IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 370 OF 2022

Dated: 29.07.2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

1. Uttar Pradesh Power Corporation Limited
Through its Chief Engineer (Planning)
3rd Floor, Shakti Bhawan Extension,
14-Ashok Marg, Lucknow, Uttar Pradesh - 226 001
Email: cgm2plg@yahoo.co.in

2. Madhyanchal Vidyut Vitran Nigam Limited
Through its Managing Director
4-A, Gokhale Marg,
Lucknow, Uttar Pradesh – 226 001
Email: md.mvvnl2010@gmail.com

3. Paschimanchal Vidyut Vitran Nigam Limited
Through its Managing Director
Urja Bhawan, Victoria Park,
Meerut, Uttar Pradesh – 250 001
Email: mdpaschimanchalvvnl@gmail.com

4. Purvanchal Vidyut Vitran Nigam Limited
Through its Managing Director
DLW Bhikaripur, Varanasi,
Uttar Pradesh – 221 004
Email: mdpurvanchalvvnl@gmail.com

5. Dakshinanchal Vidyut Vitran Nigam Limited
Through its Managing Director
Urja Bhawan, NH-2, (Agra-Delhi Bypass Road),

Sikandra, Agra,
Uttar Pradesh – 282 002
Email: dvvnlmd@gmail.com

6. Kanpur Electricity Supply Company Limited
Through its Managing Director
Headquarter, Kesa House,
14/71 Civil Lines,
Kanpur, Uttar Pradesh – 208 001
Email: md@kesco.co.in / mdkesco@gmail.com … Appellants

Versus

1. Prayagraj Power Generation Company Limited
Through its Chief Executive Officer
Shatabdi Bhawan, B 12 & 13,
Sector 4, Gautam Budh Nagar, NOIDA,
Uttar Pradesh – 201 301
Email: ppgcl@ppgcl.co.in

2. Uttar Pradesh Electricity Regulatory Commission
Through its Secretary
Vidyut Niyamak Bhawan,
Vibhuti Khand, Gomti Nagar,
Lucknow – 226 010
Email: secretary@uperc.org … Respondents

Counsel on record for the Appellant(s)	:	Shankh Sengupta, Sitesh Mukherjee Abhishek Kumar Harneet Kaur Arjun Agarwal Nived Veerapaneni Karan Arora for App.1 to 6
Counsel on record for the Respondent(s)	:	Shri Venkatesh Suhael Buttan Rishub Kapoor Simran saluja Vineet Kumar Kartikay Trivedi Ashutosh Kumar Srivastava

Abhishek Nangia
Mehak Verma
Nihal Bhardwaj
Jayant Bajaj
V.M. Kannan
Jatin Ghuliani
Isnain Muzamil
Siddharth Joshi for Res. 1

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellants have come in appeal before us against the order dated 18.08.2021 passed by the 2nd respondent Uttar Pradesh Electricity Regulatory Commission (hereinafter referred to as "the Commission") whereby it held the notification dated 07.12.2015 read with subsequent notification dated 28.06.2018 issued by the Ministry of Environment, Forest and Climate Change (hereinafter referred to as "MoEF&CC") as a change in law event for the 1st respondent Prayagraj Power Generation Company Limited's 1980 MW thermal power plant at Bara, Allahabad, Uttar Pradesh. These notifications specified emission norms with regard to Sulphur Dioxide (SO2), Nitrogen Oxide (NO2) and Particulate Matter (PM) for Thermal Power Plants (TPPs).

2. The appellant No.1 Uttar Pradesh Power Corporation Limited (hereinafter referred to as "UPPCL") is a public sector undertaking and a

government company in terms of Companies Act, 2013. It is operating as bulk supply licensee and is authorised by appellant Nos.2 to 6 to, *inter alia,* enter into Power Purchase Agreement ("PPA") on their behalf. Appellant Nos. 2 to 6 are the power distribution companies operating in the State of Uttar Pradesh.

3. The respondent No.1 Prayagraj Power Generation Company Limited (hereinafter referred to as "PPGCL") is a generating company, majority shareholding of which is held by Renascent Power Ventures Private Limited (hereinafter referred to as "Renascent") which, in turn, is a wholly owned subsidiary of Resurgent Power Ventures Pte Limited (hereinafter referred to as "Resurgent"). This company Resurgent is a joint venture between Tata Power International Pte Limited, ICICI Bank and other global investors. PPGCL operates the 1980 MW thermal power plant at Bara, Allahabad, Uttar Pradesh (hereinafter referred to as "Prayagraj TPP") which comprises of three units of 660MW each.

4. The necessary and relevant facts and circumstances leading to the filing of the instant appeal are narrated hereunder.

5. On 25.09.1975, the Indian Standards Institute ("ISI") issued the Indian Standard "Methods for Measurement of Air Pollution" Part-V setting out the methods for measurement of air pollution with particular reference to "sampling of Gaseous Pollutants". It provided for measurement of emission to be done at the point of emission i.e. stack outlet at the height of chimney discharge almost above 200 meters from the ground level as well as the measurement of ambient air quality to be done at monitoring stations fixed on ground at a height of about 1-2 meters around the thermal power plant at locations to be decided in consultation with the State Pollution Control Board in terms of the said Part-V of Indian Standard (IS) 5182.

6. The Bureau of Indian Standards issued IS: 4167-1980 on 29.12.1980 titled as "Indian Standard Glossary of Terms Relating to Air Pollution" (IS 4167) which distinguishes ambient air quality with the emission standards. A conscious attempt was made in IS 4167 at demarcating the emission standards (which is measured at the point of emission) and ambient air (which is done at ground level). "Air Quality" refers to the concentration of one or more pollutants in the air whereas "ambient" is used to describe physical properties of air or air pollution concentration in the open air as against at the point of emission or indoors.

7. The Parliament promulgated the Air (Prevention and Control of Pollution) Act, 1981 on 29.03.1981. Section 16(2)(h) of the Act empowered Central Pollution Control Board ("CPCB") to lay down standards for the quality of air.

8. In July, 1984 the Central Board for the Prevention and Control of Water Pollution issued Part-I of the Emission Regulations which laid emphasis on limiting the particulate matter emission for thermal power plants.

9. The Environment Protection Act, 1986 was promulgated by the Parliament on 23.05.1986.

10. On 19.11.1986, the Ministry of Environment and Forest ("MoEF") notified Environment Protection Rules, 1986 in exercise of power vested with it under Section 6 read with Section 25 of the Environment Protection Act, 1986. Rule 5(3) of these Rules empowers the Central Government to issue notification and impose restrictions on any activity affecting the environment.

11. It was for the first time on 03.01.1989 that by virtue of amendment in Environment Protection Rules, 1986, the emission standards for thermal power plants were also specified but only for one pollutant namely Particulate Matter ("PM") and that also in concentration terms i.e., mg/Nm_3.

12. On 27.01.1984, MoEF in exercise of power vested with the Central Government under Rule 5(3) of the Environment Protection Rules, 1986, notified Environment Impact Assessment Notification ("EIA Notification") thereby imposing restrictions and prohibition on expansion and modernization of any activity or new projects being undertaken.

13. National Ambient Air Quality Standards were notified by the CPCB on 11.04.1994 in exercise of power vested with it under Section 16 (2)(h) of the Air (Prevention and Control of Pollution) Act, 1981. These provided for the prescribed cumulative permissible ambient air quality in industrial, residential, rural and sensitive areas of all particles viz Sulphur Dioxide, Oxides of Nitrogen, Suspended Particulate Matter, Respirable Particulate Matter, Lead and Carbon Monoxide.

14. On 19.01.2005, Ministry of Power, Government of India, notified Competitive Bidding Guidelines, 2005 ("CBG-2005") for determination of

tariff by bidding process for procurement of power by distribution licensees. Clause 3.2 (ii) of these guidelines proves that Rapid Environmental Impact Assessment ("EIA") should be available before the publication of RFQ. Clause 4.7 provides that change in law impacting cost or revenue from the business of selling electricity should be adjusted separately. Clause 5.4 provides the standard documentation to be provided by the procurer in RFQ. Its Sub-clause (v) provides the safety, operational technical criteria to be met by the bidders. Under these guidelines, procurement of electricity for a period beyond seven years is recognized as long-term procurement and following two cases are envisaged: -

Case-1: Where the location, technology or fuel is not specified by the procurer.

Case-2: Hydro power projects, load center projects or other location specific projects with specific fuel allocation.

These two cases are further divided into various scenarios. The scenario in which fuel linkage is provided by the procurers and quoted tariff is in terms of capacity charges and net quoted heat rate is usually referred to as Case-2 scenario-IV.

15. MoEF notified amendments to the Environment Impact Assessment Notification ("EIA Notification 2006") on 14.09.2006. These provided for requirement of prior environmental clearance for various projects / activities categorized as 'Category-A'. Thermal power plants having capacity more than or equal to 500MW were categorized as Category-A projects requiring to obtain prior environmental clearance from the Central Government before commencing any construction work or preparation of land by the project management or undertaking following activities: -

(i) Setting up new projects or undertaking activities listed in the Schedule to the EIA Notification 2006.

(ii) Expansion and modernization of existing projects with addition of capacity beyond threshold limits specified in the Schedule to the EIA Notification 2006.

(iii) Any change in the project mix in existing manufacturing units included in the Schedule beyond specified range.

16. In December, 2007, the Central Electricity Authority ("CEA") issued a joint report on the land requirement of thermal power plants mentioning therein that while granting environmental clearance, MoEF should stipulate

that space is to be kept in the layout for installation of FGD system, if required, in future.

17. In the year 2007, the PPGCL, a Special Purpose Vehicle ("SPV") incorporated by the Government of Uttar Pradesh through the appellant UPPCL as a nodal agency for development of 3x660MW thermal power plant at Bara, Allahabad, filed a petition bearing No.503 of 2007 before the Commission seeking approval of Request for Proposal ("RFP") and other important documents for setting up the said project through Competitive Bidding Process.

18. The project was considered by Thermal Appraisal Committee of MoEF&CC on 15.11.2007 which prescribed Term of Reference ("ToR") for detailed EIA study to the project proponent.

19. The Commission disposed off the petition No.503 of 2007 filed by PPGCL vide order dated 24.01.2008 thereby approving the RFP document, PPA and other documents. One of the changes which was directed to be incorporated in the RFP was that for the purpose of bidding, certain environmental norms were required to be borne in mind by the bidders and

one such environmental norm was “FGD system not required but provision for its incorporation in future be made”.

20. Vide order dated 26.02.2008 in a review petition No.521 of 2008 arising out of the said petition No.503 of 2007, the Commission approved revision to the RFP terms providing for an incentive for early commissioning of the project.

21. By way of another order dated 24.03.2008 in petition No.524 of 2008 and batch, the Commission issued clarifications with respect to the RFP terms pertaining to Commercial Operation Date (“COD”) of the projects and incentive for early commissioning.

22. The Environmental Impact Assessment Report for PPGCL was prepared in the month of April, 2008.

23. By way of order dated 22.08.2008, the Commission approved the draft RFQ documents.

24. On 05.11.2008, RFP was issued in terms of CBG 2005 by PPGCL for selecting a developer to set up and operate the Prayagraj TPP project. The competitive bidding process was to be carried out in terms of CBG Guidelines applicable for Case-2 Scenario-IV. In line with the directions

issued by the Commission, the RFP documents specifically stipulated that bidders should bear in mind that while FGD was not required, provision for its incorporation in the future must be made.

25. Thereafter, PPGCL entered into a PPA dated 21.11.2008 with the appellant for purchase of 90% of installed capacity of the Prayagraj TPP.

26. PPGCL carried out the bid process for selection of successful bidder for Prayagraj TPP. M/s Jai Prakash Associates ("JAL") was declared as the successful bidder in the bid process with a levelized tariff of Rs.3.020/kWh. Accordingly, letter of intent (LoI) was issued by PPGCL in favour of JAL on 02.03.2009.

27. On 08.09.2009 MoEF&CC granted Environmental Clearance ("EC") certificate for setting up of project under the provisions of EIA Notification. The EC did not prescribe any limit for SO2 and NO2 emissions to be ensured by the PPGCL.

28. On 23.03.2015, MoEF&CC issued letter to PPGCL thereby extending the validity of the EC issued by the Ministry vide letter dated 08.09.2009 for a further period of two years i.e. till December 2016. Certain additional conditions, other than the conditions imposed by original EC, were

prescribed in the revised EC dated 23.03.2015. One such additional condition was that space for installation of FGD system in future should be kept.

29. The three units of 660MW of Prayagraj TPP were commissioned on 29.02.2016, 10.09.2016 and 26.05.2016 respectively.

30. Then came the notification dated 07.12.2015 issued by MoEF&CC followed by another notification dated 28.06.2018 thereby amending the Environment (Protection) Rules, 1986 prescribing modified norms related to air emission including Oxides of Nitrogen, Sulphur Dioxide, Particulate Matter, Mercury, quantum of water used and stack height for abatement of Sulphur Dioxide for the Thermal Power Plants. A summary of these new norms related to air emission by the Thermal Power Plants is extracted hereinbelow: -

"

SR. NO.	*INDUSTRY*	*PARAMETER*	*STANDARDS*
1	*2*	*2*	*4*
		TPPs (units) installed before 31st December, 2003	
		Particulate Matter	*100mg/Nm^3*
		Sulphur Dioxide (SO_2)	*600mg/Nm^3 (Units Smaller than 500MW capacity units) 200mg/Nm^3 (for units having Capacity of 500MW and above)*
		Oxides of Nitrogen (NOx)	*600mg/Nm^3*
			0.03mg/Nm3 (for units having

"25	*Thermal Power Plant*	*Mercury (Hg)*	*capacity of 500MW and above)*
		TPPs (units) installed after 01st January, 2004 up to 31st December, 2016	
		Particulate Matter	*50mg/Nm^3*
		Sulphur Dioxide (SO_2)	*600mg/Nm^3 (Units Smaller than 500MW capacity units) 200mg/Nm^3 (for units having Capacity of 500MW and above)*
		Oxides of Nitrogen (NOx)	*300mg/Nm^3*
		Mercury (Hg)	*0.03mg/Nm^3*
		TPPs (units) installed after 01st January, 2017	
		Particulate Matter	*30mg/Nm^3*
		Sulphur Dioxide (So_2)	*100mg/Nm^3*
		Oxides of Nitrogen (NOx)	*100mg/Nm^3*
		Mercury (Hg)	*0.03mg/Nm^3*

"

31. The air emission norms specified in these two notifications and applicable to the three units of Prayagraj TPP are as follows: -

"

Year of Commission-ing	*Particulate Matter*	*Sulphur Dioxide (SO_2)*	*Oxides of Nitrogen (NOx)*	*Mercury (Hg)*
2004-2016 (For Unit 1 & 2)	*50mg/Nm^3*	*200mg/Nm^3 Units having capacity of 500 MW and above*	*300mg/Nm^3*	*0.03mg/Nm^3*
From 1st January 2017 onwards (for Unit 3)	*30mg/Nm^3*	*100mg/Nm^3*	*100mg/Nm^3*	*0.03mg/Nm^3*

"

32. Here it needs to be noted that prior to issuance of these two notifications dated 07.12.2015 and 28.06.2018 by the MoEF&CC, the first respondent PPGCL was compliant with the environmental norms in respect of its Prayagraj TPP in terms of the environmental clearance dated 08.09.2009. We may further note that prior to execution of PPA dated 23.11.2008, there was no stipulation of SO2 levels being limited to 200mg/Nm3. It is as per these two fresh notifications of the MoEF&CC that the first respondent was required to keep SO2 emissions from the units below 200 mg/Nm3 irrespective of the ground level concentration and ambient air quality norms. To comply with these norms, the first respondent is required to install FGD system for each unit. The stack height post FGD installation under the notification dated 28.06.2018 is as follows: -

"

SL. NO.	*INDUSTRY*	*PARAMETER*	*STANDARDS*
1	*2*	*3*	*4*
"33A	*Thermal Power plants with Flue gas Desulphurization (FGD)*	*Stack Height/Limit in Meters*	*Power Generation capacity :* *100MW and above* *H = 6.902 (QX0.277)$^{0.555}$* *Or* *100m minimum*
			*Q = Emission rate of SO2 in kg/hr ** *H = Physical stack height in meter*

			**total of the all Unit's connected to stack*

"

33. The CPCB issued a letter dated 11.12.2017 to PPGCL, *inter alia,* prescribing the time limit for installation of FGD system by 30.04.2020 for unit 1, 30.06.2020 for unit 2 and 28.02.2020 for unit 3 in order to comply with SO2 emission norms.

34. Between November, 2017 and December 2019, PPGCL was declared as a non-performing asset ("NPA") and a stressed asset due to which it was unable to take necessary action for implementation of emission control system to comply with SO2 emission standards within the timeline specified by MoEF&CC in its letter dated 11.12.2017.

35. On 22.01.2018 State Bank of India issued RFP for competitive bidding to select a new entity who shall take over control in shareholding of PPGCL. In response thereto, Resurgent submitted its offer to acquire 75.01% of equity shareholding along with 100% preference share of PPGCL and to transfer balance 13.5% equity shares to the existing lenders.

36. The Ministry of Power issued a letter dated 30.05.2018 addressed to the Central Electricity Regulatory Commission ("CERC") stating that

notification dated 07.12.2015 of the MoEF&CC is in the nature of change in law event except in the following cases: -

> "
> *(a) Power Purchase Agreement of such TPPs whose tariff is determined under Section 63 of the Electricity Act, 2003 having bid deadline on or after 7th December, 2015; or*
>
> *(b) TPPs where such requirement of pollutions control system was mandated under the environment clearance of the plant or envisaged otherwise before the notification of amendment rules;"*

37. On 27.08.2018, State Bank of India issued in-principle Letter of Intent (LoI) in favor of RVPL intimating that based on the valuation conducted by the lenders, it has been declared as successful bidder for the purpose of taking over control of majority shareholding of PPGCL. This was followed by final LoI dated 13.12.2018. Thereafter, a share purchase agreement was entered into between the lenders, RVPL and Resurgent to effectuate transfer of share of PPGCL in favor of RVPL.

38. In February 2019, a feasibility report was prepared by Tata Consulting Engineers Limited ("TCE") for PPGCL by taking into consideration the

extent of SO2 absorption required, the flexibility of fuel firing and large volume of flue gas to be treated. TCE recommended installation of FGD system with forced oxidation, having minimum SO2, absorption efficiency of 95%.

39. On 28.02.2019, the CEA issued a report recommending suitable technology and total indicative cost for limestone based FGD works out to Rs.0.37crores/MW.

40. The Commission, vide order dated 29.03.2019 in petition No.1403 of 2019, approved change in the ownership of Prayagraj TPP.

41. On 01.05.2019, PPGCL issued a change in law notice to the appellant Nos.2 to 6 under Article 13 of the PPA in view of the relevant developments that had taken place post issuance of notifications dated 07.12.2015 and 28.06.2018 by MoEF&CC.

42. In the backdrop of these facts and circumstances, the first respondent PPGCL approached the Commission by way of petition No.1484 of 2019 under Sections 86(1)(b) and 86(1)(f) of the Electricity Act, 2003, read with Article 13.3 of the PPA dated 21.11.2008 seeking declaration to acknowledge and approve the promulgation of the new environmental rules

and regulations vide notifications dated 07.12.2015 and 28.06.2018 as change in law events. The petition contained following prayers: -

"

a) *Acknowledge and approve the promulgation of the new Environment rules and Regulations vide Notifications dated 7th December 2015 and 28th June 2018, as a Change in Law event under Article 13 of the PPA;*

b) *Allow the Petitioner ad hoc/provisional relief under Article 13.4 of the PPA dated 21.11.2008 for capital cost of Rs. 1328.68 Crore (excluding Interest During Construction & Incidental Expense During Construction i.e IDC & IEDC), Variable Cost and Additional Operation & Maintenance Expenses on account of the Change in Law Events, i.e promulgation of the new environment rules and regulation pending final determination of costs;*

c) *Allow the Petitioner to approach this Commission subsequently to revise estimates of Capital Expenditure including IDC & IEDC, Pre-operative expenses, Design Engeering & Project Management Cost, O&M expenses and Variable expenses after the competitive bidding process as advised by the CEA; and on completion of the project work;*

d) *Reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition; and*

e) Pass such other orders that this Hon'ble Commission deems fit in the facts of this case."

43. The Commission, vide impugned order dated 18.08.2021 allowed prayer (a) of the first respondent PPGCL thereby declaring the notifications dated 07.12.2015 and 28.06.2018 issued by MoEF&CC as change in law events. However, it declined the prayers (b), (c), (d) and (e) of PPGCL.

44. Accordingly, the appellants, who were respondents in the petition before the Commission, have approached this Tribunal by way of the instant appeal assailing the order dated 18.08.2021 of the Commission to the extent it declared the notifications dated 07.12.2015 and 28.06.2018 of MoEF&CC as change in law events.

45. We have heard the learned counsel for the appellants as well as the learned counsel for first respondent extensively. We have also perused the impugned order as well as written submissions filed by the learned counsels.

46. It is not in dispute that prior to the issuance of the notifications dated 07.12.2015 and 28.06.2018 by MoEF&CC, there was no requirement for first respondent to install FGD system in its power project Prayagraj TPP.

The requirement for installation of FGD system in the power plants arose only in pursuance to these two notifications which specified SO2 emission norms for the thermal power plants, which have already been extracted in Para Nos.30 & 31 hereinabove. In fact, it had become mandatory for first respondent to install FGD system in its power project post these notifications.

47. Learned counsel for the appellants vehemently argued that the impugned order of the Commission is absolutely erroneous and cannot be sustained. He submitted that the impugned order fails to undertake an objective analysis of the unique facts of the present case where the first respondent was always under an obligation to install FGD system. To buttress his submission, the learned counsel has referred to clause 1.1.4.2 (d) of the RFP which reads as "*FGD not required but provision for its incorporation at future date be made"*. It is the submission of the learned counsel that aforesaid clause of RFP mandated the bidders to quote an all-inclusive tariff including the cost of FGD system which may have to be installed at a future date.

48. The learned counsel argued that the Commission could not have brushed aside the said mandatory provision of the RFP without any

plausible reason. It is argued that the Commission, by ignoring these express provisions of the RFP, has disregarded the terms of the agreement between the parties and has attempted to rewrite the contract, which is not permissible under the law. He has placed reliance in this regard upon the judgment of this Tribunal in *Nabha Power Limited & L&T Power Development Limited v. PSPCL*, 2014 ELR (APTEL) 0857 submitting that the terms of a concluded contract cannot be reopened or reinterpreted. Relying upon the judgments of the Hon'ble Supreme Court in *Adani Power (Mundra) Limited v. Gujarat ERC,* (2019) 19 SCC 9 and *Transmission Corporation of Andhra Pradesh Limited v. GMR Vemagiri Power Generation Limited* (2018) 3 SCC 716, the learned counsel argued that expressions used in a commercial document ought to be given plain, liberal and grammatical meaning and if a contract is capable of proper interpretation by giving plain meaning to its terms, it would not be prudent to read implied terms into it on the understanding of one party or on the principles of business efficacy.

49. According to the learned counsel the expression "provision for FGD system" used in clause 1.1.4.2(d) of the RFP cannot be read as "space provision" as interpreted by the Commission. He submitted that this clause in the RFP merely provides that there was no immediate requirement of

FGD system in the power plant but provision has to be made for its installation in future. It is argued that making of such provision is a testament of the fact that requirement for installation of FGD was envisaged right at the stage of RFP and it was not a contingent requirement but a mandatory one.

50. It is also argued on behalf of the appellant that the first respondent had even failed to issue the change in law notice in the timely manner as envisaged under Article 13.3.1 of the PPA. It is pointed out that the said provision of the PPA clearly stipulates that if PPGCL was affected by any change in law event and wishes to claim so, notice ought to have been issued by it as soon as reasonably practicable. It is submitted that the notice for claiming the notification dated 07.12.215 as change in law event was issued by PPGCL on 01.05.2019 i.e. after a lapse of about four years and the Commission has failed to consider such huge as well as extraneous delay in issuing change in law notice. It argued that Article 13.3.1 of the PPA is not merely a procedural provision or an empty formality, the non-compliance of which could be brushed aside easily. Rather requirement of timely notice is substantial and material which had to be complied with by the first respondent if it wished to claim any relief

under the said provision. It is further pointed out that as per the contentions of the first respondent itself, it was declared NPA only in November, 2017 i.e. almost two years after the issuance of notification dated 07.12.2015, and no reason has been given as to why the change in law notice could not be issued prior to November, 2017.

51. On behalf of the first respondent, it was submitted that the impugned order of the Commission is justified in the facts and circumstances of the case and does not call for any interference from this Tribunal. It is argued that at the time of issuance of RFP on 05.11.2008, no norms for emission of SO2 and NO2 for thermal power plants had been prescribed, and therefore, it cannot be said that the RFP made it mandatory for thermal power plants to install FGD at a future date. The learned counsel for the first respondent argued that sub-clause (d) of clause 1.1.4.2 of RFP merely stipulated that the space needs to be provisioned for installation of FGD system at a future date, if required, indicating that only adequate space for installation of FGD system was required to be kept for such installation. It is argued that in the absence of standard emission norms for SO2 and NO2 at the time of RFP stage, it was not possible for any bidder to factor in the cost of installation of FGD system in the bids, and therefore, it is fallacious

to say that the bidders had to quote an all-inclusive tariff in the bids. It is pointed out that even the EC dated 08.09.2009 issued to PPGCL neither prescribed the norms for SO2 and NO2 emission nor mandated installation of FGD system. The learned counsel relied upon judgment dated 28.08.2020 of this Tribunal in appeal Nos. 21 of 2019 and 73 of 2019 titled as *Talwandi Sabo Power Limited v. PSERC & Anr.* and *Nabha Power Limited v. PSERC & Anr.* where this Tribunal was dealing with the same notification dated 07.12.2015 of MoEF&CC and held that a regulatory certainty ought to be given to said notification or otherwise the generating companies would not be in a position to meet the revised emission norms.

52. So far as the delay in issuance of change in law notice is concerned, it is submitted by the learned counsel that the same could not be issued as PPGCL was a stressed asset between November, 2017 and December 2019 and the notice was issued immediately after change in its ownership was approved by the Commission vide order dated 29.03.2019 followed by dismissal of appeal against the said order by the Hon'ble High Court of Allahabad on 25.04.2019.

53. We have considered the submissions made by the learned counsels and have gone through the judgments cited in support of their respective

arguments.

54. Following two issues arise for reconsideration in this appeal: -

(i) Whether the change in law notice dated 01.05.2019 issued by first respondent PPGCL is in consonance with the provisions of Article 13 of the PPA?

(ii) Whether the notifications dated 07.12.2015 and 28.06.2018 issued by MoEF&CC constitute change in law event in terms of Article 13 of the PPA?

55. To adjudicate upon both these issues, it is necessary to refer to and peruse Article 13 of the PPA. The same is reproduced hereinbelow for the sake of convenience:-

> *"**13. Article 13: Change in Law***
>
> ***13.1 Definitions***
> *In this Article 13, the following terms shall have the following meanings:*
>
> *13.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:*
>
> *i) The enactment, bringing into effect, adoption, promulgation, amendment, modification or*

repeal, of any Law or

ii) A change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or

iii) Change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurers under the terms of this Agreement, or

iv) Any change in the

a. Declared Price of Land for the Project or

b. The cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RFP or

c. The cost of implementing Environmental Management Plan for the Power Station.

but shall not include:

i) Any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or

ii) Change in respect of UI Charges or frequency intervals by an Appropriate Commission.

Provided further if GoI does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto scheduled Commercial Operation Date of power station, such non-extension shall be deemed to be a change in law.

Provided further, any change in electricity duty, cess, VAT and other levies on auxiliary power shall be deemed to be a change in law."

…

13.3 Notification of Change in Law

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

13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to all the Procurers under this Article 13.3.2 if it is beneficially affected by a

Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurers contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurers shall jointly have the right to issue such notice to the Seller.

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

a. The Change in Law; and

b. The effects on the Seller of the matters referred to in Article 13.2."

Issue No.(i): <u>Whether the change in law notice dated 01.05.2019 issued by first respondent PPGCL is in consonance with the provisions of Article 13 of the PPA.</u>

56. It is argued on behalf of the appellant that the first respondent has failed to issue the change in law notice in timely manner as envisaged under Article 13.3.1 of the PPA. It is submitted that the appellant has issued the change in law notice on 01.05.2019 i.e. after a lapse of about 4 years from the alleged change in law event i.e. MoEF&CC notification

dated 07.12.2015.

57. Article 13.3.1 of the PPA does not prescribe any fixed time frame within which the Change in Law notice ought to be given. It merely stipulates that in case, the seller (i.e. PPGCL) was affected by a change in law event and wishes to claim so, it shall give notice of such change in law event to the procurers as soon as reasonably practicable after gaining knowledge about the same. We may note here that the three units of Prayagraj TPP of the first respondent PPGCL i.e. unit 1, unit 2 and unit 3 were commissioned on 29.02.2016, 10.09.2016 and 26.05.2017 respectively. Thus, the power plant achieved complete commercial operation with effect from 26.05.2017 i.e. much later than the notification dated 07.12.2015 issued by MoEF&CC. It appears that by this time, the first respondent started facing acute financial crunch and ultimately was declared a NPA in November, 2017. It remained so till December, 2019. Meanwhile, the lender State Bank of India issued a RFP on 22.01.2018 to select a competent and experienced entity with adequate financial capacity to take control in the shareholding of the company. Upon evaluation of the bids received in this regard, RVPL emerged as successful bidder. In-principle LoI was issued by State Bank of India to RVPL on 27.08.2018

which was followed by final LoI on 13.12.2018. Thereafter, the share purchase agreement was entered into between the lenders, RVPL and Resurgent to effectuate transfer of share of PPGCL in favor of RVPL. The acquisition of majority shareholding in PPGCL by RVPL was approved by the Commission vide order dated 29.03.2019 in petition No.1403 of 2019 filed in this regard.

58. Record further reveals that vetting of technology to be used by PPGCL in the power plant was done by CEA on 28.02.2019 and it issued a report recommending suitable technology along with indicative cost for FGD works required to be installed in the power plant. Finally, the PPGCL issued change in law notice to appellant Nos. 2 to 6 under Article 13 of PPA of 01.05.2019.

59. Having regard to these facts and circumstances, which are borne out from the record and are not disputed by the appellants, it cannot be said that the first respondent did not issue the change in law notice within the reasonable time after becoming aware of the change in law event i.e. the notification dated 07.12.2015 of MoEF&CC.

60. It is manifest that due to acute financial constraints leading to PPGCL

being declared NPA, change in law notice could not be issued by the company in the years 2017 and 2018. When the ownership of the company PPGCL changed and it was taken over by a financially sound RVPL, which was duly approved by the Commission on 29.03.2019, the company can be expected to have resumed its normal operation. Further, the suitable technology for the FGD works to be done in the power plant was recommended by the CEA in its report dated 28.02.2019 which enabled the company PPGCL to work out its financial impact. Therefore, considering these developments, we find it difficult to accept the submissions of the appellant that change in law notice dated 01.05.2019 was not issued within the reasonable time as contemplated under Article 13.3.1 of the PPA.

Issue No.(ii): Whether the notifications dated 07.12.2015 and 28.06.2018 issued by MoEF&CC constitute change in law event in terms of Article 13 of the PPA.

61. We have already quoted Article 13.1 of the PPA which defines "change in law". As per Article 13.1.1(iv)(c), any change in the cost of implementing environmental management plan for the power station occurring after the date which is 7 days prior to the bid deadline, would

constitute “change in law”.

62. It is not disputed between the parties that on the specified date which is 7 days prior to the bid deadline in this case, there was no stipulation of SO2 levels being limited to 200 mg /Nm3. Even the EC dated 08.09.2009 issued by MoEF&CC for setting up of the project did not prescribe any limit on SO2 and NO2 emissions to be ensured by the PPGCL. The notification dated 07.12.2015 issued by MoEF&CC followed by another notification dated 28.06.2018 prescribed, for the first-time, modified norms related to air emission by thermal power plants. Summary of these new norms to be adhered to by thermal power plants has already been noted in Para Nos.30&31 hereinabove. It is to comply with these norms that the first respondent PPGCL is required to install FGD system for each of its units in the power plant.

63. According to PPGCL, these two notifications dated 07.12.2015 and 28.06.2018 prescribed fresh environmental norms for the thermal power plants which are mandatory in nature and involve huge expenditure in installation of the FGD system in each of the three units, and therefore, constitute change in law event entitling it to be compensated for the financial impact it is going to suffer.

64. The claim of the first respondent is vehemently opposed by the appellants submitting that the first respondent was always under an obligation to install FGD system in the power plant and no new requirement is being thrust upon it by way of the notification dated 07.12.2015. A reference is made to clause 1.1.4.2 (d) of the RFP which reads as under:-

> *"FGD not required but provision for its incorporation at a future date be made."*

65. It is argued that the expression "provision for its incorporation" used in the above referred clause in RFP clearly indicates that the expenditure for installation of FGD system was to be taken into account by the bidders while submitting the bids to quote all inclusive tariff and therefore, the notification dated 07.12.2015 did not cause any unexpected financial burden upon the PPGCL.

66. We may note that before the approval of RFP drafted by PPGCL in the instant case by the Commission on 22.08.2008, the CEA issued a joint report in December, 2007 on the land requirement for thermal power plants mentioning therein that while granting environmental clearance MoEF should stipulate that space is to be kept in the layout for installation of FGD

system, if required, in future.

67. The RFP document, PPA and other documents were approved by the Commission vide order dated 24.01.2008 passed in petition No.503 of 2007 filed by the first respondent PPGCL in this regard. One of the changes directed to be incorporated in the RFP was that for the purpose of bid, certain environmental clearances were required to be borne in mind by the bidders and one such environmental clearance was "FGD system not required but provision for its incorporation in future be made." Accordingly, RFP was issued on 05.11.2008 specifically stipulating that the bidders should bear in mind that while FGD was not required, provision for its incorporation in future must be made.

68. EC dated 08.09.2009 issued by MoEF&CC did not prescribe any limit for SO2 and NO2 emissions to be ensured by the PPGCL. The validity of the EC was extended by the Ministry vide letter dated 23.03.2015 with certain additional conditions, one of such was that the space for installation of FGD system in future should be kept.

69. Upon conjoint reading of the contents of the CEA report issued in December, 2007, provisions contained in the RFP, EC dated 08.09.2009

along with extended EC dated 23.03.2015 would clearly indicate that the PPGCL was not under any obligation at all to install FGD system in its power plant at any point of time till the modified emission norms were specified by MoEF&CC vide notification dated 07.12.2015. All these documents mention categorically “FGD system not required” but caution the generator / developer to make provision in its power plant for incorporation of such system in future, if required. Making provision for incorporation / installation of FGD system would definitely imply that proper and adequate space should be identified and kept for installation of such system. By no stretch of imagination would it imply that the bidders should include the cost of FGD system also in their bids. The argument on behalf of the appellants that the above quoted clause 1.1.4.2(d) of RFP mandates the bidders to quote all-inclusive tariff after factoring in the cost of installation of FGD system also in future, is not only devoid of any merit but also unconscionable. The bids were submitted in the end of the year 2008 when there were no specific environmental norms fixed by the MoEF&CC to be complied with by the thermal power plants. At that time, nobody knew if any such norms would be specified by the Ministry and, if so, when. In such a scenario of uncertainty it was totally unjustified to burden the consumers by requiring the bidders to quote tariff by taking into account the

cost of installation of FGD system also which may be required to be installed in future, if at all. If we assume for the sake of arguments that the bidders, while quoting bids, had to factor in the cost of installation of FGD system too, the developer would be gaining undue advantage till the time installation of such system was made mandatory by MoEF&CC as there would have been no actual investment on the said system till then and the consumers would have been facing undue financial burden in the form of higher tariff. Situation would have been worse for consumers in case no such norms were to be specified by the MoEF&CC for thermal power plants at all. Further, in the absence of specific SO2 and NO2 emission norms to be maintained by the thermal power plants, it was not practicable or possible for the bidders, at the time of submitting bids, to ascertain the suitable technology for installation of the FGD system and to make even a rough estimate of the cost of installation of such a system in the power plants at a future uncertain date.

70. In our above observations, we are fortified by the judgment of this Tribunal dated 28.08.2020 in appeal Nos.21 of 2019 and 73 of 2019 titled *Talwandi Sabo Power Limited v. PSERC & Anr.* and *Nabha Power Limited v. PSERC & Anr.* wherein this Tribunal was dealing with the same notification dated 07.12.2015 of MoEF&CC and it was held:-

"99. Therefore, in all those thermal power projects where there was requirement of only space provision, it is difficult to accept the contention of the Respondents that in spite of absence of specification and design for FGD, the Appellants were still required to estimate the cost and earmark funds anticipating revised norms after six years or so from the cut-off date. To substantiate their contention, Respondent No.2 submits that some thermal plants did install the FGD system, therefore FGD system was available in the market. It is nobody's case that FGD was not available in the market. Depending upon the requirement in terms of conditions of ECrecommended by relevant authority some thermal plants like JSW, Adani etc., might have installed FGD system. But one has to see what were the existing norms, conditions imposed in EC or other allied documents before notification in question and not the availability of FGD system in the market. As already stated, anticipating such change, substantial cost cannot be included as capital cost of the project at the time of bidding itself. If such requirement of FGD did not occur during the entire term of the Project, the consumer would be burdened with higher tariff. As a matter of fact, such substantial and significant cost as part of capital cost of the project would not have been approved at all."

71. In Para 102 of the judgment it has been observed as under: -

"102. The Respondent-Commission opined that requirement for installation of FGD equipment was already envisaged as part of environmental clearance for the project, therefore, it does not amount to Change in Lawevent. We note from the records and the documents relied upon by the Appellants that a standard clause was introduced in the ECs for many of the thermal power projects i.e., only the provision for space for the installation of FGD. As discussed above, there was no clarity on any of the norms for SO2 and NOx emission, which required specific FGD systemand/or SNCR or any other suitable technology for achieving efficiency level as existed at the time of granting ECs. One cannot find fault with the Appellants or any other project of similar nature with similar facts that they did not estimate and earmark funds for the installation of such mechanismas stated above. Therefore, we are of the opinion that installation of FGDand funds for the same was not contemplated or envisaged in the ECs, which were issued six year prior to the Notification in question."

72. Our attention was also drawn to the letter dated 30.05.2018 issued by the Ministry of Power to CERC stating that notification dated 07.12.2015 of MoEF&CC is in the nature of change in law except in the following cases: -

"

(a) *Power Purchase Agreement of such TPPs whose tariff is determined under Section 63 of the Electricity Act, 2003 having bid deadline on or after 7th December, 2015; or*

(b) *TPPs where such requirement of pollutions control system was mandated under the environment clearance of the plant or envisaged otherwise before the notification of amendment rules;"*

73. It is manifest that none of the above two conditions apply to the power plant of the first respondent. We have already noted that there was no requirement of pollution control system for the PPGCL under the environmental clearances issued to it prior to notification dated 07.12.2015. With regards to the said letter, there is discussion in the above noted judgment of this Tribunal also which is as under: -

"128. Then coming to the letter of Ministry of Power dated 30.05.2018, the contents of this letter were relied upon by both the parties. However, both Appellants and Respondent interpret same clauses differently. The relevant portions of the said letter are as under:

"5.1 The MoEF&CC Notification requiring compliance of Environment (Protection) Amendment

Rules, 2015 dated 7th December 2015 is of the nature of Change in Law event except in following cases:

…

(b) TPPs where such requirement of pollutions control system was mandated under the environment clearance of the plant or envisaged otherwise before the notification of amendment rules."

129. According to the Respondents, this letter refers to two situations (a) where the pollution control system is mandated and (b) where it is envisaged. Respondents contend that the word 'mandate or otherwise envisaged' would mean one and the same. Therefore, according to them, the condition in the EC to provide space for installing FGD at a later stage would mean it is mandated and therefore it does not amount to Change in Law event.

130. It is needless to say that the opinion expressed in this letter is not having any binding effect on any judicial/quasi judicial authority meant to adjudicate the dispute pertaining to Change in Law claim arising out of MoEF & CC Notification. No one can deny the fact that it was within the domain of Respondent-Commission to adjudicate the same initially when dispute was raised before it. In view of

hierarchy of authorities, this Tribunal as Appellate Authority has the jurisdiction to interpret whether Commissions' interpretation was right or wrong and further express opinion whether the revised norms amounts to Change in Law event or not. However, one cannot find fault with the issuance of such letter by MoP since it has to coordinate with various departments including MoEF and then discharge its functions on various issues pertaining to environment. Under such circumstances, this letter has come into existence.

131. As already stated above, in the case of similarly placed generating companies, who were successful bidders under competitive bidding process having similar terms of PPA, the Respondent-DISCOM has not challenged the orders passed by Respondent-Commission where the very same letter of MoP was relied upon.

132. One of the above contents of MoP letter dated 30.05.2018 reads as follows:

> *"TPPs where such requirement of pollution control system was mandated under the environment clearance of the plant or envisaged otherwise before the notification of amended rules".*

133. This letter refers to two situations. First one is where

*thermal power projects have requirement of pollution control system like FGD as a mandate under the environmental clearance of the plant. It would mean that it must be a requirement which has to be mandatorily complied with in terms of environmental clearance of the plant. That means it should be one of the conditions in the EC. The second situation refers to requirement of pollution control system envisaged otherwise before the Notification of amended rules. The expression used is "or envisaged otherwise" before the Notification in question. There has to be a literal interpretation of the word 'or envisaged otherwise'. The expression "or envisaged otherwise" in para 5.1 (b) is to be interpreted to mean "**envisaged in any document but the Environment Clearances**". Hon'ble Supreme Court had occasion to opine on the rule of disjunctive interpretation in cases of the use of the word "or" in LIC vs. D.J. Bahadur, (1981) 1 SCC 315. The relevant extract is mentioned herein below:*

> *"148. In order to steer clear of the above interpretation of Section 11(2) learned counsel for the employees put forward the argument that the word "or" occurring in the section should not be read as a disjunctive and should be given the meaning "and" so that the two clauses forming the conditions about which the Central Government has to be satisfied before it can act under the section are*

taken to be one single whole; but we do not see any reason why the plain meaning of the word should be distorted to suit the convenience or the cause of the employees. It is no doubt true that the word "or" may be interpreted as "and" in certain extraordinary circumstances such as in a situation where its use as a disjunctive could obviously not have been intended (see Mazagaon Dock Ltd. v. Commissioner of Income Tax and Excess Profits Tax [AIR 1958 SC 861 : 1959 SCR 848]). ***Where no compelling reason for the adoption of such a course is, however, available, the word "or" must be given its ordinary meaning, that is, as a disjunctive. This rule was thus applied to the interpretation of clause (c) of Section 3(1) of the U.P. (Temporary) Control of Rent and Eviction Act, 1974 in Babu Manmohan Das Shah v. Bishun Das [AIR 1967 SC 643 : (1967) 1 SCR 836] by Shelat, J.****:*

"The clause is couched in single and unambiguous language and in its plain meaning provides that it would be a good ground enabling a landlord to sue for eviction without the permission of the District Magistrate if the tenant has made or has permitted to be made without the landlord's consent in writing such construction which materially alters the

accommodation or is likely substantially to diminish its value. The language of the clause makes it clear that the legislature wanted to lay down two alternatives which would furnish a ground to the landlord to sue without the District Magistrate's permission, that is, where the tenant has made such construction which would materially alter the accommodation or which would be likely to substantially diminish its value. ***The ordinary rule of construction is that a provision of a statute must be construed in accordance with the language used therein unless there are compelling reasons, such as where a literal construction would reduce the provision to absurdity or prevent the manifest intention of the legislature from being carried out. There is no reason why the word 'or' should be construed otherwise than in its ordinary meaning."***

[Emphasis Supplied]

134. The context, under which the expression 'or envisaged otherwise' before the Notification in question, if compared with the first situation, certainly would mean that such condition of pollution control system was indicated in any other document other than the environmental clearance that must have come into existence before the

Notification in question. Therefore, we entirely agree with the arguments of Appellants that the scope of condition at para 5.1(b) of the aforesaid letter would actually mean that a party is not entitled to seek Change in Law claim in respect of any control system, which is already installed in terms of environmental clearance or otherwise required by any other document other than EC. For example, both the Appellants have already complied with some of the parameters envisaged i.e., particulate matter, mercury, specific water consumption, but Appellants have not sought Change in Law claim for these parameters.

135. Pertaining to the stand of Respondent No.2 that if installation of FGDis opined as Change in Law event in compliance of conditions of Notification in question, it would vitiate bidding process since it would prejudice other bidders, on this point, we accept the arguments of the Appellants. The Change in Law event in question has occurred six years after cut-off date. Having regard to the wording of the condition (vi) in the ECs in question, if read with other preparatory documents including competitive bidding guidelines, we are of the opinion that no other bidder could have anticipated/contemplated emerging of new emission norms for SO2 and NOx of the present nature.

136. In short, from the above analysis, what is noticed is a presentation was made before issuance of ECs and said presentation could be only on the basis of prevailing environmental norms. The mechanism required for the control of emissions in terms of the procedure and norms are quite different from what is required so far as the projects of the Appellants is concerned in terms of Notification of the MoEF & CC in 2015. Therefore, in the absence of circumstances requiring FGD installation for these plants at the time of issuing ECs, one cannot opine that such installation was mandatory or envisaged as a statutory requirement in other documents before the notification in question. Condition (vi) in the ECs definitely and certainly refers to installation of FGD if required in future as a mandate, therefore, the general/standard condition at (vi) would mean provision of space for FGD system alone was the requirement. This would mean the necessity may arise or may not arise in future since it depends upon environmental protection measures from time to time which may be statutorily mandated by MoEF & CC and other concerned authorities."

74. We feel in complete agreement with observations of this Tribunal in the above referred judgment and see no reason to take a contrary view.

Conclusion:

75. Having regard to the above discussion, we do not find any error or infirmity in the impugned order of the Commission. The appeal is sans any merit and is hereby dismissed.

Pronounced in the open court on this the 29th day of July, 2024.

(Virender Bhat)	(Sandesh Kumar Sharma)
Judicial Member	Technical Member (Electricity)

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