



नईदिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 720/MP/2020

कोरम/ Coram:

श्री आई. एस. झा, सदस्य/ Shri. I.S. Jha, Member

श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member

श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 08th of February, 2023

IN THE MATTER OF:

Petition under Sections 79 and 94 of the Electricity Act, 2003 read with Regulation 111 of the CERC (Conduct of Business) Regulations, 1999 seeking appropriate directions and relief pursuant to order dated 31.01.2019 passed by this directing implementation of Pilot SCED with effect from 01.04.2019

And

Petition on account of occurrence of 'Change in Law' event as per Article 13 of the Power Purchase Agreement (PPA) dated 22.04.2007 between Coastal Gujarat Power Limited and various procurers for claiming additional recurring / non-recurring expenditure incurred by the Petitioner for supply of power of the generating station located at Mundra, Gujarat

AND IN THE MATTER OF:

M/s Costal Gujarat Power Limited

Corporate Centre,

34, Sant Tukaram Road

Carnac Bunder,

Mumbai-400009

...Petitioner

Versus

Power System Operation Corporation Limited.

B-9, Qutab Institutional Area,
Katwaria Sarai,
New Delhi – 110016

...Respondent

Parties Present: Shri Sanjay Sen, Sr. Advocate, CGPL
Shri Mansoor Ali Shoket, Advocate, CGPL
Shri Nitin Kala, Advocate, CGPL
Shri Kunal Singh, Advocate, CGPL
Shri Abhay Kumar, CGPL
Ms Mandakini Ghosh, Advocate, CGPL
Shri Subhendu Mukherjee, POSOCO
Shri Alok Kumar Mishra, POSOCO

आदेश/ ORDER

The Petitioner, M/s Costal Gujarat Power Limited, is a Company registered under the Companies Act and is a wholly owned subsidiary of Tata Power Company Limited (hereinafter “Tata Power”). The Petitioner has filed the petition seeking appropriate directions and relief for the recovery of the Petitioner’s actual cost of supplying/generating electricity during the period 01.04.2019 to 30.09.2019, pursuant to Order dated 31.01.2019 passed by this Commission directing implementation of Pilot Security Constrained Economic Despatch (SCED) of ISGS with effect from 01.04.2019.

2. The Respondent, Power System Operation Corporation Ltd. (POSOCO), is a wholly owned Government Enterprise under the Ministry of Power. It is the National Load Despatch Centre (NLDC) and is the implementing agency for scheduling and dispatch of electricity.

3. The Petitioner has made the following prayers:

- a) *Direct payment of Rs. 30 crores (later revised as Rs. 19.28 crores) to the Petitioner from the NPCL Fund on account of cost incurred by the Petitioner for supply of power pursuant to this 's Order dated 31.01.2019 passed ex-parte in Petition No. 02/SM/2019 (Suo moto);*
- b) *Alternatively, declare and adopt the SCED Scheme and DoP as a 'Change in Law' event within the meaning of Article 13 of the PPA and allow compensatory tariff to the Petitioner;*
- c) *Grant exemption from filing of duly affirmed Affidavit in view of the extension of the nationwide lockdown due to Covid-19 subject to the above-mentioned undertaking that the duly affirmed Affidavit will be submitted once the regular functioning of courts resumes; and*
- d) *Allow any such other and further relief(s) as this Commission deems just and proper in the facts and circumstances of the present case*

Submissions of the Petitioner:

4. The Petitioner has submitted as under:

- a) Pursuant to competitive bidding process for development of Mundra UMPP (4000 MW) in the State of Gujarat, purpose being to supply power to the distribution licensees in the States of Gujarat, Maharashtra, Rajasthan, Punjab and Haryana (Procurers), Tata Power submitted its bids on 07.12.2006 and was declared as the successful bidder having quoted a levelized tariff of Rs.2.26367/kWh. Letter of Intent (LoI) was issued to Tata Power on 28.12.2006.
- b) In accordance with the “*Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees*”, Power Finance Corporation was notified as the Bid Process Coordinator and the Petitioner was incorporated on 10.02.2006 as a wholly owned subsidiary of Power Finance Corporation to undertake the process of bidding under Case 2 on behalf of the procurers.
- c) Tata Power acquired 100% shareholding of the Petitioner on 22.04.2007. Thereafter, the Petitioner, as the seller, entered into a Power Purchase Agreement (PPA) with the procurers on 22.04.2007 for supply of 3800 MW power from Mundra UMPP at the tariff

mentioned in Schedule 11 of the PPA calculated in accordance with Schedule 7 for each of the contract years during the term of the PPA.

- d) Mundra UMPP was envisaged to be executed based on imported coal and had an estimated coal requirement of approximately 12 MMTPA. The Petitioner had made arrangement of imported coal from Indonesia by entering into Coal Supply Agreement dated 31.10.2008 with Indo Coal Resources (Cayman) Limited, a corporation organised and existing under the laws of Republic of Indonesia, for supply of 5.85 MMTPA (+/-20 %).
- e) On 09.09.2008, Tata Power entered into an agreement with the Petitioner for meeting the balance coal requirement of 6.15 MTPA on best effort basis. Subsequently, Tata Power assigned its agreement with Indo Coal Resources (Cayman) Limited for supply of 3.51 MMTPA (+/-20 %) (which was earlier meant for Coastal Maharashtra facility) in favour of the Petitioner vide Assignment and Restatement Agreement dated 28.03.2011.
- f) On 23.09.2010, Government of Indonesia promulgated the “*Regulation of Minister of Energy and Mineral Resources No. 17 of 2010 regarding Procedure for Setting Mineral and Coal Benchmark Selling Price*”. According to these Indonesian Regulations, the holders of mining permits for production and operation of mineral and coal mines are required to sell mineral and coal in domestic and international markets including to their affiliates by referring to the benchmark price and the spot price of coal in the international market. All long-term coal contracts for supply of coal from Indonesia were required to be adjusted with the Indonesian Regulations within a period of 12 months i.e. by 23.9.2011.
- g) Since financial impact of the unprecedented and unforeseeable increase in prices of imported coal on account of Indonesian Regulations and change in international coal market scenario was huge, the Petitioner filed Petition No. 159/MP/2012 before the Commission wherein the Petitioner sought various reliefs on account of Force Majeure (Article 12) and Change in Law (Article 13) of PPA and Section 79 read with Sections 61 and 63 of Electricity Act, 2003 (Act).
- h) On 15.04.2013, the Commission, recognizing the precarious situation of the Petitioner, directed the Petitioner and Procurers to constitute a committee.

- i) In August 2013, the ‘*Committee for Determination of Compensatory Tariff*’ submitted its report to the Commission. The Commission disposed the Petition No.159/MP/2012 on 21.04.2014 while accepting the recommendations of the committee. The Order dated 21.04.2014 of the Commission was challenged before Appellate Tribunal for Electricity (APTEL) and subsequently, before Hon’ble Supreme Court. The Hon’ble Supreme Court in its judgment reported as (2017) 14 SCC 80 [*Energy Watchdog v. CERC & Ors.*] held as under:

“20. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission’s general regulatory powers under Section 79(1)(b) can then be used.”

- j) On 30.08.2018, Ministry of Power (MoP), Government of India, notified the scheme on “*Flexibility in Generation and scheduling of thermal power stations to reduce the cost of power to the consumer*” (MoP scheme of Flexibility). The objective of the scheme was to reduce the overall cost of power for the country by utilizing any un-despatched surplus in existing cheaper generating stations by way of flexibility in scheduling of generation. The scheme advocates flexibility to a generating company to supply power from any of its generating stations against schedule received for its stations. As per the scheme, the cheaper generating stations could be dispatched up to its maximum capacity before scheduling the costlier stations till the power requisitioned by all its beneficiaries is met.
- k) On 03.08.2018, POSOCO submitted a report on “*Security Constrained Economic Dispatch pan India*” to the Commission.
- l) On 12.09.2018, POSOCO submitted a consultation paper on “*Security Constrained Economic Dispatch (SCED) of Inter-State Generating Stations pan India*” to the Commission for consideration. The Consultation paper prepared by the POSOCO sought

to enhance the scope of optimisation of ISGS schedules at pan India level leading to saving in production cost. The paper explores the scope for an optimal solution to minimize the total production cost from all thermal Inter-State Generating Stations (ISGS) whose tariff is determined or adopted by CERC while honouring the technical constraints of the power plants and the grid.

- m) On 27.09.2018, the Commission directed POSOCO to upload the consultation paper on its website to seek comments from the stakeholders.
- n) On 28.09.2018, POSOCO uploaded the SCED consultation paper on its website seeking comments from the stakeholders till 28.10.2018 and subsequently extended the date to 20.11.2018.
- o) On 28.12.2018, after examining the comments received from ten stakeholders on the consultation paper POSOCO submitted to the Commission its observations/clarifications. The POSOCO requested the Commission to implement the SCED proposal on trial basis for six months.
- p) On 31.01.2019, the Commission passed the *Suo-motto* Order in Petition No.02/SM/2019 (Suo-moto) in the matter of '*Pilot on Security Constrained Economic Dispatch (SCED) of Inter-State Generating Stations (ISGS) pan India*', whereby the Commission directed POSOCO to implement a pilot for SCED for all thermal ISGS, that are regional entities and whose tariff is determined or adopted by the Commission, with effect from 01.04.2019 to 01.10.2019.
- q) On 05.02.2019, POSOCO placed the comments of stakeholders and its response to the comments on its website.
- r) On 18.03.2019, POSOCO issued the detailed operating procedure (DoP) for implementation of the pilot for SCED of 'all' thermal ISGS pan India, including the Petitioner.
- s) As a result of the aforesaid Order and DoP, a generating company is required to produce power up to its declared capacity, even if the same is over and above its scheduled capacity, and mandatorily supply such electricity to a party with whom it does not have a PPA and that too at the lowest contracted rate. In the Petitioner's case, this has resulted in the Petitioner supplying power at a rate, which is much lower than the actual cost incurred by the Petitioner in generating power.

- t) Meanwhile, on 14.05.2019, the Petitioner filed the Review Petition 9/RP/2021 which was later withdrawn by the Petitioner on 06.08.2021 and was accordingly disposed of.
- u) The present Petition is only concerned with the period from 01.04.2019 to 30.09.2019 (relevant period), when the SCED pilot was mandatorily applicable to 'all' thermal ISGS, including the Petitioner, and the Petitioner was participating in the scheme.
- v) The Petitioner, an independent Power Producer, was directly and adversely impacted by the mandatory across the board implementation of the pilot for SCED for the relevant period as Mudra UMPP, which is being implemented by the Petitioner, was one of the ISGS through which the SCED pilot was implemented and power scheduled under the pilot project.
- w) While POSOCO had circulated a Consultation Paper inviting responses from stake holders and the Petitioner had filed its response to the same, there is no discussion/analysis either at the level of POSOCO or by the Commission in its Order on the objections raised by the Petitioner and others in such responses. Further, POSOCO only uploaded its comments on the stakeholders' submissions on 05.02.2019, i.e., 5 days after the issuance of the Order.
- x) The Commission in its various orders, including Orders dated 15.04.2013 and 21.02.2014 in Petition No. 159/MP/2012 has itself recognized the fact that the Petitioner's Mundra plant is facing severe losses and needs to be compensated, and that at the current tariff the project cannot be sustained. Admittedly, losses have reached unsustainable levels and there is an imminent possibility of the plant shutting if no viable solution is shortly reached.
- y) The cost of generation of power at the Petitioner's Mundra plant is much higher than the cost at which it is selling the power to its beneficiaries, i.e., every unit generated at the Mundra plant is under compensated in Tariff, especially the Energy Charges vis-a-vis the costs being incurred.
- z) While the SCED seeks to optimize generating resources, such optimization cannot be at the cost of creating additional financial burden on the generating assets as that would eventually lead to large scale financial distress, going against the whole objective sought to be achieved by SCED.

- aa) The Petitioner was obligated to make power available to its beneficiaries as per the terms and conditions enshrined in the PPA. The Respondent's contention, to use the unscheduled reserve from the Petitioner, to have more saving in the overall system is therefore, not as per the PPA and the regulatory framework prevalent at the time of the PPA, particularly when the Petitioner is suffering huge losses on account of under-recovery of tariff. The participant to the schemes cannot be allowed to be benefitted at the cost of the Petitioner.
- bb) The SCED scheme mandated by the Commission and the POSOCO interferes with the rights and obligations of the Petitioner, particularly the manner in which it can operate its plant and consequential commercial activities.
- cc) The Order, requiring implementation of SCED, effectively mandates generating companies to produce power beyond what is requisitioned by beneficiaries under the PPA and supply it on a pan-India basis as scheduled by POSOCO to a third party with which it has no agreement, at a rate regardless of the actual cost of generation, which in the Petitioner's case is much lower than the cost incurred. In terms of a PPA, the procurer makes a requisition for the electricity required. Accordingly, the participating entities, including the Petitioner, generate the requisitioned electricity and if the entire declared capacity is not requisitioned, the Petitioner does not produce the un-requisitioned electricity. Owing to the Petitioner's peculiar facts and circumstances, it makes losses for every unit it generates. Thus, any un-requisitioned power, which is not generated, results in saving of losses.
- dd) The Petitioner's Mundra plant was an apt case to be dealt with separately and kept out of the SCED pilot so as to avoid serious financial distress, which situation has been corrected by the Commission through its Order dated 11.09.2019 by requiring only willing entities to participate in the scheme.
- ee) While the Petitioner has accordingly opted out of the scheme, it has already suffered a loss of approx. 19.28 crores for the period 01.04.2019 to 30.09.2019, when it had participated under the scheme, albeit under protest and without prejudice. As such, the Petitioner must now be paid/compensated the actual cost of supplying/generating electricity during the period 01.04.2019 to 30.09.2019 due to the Change in Law event of the SCED scheme and/or under this Commission regulatory power.

ff) In view of the above the Commission may pass appropriate directions for recovery/restitution of actual cost of generating/supplying electricity during the relevant period. It is also submitted that the Commission has the power under Article 13 (Change in Law) of the PPA to order restitution in the manner prescribed therein. In any case, the Commission has the widest regulatory powers under section 79(1) to deal with situations where there are no guidelines framed or where the guidelines do not deal with a situation, as is the case herein.

gg) As per Regulation 6.4 and 6.5 of the Indian Electricity Grid Code, the ISGS is to schedule power as per the requisitions received from beneficiaries/buyers/ power exchange. These schedules are based on contracts and collective transactions on the power exchange. However, post implementation of the SCED Scheme, the ISGS had to generate power up to its declared capacity, irrespective of schedules received from the beneficiaries/buyers on the power exchange. This constitutes a Change in Law event under Article 13 of the PPA.

hh) Accordingly, the Petitioner is *inter-alia* filing the present Petition under Article 13 of the PPA seeking approval for claiming compensation on account of occurrence of 'Change in Law' events

ii) On 11.09.2019, the Commission by its Order dated 11.09.2019 in Petition No. 08/SM/2019 (*Suo-moto*) limited the implementation of the pilot to those generating stations 'willing' to participate in the SCED pilot.

Hearing dated 30.07.2021:

5. The case was called out for virtual hearing on 30.07.2021. the Commission admitted the petition and directed the Petitioner to serve copies to the Respondent and the Respondent to file its reply within specified time.

Reply of the Respondent (POSOCO):

6. POSOCO submitted as under:
 - a) Under SCED scheme, benefit is shared among all the generators, including that of the Petitioner and their beneficiaries. SCED has caused overall economy in the country.

Amount received by the Petitioner during the period 01.04.2019 to 30.09.2019 is tabulated below:

Description	Amount (in ₹)
Amount received by Petitioner due to SCED UP (A)	1,43,12,02,460
Amount refunded by Petitioner due to SCED DOWN (B)	18,96,15,057
Amount received by Petitioner due to heat rate compensation (C)	0.00
Amount received by Petitioner due to benefit sharing (D)	21,31,86,085
Net amount received by Petitioner from the SCED pool (A – B + C + D)	1,45,47,73,488

- b) The energy scheduled for the period 01.04.2019 to 30.09.2019 by the Petitioner under SCED is as below:

Description	Energy (MWhr)
Energy transacted for SCED UP	7,59,694
Energy transacted for SCED DOWN	1,00,521
Net energy transacted in SCED	6,59,173

- c) Therefore, on an average basis, the Petitioner has received ₹ 2.21 per unit from the SCED pool as the energy/variable charge for the period 01.04.2019 to 30.09.2019.
- d) Despatch under SCED mechanism occurs only after the gate closure for scheduling under all obligations of the generator have been met by the generator. After the gate closure, when SCED despatch happens, there is no further scheduling opportunities for the generator or by the beneficiaries. Hence, in no way the generator has been prevented from meeting its contractual obligation. The generation schedule under SCED is modulated among the participating generators, keeping the supply obligation of the beneficiary's constant.
- e) Further, in case of full or partial outage of the unit(s) of a generating station, till the schedule of the generator is revised as per provision of IEGC, the supply obligation to the beneficiaries continues. The settlement takes place under deviation settlement mechanism. Similarly, SCED is used to cause economy on a country wide basis after all obligations are met.

- f) The Petitioner is also participating under the Reserve Regulation Ancillary Services (RRAS) and Automatic Generation Control (AGC) where again, only the generator schedules are modified without changing the beneficiary schedules for the purposes of secure and reliable operation of the grid.
- g) The principle of merit order despatch of power under SCED is done with the cheapest available generator to be despatched first, followed by the costlier generation. If the energy charge rates are revised post facto, then the merit order stack of available generators will get disturbed post facto.
- h) The Commission in the Order dated 27.07.2020 in petition No. 382/MP/2018 in respect of retrospective revision of variable charges of the RLNG station in RRAS despatch has directed the following:

“50. In view of above, the Commission is of the view that relaxing the provisions of the regulation and allowing true-up of the variable charges to the extent of schedule when RLNG power is scheduled, would amount to changing the basic structure and principle of despatch of generating stations under RRAS. Participation in RRAS is merit order based and the generating stations are scheduled depending on their variable costs from the lowest to the highest in each time block, subject to technical constraints as specified in the ASO Regulations and the Detailed Procedure. The retrospective adjustment, if any, shall defeat the very purpose of making it a merit order-based despatch. Therefore, relaxation sought by the Petitioner in provisions of Regulation 13.3 by application of Regulation 15 and trueing-up of the variable charges for RLNG cannot be agreed to.”

Hearing dated 24.01.2022:

- 7. The case was called out for virtual hearing on 24.01.2022. During the course of hearing the representative of the Respondent submitted that the respondent has filed its reply and the same may be taken into consideration. After hearing the learned senior counsel for the Petitioner and the representative of the Respondent, the Commission directed the Petitioner to file the following details/ information, on an affidavit, by 05.02.2022:
 - a. Details of generating station (Unit wise) - such as installed capacity, ramp up rate, ramp down rate, technical minimum and share of beneficiaries;
 - b. Time-block wise details of the aforesaid units (for the period from 1.4.2019 to 30.9.2019) regarding declared capacity/ on-bar capacity, schedule received from beneficiaries,

revision in the schedule by beneficiaries and by generators, schedule under SCED, schedule under RRAS, and actual generation; and

- c. Details of cost and recovery on account of participation under SCED Pilot and RRAS (week-wise for the period from 1.4.2019 to 30.9.2019).

Additional Information by the Petitioner:

8. In compliance to the direction of the Commission in its ROP dated 24.01.2022, the Petitioner submitted the information as under:

- a) a table containing the details of generating station (*unit-wise*) such as installed capacity, ramp up rate, ramp down rate, technical minimum and share of beneficiaries:

No. of Units	Installed DC (MW)	Ramp up (MW)	Ramp down (MW)	Tech. Min. (MW)	Beneficiary Share				
	(760 MW x No. of Units)	(30 MW / Block / Unit)	(30 MW / Block / Unit)	(.55 x 760 MW x No. of Units)	Gujarat (.475*DC)	Maharashtra (0.2*DC)	Haryana (0.1*DC)	Punjab (0.125*DC)	Rajasthan (0.1*DC)
5	3800	30 x 5 = 150 MW / Block	30 x 5 = 150 MW / Block	2090	1805	760	380	475	380
4	3040	30 x 4 = 120 MW / Block	30 x 4 = 120 MW / Block	1672	1444	608	304	380	304
3	2280	30 x 3 = 90 MW / Block	30 x 3 = 90 MW / Block	1254	1083	456	228	285	228
2	1520	30 x 2 = 60 MW / Block	30 x 2 = 60 MW / Block	836	722	304	152	190	152
1	760	30 x 1 = 30 MW / Block	30 x 1 = 30 MW / Block	418	361	152	76	95	76

- b) The time block-wise details of the aforesaid units (*for the period from 1.4.2019 to 30.9.2019*) regarding declared capacity/on-bar capacity, schedule received from beneficiaries, revision in the schedule by beneficiaries and by generators, schedule under SCED, schedule under RRAS, and actual generation.

- c) A summary and tables containing details (week-wise for the period from 1.4.2019 to 30.9.2019) of cost and recovery (*basis the invoices*) on account of participation under SCED Pilot and RRAS, which ultimately resulted in a net loss of approx. Rs. 19.28 crores to the Petitioner:

For Month	SCED Up (MWhr)	SCED Down (MWhr)	Net Injection (MWhr)	Fuel Cost (Rs./KWH)	Fuel Cost (Rs.)	SCED Revenue (Rs.)	SCED Benefit (Rs.)	Total Revenue (Rs.)	Net Loss (Rs.)
Apr-19	74,905	-22,338	52,567	2.4753	-13,01,17,912	9,48,13,538	2,59,27,167	12,07,40,705	-93,77,207
May-19	1,89,923	-5,438	1,84,485	2.4384	-44,98,49,277	33,14,92,967	4,54,79,213	37,69,72,180	-7,28,77,097
Jun-19	1,08,179	-37	1,08,142	2.5311	-27,37,18,735	20,33,29,017	2,81,25,573	23,14,54,590	-4,22,64,145
Jul-19	1,03,295	-8,594	94,702	2.5687	-24,32,60,413	18,56,39,103	3,71,91,523	22,28,30,626	-2,04,29,787
Aug-19	1,59,173	-21,337	1,37,836	2.5630	-35,32,73,404	26,86,35,739	3,68,71,805	30,55,07,544	-4,77,65,860
Sep-19	1,24,219	-42,777	81,441	2.4234	-19,73,65,212	15,76,77,040	3,95,90,804	19,72,67,844	-97,368
Total	7,59,694	-1,00,521	6,59,173		-1,64,75,84,954	1,24,15,87,405	21,31,86,085	1,45,47,73,490	-19,28,11,464

9. The Petitioner has not submitted any rejoinder to the POSOCO's reply stating that there is no need to file rejoinder at this stage but requested liberty to find additional documents as directed or advised at subsequent stage.

Analysis and Decision:

10. We have heard the Petitioner and the Respondent and have carefully perused the records.
11. From the submissions of the contracting parties, following issues emerge for adjudication before the Commission:

Issue No. 1: *Whether the Commission's Order dated 31.01.2019 in 2/SM/2019 on SCED pilot fall within the purview of regulatory framework and power bestowed under the Act? Alternatively, Whether the Commission's Order dated 31.01.2019 in 2/SM/2019 on SCED pilot and Detailed Operating Procedures dated 18.03.2019 qualify as 'Change in Law' event within the meaning of Article 13 of the PPA?*

Issue No. 2: *Whether the Petitioner should be allowed compensation from the NPCL Fund on account of cost incurred by the Petitioner for supply of power pursuant to the Commission's Order dated 31.01.2019 in 2/SM/2019 on SCED pilot?*

12. We will now discuss the issues.

Issue No. 1: *Whether the Commission's Order dated 31.01.2019 in 2/SM/2019 on SCED pilot fall within the purview of regulatory framework and power bestowed under the Act? Alternatively, Whether the Commission's Order dated 31.01.2019 in 2/SM/2019 on SCED pilot and Detailed Operating Procedures dated 18.03.2019 qualify as 'Change in Law' event within the meaning of Article 13 of the PPA?*

13. The Petitioner has submitted that the jurisdiction and powers of the Commission are limited to the functions enumerated in the provisions of Section 79 of the Electricity Act, 2003 and the Commission's Order dated 31.01.2019 in 2/SM/2019 on SCED pilot, wherein directions have been issued compelling the Petitioner to compulsorily participate in the SCED pilot, fall outside the purview of the regulatory powers bestowed under the Electricity Act, 2003. The Petitioner has also submitted that the Order dated 31.01.2019 in petition 2/SM/2019 on SCED pilot is against the legal and regulatory framework in as much as it takes away the discretion available to the Generating Company under the PPA to reduce generation in certain circumstances like reduced demand. Also, failure to grant an opportunity of hearing or even issue notice before passing the Order is in violation of the principles of natural justice. The Petitioner is entitled to adequate compensation and full restoration not only in terms of the regulatory power of this Commission but also under common law and equity.

14. We observe that the various sections of the Electricity Act, 2003 stipulate as under:

Section 3. (National Electricity Policy and Plan) --- (1) *The Central Government shall, from time to time, prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.*

.....

Section 61. (Tariff regulations):

The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

....

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;

(c) to regulate the inter-State transmission of electricity;

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;

(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;

(g) to levy fees for the purposes of this Act;

(h) to specify Grid Code having regard to Grid Standards;

(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;

(k) to discharge such other functions as may be assigned under this Act.

(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely:-

(i) formulation of National electricity Policy and tariff policy;

(ii) promotion of competition, efficiency and economy in activities of the electricity industry;

(iii) promotion of investment in electricity industry;

(iv) any other matter referred to the Central Commission by that Government.

(3) *The Central Commission shall ensure transparency while exercising its powers and discharging its functions.*

(4) In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.

15. Further, the Hon'ble Supreme Court reported as (2017) 14 SCC 80 [*Energy Watchdog v. CERC & Ors.*], *inter-alia*, held as under:

*“20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to “regulate” tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. **In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.**”*

16. From the above we observe that the Electricity Act, 2003 requires that the Commission shall be guided by the tariff policy in discharging their functions including framing the regulations under section 61 of the Act, *inter-alia*, to ensure availability of electricity to consumers at reasonable and competitive rates. Section 61 of the Electricity Act, 2003 stipulates that the Commission

shall be, inter-alia, guided by the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments. Further, the Commission has the jurisdiction in case of all generating companies owned or controlled by the Central Government, as also in respect of the generating stations having a composite of generation and sale in more than one State. Further, it has also been held by the Hon'ble Supreme Court that the Commission enjoys the general regulatory power under Section 79(1)(b) which acts as the source of the power to regulate including the power to determine or adopt tariff.

17. Further, the Commission notes that the relevant sections of the Electricity Act, 2003 are as under:

Section 28 (2) The Regional Load Despatch Centre shall comply with such principles, guidelines and methodologies in respect of wheeling and optimum scheduling and despatch of electricity as the Central Commission may specify in the Grid Code.

26. National Load Despatch Centre –

(1) The Central Government may establish a Centre at the national level, to be known as the National Load Despatch Centre for optimum scheduling and despatch of electricity among the Regional Load Despatch Centres.

18. Also, relevant Regulations of *Central Electricity Regulatory Commission (Indian Electricity Grid Code), Regulations 2010* and subsequent amendments (hereafter IEGC) stipulate as under:

“2.3 Role of RLDC

2.3.1 According to sections 28 and 29 of Electricity Act, 2003, the functions of RLDCs are as follows:

- (1) The Regional Load Despatch Centre shall be the apex body to ensure integrated operation of the power system in the concerned region.*
- (2) The Regional Load Despatch Centre shall comply with such principles, guidelines and methodologies in respect of wheeling and optimum scheduling and despatch of electricity as may be specified in the Grid Code.*
- (3) The Regional Load Despatch Centre shall-*
 - (a) be responsible for optimum scheduling and despatch of electricity within the region, in accordance with the contracts entered into with the licensees or the generating companies operating in the region;*
 - (b) monitor grid operations;*
 - (c) keep accounts of quantity of electricity transmitted through the regional grid;*
 - (d) exercise supervision and control over the Inter-State transmission system ; and*

- (e) *be responsible for carrying out real time operations for grid control and despatch of electricity within the region through secure and economic operation of the regional grid in accordance with the Grid Standards and the Grid Code.*
- (4) ***The Regional Load Despatch Centre may give such directions and exercise such supervision and control as may be required for ensuring stability of grid operations and for achieving the maximum economy and efficiency in the operation of the power system in the region under its control.***
- (5) *Every licensee, generating company, generating station, substation and any other person connected with the operation of the power system shall comply with the directions issued by the Regional Load Despatch Centers. (emphasis added)*

“Regulation 6.5

...

20. *If, at any point of time, the RLDC observes that there is need for revision of the schedules in the interest of better system operation, it may do so on its own, and in such cases, the revised schedules shall become effective from the 4th time block, counting the time block in which the revised schedule is issued by the RLDC to be the first one.”*

19. From the above we observe that Section 28(2) of the Electricity Act, 2003 empowers the Commission to specify principles, guidelines and methodologies for optimum scheduling and despatch of electricity for RLDCs through Grid Code. As per Section 28 (3)(a) of the Act, RLDCs have the responsibility for “*optimum scheduling and despatch of electricity within the region*”. Further, National Load Despatch Centre has been entrusted with the responsibility of optimum scheduling and despatch of electricity among the RLDCs as per Section 26 of the Act. The RLDC may give such directions and exercise such supervision and control as may be required for ensuring stability of grid operations and for achieving the maximum economy and efficiency in the operation of the power system in the region under its control. Further, if, at any point of time, the RLDC observes that there is need for revision of the schedules in the interest of better system operation, it may do so on its own.

20. In the instant case we observe that each DISCOM generally follows merit order dispatch of generation from its own portfolio of contracts, thus, a local level of optimization takes place. However, there exists scope for optimization by despatching cheaper stations which are fragmented on a pan India basis. The Commission felt the that there was need for exploring the possibility of creating a regulatory framework for further optimising scheduling and despatch of generating stations and with the overall objective of minimising the production cost of the

system without compromising grid security. As such, the Commission pronounced Order dated 31.01.2019 in 02/SM/2019 on SCED pilot and it was held as under:

“

....

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The Commission recognizes the fact that after rolling out the SCED mechanism on pilot basis, based on the stakeholder's feedback, further decision can be made in due course. Accordingly, the Commission directs POSOCO for implementation of Security Constrained Economic Dispatch of Electricity for the Inter-State Generating Stations on pilot basis as follows:

Pilot on Security Constrained Economic Dispatch for ISGS pan India

- a. POSOCO shall implement SCED optimisation model for all the thermal Inter State Generating Stations (ISGS) that are regional entities and whose tariff is determined or adopted by the Commission for their full capacity without violating grid security and honouring the existing scheduling practices prescribed in the Indian Electricity Grid Code on trial basis for six months.
- b. POSOCO is directed to frame the Detailed Procedure within one month from the date of this order to operationalize the scheme and submit to the Commission for information. The Detailed Procedure shall contain the guidelines regarding operational aspects of SCED including scheduling, dispatch, accounting, settlement and any residual matter. The same may be informed to all stakeholders.
- c. The variable charges declared by the generators for the purpose of Reserve Regulation Ancillary Services (RRAS) shall be considered in the optimisation process.
- d. Schedules of the States/beneficiaries shall not be changed and the beneficiaries shall continue to pay the charges for the scheduled energy directly to the generator as per the existing practices.
- e. NLDC shall open a separate bank account called “National Pool Account (SCED)”. All payments to/from the generators on account of SCED schedules shall flow to and from the said National Pool Account.
- f. For any increment in the injection schedule of a generator due to optimization, the generator shall be paid from the National Pool Account (SCED) for the incremental generation at the rate of its variable charge.
- g. For any decrement in the schedule of a generator due to optimization, the generator shall pay to the aforesaid National Pool Account (SCED) for the decremental generation at the rate of its variable charge after discounting compensation due to part load operation as certified by RPC as per the provisions of IEGC.
- h. The incremental changes in schedules on account of optimization shall not be considered for incentive computation for the generating stations. The deviation in respect of such generators shall be settled with reference to their revised schedule. The increment or decrement of generation under SCED shall not form part of RRAS.
- i. The RPCs shall issue weekly SCED accounts along with the DSM, RRAS, FRAS and AGC accounts based on the data provided to them by RLDCs. NLDC would indicate a

consolidated all India statement, week wise and month-wise indicating the schedules on account of SCED.

- j. RPCs shall issue the regional accounts including the SCED schedules and NLDC shall issue a consolidated “National SCED Settlement Statement” comprising payment and receipts to/from all generators participating in the SCED.*
- k. The sharing of benefits/savings has been accepted in principle by the Commission. However, methodology of sharing shall be decided after the results of the pilot and the extent of savings are available.*
- l. In view of the above, the savings obtained through SCED after settlement of all accounts of SCED shall be recorded and maintained in the “National Pool Account (SCED)” by the NLDC. POSOCO shall also maintain the relevant data during the operation of the pilot including but not limited to generating station-wise installed capacity, declared capacity, schedule (including all revisions), URS, generator-wise Variable cost, optimisation up/down, part-load compensation (if payable), discom/constituent wise share in respective generating stations, requisition (Day-ahead and last revision) from the generating stations.*
- m. POSOCO shall procure the hardware and develop the necessary software along with optimization tools for the implementation of SCED framework.*
- n. CTU is directed to ensure reliable communication between the respective generating stations and Load Despatch Centres.*
- o. Stakeholder awareness programs may be conducted by RPCs and POSOCO for smooth implementation of SCED pan-India.*
- p. The above pilot for SCED shall be implemented by POSOCO w.e.f. 1.4.2019.*
- q. POSOCO is also directed to apprise the Commission regarding the experience gained in the form of a feedback report covering all the aspects within a month of completion of the six months of pilot operation.”*

21. From the above it can be observed that the Commission in its Order dated 31.01.2019 on the SCED Pilot have explicitly mentioned that the prime drive behind such regulatory intervention is to explore the scope for optimisation and therefore the possibility of minimising the system cost without major structural changes in the existing system /framework of scheduling and accounting.

22. It is important to note that main philosophy enshrined in Security Constrained Economic Dispatch (SCED) is as under

- (a) The existing scheduling practices prescribed in the IEGC are to be complied with.
- (b) Variable charges declared by the generators for RRAS purpose is considered in the optimization process.
- (c) Schedules of States/beneficiaries is not changed and beneficiaries continue to pay the charges for the scheduled energy directly to the generator.

(d) the despatch under SCED mechanism occurs only after the gate closure for scheduling under all obligations of the generator have been met by the generator.

(e) After the gate closure, when SCED despatch happens, there is no further scheduling opportunities for the generator or by the beneficiaries.

23. We observe that the generation schedule under SCED is modulated among the participating generators, keeping the supply obligation of the beneficiaries constant. SCED is used to cause economy on a country wide basis after all obligations are met. SCED is helping in minimising of the system cost without major structural changes in the existing system/framework of scheduling and accounting. We are of the view that the Commission has comprehensive power under the Electricity Act, 2003 to explore the possibility of further optimising scheduling and despatch of generating stations with overall objective of minimising the production cost of the system without compromising grid security and make a regulatory framework accordingly.

24. The next submission raised by the Petitioner is that this Commission does not have jurisdiction to direct a generating company to mandatorily supply electricity to a party with whom it does not have PPA. The Petitioner has placed its reliance on the judgment dated 06.05.2009, of the Hon'ble Supreme Court in *Tata Power Company Limited v Reliance Energy Limited cited as (2009)16 SCC 659*. We observe that in the relied judgment the issue was of the allocation of the available energy from TPC(G), by Maharashtra Electricity Regulatory Commission on the basis of coincident peak demand of the distribution licensees. Vide judgement dated 06.05.2009 it has been observed that “*While exercising its power of ‘Regulation’ in relation to purchase of electricity and procurement process of distribution, it is not permissible for the Commission to direct allocation of electricity to different licensees keeping in view their own need.*” We note that vide Order dated 31.01.2019 in 2/SM/2019, SCED pilot project is created which explores the scope for optimisation and therefore the possibility of minimising the system cost without major structural changes in the existing system /framework of scheduling and accounting. The despatch under SCED mechanism occurs only after the gate closure for scheduling under all obligations of the generator have been met by the generator. There are no further scheduling opportunities for the generator or by the beneficiaries. Hence, the judgment dated 06.05.2009 is not applicable in the instant case.

25. The Petitioner has also raised objection to the Order dated 31.01.2019 in 2/SM/2019 on SCED pilot as being not just and fair. We observe that the Supreme Court vide judgment dated 02.01.2023 in Writ Petition (Civil) No. 906 of 2016 in case titled *Vivek Narayan Sharma Versus Union of India* has held as under:

Four-pronged test of proportionality

266. *The Constitution Bench of this Court in the case of Modern Dental College and Research Centre (supra), while considering a balance between the right under Article 19(1)(g) and the reasonable restrictions under clause (6) of Article 19 of the Constitution of India, observed thus:*

“60.Thus, while examining as to whether the impugned provisions of the statute and rules amount to reasonable restrictions and are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as “doctrine of proportionality”. Jurisprudentially, “proportionality” can be defined as the set of rules determining the necessary and sufficient conditions for limitation of a constitutionally protected right by a law to be constitutionally permissible. According to Aharon Barak (former Chief Justice, Supreme Court of Israel), there are four sub-components of proportionality which need to be satisfied [Aharon Barak, Proportionality: Constitutional Rights and Their Limitation (Cambridge University Press 2012).], a limitation of a constitutional right will be constitutionally permissible if:

(i) it is designated for a proper purpose;

(ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;

(iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally

(iv) there needs to be a proper relation (“proportionality stricto sensu” or “balancing”) between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.”

26. We observe that the Supreme Court vide judgment dated 13.05.2015 in Civil Appeal No. 4417 of 2015 (arising out of S.L.P.(C) No. 34063 of 2012) in case titled *Hindustan Zinc Ltd. Versus Rajasthan Electricity Regulatory Commission* has held as under:

39. The learned counsel on behalf of the respondents have countered the above contentions by submitting that a distribution licensee is obliged to supply power to Captive Power Plants and Open Access Consumer under Section 43 of the Act of 2003, if

*there is a request to supply. In such view of the matter, it will be highly discriminatory to only subject the regular consumers of the distribution licensee to bear the cost of purchase of renewable energy and to exempt the gencos from the Open Access Consumers or Captive Power Plants from the obligation to purchase/share the cost for purchase of renewable power despite being connected to the distribution network of the distribution licensee and despite the fact that they can demand back up power from such licensee any time they want. Thus, in order to realize the attempt of reducing dependence on fossil fuels, it can be said that **the impugned Regulations are imperative in the larger public interest and are just reasonable restrictions imposed** upon the captive gencos as permissible under Article 19(6) of the Constitution of India.*

....

....

*50. Article 51A(g) of the Constitution of India cast a fundamental duty on the citizen to protect and improve the natural environment. Considering the global warming, mandate of Articles 21 and 51A(g) of the Constitution, **provisions for the Act of 2003, the National Electricity Policy of 2005 and the Tariff Policy of 2006 is in the larger public interest. Regulations have been framed by RERC imposing obligation upon captive power plants and open access consumers to purchase electricity from renewable sources.** The RE obligation imposed upon captive power plants and open consumers through impugned Regulation cannot in any manner be said to be restrictive or violative of the fundamental rights conferred on the appellants under Articles 14 and 19(1)(g) of the Constitution of India. Upon consideration of the rival submissions by the well-reasoned order, the High Court has rightly upheld the validity of the impugned Regulation and we do not find any reason to interfere with the impugned judgment. All the appeals are dismissed as the same are devoid of merit.*

27. Let us now apply the 'four-pronged test of proportionality' on the Order dated 31.01.2019 in petition no. 02/SM/2019 on SCED pilot, to analyse as to *whether the impugned Order is just, equitable and fair*. We observe that the Order dated 31.01.2019 on SCED pilot has been issued with the objective of minimising the production cost of the system without compromising grid security by optimising scheduling and despatch of generating stations and without major structural changes in the existing system /framework of scheduling and accounting. We find that the Order dated 31.01.2019 on SCED pilot, had a *proper purpose* of creating a pilot on SCED for ISGS pan India on trial basis for six months, hence satisfying the *first test*. Further, regarding *second test* we find that the SCED pilot project was necessary to explore the scope of minimising system cost without major structural changes in the existing framework of scheduling and accounting. It is pertinent to mention here that despatch under SCED mechanism occurs only after the gate closure i.e. when there is absolutely no scope further scheduling opportunities for the generator or by the beneficiaries. Hence, there is no limitation attached on the generator

rather it facilitates optimum scheduling and despatch of generating stations. Further, regarding *third test*, we find that since the SCED mechanism occurs only after the gate closure hence there can be no alternative measures that may similarly achieve the same purpose. Finally, regarding *fourth test*, we find that the objective of minimising the system cost without compromising grid security is the matter of social importance and in *larger public interest*. Needless to mention here the provisions regarding ensuring stability of grid operations, achieving the maximum economy and efficiency in the operation of the power system etc. as per the IEGC, Electricity Act of 2003, the National Electricity Policy of 2005 and the Tariff Policy of 2006 are in the larger public interest. In any case, in our view, there is a direct and proximate nexus between the Order dated 31.01.2019 in petition no. 02/SM/2019 on SCED pilot, and the objectives sought to be achieved. It is pertinent to mention that the scope and objective mentioned in the Order dated 31.01.2019 on SCED pilot are in consonance with the principles enshrined in the Electricity Act, 2003. Further, the Commission in its subsequent order in petition no. 08/SM/2019 dated 11.09.2019 on the extension of SCED pilot has observed that the pilot has helped gain experience in the scope of optimisation at the ISGS level and has shown positive results. While establishing the scope of optimisation, the Commission also highlighted the need for appropriate regulatory framework in the context with due consultation with the stakeholders. Hence in our view the impugned Order is just, equitable and fair and well within the legal framework as enshrined in Electricity Act, 2003.

28. The Petitioner has also submitted that there was no public consultation before issuing the impugned Order dated 31.01.2019 in petition no. 02/SM/2019 on SCED pilot. We would like to clarify that it is not mandatory to conduct public hearing in the suo-motu order. However, in the instant petition on 12.09.2018, POSOCO submitted a consultation paper on “*Security Constrained Economic Dispatch (SCED) of Inter-State Generating Stations pan India*” to the Commission for consideration. On 27.09.2018, the Commission directed POSOCO to upload the consultation paper on its website to seek comments from the stakeholders. On 28.09.2018, POSOCO uploaded the SCED consultation paper on its website seeking comments from the stakeholders till 28.10.2018 and subsequently extended the date to 20.11.2018. On 28.12.2018, after examining the comments received from ten stakeholders on the consultation paper POSOCO submitted to the Commission its observations/clarifications and requested the

Commission to implement the SCED proposal on trial basis for six months. Further, as mentioned in earlier para, the thrust behind the Commission's suo motu order was to optimise the scheduling and dispatch of the generating resources and reducing the overall cost of production of electricity and in doing so the Commission has inter-alia also observed that:

“20. The Commission recognizes the fact that after rolling out the SCED mechanism on pilot basis, based on the stakeholders” feedback, further decision can be made in due course. Accordingly, the Commission directs POSOCO for implementation of Security Constrained Economic Dispatch of Electricity for the Inter-State Generating Stations on pilot basis as follows.” (emphasis added)

29. Furthermore, the Commission in its subsequent order in petition no. 08/SM/2019 dated 11.09.2019 on the extension of SCED pilot has observed that the pilot has helped gain experience in the scope of optimisation at the ISGS level and has shown positive results. While establishing the scope of optimisation, the Commission also highlighted the need for appropriate regulatory framework in the context with due consultation with the stakeholders.

30. The Petitioner has submitted that as a result of the Order dated 31.01.2019 on SCED pilot and the DoP dated 18.03.2019, the Petitioner is required to produce power up to its declared capacity irrespective of the fact that the same is over and above its scheduled capacity and as such compulsorily supply the power to the party with whom it hasn't executed the PPA. The Petitioner has submitted that the Order dated 31.01.2019 in 02/SM/2019 on SCED pilot and the DoP dated 18.03.2019 may be treated as 'Change in Law' event as per Article 13 of the PPA.

31. Article 13 of the PPA stipulates as under:

“ARTICLE 13: Change in Law:

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, or any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Government Instrumentality provided such Court of law, tribunal or Indian Government Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement, or (iv) any change in the (a) Declared Price of Land for the Project, or (b) the cost of Implementation of the resettlement and rehabilitation

package of the land for the Project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power, Station mentioned in the RFP, indicated under the RFP and PPA:

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. ”

32. From the above, we note that as per Article 13 of the PPA the ‘Change in Law’ *inter-alia*, means the enactment, adoption, promulgation, amendment, modification or repeal or any Law or a change in interpretation of any Law. In order to claim relief under Change in Law clause of the PPA the cause of action/event should necessarily be within the spectrum of the agreement entered amongst the parties. We observe that the Order dated 31.01.2019 on SCED pilot and the DoP dated 18.03.2019 are in the nature of *directions* to the POSOCO to implement the pilot for SCED for the thermal ISGS which are regional entities and whose tariff has been determined /adopted by this Commission. They do not fall under the definition of Change on Law as per Article 13 of the PPA. Furthermore, the Order dated 31.01.2019 on SCED pilot and the DoP dated 18.03.2019 mandate optimal despatch of the unused declared capacity over and above scheduled capacity only after the gate closure for scheduling after all obligations of the generator have been met by the generator. After the gate closure, when SCED despatch happens, there is no further scheduling opportunities for the generator or by the beneficiaries. It is observed that the existing scheduling practices prescribed in the IEGC are complied with, without major structural changes in the existing system /framework of scheduling and accounting.

33. In view of the above discussion we hold that Order dated 31.01.2019 in 2/SM/2019 on SCED pilot falls within the purview of the regulatory powers bestowed on the Commission under the Electricity Act, 2003. The issue is disposed of accordingly.

Issue No. 2: Whether the Petitioner should be allowed compensation from the NPCL Fund on account of cost incurred by the Petitioner for supply of power pursuant to the Commission’s Order dated 31.01.2019 in 2/SM/2019 on SCED pilot?

34. The Petitioner has claimed that implementation of the SCED pilot and DoP, has resulted in the Petitioner suffering a loss of approx. Rs. 19.28 crores for the relevant period of six months from 01.04.2019 to 30.09.2019. The Petitioner also submitted block wise details of the station during the aforesaid period along with the details of cost and recovery on account of participation in the pilot.
35. The Commission has gone through the additional information provided by the Petitioner as compliance to the ROP dated 24.01.2022. The Commission would also like to note that the said information was provided in the form of scanned copies, making it difficult to undertake proper analysis.
36. The energy scheduled for the period 01.04.2019 to 30.09.2019 by the Petitioner under SCED is as follows:

Description	Energy (MWhr)
Energy transacted for SCED UP	7,59,694
Energy transacted for SCED DOWN	1,00,521
Net energy transacted in SCED	6,59,173

37. From the above table, we observe that the Petitioner has received the SCED Up signal more than SCED Down during the said period. The Petitioner's initial estimated loss of Rs 30 crore in the original petition after considering the SCED compensation has come down significantly to Rs 19.28 Crore for the relevant period as per Petitioner's own submission under the compliance to the direction of the Commission.
38. We observe that as a result of participation in the pilot, the Petitioner has received Rs 2.21 per unit from the SCED pool as the energy charge as against the average energy charge of Rs 1.88 per unit at which the Petitioner sold the electricity to its beneficiaries. In other words, participation in the SCED has helped the Petitioner recover tariff more than it would have received if power were sold to its beneficiaries. Further, the very fact that under SCED pilot only the un-requisitioned surplus being the difference between the declared capacity and schedule has been used for SCED Up, establishes that no right has been breached. In respect of the projects

under section 62 and section 63 of the Act with two-part tariff, declared capacity is linked to recovery of fixed cost and also implies commitment to supply energy at rate of the energy charge determined or adopted, up to the level of declared capacity. As such, the argument of the Petitioner that average cost of fuel during the relevant period was higher leading to loss to tune of Rs 19.28 Crore, does not sustain.

39. Further, under the SCED pilot, the principle of merit order despatch of power is followed by the respondent in which the cheapest available generator is despatched first, followed by the costlier generation. Compensating the Petitioner on account of the revised fuel cost as claimed by the Petitioner would tantamount to revising energy charge rates post facto and in turn distort the principle of merit order. This would also tantamount to allowing the truing up of the variable charges to the extent of schedule and mean changing the basic fundamental structure of the SCED pilot.
40. The Commission has directed POSOCO to consider variable charges declared by the generators for the purpose of Reserve Regulations Ancillary Service (RRAS) for the SCED optimisation and accordingly, the detailed procedures were submitted by POSOCO. The settlement under SCED pilot is on weekly basis, taking into consideration the rate which has been intimated by the generator under RRAS Regulations.
41. In view of the above discussion, the Commission is of the opinion that retrospective reimbursement sought by the Petitioner would defeat the purpose of the SCED pilot and hence cannot be accepted.
42. The Petition No. 720/MP/2020 is disposed in terms of the above.

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(पी. के. सिंह)
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(अरुण गोयल)
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(आई. एस. झा)
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