



Petition No. 1376 of 2018

BEFORE

THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

LUCKNOW

Date of Order: 22.02.2021

PRESENT:

Hon'ble Shri Raj Pratap Singh, Chairman

Hon'ble Shri Kaushal Kishore Sharma, Member

Hon'ble Shri Vinod Kumar Srivastava, Member (Law)

IN THE MATTER OF: Petition under Section 86 (1) (b) and Section 86 (1) (f) of the Electricity Act, 2003 read with Regulation 26 of the Uttar Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 and Clause 6.9 of the Final Power Purchase Agreement of Vishnuprayag H.E.P. (400 MW) dated 16th January 2007 between Jaiprakash Power Ventures Limited and Uttar Pradesh Power Corporation Limited for revision in Design Energy, consequent changes in the Saleable Design Energy and also changes in the incentives towards the Secondary Energy according to the revised Design Energy owing to the situation of Change in Law.

M/s Jai Prakash Power Ventures Ltd.,

JA House, 63 Basant Lok,

Vasant Vihar, New Delhi – 110 057

..... Petitioner



1. UP Power Corporation Ltd. (through its Chairman), 7th Floor, Shakti Bhawan Extnn, 14- Ashok Marg, Lucknow
2. Government of Uttar Pradesh. (through its Principal Secretary, Energy) Bapu Bhawan, Lucknow.
3. Government of Uttarakhand. (Through its Principal Secretary (Irrigation & Power), Uttarakhand

.....Respondents

ORDER

(Date of Hearing 08.12.2020)

1. The Petitioner, herein, Jaiprakash Power Ventures Limited has filed this instant Petition under Section 86(1)(b) and Section 86(1)(f) of the Electricity Act, 2003 read with Regulation 26 of the Uttar Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 and Clause 6.9 of the Final Power Purchase Agreement of Vishnuprayag H.E.P. (400 MW) dated 16th January 2007 for revision in Design Energy, consequent changes in the Saleable Design Energy and also changes in the incentives towards the Secondary Energy according to the revised Design Energy owing to the situation of Change in Law.
2. The Design Energy as defined under Article 1 was fixed vide order of this Commission dated 19.07.2006. The Petitioner has sought that Design Energy is now liable to be changed owing to the situation of change in law pertaining to the revised direction of E-flow of water. The petitioner has stated that there would be a reduction in the Design Energy from 1774.42 MU to 1704.04 MU thereby reducing the Design



Energy by a total of 70.38 MU and the Saleable Design Energy to 1484.58 MU. The reduction of the Saleable Design Energy would also cause a change in the incentive for the Secondary Energy as well as the computation of the Energy Tariff as defined in Article 3.7 of PPA for which also the petitioner has prayed in the instant petition.

3. The Petitioner has made following prayers:

- a) Pass an order for a revision of Design Energy from 1774.42 MU to 1704.04 MU thereby causing a reduction of 70.38 MU in terms of Article of 6.9 of PPA;
- b) Pass an order directing the change in the computation of Saleable Design Energy as defined under Article 3.3 of the PPA and thereby modify the order dated 19.07.2006 passed by this Hon'ble Commission and consequently the change in computation of Energy Tariff for Saleable Design Energy in terms of Article 3.7 of the PPA;
- c) Pass an order for the changes in the Incentives towards Secondary Energy based on the Revised Design Energy; and
- d) Pass such and further orders as this Hon'ble Commission thinks fit and proper in the present case.

Brief Facts in Petition:

- 4.** The Petitioner Company has developed and commissioned Vishnu Prayag Hydro Electric Project (4x100 MW) across the



river Alaknanda at Vishnu Prayag in District Chamoli, Uttarakhand in Private Sector.

5. A Power Purchase Agreement was executed between the Petitioner and the erstwhile UP State Electricity Board on 07.09.1996. Consequent upon creation of Uttaranchal State on reorganization of Uttar Pradesh, an amended PPA was executed between UPPCL and the Petitioner on 19.09.2002 which was submitted before the Commission and approved by vide its order dated 14.06.2003, 16.02.2006, 19.07.2006 and 20.11.2006.
6. In terms of the PPA, 88% Energy is sold to the Respondent on the Tariff as defined in the PPA. The Government of Uttarakhand is given the balance 12% Energy generated by the Project free of cost.
7. The petitioner filed a Petition No. 351 /2006 on 24.05.2006 for approval of Provisional Tariff for the period 01.06.2006 to 31.03.2007 and for approval of Design Energy for the Project based on Revised Hydrological Data approved by the Central Water Commission (CWC) / Central Electricity Authority (CEA). This Commission vide order dated 19.07.2006 approved the Provisional Tariff and the Design Energy. The release of water from the 400 MW Vishnuprayag HEP was being regulated in terms of the Amended Implementation Agreement dated 22.03.2003 and the Final Power Purchase Agreement dated 16.01.2007 at the rate of 0.14 cumecs for aquatic life and accordingly the Design Energy for the



purposes of the PPA was fixed at 1774.42 MU vide order of this Commission dated 19.07.2006.

8. Thereafter, the Final Power Purchase Agreement, incorporating all modifications and amendments, was entered into on 16.01.2007 between the petitioner and the respondent no. 1. Based on the Final Power Purchase Agreement, Commission vide its order dated 07.10.2008 and 13.10.2008 approved the Final tariff for the Project for the years 2008 - 09 and onwards.

9. On 09.08.2107 the Hon'ble National Green Tribunal in the petition namely Pushp Saini vs. Ministry of Environment, Forest & Climate Change & Ors. passed an order directing that all rivers in the country shall maintain minimum 15% to 20% of the average seasonal lean flow of that river. Consequently, the Secretary, Government of Uttarakhand issued Letter No. 708/1/2018-05/24(writ)/2016 dated 05.06.2018 to all the Hydro-Electric Project Developers including the petitioner directing inter alia release of minimum environmental (E)-flow at the rate of 15% of average flow during the lean season. Uttarakhand Jal Vidyut Nigam Limited on 03.08.2018 vide letter no. 2990/UJVNL/01/PR-NE/W-1 directed JPVL to submit the monthly report to the UJVNL in the prescribed format pertaining to water released.

10. In view of the event of "**Change in Law**" as ordered by the Hon'ble National Green Tribunal, the petitioner is now to



maintain the increased E-flow to 15% of the average flow during the lean season which works out to 1.43 cumecs. Consequently, the Design Energy generation in 90% dependable year would be reduced to 1704.04 MU from 1774.42 MU. The Energy Department, Government of Uttarakhand has clarified the lean season to be period taken from December to March. Based on the above revised Design Energy, there would be consequent reduction in the Saleable Design Energy, Incentive for Saleable Secondary Energy.

11. Tariff or Company Tariff for sale has been defined under Article 3 of the PPA which includes the Annual Capacity Charges and the Energy Charges and in the present position of change in law there shall be no change in the Annual Capacity Charges or the Energy Charges. Further, the Saleable Design Energy has been computed under Article 3.3 of the PPA which is reproduced as under:

3.3 Saleable Design Energy

Computation of Saleable Design Energy for the 90% Dependable Year with 95% Availability of Installed Capacity of the Station during a year shall be as under, unless revised or modified in terms of this Agreement

:-



		<u>Million Units (MU) of Energy</u>	<u>Million Units (MU) of Energy after NGT order</u>
a)	<i>Design Energy i.e. energy generated in the 90% Dependable Year (1971-72) (June-May) with 95% Availability of Installed Capacity</i>	1774.42	1704.04
b)	<i>Deduct on account of the following:</i>		
	(i) <i>Auxiliary Consumption at the Project @ 0.5% of energy generated</i>	8.87	8.52
	(ii) <i>Transformation losses upto Station 400kV bus bars @ 0.5% of the energy generated</i>	8.87	8.52
c)	<i>Net Design Energy available at Station 400kV bus bars after deducting losses (a-b)</i>	1756.68	1687.00



d)	<i>"Saleable Design Energy" @ 88% of the Net Design Energy available after deducting 12% free energy supply to UPPCL for Supply to Government of Uttarakhand</i>	1545.88	1484.58
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12. The Energy Tariff for Saleable Design Energy is computed in terms of the PPA. Article 3.7 of the PPA:

'Article 3.7 PPA

Energy tariff for Saleable Design Energy (Rupees per kWh) shall be computed by totalling of (i) O & M Expenses (ii) Taxes on Income (iii) Return on Equity (iv) interest on working capital (v) other miscellaneous charges, and dividing it by the Saleable Design Energy, i.e. 1545.88 million units. Energy Charges payable shall be equal to energy tariff so arrived and multiplied by 88% of total Energy delivered at busbar during the month limited to Saleable Design Energy apportioned for the Month as per Annexure-II. The aforesaid shall be payable on a Monthly basis, subject to a cumulative adjustment in each Month of the Tariff Year and final adjustment at the end of the Tariff Year.'

The Petitioner has stated that upon the change in Saleable Design Energy the calculation for the Energy Tariff as defined in Article 3.7 of the PPA shall consequently change.



13. Deemed Generation and Design Energy have been defined under Article 1.2 Definitions of the PPA which are reproduced herein below:

'Article 1.2 Definitions

"Deemed Generation"

In case of reduced generation due to reasons beyond the control of the Company or non availability of UPPCL's transmission lines or on receipt of backing down instructions from the Control Centre and it results in spillage of water, the energy loss on account of such spillage shall be considered as Deemed Generation limited to Design Energy.

"Design Energy" or "the normative level of generation"

The quantum of energy which could be generated in a 90% Dependable year i.e. 1971-72 (June-May) with 95% availability of Installed Capacity of the Station, which has been determined to be 1774.42 MU as per Annexure-II and approved by the Hon'ble Commission vide it's order dated 19.07.2006.'

14. Article 3.11(b) of the PPA also provides for the remedy for reduced generation for reasons beyond the control of the Company. The said article is reproduced herein below:

'Article 3.11 (b)

In case of reduced generation due to reasons beyond the control of the Company or non-availability of any part of the Associates Transmission System or on

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receipt of backing down instructions from the concerned Regional Electricity Board/Control Centre which results in spillage of water, the energy loss on account of such spillage shall be considered as Deemed Generation limited to the Design Energy, during the total period of Agreement.'

15. Article 6.9 of the PPA defines law and covers within its ambit an order, judgment issued by Court or Tribunal and therefore the order of the Hon'ble National Green Tribunal dated 09.08.2017 squarely causes the change in law situation in the present case. The said Article 6.9 of PPA also provides for change in tariff due to change in law.
16. The petitioner issued a request letter dated 30.08.2018 to the respondent no. 1 for the requisite changes in Design Energy tariff and secondary energy owing to the change in law.

Record of Proceedings

17. Commission held the hearing in the matter on 23.01.2019, 05.02.2019, 07.03.2019, 21.11.2019, 13.12.2019, 29.01.2019, 25.02.2020, 13.05.2020, 04.11.2020 and 08.12.2020. The Commission through various orders has directed Petitioner to submit CEA certificate verifying computations submitted in the Petition and verification / certification of date of compliance to minimum environmental flow of 15% by an independent agency viz; CWC / State Govt. The petitioner during the hearing held on 13.5.20 submitted that due to Covid-19 & subsequent lock down



at different places in the country, the CWC / State Govt. certification process is likely to take another 4 to 6 weeks. During this hearing, the petitioner also referred to subsequent notification of Oct,18 from Ministry of Water Resources mandating different percentage of minimum e-flow in different months to be complied by Oct,21 which was subsequently amended for compliance by 15.12.19. Commission vide order dated 18.5.20 decided to keep the matter in abeyance till necessary certifications regarding compliance to NGT order and any subsequent notification is placed on record by the petitioner. The Commission concluded the hearing on 08.12.2020 with direction to file written submission. UPPCL has filed its written submission dated 16.12.2020 and JPVL has filed its written submission dated 18.12.2020.

- 18.** UPPCL vide counter affidavit dated 5.8.19 has submitted that the prayers of the petitioner may be considered by the Commission only after ascertaining the veracity of the claims of the petitioner based on CEA certificate to be placed on record by the petitioner in compliance of the Commission order dated 5.2.19.
- 19.** The petitioner vide affidavit dated 6.9.19 placed on record the copy of certificate dated 4.9.19 issued by CEA verifying the revised design energy at 1695.54 MUs as against 1704.04 MUs claimed by the petitioner in the petition. The petitioner based on CEA certificate amended the prayer made in the main petition by way of this affidavit.



20. The petitioner vide affidavit 9.12.19 has submitted that the date of implementation of revised e-flow for the Vishnuprayag HEP was made from 3.10.18 by the petitioner and intimated UJVNL vide letter dated 6.10.18. The petitioner also submitted daily long books and has stated that minimum e-flow was initially at the rate of 1.50 cumecs since the setting of barrage gate was not completed and eventually the e-flow was set at & maintained at 1.43 cumecs which is also recorded in the daily long books. **The petitioner has also stated that there is no provision either in the regulations or in the PPA pertaining to change in design energy. However, the petitioner is claiming the design energy on the basis of change in law provisions in the PPA which clearly define "an order of a Court/Tribunal" to fall within the ambit of change in law.** The petitioner has also stated that it does not pay any water cess and as per the implementation agreement dated 23.3.03, it is providing 12% free energy to State Government. The Commission vide order dated 13.12.19 decided to list the matter on 23.1.20 subject to placing the requisite certificate on record at least one week in advance.
21. The petition vide affidavit dated 20.1.20 filed a certificate dated 15.1.20 from UJVNL thereby certifying the revised e-flow of the Vishnuprayag HEP 1.43 cumecs as per the directions contained in the order of the Hon'ble NGT dated 9.8.17 which has been made effect from 3.10.18.
22. The petitioner vide affidavit 24.2.20 has placed on record, a letter from Irrigation Dept., Govt. of Uttarakhand dated 19.2.20, stating that for all hydro-electric projects situated in the State,



UJVNL is the State nodal agency for ensuring e-flow and is accordingly monitoring e-flows as per prevailing guidelines. The petitioner also submitted a comparison of generation during the period Oct to Dec for FY 17-18 & 18-19 to demonstrate the impact on generation due to increase in e-flow.

- 23.** The petitioner vide affidavit dated 4.8.20 has placed a CWC letter dated 23.7.20 informing that CWC is monitoring the e-flow status as mandated vide notification no.S.O.5195(E) dated 9.10.18. CWC has also informed that it does not have any monitoring station of its own at Vishnuprayag HEP and is monitoring the status of e-flows based on inflow/outflow data being provided by the project authority. The outflow data as provided by the authority and mandated e-flow as per notification dated 9.10.18 for the period from 1.1.19 and updated till 30.6.20 was also furnished. The petitioner also placed copy of gazette notification date 9.10.18 issued by Ministry of Jal Shakti (Dept. of Water Resources, River Development Ganga Rejuvenation). Subsequently, based on CWC report that all existing projects have provision of releasing the mandatory e-flow through controlled gated spill ways or water ways without any modification / structural modification of the body of the project, another notification dated 14.9.19 was issued revising the timelines for implementation of revised e-flows to 15.12.19 from a 3 year period initially provided. The partitioner has also a placed on record a copy of certificate dated 17.2.20 from CEA certify the design energy as 1432.28 MUs. The petitioner has modified the prayers in the main petition to allow revision of design energy from 1774.42 MUs to 1695.54 MUs for the period of 3.10.18 to



14.12.19 and consequently to 1432.28 MUs from 15.12.19 till dated in terms of article 6.9 of the PPA.

24. UPPCL vide its affidavit dated 20.11.20 has submitted that as per the energy bills raised by the petitioner it is evident that revised design energy is lower than the actual energy being generated by the plant. The original saleable energy of the project was 1545.88 MUs and the revised saleable energy with effect from 15.12.19 would be 1247.80 MUS as per CEA certificate. UPPCL has submitted the financial impact of change in law on UPPCL is to the tune of Rs.3.05 CR. During FY 18-19 , Rs.21.7 Cr. During FY 19-20 and estimated Rs.35.77 CR. During FY 20-21. UPPCL has also contended that there is no change in the annual capacity charge and the energy charge due to the present change in law but the only change is brought about in the saleable design energy which is computed on the basis of design energy. Though admittedly there has been a change in law due to the order of NGT yet the impact on cost of generation of energy or the change in amount of energy being produced has not reduced and therefore the economic position before the change in law took place still being maintained and no fiscal detriment / harm / loss is being incurred by the petitioner and thus no relief shall be granted to the petitioner. the objective of change in law / negate the adverse impact of unexpected changes in law such that the aggrieved part is put in the same economic position as if such change in law had not occurred, as there is no impact of change in law on a economic position of petitioner by the revision in e-flow. No consequential relief may be granted. **UPPCL has submitted that the mandate of change in law provision is Restitution i.e.,**



relief may be granted in a manner to place an affected party in a same economic position as if a change in law had not occurred. UPPCL has placed on record case laws of Hon'ble Supreme Court & APTEL.

Commission's analysis and decision

25. The Commission having concluded the hearing, based on the documents available on record and pleading by the parties, has framed the following issues for adjudication / determination in the matter:

Issue 1: Whether the Hon'ble National Green Tribunal order dated 09.08.2017 and Notification dated 09.10.2018 and its amendment vide dated 14.09.2019 issued by Ministry of Jal Shakti (Dept. of Water Resources, River Development Ganga Rejuvenation) are "Change in law"

Issue 2: Whether Design energy of the Petitioner's Project ought to be revised in terms of the PPA and applicable Generation tariff Regulations of this Commission

The Commission in following paragraphs has dealt with each of these issues:

Issue 1: Whether the Hon'ble National Green Tribunal order dated 09.08.2017 and Ministry of Jal Shakti Notification dated 09.10.2018 and its amendment vide dated 14.09.2019 issued by Ministry of Jal Shakti (Dept. of Water Resources, River Development Ganga Rejuvenation) are "Change in law"



26. The relevant portion of the "Change in Law" article is reproduced herein below:

'Article 6.9 CHANGE IN LAW

(a) Definition of Law

For the purpose of this Agreement, "Law" means any act, rule regulation, notification, directive, order, judgment or instruction having the force of law enacted or issued by any competent legislature, government or statutory authority of India, court or tribunal, government of India, the laws of any national, state, local or municipal legislature in India.

(b) Definition of Change in Law

For the purpose of this Agreement, "Change in Law" means:

- i) any enactment and enforcement of any new law,*
- ii) any amendment, alteration, modification or repeal of any existing Law by a competent court, tribunal or legislature in India, government or statutory authority of India or,*
- iii) any authoritative interpretation of an existing law issued by a competent court, tribunal, government or statutory authority contrary to the existing official interpretation thereof, in each case coming into effect after the Effective Date, and directly or indirectly affecting the Parties to*



this Agreement in their performance of their obligation under this Agreement, and provision for which has not been made elsewhere in the Agreement.

27. In terms of UPERC Generation Tariff Regulations, 2014, Change in Law is defined as

(1) **'Change in law'** means occurrence of any of the following events:

- (a) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law; or
- (b) change in interpretation of any law by a competent court, Tribunal or Indian Governmental Instrumentality which is the final authority under law for such interpretation;
- (c) change by any competent statutory authority, in any consent, approval or license available or obtained for the project; or
- (d) coming into force or change in any bilateral or multilateral agreement/treaty between the Government of India and any other Sovereign Government having implication for the generating station regulated under these regulations.

28. On 09.08.2107, the Hon'ble National Green Tribunal passed an order directing that all rivers in the country shall maintain



minimum 15% to 20% of the average seasonal lean flow of that river. Consequently, the Secretary, Government of Uttarakhand issued Letter No. 708/1/2018-05/24(writ)/2016 dated 05.06.2018 to all the Hydro-Electric Project Developers including the petitioner directing inter alia release of minimum environmental (E)-flow at the rate of 15% of average flow during the lean season. Uttarakhand Jal Vidyut Nigam Limited ("UJVNL") on 03.08.2018 vide letter no. 2990/UJVNL/01/PR-NE/W-1 directed JPVL to submit the monthly report to the UJVNL in the prescribed format pertaining to water released.

- 29.** The petition vide affidavit dated 20.1.20 filed a certificate dated 5.1.20 from UJVNL thereby certifying the revised e-flow of the Vishnuprayag HEP 1.43 cumecs as per the directions contained in the order of the Hon'ble NGT dated 9.8.17 which has been made effect from 3.10.18. The petitioner vide affidavit 24.2.20 has placed on record a letter from Irrigation Dept., Govt. of Uttarakhand dated 19.2.20 stating that for all hydro- electric projects situated in the State, UJVNL is the State nodal agency for ensuring e-flow and is accordingly monitoring e-flows as per prevailing guidelines.
- 30.** The Government of India under the MINISTRY OF JAL SHAKTI (Department of Water Resources, River Development and Ganga Rejuvenation) (NATIONAL MISSION FOR CLEAN GANGA) issued a notification in the Gazette of India on 09.10.2018 ("Gazette Notification") issuing fresh norms for the minimum environmental flows to be maintained at locations downstream of structures or projects meant for diversion of river flows for



purposes like irrigation, hydropower, domestic and industrial and other requirements. The implementation of the revised e-flows for the existing projects shall be within a period of three years from the date of the notification. In furtherance of the abovementioned Gazette Notification, another notification dated 14.09.2019 was issued as per which the timelines for the implementation of the revised e-flows as per the Gazette Notification were revised to 15.12.2019 from a three-year period initially provided.

- 31.** As per PPA dated 19.07.2006, mandated e-flow was 0.43 cumecs, which changed to 1.43 cumecs in compliance to Hon'ble NGT order dated 09.08.2017 and subsequently was mandated as per following details vide MINISTRY OF JAL SHAKTI (Department of Water Resources, River Development and Ganga Rejuvenation) (NATIONAL MISSION FOR CLEAN GANGA) notification in the Gazette of India on 09.10.2018 ("Gazette Notification"):

Sl. No.	Season	Months	(%) Percentage of Monthly Average Flow observed during each of preceding 10-daily period
1.	Dry	November to March	20
2.	Lean	October, April and May	25
3.	High Flow Season	June to September	30*#



32. The petitioner vide affidavit dated 4.8.20 has placed a CWC letter dated 23.7.20 informing that CWC is monitoring the e-flow status as mandated vide notification no.S.O.5195(E) dated 9.10.18. CWC has also informed that it does not have any monitoring station of its own at Vishnuprayag HEP and is monitoring the status of e-flows based on inflow/outflow data being provided by the project authority. The outflow data as provided by the authority and mandated e-flow as per notification dated 9.10.18 for the period from 1.1.19 and updated till 30.6.20 was also furnished.

Commission's View

33. It is clear from above that both in terms of the Change in Law defined in the PPA/ Generation Tariff Regulations, 2014, the National Green Tribunal Order dated 09.08.2017 and Ministry of Jal Shakti Notification dated 09.10.2018 is "Change in law" mandate different e-flow as compared to 0.43 Cumecs in PPA dated 19.07.2006. Therefore, Commission holds that both the Hon'ble NGT order dated 09.08.2017 and Ministry Notification dated 09.10.2018 are of the nature of Change in Law. CWC has also informed that it does not have any monitoring station of its own at Vishnuprayag HEP and is monitoring the status of e-flows mandated vide notification no.S.O.5195(E) dated 9.10.18 based on inflow/outflow data being provided by the project authority.



Issue 2: Whether Design energy of the Petitioner's Project ought to be revised in terms of the PPA and applicable Generation tariff Regulations of this Commission.

34. The Petitioner is seeking design energy reduction on account of NGT Order dated 09.08.2017 and Ministry Notification dated 09.10.2018, which are of in nature of Change in law. The following table shows the reduction of the design energy along with the applicable dates:

<u>S. No.</u>	<u>Design Energy</u>	<u>Date</u>	<u>Source</u>
1.	1774.42 MU	19.07.2006	UPERC Order
2.	1695.54 MU	03.10.2018	CEA Certificate
3.	1432.28 MU	15.12.2019	CEA Certificate

The Petitioner has stated that 'Change in Law' has caused the change in the average e-flow, thereby Design Energy has to be revised from 1774.42 MU to 1695.54 and consequently to 1432.28 MU thereby causing a reduction of 78.88 MU and 342.14 MU in total net effect. Consequently, computation of Saleable Design Energy as defined under Article 3.3 of the PPA would have to be changed accordingly and thereby the order dated 19.07.2006 passed by this Commission has to be modified. The change in computation of Energy Tariff for Saleable Design Energy and incentives towards the Secondary Charges would also have to be changed.



35. The comparative chart of the details of the change in the Design Energy is as follows:

S. No.	Particulars	Existing saleable Design energy upto 02.10.2018 Million Units (MU) of Energy	Revised after change in flow w.e.f 03.10.2018 to 14.12.2019 Million Units (MU) of Energy	Revised after change in flow w.e.f 15.12.2019 Million Units (MU) of Energy
a)	Design Energy i.e. energy generated in the 90% Dependable Year (1971-72) (June-May) with 95% Availability of Installed Capacity	1774.42	1695.54	1432.28
b)	Deduct on account of the following :-			
	(i) Auxiliary Consumption at the Project @ 0.5% of energy generated	8.87	8.48	7.16
	(ii) Transformation losses upto Station 400kV bus bars @ 0.5% of the energy	8.87	8.48	7.16



	generated			
c)	Net Design Energy available at Station 400kV bus bars after deducting losses (a-b)	1756.68	1678.58	1417.95
d)	"Saleable Design Energy" @ 88% of the Net Design Energy available after deducting 12% free energy supply to UPPCL for Supply to Government of Uttaranchal	1545.88	1477.15	1247.80

36. The Commission has gone through relevant portion of the "Change in Law" article and the same is reproduced herein below:

'Article 6.9 CHANGE IN LAW

(a) *Definition of Law*

For the purpose of this Agreement, "Law" means any act, rule regulation, notification, directive, order, judgment or instruction having the force of law enacted or issued by any competent legislature, government or statutory authority of India, court or tribunal, government of India, the laws of any national, state, local or municipal legislature in India.

(b) *Definition of Change in Law*



For the purpose of this Agreement, "Change in Law" means:

- iv) any enactment and enforcement of any new law,
- v) any amendment, alteration, modification or repeal of any existing Law by a competent court, tribunal or legislature in India, government or statutory authority of India or,
- vi) any authoritative interpretation of an existing law issued by a competent court, tribunal, government or statutory authority contrary to the existing official interpretation thereof, in each case coming into effect after the Effective Date, and directly or indirectly affecting the Parties to this Agreement in their performance of their obligation under this Agreement, and provision for which has not been made elsewhere in the Agreement.

(c) Delays

In the event any Change in Law coming into force prior to the Scheduled Commercial Operation Date of any Unit, causes any delay in Commercial Operation of the Unit, the Schedule Commercial operation Date of that Unit shall be extended by a reasonable time as mutually agreed between UPPCL and the Company.

(d) Additional Expenditure



The amount of any additional expenditure incurred by the Company including Interest During Construction and Financing Cost with regard to the Project, which is reasonably necessary to comply with any Change in Law coming into force prior to Commercial Operation Date of Unit IV shall be added to the Capital Cost subject to approval by Hon'ble Commission. To the extent the amount of any such expenditure shall have been funded with Debt, Interest on Debt, and Debt Repayment attributable thereto shall be reflected in the Tariff, and to the extent the amount of any such expenditure shall have been funded with Equity, the Return on Equity attributable thereto shall be reflected in the Tariff.

(e) Additional Facilities and Modification

Where any Change in Law coming into force after Commercial Operation Date of Unit IV requires the construction of any additional facilities or modifications of any existing facility of the Project, the Company may incur such expenditure thereon as may be reasonably required to comply with such Change in Law and the amount of such expenditure shall be added to the Capital Cost subject to approval by Hon'ble Commission. To the extent amount of any such expenditure shall have been funded with Debt, the Interest on Debt, and Debt Repayment attributable thereto shall be reflected in the Tariff, and to the extent the amount of any such expenditure shall have been funded with Equity, the Return on Equity attributable



thereto shall be reflected in the Tariff. Benefits, if any, with regard to Tariff, accrued due to Change in Law shall go towards reduction in Tariff.

(f) Other Increased Costs

To the extent that the Company incurs any other increase in costs as a result of any Change in Law which is not covered by the escalations in the Tariff elsewhere provided in this Agreement, the amount of such costs shall be paid by UPPCL to the Company subject to approval of such expenditure by the Hon'ble Commission.

(g) General

The plan of remedial measures to mitigate the effect of Change in Law, including how and by whom the costs of mitigation are to be funded, shall be as may be mutually agreed upon.

(h) Change in Tariff due to change in Law

If there is any change in Tariff as per Article 3, due to change in law, then the same would be got approved by the Hon'ble Commission.'

- 37.** The Article 6.9(e) provides for incurring expenditure due to change in law towards additional facilities or modifications of any existing facility of the Project. The Article 6.9(f) provides for any Change in Law which is not covered by the escalations in the Tariff. The escalations in tariff of the Project are towards O&M expenses which dependent upon capital cost of the Project. The Article 6.9(g) provides that for giving to effect to change in law, if



there is certain planned expenditure required to be made to mitigate the effect, shall be mutually agreed.

- 38.** It is noted that based upon the report of the Central Water Commission ("CWC") that all the existing projects should have a provision for releasing the mandated e-flow through controlled gated spillways or water ways **without any modification structural modifications in the body of the project**, another notification dated 14.09.2019 was issued as per which the timelines for the implementation of the revised e-flows as per the Gazette Notification dated 09.10.2018 were revised to 15.12.2019 from a three year period initially provided. **The Petitioner has submitted that the mandated e-flow has been achieved through barrage gate settings and no capital expenditure has been incurred for giving effect to mandated e-flows. Therefore, there is no change in Capital cost of the Project to result in consequential change in tariff. The Petitioner has also stated that there are no remedial measures required to give effect to Change in law.**

Therefore, clause 6.9(e), 6.9(f) and 6.9(g) are not applicable to the present case.

- 39.** The Petitioner has affirmed that Tariff or Company Tariff for sale has been defined under Article 3 of the PPA (which includes the Annual Capacity Charges and the Energy Charges) and in the present position of change in law there shall be no change in the Annual Capacity Charges or the Energy Charges. Subsequently,



it has submitted that the case of the petitioner falls in sub-clause (h) of clause 6.9 where a change in tariff is required due to the ensuing change in law position.

40. UPPCL has admitted that both the Hon'ble NGT order dated 0.9.08.2017 and Ministry Notification dated 09.10.2018 are Change in law but not agreed to revise the design energy. UPPCL has stated that as per the energy bills raised by Vishnuprayag, it is quite evident that the actual energy being generated by the Plant is not less than original design energy as approved by the Commission vide order dated 19.07.2006.
41. UPPCL pointed out certain case laws to support its contention and pleaded its case on the interrelation of the financial impact on the generator with the "change in law". However, the UPPCL did not delve into the language of the clauses in the said case laws and did not compare the clauses of the cases cited by the Respondent with that of the clause of the Petitioner. The cases cited by UPPCL are all PPA's which are finalised under the bidding process as per Section 63 of the Electricity Act, 2003 which is a clear distinction from the case of the Petitioner herein where the PPA of the Petitioner is executed in accordance with Section 62 of the Electricity Act, 2003. **Therefore, there would be no applicability of the citations upon the present case of the Petitioner and no parity of financial impact can be made in the present case.**



42. Having analyzed that PPA provision contemplate change in tariff due to change in law, which is not the case even admittedly by the Petitioner, let us examine the PPA and Regulations provisions with regard to Design Energy of the Petitioner's Project. The definition of Design Energy as per PPA is as follows:

"Design Energy" or "the Normative level of generation" - The quantum of energy . ":which could be generated in a 90% Dependable Year i.e. 1971-72 (June-May) with 95 % Availability of Installed Capacity of the Station, which has been determined to be 1774.42 MU as per Annexure-H and approved by Hon'ble Commission vide its Order dated 19.07.2006"

"Saleable Design Energy" - 88% of the Net Design Energy which comes to 1545.88 MU during a year as approved by the Hon'ble Commission vide its Order dated 19.07.2006, comprising- of monthly breakup. as per Annexure-11.

There is no provision in the PPA for change in Design Energy.

43. **The Vishnuprayag hydroelectric power plant commenced operations in October 2006 and is designed to produce approximately 1,744.42 MU of energy in a 90% Dependable Year. For a hydroelectric power project, the energy**



generated by the power station is dependent on the availability of water flows. Payments for Energy Charges are based on the Design Energy of the power plant, which, in turn, has been calculated based on the quantum of water flow in a 90% Dependable Year (water flow which is 90% probable). As this dependability is determined on a long-term basis, there may be some years or several years in succession, when the planned generation may not be fully realized, while, alternately, there could be certain years where the planned generation estimates are surpassed. Further, the payment for Secondary Energy under each long-term PPA for the hydroelectric plants is for energy produced in excess of the Design Energy of the plant based on a 90% Dependable Year for the applicable plant.

44. The actual energy supplied i.e. saleable energy by the Petitioner's Plant for FY 2018-19 and 2019-20 has been 1664 Mus and 1731 Mus as per affidavit dated 16.12.2020 submitted by UPPCL. The Petitioner is contemplating that if revised design energy is not accepted and saleable energy happens to be lower than the pre-determined saleable design energy of 1545.88 MU, Petitioner will not be able to recover the primary energy charges as per entitlement under Tariff Regulations / PPA and will be in economic / financial losses.



45. The Commission is of the view that the economic loss of the petitioner cannot be assessed by reducing the Design Energy of the plant because in some years, even after accounting for the environment flow, the power generation may be more than design energy. In case, the Design Energy is reduced but the actual generation is more than the reduced design energy, it may lead to undue enrichment to the Petitioner by recovering more on account of primary as well as secondary energy charges. Therefore, economic loss of the petitioner due to above change in law needs to be computed on annual basis considering the original design energy of 1774.42 Mus as reference.

In case the actual generation in a particular year is less than the design energy of the Project i.e., 1774.42 Mus, on account of above change in law, the actual generation shall be taken as design energy of that particular year for recovery of Energy Charge and Fixed Charges of the year to offset any economic loss. The ECR and NAPAF for that financial year, when actual generation falls below design energy of the Project, shall be worked out based on actual generation of that financial year. This would be applicable with effect from Ministry of Jal Shakti Notification dated 09.10.2018 i.e. for FY 2018-19 and onwards and applicable only in case of actual generation being less than design energy of 1774.46 Mus in a year. For period of 09.10.2018 to 31.03.2019, the same principle shall apply on prorated



basis. The Petitioner may approach the Respondent, UPPCL on account of any economic loss as per above methodology on annual basis

The Petition is disposed of in terms of above.

(Vinod Kumar Srivastava)
Member

(Kaushal Kishore Sharma)
Member

(Raj Pratap Singh)
Chairman

Place: Lucknow

Dated: 22.02.2021