalation in the rate of water charges and accordingly, the Petitioner considered water charges @ ₹0.90

per cubic meter in the quoted tariff of the bid. The relevant portion of '2006 Notification' is extracted as under:

**"2006 Notification**

....

4. The rates mentioned above, shall be revised after every 3 years.

....."

As per the above notification, the rates of water charges are required to be revised after every three years. The petitioner was aware at the time of submission of bid that the rate of water charges shall undergo changes after every 3 years. Therefore, it was the responsibility of the Petitioner to take note of such increase in future and suitably factor the same in the quoted tariff. Thus, we are not in an agreement with the contention of the Petitioner that at the time of submission of the bid, it was not aware about future escalation in the rates of water charges.

31. The issue for our consideration is whether the '2010 Notification' dated 1.5.2010 increasing water charges to ₹9.12/m<sup>3</sup> (as on December, 2013) is a Change in law or not in terms of Article 13 of the PPA dated 26.2.2007. The Petitioner has contended that the change in water charges imposed by the Chhattisgarh Government through issuance of various notifications by exercising its statutory power conferred by M.P. Irrigation Act, 1931 falls under Change in Law as provided under Article 13 of the PPA. GUVNL has submitted that Commission vide order dated 19.2.2016 in Petition No. 153/MP/2015, has already decided the issue of increase in water charges are distinct from tax on water, local cess or other taxes and the water charges are in the nature of operating cost incurred for procuring the water. Therefore, only imposition of new taxes or cess or levies on the prevalent price of water charges can be a change in law and not increase in water charges.

However, the Petitioner in its rejoinder has submitted that since the present case is factually different from the above case, the Commission's order dated 19.2.2016 in Petition No. 153/MP/2015 and APTEL judgment dated 12.09.2014 in Appeal No. 288 of 2013 are not applicable to the facts and circumstances of the present case. Based on the submission of the Petitioner and averments made by GUVNL, we proceed to examine whether the decision taken by the Commission vide order dated 19.2.2016 in Petition No. 153/MP/2015 based on the APTEL's judgment dated 12.9.2014 in Appeal No. 288 of 2013 is applicable in the present case.

32. The Appellate Tribunal vide its judgment dated 12.9.2014 in Appeal No. 288 of 2013 has observed as under:

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

25. For example, if the tax on cost of coal has been increased from 5% to 8%, then for computing the impact of Change in Law, only the increase in the actual expenditure of Seller due to increase in tax from 5% to 8% has to be considered. This is because if the tax had not increased, the Seller would have paid tax of 5% on the actual cost of coal. With the Change in Law, the Seller has now to pay 8% on the actual cost of coal. Therefore, to restore the Seller to the same economic position as if such Change in Law has not occurred, the Seller has to be compensated for additional tax of 3% on the actual cost of coal. However, the Seller will have to submit proof regarding payment of tax on coal."

From the judgment of APTEL, it emerges that the base price of any of the capital input or operating input which form the basis of the bid cannot undergo any change on account of price escalation of such input cost. However, the compensation on account of change in law, namely, on account of introduction of any new tax or levy or cess or variation in the existing rate of any of them which occur after the bid deadline will be admissible under change in law.

33. Now, we proceed to examine the Commission's order dated 19.2.2016 in Petition No. 153/MP/2015 and the relevant portion of the said order is extracted as under:

"45. We have considered the case of the petitioner in the light of the judgement of the Appellate Tribunal in Wardha Case. MP Irrigation Act, 1931 provides for fixation of rates of charges for supply of water. Sections 37 and 40 of the said Act are extracted as under:

**"37. Purpose for which water may be supplied**

(1) Water may be supplied from a canal:-

- a. Under an irrigation agreement, in accordance with the provisions of Chapter VI;
- b. On demand, for the irrigation of specified areas;
- c. To supplement a village tank ;
- d. For industrial urban or other purposes not connected with agriculture;
- e. For the irrigation of a compulsorily assessed area

(2) Charges for the supply of water under clause (a), (b),(c), [or (e) of sub – section (1) shall be paid at such rates as may be fixed by the State Government in accordance with rules made under this Act.

**40. Supply of water for industrial, urban or other purposes.-** The conditions for the supply of water for Industrial, urban or other purposes not connected with agriculture, and the charges therefore, shall be as agreed upon between the State Government and the company, firm, private person or local body concerned and fixed in accordance with rules made under this Act."

The notification dated 21.4.2010 revising the water rates have been issued under Sections 37 and 40 of the MP Irrigation Act, 1931. The said notification provides that an industrial undertaking before utilisation of water is required to execute in Form 7A of the MP Irrigation Rules 1974. The petitioner has placed on record the Agreement for Supply of Water to Industrial Power Plant between Sasan Power Limited and Government of Madhya Pradesh on 5.1.2013. As per para 2 of the Agreement, Sasan Power is required to pay to MP Government the water rates for water drawn by it @ ₹5.50 per Cum as on 1.1.2013 as per the notification dated 21.4.2010. The said para further provides as under:

"In addition to the payment of water rates specified above, the company shall also pay the Water Resources Department Local fund cess or any other tax at the rates as fixed by the Government from time to time. The Government hereby reserves the rights to revise the rates from time to time the said water rates and the local cess or other taxes to be paid by the company and the company shall pay such revised water rates and local cess or other taxes as may be fixed by the Government from time to time....."

Therefore, the Agreement entered into by the petitioner with Government of MP clearly recognises the water rates as distinct from local cess or other taxes. The water charges at the water rates are therefore paid for the use of water by the petitioner and are in the nature of operating cost incurred for procuring the water during operating period for supply of power to the procurers. In terms of the



judgement of the Appellate Tribunal in Wardha case, only new taxes or cess or levies on the prevalent price of water charges are payable if they are otherwise covered under change in law i.e. they were not in force at the time of bid deadline or their rates have changed after the bid deadline. However, the actual water charges are not admissible under change in law in accordance with the ratio of the judgement of the Appellate Tribunal in Wardha case. Accordingly, we disallow the claims of the petitioner for compensation on account of water charges under change in law. In view of our decision to disallow the water charges under change in law, there is no need to consider the materials placed on record regarding quantification of the compensation on account of water charges.”

In the above case, the notification dated 21.4.2010 revising the water rates has been issued under Section 37 and 40 of the MP Irrigation Act, 1931. In the present case, ‘2006 Notification’ and ‘2010 Notification’ imposing and revising the water charges rates have also been issued under Sections 37 and 40 of the Chhattisgarh Irrigation Act, 1931. The same Irrigation Act, 1931 is applicable for the instant petition also, as the Petitioner’s plant is located in the State of Chhattisgarh (which is created and bifurcated from the state of MP in the year 2000). The 2010 Notification also provides that a agreement to be executed in Form 7-A prior to the use of water (which was executed by the Petitioner on dated 4.12.2013) similar to as that in the Sasan case. Further, the Water Supply Agreement (WSA) dated 4.12.2013 executed by the Petitioner with the Water Resources Department, Government of Chhattisgarh is also similar to the Water Supply Agreement executed by the Sasan Power Ltd. with the Government of Madhya Pradesh. Para under Note of the WSA dated 4.12.2013 provides as under:

“In addition to the payment of water rates specified above, the company shall also pay the Water Resources Department Local fund cess or any other tax at the rates as fixed by the Government from time to time. The Government hereby reserves the rights to revise the rates from time to time to said water rates and the local cess or other taxes to be paid by the company and the company shall pay such revised water rates and local cess or other taxes as may be fixed by the Government from time to time.....”

The above specified clause is also similar to the clause as in Sasan case. Therefore, the Agreement entered into by the Petitioner with Government of Chhattisgarh clearly recognises the water rates as distinct from local cess or other taxes. The water charges at the water rates are therefore, paid for the use of water by the Petitioner and are in the nature of operating cost incurred for procuring the water during operating period for supply of power to the procurers. As per the decision of the Commission in the above referred case (quoted at Para 37 above), the actual water charges are not admissible under change in law in accordance with the ratio of the judgement of the Appellate Tribunal in Wardha case. Therefore, we are of the view that the Commission's order in the Sasan case is factually a precedent case and is squarely applicable in the present case also.

34. In the light of above, the increase in water charges is not admissible under change in law and the claim of the Petitioner is rejected subject to the outcome of decision in Appeal No. 133 of 2016 filed by Sasan Power Limited before the Appellate Tribunal for Electricity.

### **Carrying Cost**

35. The Petitioner has submitted that the intent of having change in law clause under the PPA is to restore the affected party to the same economic position as if change in law event has not been occurred. GUVNL has submitted that the Petitioner is not entitled to carrying cost as the same has been rejected by the Commission vide order dated 16.02.2017 in 1/RP/2016 in Petition No. 402/MP/2014 and order dated 17.3.2017 in Petition No. 157/MP/2015. In our view, there is no provision in the PPA to allow carrying cost on the amount covered under change in

law till its determination by the Commission. Therefore, the Petitioner's prayer to allow carrying cost is rejected.

**Issue No. 4: The mechanism for compensation on account of Changes in Law during the operation period:**

36. Since, the Commission has disallowed the claim for Increase in water charges under Change in law, therefore, the beneficiaries are under no obligation to pay compensation to the Petitioner. Thus, there is no requirement to provide any compensation mechanism for payment of increase in water charges.

**Summary of Decision:**

37. Based on the above analysis and decisions, the summary of our decision under the Change in Law is as under:

<b>S. No.</b>	<b>Change in Law events</b>	<b>Decision</b>
1	Increase in Water Charges	Disallowed
2.	Carrying cost	Disallowed

38. Petition No. 239/MP/2016 is disposed of in terms of the above.

**Sd/-**  
**(Dr. M.K.Iyer)**  
**Member**

**Sd/-**  
**(A. S. Bakshi)**  
**Member**

**Sd/-**  
**(A. K. Singhal)**  
**Member**

**Sd/-**  
**(P.K. Pujari)**  
**Chairperson**