

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 27/MP/2024

Coram:

**Shri Jishnu Barua, Chairperson
Shri Ramesh Babu, Member
Shri Harish Dudani, Member**

Date of Order: 30th December, 2024

In the matter of

Petition under Section 79(1)(b) and (f) of the Electricity Act, 2003 for adjudication of disputes in relation to the Change in Law claims of Adani Power Limited in terms of the Power Purchase Agreement dated 2.2.2007 read with Supplemental Power Purchase Agreement dated 5.12.2018 and consequential reliefs.

And

In the matter of

Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhawan,
Race Course Circle,
Vadodara-390 007

...Petitioner

Vs.

- 1. Adani Power Limited,**
Adani Corporate House"
Shantigram, Near Vaishno Devi Circle,
S. G. Highway, Khodiyar,
Ahmedabad,
Gujarat-382421
- 2. PFC Consulting Limited,**
(A Wholly Owned Subsidiary of Power Finance Corporation)
First Floor, Urja Nidhi
1, Barakhamba Lane,
Connaught Place,
New Delhi – 110001
- 3. Power Finance Corporation,**
'Urjanidhi', 1, Barakhamba Lane,
Connaught Place
New Delhi- 110001



4. The Ministry of Power, Government of India,
Shram Shakti Bhawan,
Rafi Marg,
New Delhi- 110001

...Respondents

Following were present:

Ms. Ranjitha Ramachandran, Advocate, GUVNL
Ms. Srishti Khindaria, Advocate, GUVNL
Shri Kumar Gaurav, APL
Shri Himanshu Umrajwala, APL

ORDER

The Petitioner, Gujarat Urja Vikas Nigam Limited (hereinafter referred to as "Petitioner/GUVNL") has filed the present Petition along with the following prayers:

"Interim prayer"

- a) *"Pending adjudication of the present Petition, stay the Supplementary Invoice dated 13.10.2023 raised by Adani Power on GUVNL;*
- b) *Pass interim orders directing Adani Power not to take any coercive action against GUVNL in regard to the Supplementary Invoice dated 13.10.2023;*
- c) *Stay the action taken by Adani Power by uploading the Supplementary Invoice dated 13.10.2023 on the PRAAPTI Portal, consequently the regulation of power supply and consequences thereof;*
- d) *Pass ad interim ex-parte orders in terms of the above; and*
- e) *Pass any such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case*

"Main prayer:"

- a) *"Admit the present petition;*
- b) *Declare that the Supplementary Invoice dated 13.10.2023 raised by Adani Power is not in terms of the Power Purchase Agreement dated 02.02.2007 read with the Supplementary Power Purchase Agreement dated 05.12.2018, and therefore not payable;*
- c) *Direct Adani Power to withdraw its Supplementary Invoice dated 13.10.2023;*
- d) *Award exemplary costs in favour of GUVNL and against Adani Power;*
- e) *Award costs of litigation in favour of GUVNL; and*
- f) *Pass any such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case."*

2. The Petitioner is a Company incorporated under the provisions of the Companies Act, 1956 and undertakes the functions of bulk purchase of electricity from the generators and other sources and bulk supply of electricity to the State-owned distribution licensees in the State of Gujarat after the re-organisation of the Gujarat Electricity Board (hereinafter referred to as 'GEB').

3. Respondent No. 1, Adani Power Limited (hereinafter referred to as 'Adani Power') earlier Adani Power (Mundra) Limited, owns and operates the 4620 MW thermal power plant within Special Economic Zone at Mundra, Gujarat, consisting of four Units of 330 MW in Phase-I and II, two Units of 660 MW in Phase-III and three Units of 660 MW in Phase-IV. On 2.2.2007, Adani Power and GUVNL entered into a Power Purchase Agreement (hereinafter referred to as 'PPA') for the sale and purchase of 1000 MW power from Units 5 and 6 of the Mundra Power Plant. Respondent No. 2 is an entity responsible for the functioning of the PRAAPTI Portal (Payment Ratification and Analysis in Power procurement for bringing transparency in Invoicing of Generators Portal) designated by the Ministry of Power, Government of India.

4. The present Petition has been filed with respect to the claims of Adani Power towards custom duty on spares and consumables from March 2022 to March 2023 under Change in Law provisions of the PPA. The Petitioner does not challenge the legitimacy of customs duty as a Change in Law event, in accordance with the Commission's Order dated 17.9.2018 read with the Order dated 4.5.2017 in Petition No. 235/MP/2015, wherein the Commission recognized that the reimbursement only after the consideration of the condition that the impact has to be more than 1% of the

value of Letter of Credit and the mechanism proposed also recognised the said condition to be applied year-wise. Accordingly, a Change in Law claim will be admissible if, due to a Change in Law, the increase/ decrease in revenues or cost to Adani Power is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a contract.

5. The Petitioner has mainly submitted as under:

(a) On 5.12.2018, Adani Power and GUVNL entered into a Supplementary Power Purchase Agreement (hereinafter referred to as "SPPA") in terms of Article 18.1 of the PPA dated 2.2.2007 to amend certain provisions of the PPA, including in regard to Change in Law. Accordingly, in terms of the SPPA, Adani Power is not entitled to any Change in Law claims on energy charges. Therefore, there is no further claim of Change in Law being raised on the aspects of fuel, etc.

(b) On 13.10.2023, Adani Power raised a supplementary invoice on GUVNL towards a Change in Law claim for customs duty on spares and consumables of Rs. 78,26,557/-. As per the claim of Adani Power, the Letter of Credit opened by GUVNL for the PPA dated 2.2.2007 read with the SPPA is Rs. 297.92 crores, and 1% of the value of such Letter of Credit will be Rs. 2.97 crores. Therefore, the supplementary invoice for Change in Law raised by Adani Power for Rs. 78,26,557/- is less than Rs. 2.97/- crores, and therefore, the minimum threshold of the impact being more than 1% of Letter of Credit is not satisfied. Owing to the amount claimed by Adani Power for the impact of Change in Law being below Rs. 2.97 crores, vide letter dated

18.10.2022, GUVNL returned the invoice raised by Adani Power vide letter dated 18.10.2023. In response to the said letter, Adani Power replied vide letter dated 20.11.2023 and in the said letter included IGST and GST of Rs. 255 crores in its Change in Law claims and the same amounts are also claimed in the monthly bills.

(c) In addition to the above letter of Adani Power, i.e., 18.10.2023, the said amounts are not to be claimed as Change in Law but to be part of the energy charges. As per the SPPA dated 5.12.2018, there is no Change in Law on energy charges, and admittedly, the IGST and GST and compensation cess relating to fuel are part of the energy charges. In regard to the above, the energy charges, which were a non-escalable fixed amount of Rs. 1.3495 per kWh under Schedule 10 of the PPA as per the bid submitted by Adani Power, were subsequently amended in the SPPA dated 5.12.2018 as computation of energy charges based on the formula, in terms of Article 3.2.3 of the SPPA. Accordingly, energy charges claimed on the basis of the formula have to be on a month-to-month basis; there cannot be any further claim on account of the Change in Law event. Article 13.2(b) dealing with the operation period does not cover the monthly energy charges calculated as per the formula given in the SPPA, as the same has already been provided for in the basic energy charges payable. Article 13.2 of the PPA deals with the determination of the impact of the Change in Law other than those already covered in the formula for basic energy charges.

(d) When the Supplementary PPA had already recognised the energy charges with reference to the taxes and charges payable on account of GST, etc., there is no impact of Change in Law when there is an increase/decrease in the GST/IGST. The application of Article 13.1 of the PPA will be there only if there is an impact of Change in Law and not merely because of an event of Change in Law. If the impact had already been factored in the energy charges, the same cannot be claimed under Article 13.1 of the PPA. If the claim is not admissible under Article 13.1, it cannot be considered for the purpose of determining the impact due to a Change in Law to reach the threshold limit of 1% of the Letter of Credit value.

(e) Adani Power has, contrary to the terms of the PPA, sought to include the GST and IGST claims in the calculation of its Change in Law claims to meet the 1% threshold as specified in the proviso to Article 13.2(b) of the PPA. This is clear from the fact that Adani Power had not made any such claim at the time of presenting the supplementary invoice.

(f) The Change in Law claims can only be considered if raised through supplementary invoices in terms of Article 13.4 of the PPA. Adani Power in its letter dated 20.11.2023, has admitted that the ISGT and GST compensation is '*claimed along with Monthly Invoices*'. Until the implementation of the SPPA, the claims for IGST and GST and compensation cess on coal were being billed as supplementary invoices for Change in Law, which was stopped after the implementation of the SPPA dated 5.12.2018. Therefore, clearly there is a difference in the consideration of the amount prior to the SPPA dated

5.12.2018. After the said SPPA, the said amount is not a Change in Law claim.

(g) Adani Power has not considered the representations made by GUVNL and, instead of withdrawing its claim, has proceeded to upload the supplementary invoice of Rs. 78,26,557/- on the PRAAPTI Portal, and the trigger date for the same is 4.2.2024.

(h) The claims are clearly not admissible under the provisions of Article 13.2 of the PPA as the claim is less than the threshold limit of 1% of Letter of Credit, as provided therein, Adani Power is arbitrarily adopting coercive action to recover the amount. Accordingly, a minimum threshold for claiming compensation for a Change in Law event has to be done as per the PPA and as recognised by the Commission. However, since, in the present case, the same has not been followed, the compensation is not payable.

Hearing dated 2.2.2024

6. The Petition was heard on 2.2.2024, and after hearing the submissions of the Petitioner, the Commission admitted the instant Petition and directed the parties to file their respective replies and rejoinder, if any. The Commission also directed that no coercive action, including the regulation of supply, be taken against the Petitioner in respect of the supplementary invoice dated 13.10.2023 till the next date of the hearing.

Reply of Respondent No. 1, i.e., Adani Power Limited

7. The Respondent No. 1, vide its reply dated 31.5.2023, has mainly submitted as under:



(a) The Commission, vide its order dated 4.5.2017 in Petition No. 235/MP/2015, has approved Change in Law events, i.e., (i) Clean Energy Cess, (ii) Countervailing Duty (CVD) and (iii) Customs Duty on Spares & Consumables in terms of Article 13 of the PPA. Thereafter, under the GST regime, the Clean Energy Cess has been replaced by the GST compensation cess while the Countervailing Duty (CVD) has been replaced by IGST, and the same is approved by the Commission vide order dated 14.3.2018 in Petition No. 13/SM/2017 as Change in Law event. Accordingly, the compensation has been claimed in accordance with the Change in Law events through the supplementary invoices till October 2018.

(b) Subsequently, based on the recommendations of the High-Power Committee Report, GR dated 1.12.2018 of the Government of Gujarat and the Hon'ble Supreme Court order dated 29.10.2018 in MA No. 2705-2706 of 2018 in Civil Appeal Nos. 5399-400 of 2016, GUVNL and APL signed a Supplementary PPA (SPPA) dated 5.12.2018, and the Commission vide its order dated 12.4.2019 in Petition No. 374/MP/2018 approved the said Supplementary PPA.

(c) As per the SPPA dated 5.12.2018, the mechanism for claiming Change in Law events, i.e. (i). GST Compensation Cess and (ii) IGST has been changed, and both approved Change in Law events became part of energy charges to be claimed through the monthly energy invoice to be raised by Adani Power every month. The nature of Change in Law events has not changed. Principally, both GST Compensation Cess and IGST continue to be

approved Change in Law events under Article 13 of the PPA even though they have become part of energy charges as per the SPPA dated 5.12.2018.

(d) As per Article 3.2.3 of SPPA, energy charges have to be claimed as per the landed cost of coal, which includes Change in Law events related to coal, and the Petitioner has been making compensation towards such Change in Law events as a part of energy charges. Further, Article 3.2.4(III)(vi) of the SPPA dated 5.12.2018 also specifies approved Change in Law events; in addition, Article 13.2(b) of the PPA provided threshold value for payment of the compensation towards Change in Law.

(e) Accordingly, Respondent vide supplementary Invoice dated 13.10.2023 claimed Change in Law compensation for Levy of Customs Duty on spares and consumables for the FY 2022-2023 amounting to Rs. 78,26,557/- which in aggregate with Change in Law events: - (i). GCT compensation Cess & (ii). IGST amounting to Rs. 234.77 crores, totals out to Rs. 235.55 crores (Rs. 234.77 crores + Rs. 0.78 crores) for the aforesaid period. The said amount is much higher than the threshold value of 1% of LC value, i.e., Rs. 2.97 crores (1% of Rs. 297.92 crores).

(f) Respondent relied on several decisions to substantiate the point that the total impact on account of increase/ decrease in revenues or cost to the seller exceeds 1% of the LC value and, therefore, the Change in Law compensation claimed towards levy of Custom Duty on Spares and Consumable is payable by Petitioner as per Article 13.2(b) of the PPA i.e., CERC order dated 17.10.2022 in Petition No. 700/MP/2020 & 121/MP/2022 in

JPL vs. TANGEDCO; MERC order dated 03.08.2018 in Case No. 124 of 2018 in APML vs. MSEDCL and MERC order dated 18.10.2017 in Case No. 38 of 2016 in APML vs. MSEDCL.

(g) The Petitioner, vide its letter dated 10.10.2019, has admitted Rs. 6,89,807/- towards the claim for Change in Law compensation towards Customs Duty on Spares and Consumable raised by the Respondent on 13.9.2019 for the period from April 2018 to March 2019 (Including the period from 15.10.2018 to March-2019). The admitted and paid amount was also less than the threshold limit of 1% of LC value, i.e., Rs. 63.42 lakh (1% of Rs. 63.42 Cr). As Petitioner had earlier in Oct 2019. i.e., subsequent to the signing of SPPA dated 05.12.2018, had paid Change in Law compensation towards Customs Duty on Spares & Consumable of Rs. 6,89,807/-, the Petitioner shall not be permitted to approbate and reprobate.

(h) As per Article 11.6.9 of PPA the Petitioner is obligated to pay the claimed amount even if the same is disputed.

(i) There is no valid ground or justification for the Petitioner to dispute the claim of Change in Law towards Customs Duty on Spares & Consumable of Rs 78,26,557/- for FY 2022-2023.

Rejoinder on behalf of the Petitioner

8. The Petitioner, vide its rejoinder dated 11.3.2024, has mainly submitted as under:

(a) The Petitioner denied the contentions of the Respondent that the claims for energy charges as per the SPPA are not change in law as claimed by Adani Power. As in terms of the SPPA, Adani Power is not entitled to any change in law claims on energy charges.

(b) Adani Power has failed to deal with the implication of the proviso to Article 3.2.4(vi) of the SPPA, which unequivocally states that Adani Power shall *'not be entitled to any payment towards approved Change in Law for the Energy Charge from the date of approval of Supplemental Agreement by Appropriate Commission.'*

(c) The claim for Rs. 78,26,557 raised by Adani Power vide the `Supplementary Invoice is around 0.3% of the total LC value, which is below 1% of the Letter of Credit value in terms of the proviso to Article 13.2(b) of the PPA.

(d) The judgments relied upon by Adani Power are distinguishable on facts as well as principles of law. The issue herein is not on whether the change in law is to be considered in aggregate or not but rather whether, in the present case, Adani Power's claims for change in law cross the threshold of 1% of the Letter of Credit.

(e) The claim for GST Compensation Cess and IGST was claimed as part of Change in Law events (until October 2018), and a Supplementary invoice was raised (which also included BCD on coal). However, for FY 2022-23, no such invoice has been raised for any change in law event other than customs duty

on spares and consumables. Therefore, the only change in law being claimed is customs duty on spares and consumables, and which claim does not cross the threshold of 1% of the Letter of Credit.

Hearing dated 20.3.2024

9. The matter was finally heard on 20.3.2024, and the parties were directed to file their respective written submissions. Accordingly, the Commission reserved the matter for order.

Written Submissions of GUVNL and Adani Power Limited

10. The Petitioner, GUVNL, and Adani Power, vide its written submissions dated 5.4.2024, have mainly reiterated the submissions made in its Petition and reply. However, Adani Power, in its written submission, has shown a comparison in a tabular form between the increase in cost to the seller in aggregate for the Financial Year 2022-23 with the threshold value (i.e., 1% of LC value) and the same is reproduced as under:

As a result of the Change in Law, increase in cost to the seller in aggregate for the Financial Year 2022-23 (Rs. crores)		Threshold Value (1 % of LC value of 297 crores)	Test
1. Levy of GST Compensation Cess and IGST	234.77	-	Whether Rs. 235.55 crores is in excess to the Rs. 2.97 crores? Yes Test is successful. Hence, the compensation is payable.
2. Levy of Custom Duty and Spares and Consumables	0.78		
3. Total Increase in cost to APL (1+2)	235.55	2.97	

Analysis and Decision



11. We have considered the submissions of the Petitioner and the Respondents and perused the documents on record.

12. We have considered the submissions made by the parties. The only issue that arises for our consideration is whether the Supplementary Invoice dated 13.10.2023 raised by APL for the Change in Law compensation towards Customs Duty on Spares & Consumable for the period from March 2022 to March 2023 is payable or not by GUVNL in terms of the PPA dated 2.2.2007 read with the SPPA dated 5.12.2018.

13. At the outset, it is pertinent to note that there is no dispute between the parties as to APL's claim for the Customs Duty on Spares & Consumable being a Change in Law event in terms of the Order dated 4.5.2017 passed by the Commission in Petition No. 235/MP/2015 (APL v. Uttar Haryana Bijli Vitran Nigam Ltd. and Ors.). Apart from the Custom Duty on Spares & Consumables, the said Order *inter alia* also recognized the levy of Clean Energy Cess and Countervailing Duty as a Change in Law under Article 13 of the PPA. However, under the GST regime, the Clean Energy Cess has been replaced by the GST Compensation Cess, and the Countervailing Duty has been replaced by IGST. Moreover, the parties are also not at dispute that as per the *proviso* to Article 13.2(b) and the mechanism prescribed by the Commission in its Order dated 4.5.2017, the year-wise compensation for the Change in Law claims relating to the Operating Period becomes payable only if the increase in revenue or cost to APL is in excess of an amount equivalent to 1% of the LC in aggregate for a contract year. Furthermore, it is also not a disputed proposition that the value of LC opened by Bank of Baroda in favour of APL, on

behalf of GUVNL, for the concerned period was Rs.297.92 crores and 1% of LC amount i.e. the threshold for claiming the Change in Law compensation for the Operating Period was Rs. 2.97 crores.

14. Evidently, the Supplementary Invoice dated 13.10.2023 raised towards Change in Law compensation for the Customs Duty on Spares & Consumable was for Rs.0.78 crore only. At the same time, the impact of the events viz. GST Compensation Cess and IGST for the FY 2022-23 was to the tune of Rs. 234.77 crores and it is the precise case of APL that its Supplementary Invoice dated 13.10.2023 is proper and valid since the aggregate impact of the Change in Law events viz. (i) Custom Duty on Spares and Consumables, (ii) GST Compensation Cess, and (iii) IGST, was Rs. 235.55 crores, which is much higher than the threshold value of 1% of LC value. Whereas, it is the case of GUVNL that in view of the SPPA dated 5.12.2018, the events viz. GST Compensation Cess and IGST can no longer be considered as Change in Law events.

15. Hence, the controversy turns on the provisions of the SPPA and whether in light of these provisions, can the GST Compensation Cess and IGST still be considered as Change in Law event(s). In the above background, the relevant provisions of the SPPA dated 5.12.2018 are extracted hereinbelow:

“3.2 All provisions in the PPA relating to determination of Capacity Charge & Energy Charge, shall be replaced and substituted with the following provisions.

.....

3.2.3 Energy Charge shall be determined for each Month, as under:

(Energy charge rate in Rs./kWh) × {Scheduled energy (ex-bus) for the Month in kWh.}

Energy charge rate (ECR) in Rupees per kWh on ex-power plant basis shall be determined to four decimal places in accordance with the following formulae:

$$ECR = \{GHR \times LPPF / CVPF\} \times 100 / (100 - AUX) \text{ minus } DT$$

Where:



AUX = Lower of actual or normative auxiliary energy consumption of 6.50% as specified in the Tariff Regulations as defined herein.

CVPF (as received basis) = Weighted Average Gross calorific value of coal in Kcal / Kg on as billed basis minus lower of (i) actual difference between GCV at loading port and unloading port or (ii) 72 Kcal / Kg towards loss of heat during transportation as per ISO 1928 (dated 01.06.2009)

ECR = Energy charge rate, in Rupees per kWh sent out.

GHR = Lower of actual or Gross station heat rate of 2274 in kCal per kWh as specified in the Tariff Regulations as defined herein.

LPPF = Weighted average landed price at the plant site of coal as primary fuel (which for the avoidance of doubt shall include all taxes on the sale, transportation & import of coal and inland transportation costs for transporting and delivering coal to the plant site), in Rupees per kg, during the relevant Month. LPPF shall be worked out as per table in Clause 3.2.4 of this Supplemental Agreement.

DT - is discount in relation to Mining Profit as determined in clause 3.3 of this Supplemental Agreement.

For the avoidance of doubt, this discount (DT) will be determined and applied only in respect of Energy Charge in respect of actual power generation for Contracted Capacity as specified in the PPA dated 02.02.2007 and in respect only of such proportion of the Capacity that pertains to Contracted Capacity linked to imported coal as Fuel.

.....
3.2.4 The Energy Charge determined as above, shall be subject to the following conditions:

.....
(iv) The payment of the Monthly Bill and Supplementary Bill shall be as per the Tariff specified under PPA dated 2.02.2007 until the approval of the Supplemental Agreement by Appropriate Commission. Differential amount towards Revised Tariff shall be payable after approval of Appropriate Commission without any interest / carrying cost / delay payment surcharge.

.....
(vi) Further, the Seller shall not be entitled to any payment towards approved Change in Law for the Energy Charge from the date of approval of Supplemental Agreement by Appropriate Commission. Any payment received by the Seller towards approved Change in Law for the Energy Charge component for the period between Amendment Effective Date and the date of approval by the Appropriate Commission shall be adjusted in the differential amount stated at Para (iv) above.

The above SPPA marks a shift in the methodology for the determination of Energy Charge Rate (ECR), i.e., from the quoted rates to a formulae-based mechanism. Further, a bare reading of the above clauses of the SPPA clearly reveals that the computation of the ECR now includes all taxes on the sale, transportation & import of coal, and inland transportation costs for transporting and delivering coal to the Plant site. Thus, the levies of GST Compensation Cess and IGST on the coal are factored into while arriving at the ECR. Hence, for this very

reason, the parties, at Article 3.2.4(vi), appear to have agreed that the seller shall not be entitled to any payment towards approved Change in Law for the Energy Charge from the date of approval of the SPPA by the Appropriate Commission.

16. While the parties have not specifically alluded to the subsequent developments that took place after the SPPA dated 5.12.2018, we find it appropriate to refer them for ascertaining the overall intent of the parties and the likely impact, if any, these developments may have on the controversy at hand. Subsequent to the SPPA dated 5.12.2018, the APL and GUVNL went on to sign the Settlement Deed dated 3.1.2022 and the Supplementary PPA dated 30.3.2022. The background that led to the signing of these Settlement Deed and the Supplemental PPA dated 30.3.2022 has already been captured and discussed in detail in the order dated 13.6.2022 passed by the Commission in Petition No. 111/MP/2022 along with IA No. 36/2022 (GUVNL v. APMuL) whereby the Commission proceeded to determine the Base Rate as on 15.10.2018 in terms of the provisions of the Settlement Deed and Supplemental PPA dated 30.3.2022 for the recommendation to the Government of Gujarat. Since the series of events that led to the signing of the Settlement Deed and SPPA do not have any material bearing on the controversy involved in the present case, we do not find it necessary to reiterate them herein. However, since by way of the above documents, certain provisions, including methodology for computing the ECR contained in SPPA dated 5.12.2018, have also been modified, we may refer to the relevant provisions of the Settlement Deed and the Supplemental PPA dated 30.3.2022 for the limited purpose as noted above:

Settlement Deed dated 3.1.2022

“5. APMuL and GUVNL hereby mutually agree on the following terms in regard to the tariff admissible in modification and supersession of the terms contained in the PPA dated 2.2.2007 read with the related SPPA dated 5.12.2018 which shall be effective 15.10.2018 and govern the period till 9.7.2019 and thereafter from the date of the commencement of the supply under this Settlement for the entire duration and in PPA dated 6.2.2007 read with related SPPA dated 5.12.2018 which shall be effective 15.10.2018 and govern the entire duration.

a. the fixed or capacity charges shall be as per the terms of the PPA dated 02.02.2007 read with related SPPA dated 05.12.2018 and as per PPA dated 06.02.2007 read with related SPPA dated 05.12.2018 respectively without any further change and the same shall be applicable through out the duration mentioned above;

b. To avoid disputes in relation to energy payments and to ensure pass through of coal cost in a prudent and transparent manner, it is decided that the payment of energy charges shall be linked to the escalation rates notified by CERC from time to time for which the base rate is to be determined. GUVNL shall request CERC for determination of the base rate for following sub-parameters viz. FOB coal cost (in USD/kWh) for quality of coal consumed including other charges, Ocean Freight (in USD/kWh) and Port Handling Charges (in Rs./kWh) as on 15.10.2018 based on normative operating parameters as per provisions of SPPA dated 5.12.2018.

The base rate recommended by CERC shall be submitted to the Govt. of Gujarat for approval.

In addition to above, applicable tax, duties, cess etc. on energy charges shall be payable as per the SPPA on reimbursement basis, whereas other Change in Law shall be as per PPA with approval of CERC.

c. The base rate as per above would be finalised by the Government of Gujarat and the parties agree that they will abide by decision of the Government of Gujarat on the determination of base rates mentioned above.

d. In addition to the above, the applicable tax, duties, cess etc. on energy charge shall be payable as per the SPPA on reimbursement basis. Whereas other Change in law shall be as per PPA read with SPPA dated 05.12.2018 with approval of Central Electricity Regulatory Commission. There shall be no other consideration or claim for change in law in relation to variable / energy charges.

Supplemental PPA dated 30.3.2022

“4.1 The following provisions in regard to the tariff admissible in modification and supersession of the terms contained in the PPA dated 2.2.2007 read with the related SPPA dated 5.12.2018 shall be effective from 15.10.2018 and govern the period till 9.7.2019 and thereafter from 15.3.2022 being the date of commencement of supply

under the Deed of Settlement for the entire duration of the PPA as provided in the SPPA dated 5.12.2018:

(1) The fixed or capacity charges shall be as per the terms of the PPA dated 2.2.2007 read with SPPA dated 5.12.2018 without any further change and the same shall be applicable throughout the duration of the PPA read with SPPAs.

(2) The Energy Charge Rate for determination of Energy Charges shall be determined based on a Base Rate to be determined as provided hereunder and the applicable escalation rates notified by the Central Electricity Regulatory Commission from time to time.

(3) Determination of Base Rate for Energy Charges: The Procurer shall request the Central Electricity Regulatory Commission for determination of the Base Rate for following sub-parameters viz. FOB coal cost (in USD/kWh) for quality of coal consumed including other charges, Ocean Freight (in USD/kWh) and Port Handling charges (in Rs./kWh) as on 15.10.2018 based on normative operating parameters as per provisions of SPPA dated 5.12.2018.

The Base Rate recommended by Central Electricity Regulatory Commission shall be submitted to the Government of Gujarat for approval. The Base Rate as per above would be finalised by the Government of Gujarat and the parties agree that they will abide by decision of the Government of Gujarat on the determination of the Base Rate mentioned above.

(4) In addition to the above, applicable tax, duties and cess etc. on energy charges shall be payable as per the SPPA dated 5.12.2018 on reimbursement basis, whereas other Change in Law shall be as per the PPA with approval of the Central Electricity Regulatory Commission. A separate Supplemental invoice as per PPA dated 2.02.2007 shall be raised for seeking reimbursement of approved Change in Law. There shall be no other consideration or claim for change in law in relation to variable/energy charges.

(5) Each of the sub-parameters viz. FOB coal cost (in USD/kWh) for quality of coal consumed including other charges, Ocean Freight (in USD/kWh), and Port Handling charges (in Rs./kWh) as on 15.10.2018 shall be thereafter escalated as per the applicable Central Electricity Regulatory Commission notified escalation rate from time to time related to imported coal. The month to month Energy charges based on Base Rate and escalation/adjustment provided by the Central Electricity Regulatory Commission shall apply for all intent and purposes for the period from 15.10.2018 onwards.

Base Rate for both escalable and non-escalable components of Transportation Energy Charges (Ocean Freight) and Port (Fuel) Handling charges shall be determined by the Central Commission subject to ceiling rate for each of them as per the SPPA dated 5.12.2018.

(6) The actual amounts paid by the Procurer to the Seller under the PPAs/SPPAs for the period from 15.10.2018 till date of settlement shall be adjusted accordingly without interest.

The Parties have agreed to the continued validity of the PPA dated 02.02.2007 in terms of the Deed of Settlement and the supply of power by Seller to Procurer has been restored from 15.03.2022 and the Seller shall duly declare availability against the Contracted Capacity to the Procurer and undertake generation and supply to the Procurer from Units 5 & 6 on sustained basis in terms of the PPA read with this Supplemental Agreement and Deed of Settlement.....”

“7. For the purpose of working of monthly energy charges, the Article 3.2.3, 3.2.4, & 3.5.3 in both the SPPAs dated 5.12.2018 shall be substituted with the following:

Energy Charge shall be determined for each Month, as under:

Monthly energy charges for month ‘m’ will be calculated as under:

$$MEP_m = AEO_m \times MEP_n \text{ minus } DT$$

Where

MEP_m is the monthly Energy Charges for the month ‘m’ (in Rs)

AEO_m is the scheduled energy at the delivery point during the month ‘m’ (in kWh)

MEP_n is the Energy Charge, in Rs./kWh (upto four decimal), and is the sum of (a) : (i) Escalable Fuel Energy Charges (MEFEP_n) (ii) Escalable Transportation Energy Charges (METEP_n) (iii) Escalable Fuel Handling Energy Charges (MEFHEP_n) and (b): (i) Non Escalable Transportation Energy Charges (MNETEP_n) (ii) Non Escalable Fuel Handling Energy Charges (MNEFHEP_n) for the contract year ‘n’ in which Month ‘m’ occurs and computed as mentioned hereunder:

.....
In addition to the above, applicable tax, duties and cess etc. on energy charges shall be payable as per the SPPA dated 5.12.2018 on reimbursement basis, whereas other Change in Law shall be as per the PPA with approval of the Central Electricity Regulatory Commission.”

Suffice it to note that under these documents also, the parties have agreed and decided to continue with the payment of applicable taxes, duties, cess, etc., on energy charges as per the provisions of the SPPA dated 5.12.2018, i.e., on a reimbursement basis and that there shall be no other consideration/claim for Change in Law in relation to variable charge/energy charges. We, however, hasten to add

that reference to these documents, i.e., Settlement Deed and Supplemental PPA dated 30.3.2022, has been only for the limited purpose of ascertaining the overall intent of the parties as reflected therein and the likely impact, if any, such documents have on the issue involved in the present case and nothing beyond.

17. In view of the above, the events viz. GST Compensation Cess and IGST on the coal, now being part of the Energy Charge Rate, can no longer be considered as a Change in Law event for APL. Pertinently, the impact of these levies of APL, as pointed out, is now being directly addressed in the ECR and by way of Monthly Invoice(s) raised by APL. Indubitably, APL is no longer required to raise a Supplementary Invoice(s) for claiming any reliefs *qua* such events/levies as it might have required for a Change in Law event.

18. APL has also sought to point out that previously, GUVNL had paid the amount of Rs. 6,89,807/- for Change in Law compensation towards Customs Duty on Spares and Consumables for the period from April 2018 to March 2019 (including the period from 15.10.2018 to March 2018) by its letter dated 10.10.2019 without having raised any such dispute that the compensation amount is less than the threshold limit of 1% of LC value. Thus, the Petitioner ought not to be permitted to approbate and reprobate. In response, GUVNL has clarified that the said compensation was paid as there were other Change in Law claims for the period from April 2018 to March 2019, which amounted to more than 1% of LC amount and the cumulative amount towards Change in Law for FY 2018-19 paid by GUVNL to APL was Rs. 31.50 crores including the Customs Duty on Spares and Consumables. It is also submitted that the period of FY 2018-19 includes the period prior to

15.10.2018 (before SPPA), and there has been a change in the methodology since 15.10.2018, and the Change in Law claims for FY 2018-19 will also include the claims prior to 15.10.2018 and if the same were payable in terms of unamended PPA then the same cannot be equated with the mechanism in place w.e.f. 15.10.2018. We have considered the submissions made by the parties and do not find any approbation and reprobation on the part of GUVNL as alleged by APL. As pointed out by GUVNL, the contract year of 2018-19 also included the period prior to the effective date of the SPPA dated 5.12.2018 (i.e., the period prior to 15.10.2018) and the Change in Law claims for such period. Hence, if such Change in Law claims for the contract year 2018-19, which also factored into claims relating to the period prior to 15.10.2018, exceeded the 1% of the LC amount for the said period, then even claim towards Customs Duty on Spares and Consumables would become payable, as has also been paid by GUVNL. However, as noted above, all approved Change in Law events on the Energy Charges ceased to be a Change in Law event upon the SPPA coming into effect. Hence, for the subsequent contract year(s), the balance Change in Law event(s) has to pass the threshold prescribed in Article 13.2(b) for the compensation of such Change in Law event(s) becomes payable.

19. In view of the above observations and findings, we hold that in light of the provisions of the SPPA dated 5.12.2018, the GST Compensation Cess and IGST on coal can no longer be considered a Change in Law events, and as a result, the Supplementary Invoice dated 13.10.2023 raised by APL towards the Change in Law compensation for the Customs Duty on Spares & Consumable for the period from March 2022 to March 2023, being less than the 1% of LC amount for the contract year, cannot be held as payable by GUVNL in terms of Article 13.2(b) of the PPA.

20. The Petition No. 27/MP/2024 is disposed of in terms of the above.

Sd/-
(Harish Dudani)
Member

sd/-
(Ramesh Babu V.)
Member

sd/-
(Jishnu Barua)
Chairperson

