

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)**

Appeal No. 195 of 2022

Dated : 15.11.2022

**Present: Hon'ble Mr. Justice R. K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

IN THE MATTER OF:

Jaiprakash Power Ventures Limited

Having its corporate office at:

JA House, 63 Basant Lok,
Vasant Vihar, New Delhi – 110057

... **Appellant**

VERSUS

1. Uttar Pradesh Power Corporation Limited

Shakti Bhawan, 14 Ashok Marg,
Lucknow – 226 001.

**2. Uttar Pradesh Electricity Regulatory
Commission,**

Through its Secretary,
Vidyut Niyamak Bhawan,
Vibhuti Khand, Gomti Nagar,
Lucknow –226010.

3. Government of Uttar Pradesh

Through its Principal Secretary (Energy),
Bapu Bhawan, Lucknow – 226001.

4. Government of Uttarakhand,

Through its Principal Secretary
(Irrigation and Power),
Dehradun, Uttarakhand.

.... **Respondent(s)**

Counsel for the Appellant(s)

:

Mr. Basava Prabhu Patil, Sr. Adv.
Mr. Ramanuj Kumar
Mr. Manpreet Lamba
Ms. Priyal Modi
Mr. Geet Ahuja

Counsel for the Respondent(s) : Mr. Hemant Sahai
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Mr. Shreshth Sharma
Mr. Nitish Gupta
Mr. Sagnik Maitra
Mr. Nipun Sharma
Mr. Nehul Sharma
Ms. Shefali
Mr. Saurobroto Dutta
Mr. Utkarsh Singh
Mr. Nishant Talwar
Mr. Avdesh Mandloi for R-1

J U D G M E N T

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The present appeal has been filed by M/s Jaiprakash Power Ventures Limited (hereinafter referred to as “the Appellant”) against the Order dated 22.02.2021(in short “the Impugned Order”) passed by the Uttar Pradesh Electricity Regulatory Commission (in short “the State Commission”) in Petition No. 1376 of 2018.

2. The Appellant is aggrieved by the decision of the State Commission for not considering its prayer inter alia revision of Design Energy due to Change in Law (in short “CIL”) event, occurred in the light of judgment passed by the National Green Tribunal (in short “NGT”) and the Government of India (in short “GOI”) notifications and also seeking direction for change in the computation of saleable Design Energy under the provisions of the PPA.

3. The Appellant is a generating company, a subsidiary company of Jaiprakash Power Industries Limited (in short "JIL") having been set up the Vishnuprayag Hydro-electric Project (in short "VHEP") with a capacity of 400 MW in the erstwhile State of Uttar Pradesh, now in the State of Uttarakhand having signed PPA with Uttar Pradesh Power Corporation Limited (in short "UPPCL").

4. The UPPCL, the Respondent No. 1 is a Government company under the control of the Government of Uttar Pradesh, responsible for planning and managing the Transmission, Distribution and Supply of electricity.

5. The second Respondent, the State Commission has been established under the Uttar Pradesh Electricity Regulatory Reforms Act, 1999 and has the power to adjudicate the dispute in hand.

6. The third and fourth respondents are the Government of Uttar Pradesh and Government of Uttarakhand.

7. On 14.10.1992, the parent company, JIL has signed an MoU with the Government of Uttar Pradesh and subsequently with the erstwhile Uttar Pradesh State Electricity Board (in short "UPSEB") which was under the direct control of the Government of Uttar Pradesh.

8. In pursuance to the MoU an agreement was signed on 20.09.1994 (in short "Agreement") with the UPSEB, giving permission to the Appellant to establish, operate and maintain the said Vishnuprayag Hydro Electric Project with the installed capacity of 400 MW. The initial period of the agreement has been maintained as 30 years from the date of commissioning with the

condition that it can be extended further for 20 years on mutually agreed terms and conditions.

9. Under the said Agreement, the entire power generated from the project shall be supplied to the UPSEB, subsequently, the Government of Uttar Pradesh transferred all the rights of the project to the Appellant including the rights, entitlements, assets and liability, also laying down a condition that 12 per cent of the free energy shall be supplied to the Government of Uttar Pradesh/ UPSEB.

10. The said energy as generated was proposed to be supplied through associated 400 kV Transmission System of UPSEB established for the said purpose which in turn was to be kept ready before the scheduled synchronization date by the Government of UP/UPSEB.

11. In accordance with the above, a Power Purchase Agreement was signed between the erstwhile UPSEB and the Appellant on 7th September, 1996 which was further amended on 19th September, 2002. It is submitted that after reorganization of State of Uttar Pradesh, the project now exists in the State of Uttarakhand.

12. In accordance with the reforms taken place under the Act, the erstwhile UPSEB was unbundled into four Government companies namely:

- a) Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited (UPRVUNL);
- b) Uttar Pradesh Jal Vidyut Nigam Limited (UPJVNL);
- c) Uttar Pradesh Power Corporation Limited (UPPCL); and
- d) Kanpur Electric Supply Company Limited (KESCL).

13. Further as a result of the process of unbundling the following distribution companies were formed for the purpose of distributing electricity in the State of Uttar Pradesh.

- a) Pashchimanchal Vidyut Vitran Nigam Limited, Meerut
- b) Dakshinanchal Vidyut Vitran Nigam Limited, Agra
- c) Purvanchal Vidyut Vitran Nigam Limited, Varanasi
- d) Madhyanchal Vidyut Vitran Nigam Limited, Lucknow.

14. The UPPCL is one of the successor companies as already mentioned above of the erstwhile UPSEB inter alia having vested with all rights and obligations under the PPA and the Agreement signed on 20.09.1994 regarding the procurement of power from the subject generating station. It was submitted that the Agreement was amended on 22.03.2003 due to bifurcation of the State of Uttar Pradesh wherein the rights and obligations of the State of Uttar Pradesh were incorporated.

15. Subsequently, on 29.10.2002 the said amended Power Purchase Agreement signed in accordance with the amended Agreement by Order dated 14.06.2003.

16. The Appellant filed a Petition No. 351 of 2006 on 24.05.2006 before the State Commission for approval of provisional tariff and also for the approval of Design Energy for the Project based on the revised hydrological data approved by the Central Water Commission (CWC) and Central Electricity Authority (CEA), the State Commission vide its order dated 19.07.2006 approved provisional tariff thereby approved Design Energy for the Project at 1774.42 MU which is incorporated in the Final PPA to be signed as per the order. Subsequently based on the final PPA, the State Commission determined final tariff for the years 2008-09 and onwards.

17. The dispute which is under consideration is the outcome of the directions rendered by judgment dated 09.08.2017 passed by the National Green Tribunal (NGT) in Pushp Saini Vs. Ministry of Environment, Forest & Climate Change &Ors, whereby it has been directed that all project authorities shall ensure to maintain minimum of 15% to 20% of the average seasonal lean e-flow in the river on which the project is commissioned.

18. In accordance with the NGT Order, the Energy Department, Government of Uttarakhand issued a clarification on 13.04.2018 declaring the lean season to be a period falling between December to March, further directions were also issued by the Government of Uttarakhand on 05.06.2018 in accordance with the NGT Order mandating minimum e-flow of 15 to 20 per cent which works out to 1.43 cumecs per day in respect of the VHEP as submitted by the Appellant.

19. Accordingly, due to change in the mandatory e-flow in the river effecting the availability of water for the project, the Appellant approached the UPPCL for reduction in the Design Energy due to less viability of water for the project and also requesting for change in tariff in respect of energy charges and incentive towards secondary energy.

20. In the meantime, another notification, in accordance to the NGT Order, was issued by the Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation on 14.09.2019 whereby setting the time lines for the implementation of the revised minimum e-flow being effective from 15.12.2019 with an initial period of three years. Accordingly, with the above notification, the Appellant adjusted to fix barrage in order to increase e-flow of water from project into the river, thus allowing the e-flow at

an enhanced rate of 20 per cent of the average lean season e-flow which was more than 10 per cent of the e-flow supposed to be maintained under the amended Implementation Agreement of the final PPA signed.

21. The Appellant submitted that on the directions of the State Commission rendered vide interim order dated 05.02.2019, in Petition No. 1376 of 2018, it has approached CEA on 30.10.2019, seeking approval for the revised Design Energy in accordance with the implementation of the increased e-flow as mandated by the NGT Order and the Government of India notifications as mentioned above, declaring that on the basis of 90 per cent dependable year a Design Energy comes out to be 1432.28 MU, the relevant extract of the order of the State Commission is quoted as under:

*“4. The Petitioner has submitted the computation of revised design energy and the saleable design energy. They have also quoted the relevant provisions of PPA and have stated that the order of the National Green Tribunal falls under the category of Change in Law. Therefore they have requested for change in design energy, saleable design energy and the computation of incentives. **The Commission asked the Petitioner to submit the certificate of CEA verifying the computation submitted in the Petition.**”*

(Emphasis Supplied)

22. The same was examined in CEA and approved vide order dated 17.02.2020. After obtaining approval of CEA, the Appellant filed the CEA's approval before the State Commission in Petition No. 1376 of 2018 for reduction in Design Energy from 1774.28 MU to 1695.54 MU for the period

starting from 03.10.2018 to 14.12.2019 and further revised to 1432.28 MU from 15.12.2019 onwards and accordingly reduction in saleable Design Energy as per Article 3.3 of the final PPA, the prayer being on account of Change in Law (in short “CIL”) due to NGT Order, the Government of Uttarakhand Order and the Government of India notification issued in 2019 mandating the minimum e-flow at 15 to 20 per cent of average lean season e-flow.

23. The Appellant submitted that on May 13, 2020, the State Commission further, directed the Appellant to place on record a certificate issued by the CWC which would show the implementation of the minimum environmental e-flow by the Appellant, in compliance, the Appellant by its affidavit dated July 30, 2020 placed on record the CWC letter dated July 23, 2020 confirming implementation of minimum e-flow requirement.

24. Therefore, the main issue which under dispute is whether the Design Energy ought to be revised due to occurrence of CIL or not, the relevant provision of the PPA regarding CIL is reproduced as under:

“Article 6.9: Change in Law to mean:

(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.”*

(c) *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.

25. The State Commission vide the Impugned Order, accepted that there has been a CIL event under the Final PPA, however, observed that such CIL event does not entitle the Appellant to seek reduction in Design Energy specified in the Final PPA, acceptance of CIL by the State Commission is extracted as under:

“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.**"*

26. Therefore, from the above, it is clear that the judgment rendered by the NGT and the notifications issued by the Government of India (GOI) are Change in Law events.

27. Undisputedly, the change in the e-flow has also impacted the availability of water for the project and certainly effected the Design Energy of the VHEP.

28. It is important to note here that CEA, vested with the statutory responsibility of according Techno Economic Clearance (in short "TEC") prior to the enactment of the Act i.e. prior to 10.06.2003 and according "Concurrence" thereafter to the Hydro Electric Projects in the country, is also carries out studies and analysis for the Design Energy for such projects from time to time and specifying the same as part of the TEC and now of the Concurrence. In the present case the TEC accorded by CEA contained Design Energy as one of the parameters for the project.

29. As such, any change or revision if carried out by CEA for the Design Energy for any project, it becomes a part of the TEC or the Concurrence accorded by CEA.

30. Therefore, there cannot be any argument that the decision of CEA has the Statutory essence and is a binding for all. Even the State Commission

directed the Appellant to obtain the certificate from CEA for the change in the Design Energy due to CIL.

31. The Design Energy is an import parameter and any revision due to occurrence of CIL event, the affected party deserves to be compensated for it, however, vide the impugned order, the State Commission has rendered findings contrary to it.

32. On being asked regarding the reason for referring the matter to CEA, the Learned Advocate on behalf of UPPCL submitted that the reference to CEA for certifying the revised Design Energy has no relevance as Design Energy is frozen under the provisions of the PPA and it was referred by the State Commission against the request of the Appellant only, without going into the merit.

33. We decline to entertain such a statement made, the State Commission is bound by certain responsibilities, and cannot refer matters under disputes to other Statutory bodies without any relevant purpose whereby seeking certain advices or approvals, which is nothing but totally unwarranted, if it is so, such action deserves serious observations however, we restrain ourselves in passing any adverse remarks at this stage. If it was referred to CEA, the State Commission is bound by the revision of Design Energy approved by CEA.

34. The submission of the UPPCL claiming the certificate of CEA as irrelevant is nothing but a challenge to the authority of CEA including its decision making process. We strongly condemn the submission of the Respondent no. 1.

35. The Respondent No. 1, UPPCL has argued that the core issue in the present matter is whether the Design Energy is susceptible to be revised due to Change in Law as claimed as the Design Energy is frozen in the PPA and cannot be changed even account of CIL.

36. We are not convinced by such an argument as Design Energy depends on the availability of water and in case of such availability is changed by legislative enactments or on the direction of the courts, it is bound to change.

37. The State Commission, in the Impugned Order, recorded as under:

“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:

S. No.	Design Energy	Date	Source
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)

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 finalized 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.***

38. From the above, it is clear that the State Commission considered the certificate given by CEA for the revision in the Design Energy and also, rejected the case laws submitted by UPPCL to support its contention on the interrelation of the financial impact on the generator with the CIL.

39. The UPPCL submitted that even if there is a change, will not prejudice JPVL in any manner whatsoever for the following reasons:

- (i) The Project Tariff is determined under Section 62 of the Electricity Act, 2003 and thus, the generator is always assured of full cost recovery plus Return on Equity.
- (ii) The Design Energy is defined as a normative generation figure and is not to be confused with actual generation. This is to ensure predictability for the Generator i.e., JPVL, since the hydrology risk is being taken entirely by the procurer, UPPCL. Substituting actual generation figures for normative figures, in the formula for determination of Tariff, will distort the economics and prejudice the Respondent and also unjustly enrich the generator.

- (iii) The formula for determination of Energy Charge Tariff is simple – Aggregate of all the elements of cost (including O&M and ROE) divided by Design Energy, to arrive at the Energy Charge Tariff per unit. The Annual Fixed Charge (“**AFC**”) which is paid on an annuity basis ensures full recovery of long-term capital, financing and other costs. With the aggregate of the AFC and Energy Charge, all possible costs of the generator plus ROE are covered and underwritten. No element of cost or ROE remains uncovered.
- (iv) AFC and Energy Charge. There is no dispute nor any claim with respect to the AFC. The Energy Charge is the aggregate of all the costs specified in Article 3.6 of the PPA (which includes ROE), divided by the Design Energy.
- (v) Design Energy was determined by the UPERC vide its order dated 19.07.2006 applying the methodology of CWC/CEA. This order is not challenged nor is it a subject matter of the present appeal and therefore, the Design Energy so determined and included in the PPA is sacrosanct and not subject to any variation, unless specifically permitted under the PPA. It is reiterated that the PPA does not permit change in the Design Energy, however, this by itself does not prejudice the generator in any manner whatsoever.
- (vi) In any event, the Design Energy, which is the Normative Level of Generation, is determined on the basis of historical data, i.e., the energy generated in a 90% Dependable Year. This ensures balance of risks between generator/JPVL and UPPCL

procurer. It is deliberately not 100% Dependable Year, nor 110% of Dependable Year. This ensures that the risks are balanced, i.e., the procurer UPPCL is not saddled with a high Energy Charge Tariff (if the Design Energy is lowered), nor is an unreasonable burden to ensure generation at a higher level (say 100% or more of a Dependable Year) imposed on the generator. The Design Energy has been defined in the PPA as under:

40. We decline to accept the above submission of the Respondent No. 1 as Design Energy is bound to change based on the change in flow of water if its availability is changed by the mandate of law and duly certified/ approved by CEA and any consequential change if affected, the same is bound to be extended to the affected party by the State Commission.

41. The State Commission observed that:

"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 90⁰/0 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.”

42. The State Commission has reproduced the definition of the design energy as incorporated in the PPA which defines the concept as “*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*”, therefore, it is the quantum of energy equivalent to the energy which can be generated with 95 % availability of the generating capacity.

43. Further, the State Commission also acknowledged that “***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).***”

44. It cannot be argued now that the Design Energy is not dependent on the water availability and in case the water flows are changed or reduced, the Design Energy is ought to change and so is the Tariff.

45. Further, the State Commission also observed that ***“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”***.

46. However, we fail to understand the observation of the State Commission at *para 45* of the Impugned Order as quoted above, which is totally unjust and unreasonable in the light of the observations as noted above.

47. The UPPCL, in support of its arguments, placed before us a simple example, the aggregate of the costs is the numerator, and the Design Energy is the denominator, to arrive at the Energy Charge per unit of generation. Thus, if the denominator is reduced, the Energy Charge will increase. Arithmetically, assuming aggregate costs to be 100 and Design Energy as 25, then the Energy Charge is 100 divided by 25 equals to 4 per unit. On the other hand, if the Design Energy is reduced, as contended by JPVL, to 20 (for example) then the resultant Energy Charge will be 100 divided by 20 equals to 5.

48. We are not considering any such argument at this stage as we find no merit in it, and only considering the aspect of revision in the Design Energy and the consequential effect on the saleable Design Energy.

49. Further, the Respondent No. 1 accepted that the change in flow of water because of the judgment rendered by NGT and the Government notifications is a CIL event as adjudicated by the State Commission, however, argued that the Hydrology risk is on the account of UPPCL only as JPVL will be compensated

on the basis of deemed generation up to the Design Energy, if the actual generation in any particular year is less than the Design Energy, further repeated that, the Design Energy, as a mere denominator, is only for the purposes of computing tariff or energy charge.

50. The above submission of the UPPCL was countered by the Appellant arguing that none of the above argument were raised by Respondent No. 1 before the State Commission nor these submissions are part of the Reply filed by Respondent No 1 before this Hon'ble Tribunal and therefore, these contentions cannot be permitted to be raised for the first time in this Appeal. In addition, none of these objections form part of the reasoning given in the Impugned Order for denying relief to the Appellant.

51. Further, argued that Respondent No. 1 is interlinking the issue of CIL with the hydrology risk, which is compensated by the procurer in terms of Deemed Generation as part of the PPA i.e. when the actual generation falls short of Design Energy for reasons solely attributable to hydrology.

52. We agree with the submission of the Appellant, in the present case it is only reduction in water availability as Appellant has to release greater quantum of water to sustain aquatic life as a result of Change in Law and not because of hydrology, the present case covered under Deemed Generation provision.

53. The Appellant submitted that in any event, Deemed Generation charges were payable only for the first seven years of operation which has long expired, further, Deemed Generation compensation is capped to Design Energy which does not take into account tariff payable for Secondary Energy.

54. Undisputedly, the State Commission vide its order dated 05.02.2019, as quoted in the preceding paragraphs, has itself directed the Appellant to obtain CEA certification verifying reduction in Design Energy on account of increased environmental flow obligation, additionally, vide order dated January 29, 2020 (and reiterated on May 18, 2020), again directed the Appellant to obtain a certificate from Central Water Commission (CWC) to demonstrate compliance with the increased water discharge obligation, therefore, after having been complying with the directions of the State Commission by submitting the relevant certificates from the CEA and CWC, the State Commission is bound by such documents and thus cannot deny revision in Design Energy on the ground that there is no provision for such revision in the Final PPA.

55. It is now clear that the original Design Energy of 1774.72 MUs was approved by the State Commission vide order dated 19.07.2006 and therefore, it was imperative for the State Commission to approve the revision in Design Energy which was triggered as a result of Change in Law and had received CEA's approval.

56. It is again reiterated that CEA is the apex technical and statutory body to review and vet revisions in Design Energy for hydro electric projects including the VHEP, such approvals shall be binding on all.

57. The Appellant also submitted that the State Commission, while approving the Design Energy for the Project, had computed Design Energy on the basis of 0.14 cumecs of water release to sustain aquatic life which has subsequently increased as a result of the CIL events, namely, the NGT Order, the GOUK order and the 2019 Government notifications, mandating the Appellant to revise the e-flow, accordingly, with change in e-flow, the basic

parameter in the calculation of Design Energy stands changed, and thus the change in Design Energy, though all other parameters remaining unchanged.

58. The State Commission even after accepting that on account of enhanced water release requirement mandated by the NGT Order and the GOI Notification, the Design Energy for the Project would change, however, the State Commission despite the change necessitated in Design Energy on account of the Change in Law events, disallowed the prayer of the Appellant seeking revision in Design Energy stating that there was no provision for change in Design Energy in the Final PPA.

59. Further, the State Commission observed that the Saleable Design Energy of the Project be calculated month-wise on the basis of month-wise flow (0.14 cumecs as per the Final PPA) unless revised or modified, as such it is evident that the State Commission has erred in holding that the Final PPA contains no provision for revision of Design Energy.

60. Our attention was invited to the judgment of this Tribunal in the matter of Punjab State Power Corporation Limited Vs. Everest Power Private Limited &Ors. [Appeal No. 35 of 2014] wherein it was directed that the Design Energy should be considered with a revision, relevant extract is quoted as under:

“192. The 13th Issue is regarding change in law on account of mandatory 0.5 cumecs discharge.

193. According to Everest Power the State Commission erred in not holding minimum lean season discharge as mandated by the Ministry of Environment & Forests vide

environment clearance dated 21.6.2005 as ‘Change in Law’ under PPA/PSA. The State Commission disallowed the same stating that PPA was executed on 25.7.2005 whereas the Environment Clearance was issued on 21.6.2005. However, the triggered date for effectuating change in law is 27.2.2004.

194. We find that the trigger date of change in law as per Article 12.1.1 of the PPA is 27.2.2004. accordingly, the condition in environmental clearance issued on 21.6.2005 would be covered under ‘Change in Law’. **Accordingly, this issue is decided in favour of the Appellant. Thus, the design energy of the Appellant may be decided after accounting for the mandatory 0.5 cumecs discharge.**

[Emphasis Supplied]

61. From the above, it is clear that the Design Energy should be decided based on the e-flow getting affected due to CIL event and thus in the present case, the Design Energy ought to be revised on account of the CIL events affecting or revising the e-flows and the consequential reliefs have to be extended by the State Commission including the saleable Design Energy.

ORDER

For the foregoing reasons as stated supra, we are of the considered view that the Appeal has merit and is thus allowed, the Design Energy of the VHEP shall be revised in accordance with the approval of CEA i.e. 1695.54 MU with effect from 03.10.2018 and further revised to 1432.28 MU with effect from 15.12.2019, all consequential changes shall be determined by the Uttar

Pradesh Electricity Regulatory Commission (“State Commission”) accordingly including the Saleable Design Energy.

The State Commission is also directed to pass the consequential orders expeditiously but not later than three months from the date of this Judgment. All pending IAs, if any, shall also be disposed of accordingly.

PRONOUNCED IN THE OPEN COURT ON THIS 15th DAY OF NOVEMBER, 2022.

**(Sandesh Kumar Sharma)
Technical Member**

**(Justice R. K. Gauba)
Officiating Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

pr/mkj