IN THE APPELLA TE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

Appeal No. 101 of 2020

Dated: 13th November, 2020

Present: Hon`ble Mr. Ravindra Kumar Verma,Technical Member(Electricity)
Hon`ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

Lalitpur Power Generation
Company Limited
Through its Authorised Signatory
Bajaj Bhawan, Jamnalal Bajaj Marg,
B-10, Sector-3,
Noida-201301 ...Appellant

Versus

1. **Uttar Pradesh Electricity Regulatory**
Commission
Through its Secretary
Vidyut Niyamak Bhawan,
Vibhuti Khand, Gomti Nagar
Lucknow-226010 ...Respondent No.1

2. **Uttar Pradesh Power Corporation**
Limited
Through its Managing Director,
7th Floor, Shakti Bhawan,
14, Ashok Marg,
Lucknow – 226001 ...Respondent No.2

Counsel for the Appellant(s)	:	**Mr. Amit Kapur** **Mr. Upendra Prasad** **Mr. Akshat Jain** **Mr. Pratyush Singh** **Mr. Sanjeev Kumar Singh** **Mr. Shighra Kumar**
Counsel for the Respondent(s)	:	**Mr. C.K. Rai for R-1** **Mr. Hemant Sahai** **Ms. Puja Priyadarshini** **Mr. Nived Veerapaneni for R-2**

JUDGMENT

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

1. The Lalitpur Power Generation Co. Ltd. (hereinafter referred to as "**Appellant**/ **LPGCL**") has challenged the order dated 07.02.2020 (hereinafter referred to as "**Impugned Order**") passed by the Uttar Pradesh Electricity Regulatory Commission (hereinafter referred to as the **"Respondent No. 1**/ **State Commission"**) passed in Petition No. 1468 of 2019 whereby the State Commission disallowed in-principle approval of the additional capital expenditure to be incurred by the Appellant on account of installation of various Emission Control Systems/Flue Gas Desulfurization ("**FGD**") system in compliance of Ministry of Environment, Forest and Climate Change ("**MoEFCC**") Notification dated 07.12.2015.

2. The Appellant is a generating Company with an installed capacity of 1980 MW (3 x 660 MW) Thermal Power Project at Boragaon, District Lalitpur, Uttar Pradesh.

3. The first Respondent is the Uttar Pradesh Electricity Regulatory Commission discharging functions under the Electricity Act, 2003.

4. The second Respondent is the Uttar Pradesh Power Corporation Ltd., a company responsible for electricity transmission and distribution within the State of Uttar Pradesh under the Electricity Act, 2003.

5. The Appellant installed the Thermal Power Project under the Energy Policy ("Energy Policy, 2009") notified by the Government of Uttar Pradesh in 2009. Under the said policy Government of UP allowed development of Independent Power Projects (IPPs) under various routes including Memorandum of Understanding (MOU) route by the private developers. The Policy further stipulates that the projects under MoU route will be treated as "Industry" in terms of Industrial Policy of the State and all the incentives available to new projects will be applicable.

Power Purchase Agreement (PPA)

6. On 18.11.2010, UP Commission approved the Draft Power Purchase Agreement (PPA) for supply of 90% power from the Project and accordingly, a PPA was executed between LPGCL and UPPCL on 10.12.2010. Subsequently on 15.06.2011, a Supplementary PPA was executed between the Appellant and UPPCL for supply of 100% saleable power from the Appellant's Project and the same was approved by the state Commission on 03.11.2014. The relevant extracts of the PPA are: -

*“**Change in law**” shall have the meaning ascribed thereto in Article 13.1.1:*

….

*“**Effective Date**” means the date of signing this Agreement by last of all the Parties;*”

“*13.1.1 “**Change in law**” means:*

<u>The occurrence of any of the following events after the date, which is (7) days prior to the Effective Date:</u>

i. *any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law;*

ii. *any Change in interpretation of any law by a competent court of Law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or;*

iii. *any change in any consents, approvals or licenses available or obtained for the project, otherwise than the 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 cost of implementing Environmental Management Plan for the Power Station* (; *….*”

“*13.2 Application and Principles for computing impact of Change in Law*

While determining the consequences of Change in Law under this Article 13, the parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in Article 13, the affected party to the same economic position as if such a Change in Law has not occurred.

(a) Construction Period

As a result of any change in law, the impact of increase/decrease of capital cost of the project in the tariff

shall be approved by UPERC. In case of Dispute, Article 17 shall apply

(b) Operation Period

As a result of any change in law, the compensation for any increase/decrease in revenues or cost to the seller shall be determined and effective from such a date, as decided by Appropriate Commission whose decision shall be final and binding on both the parties, subject to the rights of appeal provided under applicable 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 13.3.2 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 reasonable practicable after becoming aware of the same or should reasonably have known of the Change in Law.

….

13.4 Tariff Adjustment Payment on account of Change in Law

13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from:

(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law, or
(ii) the date of order/judgment of the Competent Court or tribunal or Indian Government Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

13.4.2 The payment for Change in Law shall be through Supplementary Bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff."

Environmental Clearance ("*EC*")

7. On 31.03.2011, MoEFCC accorded Environmental Clearance ("***EC***") to the Appellant for the Project. The EC was subsequently amended on 20.05.2014 and 30.05.2016 to incorporate changes with respect to change in source of coal from imported to domestic. The EC, *inter*-alia, contains the following clauses: -

> "*A. Specific Conditions*
> *….*
> *(xiv) Provision for installation of FGD shall be provided for future use.*
> *(xv) The project proponent shall undertake measures and ensure that no fugitive fly ash emissions take place at any point of time.*
> *(xvi) Stack of 275 m height shall be installed and provided with continuous online monitoring equipment for SOx, NOx and PM2.5 & PM10. Exit velocity of flue gases shall not be less than 22m/sec. Mercury emissions from stack may also monitored on periodic basis.*
> *(xvii) High Efficiency Electrostatic Precipitators (ESPs) shall be installed to ensure that particulate emission does not exceed 50 mg/Nm3*
> *(xviii) Adequate dust extraction system such as cyclones/bag filters and water spray system in dusty areas such as in coal handling and ash handling points, transfer areas and other vulnerable dusty areas shall be provided.*
> *….*
> *B. General Conditions*
> *….*
> *(vii) Regular monitoring of ambient air ground level concentration of SO2, NOx, PM2.5 & PM10 and Hg shall be carried out in the impact zone and records maintained. If at any stage these levels are found to exceed the prescribed limits, necessary control measures shall be provided immediately. The location of the monitoring shall be decided in consultation with SPCB. Periodic reports shall be submitted to the regional office of this ministry. The data shall also be put on the website of the company.*
> *(xvi) Separate funds shall be allocated for implementation of environmental protection measures along with item-wise*

break-up. These costs shall be included as part of the project cost. The funds earmarked for the environment protection measures shall not be diverted for other purposes and year-wise expenditure should be reported to the Ministry."

Consent to Establish by UPPCB

8. On 11.04.2011, Uttar Pradesh Pollution Control Board ("*UPPCB*") accorded Consent to Establish to LPGCL for the Project. The relevant extracts are as under: -

> *3. "Do not start trial production in the Industry until they have obtained consent from the Board under the Air and Water Act. For obtaining water and air consent, the consent applications prescribed at least 2 months before the date of commencement of production in the unit must be submitted to this office mentioning the first application before production. If the industry does not comply with the above, legal action can be taken against the industry under the said act without any prior notice…*
>
> *8. Ensure implementation of Water/Air pollution control plan before starting the production."*

Consent to Operate

9. On 19.06.2015, 21.01.2016 and 18.07.2016, Uttar Pradesh Pollution Control Board accorded Consent to Operate to LPGCL for the Project under Air (Pollution prevention and control) Act 1981 and Water (Pollution prevention and control) Act 1974. The relevant extracts are as under: -

"1. The hourly maximum emission volume of flue gas should not exceed the quantity emitted by the Chimney given below;

Source of Air pollution	*Fuel*	*Established pollution control system*
(i) 1983 Ton/Hr	*Coal: 31237*	*ESP/ every*

capacity boiler: 03 nos.	*Ton/day*	*Boiler, Chimney 275 Mtr.*

2. The quantities emitted by various Chimneys in the atmosphere confirm to the Board standards

(i)	*Suspended Particulate Matter (SPM)*	*mg/Nm^3*
(ii)	*Metal dust (Iron, Zink, Copper etc.)*	*-*
(iii)	*Hydrogen, sulfur trioxide sulfide mist)*	*-*
(iv)	*Sulfur dioxide*	*(PCM)*
(v)	*Carbon Monoxide*	*-*
(vi)	*Hydrocarbon*	*-*
(vii)	*Ammonia*	*-*
(viii)	*Fluorine*	*-*
(ix)	*Mercaptan*	

……………..

8. All arrangements should be made to monitor emissions from the stack of the unit within one month of the date of issue of consent order."

Commercial Operation Date ("*COD*")

10. The Appellant commissioned the generating units and the unit wise Commercial Operation Date ("***COD***") are as under: -

Unit	*COD*
Unit – I	01.10.2015
Unit – II	14.10.2016
Unit – III	23.12.2016

MOEFCC Notification dated 07.12.2015

11. On 07.12.2015, MoEFCC notified the Environment (Protection) Amendment Rules, 2015 ("*Amendment Rules*"/"*MoEFCC Notification*") that mandates all Thermal Power Plants ("*TPPs*") installed till December 2016, like the Appellant's Project, to comply

with the Revised Emission Norms and other terms and conditions stipulated therein on or before 06.12.2017 (i.e., within a period of 2 years from the date of MoEFCC Notification).

12. In terms of the MOEFCC Notification, norms applicable for Units having capacity above 500 MW and installed between 01.01.2003 and 31.12.2016 are as under: -

(a) Emission limit for Particulate Matter is 50 mg/Nm^3. In LPGCL's case, the Project is designed for PM of maximum 50 mg/Nm3 as the condition for PM limit of 50 mg/Nm3 was specified in the EC dated 31.03.2011 for the Project.

(b) Oxides of Nitrogen emission limited to 300 $mg/Nm^{3.}$ (*new norm*)

(c) Sulphur Dioxide emission limited to 200 mg/Nm^3 (*new norm*).

(d) Mercury emission limited to 0.03 mg/Nm^3 (*new norm*).

(Cumulatively referred to as *"Emission Norms*")

13. The Appellant has submitted that the MoEFCC's Notification has introduced new norms and amended the existing/applicable environmental norms, for all existing as well as future TPPs. Therefore, in compliance of the MoEFCC Notification, the Appellant is mandated to install/retrofit various Emission Control Systems like Flue Gas De-sulfurization **("FGD")** System, Combustion Modification System etc. in the Project, which will require the Appellant to carry out major capital works.

14. It is the case of the Appellant that to meet the Revised Emission Norms with respect to Sulphur Dioxide, the Appellant is required to install/retrofit its Project with FGD System, which will result in: -

(a) One-time Additional Capital Expenditure on account of installation of various Emission Control Systems.

(b) Recurring Operational Expenditure during the term of the PPA read with SPPA, i.e., increase in operation and maintenance expenses of the Project

(c) Increase in auxiliary consumption of the Project

(d) Disruption in power generation during the installation phase of various Emission Control Systems.

(e) Loss of Fixed cost recovery during the shutdown period.

15. In terms of MoEFCC's Notification, the Appellant was required to comply with Revised Emission Norms by 06.12.2017 (two years from date of publication of the MoEFCC Notification).

However, on 08.06.2016, in a meeting convened by MoEFCC on Coal Washeries (Environment & Forest Clearances) and Emission Norms for Thermal Power Plants chaired by the Minister of Environment, Forest & Climate Change and Minister of Power, Coal & Renewable Energy, it was decided, inter-alia that: -

(a) A Committee comprising representatives from MoEFCC, MoP, CEA, MoC, PGCIL, CPCB be constituted to look into issues relating to implementation of the Revised Norms.

(b) MoP/CEA were directed to submit an action plan by December 2016 indicating unit wise retrofit/renovation for each TPPs.

16. On 26.06.2016, The Central Electricity Regulatory Commission issued a letter to CEA seeking its recommendations on the following: -

(a) Impact of the revised environment standards as per the Environment (protection) Amendment Rules, 2015 on the operational norms of the Coal based thermal generating stations specified by the Commission in the Tariff Regulations, 2014

(b) The types of Flue Gas Desulfurization (FGD), selective non-catalytic reduction system (SNCR)/ Selective Reduction (SCR) systems feasible to be installed and their impact on operation norms;

(c) Impact on operational norms on account of modification of cooling system from open cycle to comply the norms of water consumption;

(d) Indicative cost of implementation of environment standards, if available with CEA;

(e) Any other matters related with implementation of the new environment standards.

17. On 01.08.2016, CEA wrote to Central Commission, furnishing the general aspects of the requirement under the Revised Norms but made no specific recommendations on the technology required for SOx and NOx control including the tentative cost involved.

18. On 21.09.2016, MoP constituted a Committee under Chairperson, CEA for preparing a Phasing Plan for implementation of the Revised Emission Norms issued by MoEFCC on 07.12.2015. The 1st and 2nd meeting of the Committee was held on 21.10.2016 and 13.12.2016, respectively wherein it was, *inter-alia,* decided that: -

(a) Region-wise list will be prepared by CEA identifying TPPs for ESP upgradation and installation of FGD system.

(b) Concerned Regional Power Committees ("*RPCs*") shall prepare Phasing Plan for implementation of the Revised Emission Norms for the identified TPPs.

19. Thereafter, CEA in coordination with the concerned Regional Power Committees formulated a Phasing Plan for implementation

of the Revised Emission Norms in units identified for FGD installation and ESP upgradation.

20. On 06.11.2017, the Appellant filed Petition No. 1263 of 2017 before UP Commission seeking approval of additional capital cost for installation of various Emission Control Systems such as FGD System for compliance of MoEFCC's Notification dated 07.12.2015. UPPCL, who had signed the PPA for procuring 100% power from the Appellant's power station was impleaded as party respondent in these proceedings.

Central Pollution Control Board (CPCB)'s letter dated 11.12.2017

21. On 11.12.2017, CPCB wrote to the Appellant and, *inter-alia*, stated that: -

    (a) The project shall meet emission limit of PM immediately by installing Electrostatic Precipitator ("*ESP*").

    (b) The plant shall install FGD by December 2020, February 2021 and October, 2021 in Units I, II and III respectively so as to comply with SO2 emission limit.

    (c) The plant shall take immediate measures like installation of low NOx burners, providing Over Fire Air (OFA) etc. and achieve progressive reduction so as to comply with NOx emission limit by the year 2022.

    Appellant has submitted that it's Project is already in compliance of emission level of PM and NOx, hence CPCB directions qua installation of ESP and low NOx burners is not applicable in the present case. Appellant is only mandated to comply with emission level of SO2 by installing FGD system.

UPERC's order dated 18.12.2017

22. On 18.12.2017, UP Commission passed Order in Petition No. 1263 of 2017 and, *inter-alia*, directed the Appellant to approach Central Electricity Authority ("*CEA*") to decide specific optimum technology, associated cost and major issues to be faced in installation of various Emission Control Systems and MoEF for phasing of the implementation of the different environmental measures. The Appellant was further granted liberty to file appropriate petition at an appropriate stage based on approval of CEA and direction of MoEF. The relevant extracts are: -

> "*12….. the petitioner is directed to approach CEA for the Central Electricity Authority to decide specific optimum technology, associated cost and major issues to be faced in installation of different system like SCR, etc. The petitioner is also directed to take up the matter with the Ministry of Environment and Forest for phasing of the implementation of the different environmental measures.*
>
> *13. Accordingly, the petitioner is granted liberty to file appropriate petition at an appropriate stage based on approval of CEA and direction of MoEFCC which shall be dealt with in accordance with law.*"

23. Accordingly, on 28.12.2017, the Appellant wrote to CEA (with a copy to MoEFCC, MoP) seeking CEA's recommendations *qua* optimum technology, associated cost and issues to be faced in installation of various Emission Control Systems for compliance of MoEFCC Notification dated 07.12.2015.

24. On 22.02.2018, the Appellant wrote to CPCB and, *inter-alia*, apprised CPCB about the Order dated 18.12.2017 passed by UP Commission in Petition No. 1263 of 2017.

25. On 10.04.2018, CEA wrote to various TPPs regarding adherence to Environmental norms as per Environment (Protection) Amendment Rules 2015 for Thermal Power Stations. The relevant extracts are:-

> " *…In light of the above and also in order to suggest Power Producers an appropriate technology and related coast implications, IPPs are requested to approach concerned regulators and submit a detailed feasibility report consisting of following:-*
>
> *I. Brief details of the plant*
> *II. Present Emissions and water usage of the plant*
> *III. Comparison of available technologies for reduction of emission levels and selection of technology, reasons thereof*
> *IV. Proposed scheme and impact on existing plant including study on reagent and by-product where so necessary*
> *V. Implementation plan along with schedule*
> *VI. Cost estimates including Capex, Opex etc.*
> *VII. Impact on Tariff*
> VIII. *Layout and flow diagrams of the proposed system*
>
> *The phasing plan for implementation of FGD system is strict and the power producers across the country are expected to meet the specified timeline. It is requested to submit the detail feasibility report of concern plants. This would enable IPPs to approach respective regulatory commission for further action.*"

MOP's direction dated 30.05.2018 to CERC

26. On 30.05.2018, MoP in exercise of powers conferred under Section 107 of the Electricity Act issued directions to Central Commission to declare the MoEFCC Notification dated 07.12.2015 as a "Change in Law" event. Central Commission was, *inter-alia*, directed to allow the additional capital expenditure due to installation of various Emission Control Systems/ FGD and its operational cost as pass through in tariff. The relevant extracts are:-

"*5. After considering all aspects and with due regard to the need for safeguards against environmental hazards, and accordingly to ensure timely implementation of new environmental norms, the Central Government has decided that –*

5.1 The MoEFCC 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:

a) Power Purchase Agreements 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;

5.2 The additional cost implication due to installation or up-gradation of various emission control systems and its operational cost to meet the new environment norms, after award of bid or signing of PPA as the case may be, shall be considered for being made pass through in tariff by Commission in accordance with the law.

5.3 The respective TPPs may approach the Appropriate Commission for approval of additional capital expenditure and compensation for additional cost on account of this Change in Law event in respect of the Power Purchase Agreement entered under Section 62 or Section 63 of the Electricity Act, 2003.

> *5.4 For the TPPs that are under the purview of the Central Commission, the Commission shall develop appropriate regulatory mechanism to address the impact on tariff, and certainty in cost recovery on account of additional capital and operational cost, under concluded long term and medium term PPAs for this purpose….*"

27. On 06.02.2019 and 11.02.2019, UPPCL nominated its representative from Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited ("*UPRVUNL*") for monitoring the process of tendering and awarding the contract for FGD.

CEA's Report

28. On 21.02.2019, CEA wrote to LPGCL and issued its recommendations *qua* suitable technology and indicative cost for installation of FGD system to comply with MoEFCC Notification in the Appellant's Project ("*CEA Report*"). The recommendations by CEA *inter-alia* were: -

    (a) In the case of LPGCL, two FGD technologies were proposed by CEA (with individual FGD for each Unit):-

        (i) Wet FGD (Lime stone based) FGD.

        (ii) Ammonia based SOx removal FGD

    (b) The maximum Additional Auxiliary Power Consumption ("*APC*") for complete FGD facilities is 1%. However, if Gas to Gas Heater ("*GGH*") is used then additional APC of 0.1% per FGD may be considered.

    (c) The indicative estimated cost for Wet limestone base FGD works out to INR 0.42 Cr/MW (CAPEX only for Limestone based FGD). This indicative cost is the "Base Cost" only and does not include Taxes-Duties etc.

(d) The cost of retrofitting the FGD for LPGCL ought to be discovered through open competitive bidding in consultation with UPPCL.

(e) Since, LPGCL had proposed to use the existing chimney as wet stack to avoid generation loss, a temporary chimney above absorbers or at ground was recommended along with necessary arrangements required for disposing off flue gasses. If required, GGHJ can also be used.

(f) As regards Opportunity Cost, LPGCL was advised to minimize the interconnection time by taking suitable measures so that 'Opportunity Cost' may have least impact on CAPEX and eventually on tariff revision.

(g) For Opex, the same would include reagent cost, additional water consumption associated with FGD, manpower cost, APC and By-product handling and revenue earned through disposal of by product.

29. On 05.04.2019, Appellant wrote to UPPCL/UPRVUNL and, *inter-alia*, stated that: -

(a) UP Commission vide its Order dated 18.12.2017 passed in Petition No. 1263 of 2017 (wherein UPPCL was also a party) had directed the Appellant to approach CEA for in-principle approval to decide optimum technology for FGD, FGD's Capital cost and associated cost and major issues to be traced in installation of different systems for compliance of MoEFCC Notification dated 07.12.2015. Accordingly, Appellant wrote to CEA on 28.12.2017.

(b) CEA vide its letter dated 21.02.2019 has provided its report on recommendation of suitable technology and indicative

cost in the installation of FGD to meet the new MoEFCC Emission Norms for the Appellant's Project.

(c) As per the said report dated 21.02.2019, the Appellant will shortly file petition before UP Commission as per the Order dated 18.12.2017.

(d) After approval of UP Commission, the Appellant will proceed for bidding and ordering of FGD.

(e) As per the Appellant's estimate, it will take around 32 months for the FGD installation from the date of ordering.

30. On 21.05.2019, the Appellant filed Petition No. 1468 of 2019 before State Commission seeking in-principle approval of expenditure on account of installation of various Emission Control Systems in compliance with MoEFCC Notification dated 07.12.2015.

31. On 03.09.2019, the State Commission passed an Order in Petition No. 1468 of 2019 and, *inter-alia*, directed the Appellant to file CEA recommendations/report dated 21.02.2019.

32. On 11.09.2019, the State Commission notified the Uttar Pradesh Electricity Regulatory Commission (Terms and Conditions of Generation Tariff) Regulations, 2019 ("*Generation Tariff Regulations 2019*"). The relevant extracts are: -

"*3. Definitions:*
….
(5) "Auxiliary Energy Consumption" or "AUX" in relation to a period in case of a generating station means the quantum of energy consumed by auxiliary equipment of the generating

station, such as the equipment being used for the purpose of operating station and machinery including switchyard of the generating station and the Transformer Losses within the generating station, expressed as a percentage of the sum of gross energy generated at the generator terminals of all the units of the generating station:

Provided that Auxiliary Energy Consumption shall not include energy consumed for supply of power to housing colony and other facilities at the generating station and the power consumed for construction works at the generating station;

Provided further that Auxiliary Energy Consumption for the compliance of environmental emission standards shall be considered separately.

….

(10) "Change in law" means occurrence of any of the following events:

(a) Bringing into effect or promulgation of any new Indian law or Indian enactment

(b) adoption, amendment, modification, repeal or re-enactment of any existing Indian law; or

(c) change in interpretation or application of any Indian law by a competent Court, Tribunal or Indian Governmental Instrumentality which is the final authority under law for such interpretation or application;

(d) change by any competent statutory authority, in any condition or covenant of any consent or clearances or approval or License available or obtained for the project; or

(e) 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.

….

20. Additional capitalization:

….

(4) Additional capitalization on account of Renovation and Modernization (R&M)

a) The generating company, for meeting the expenditure on renovation and modernization (R&M) for the purpose of extension of life beyond the useful life of the generating station or a unit thereof, shall make an application before the Commission for approval of the proposal with Detailed Project Report giving complete scope, justification, cost benefit analysis, estimated life extension from a reference date,

financial package, phasing of expenditure, schedule of completion, reference price level, estimated completion cost including foreign exchange component, if any, record or consultation with beneficiaries and any other information considered to be relevant by the generating company….

b) Where the generating company makes an application for approval of its proposal for Renovation and Modernization, the approval shall be granted after due consideration of reasonableness of the proposed cost estimates, financing plan, schedule of completion, interest during construction, use of efficient technology, cost-benefit analysis, expected duration of life extension consent of the beneficiaries, if obtained, and such other factors as may be considered relevant by the Commission.

c) Any expenditure incurred or projected to be incurred and admitted by the Commission after prudence check based on the estimates of Renovation and Modernization expenditure and life extension, and after deducting the accumulated depreciation already recovered from the original project cost, shall form the basis for determination of tariff…."

33. On 11.09.2019, UPPCL filed Reply to Petition No. 1468 of 2019.

34. In compliance of the Order dated 03.09.2019, on 07.10.2019, the Appellant filed application for taking on record CEA recommendations/report dated 21.02.2019 in Petition No. 1468 of 2019.

35. On 09.10.2019, Appellant filed Rejoinder to the Reply dated 11.09.2019 filed by UPPCL.

36. On 06.01.2020 and 24.01.2020, LPGCL wrote to UPPCL informing about the initiation of competitive bidding process for Design, Procurement, Erection and Commissioning of FGD system.

LPGCL also requested UPPCL to participate in the tendering process and appoint its representative.

37. On 07.02.2020, the State Commission passed the Impugned Order (which was uploaded on the website of UP Commission on 10.02.2020) and, *inter-alia*, disallowed in-principle approval of expenditure on account of installation of various Emission Control Systems in compliance with MoEFCC Notification dated 07.12.2015.

38. The State Commission in the impugned order has framed three issues and has decided as under:

(i) On the issue of regulatory uncertainty qua treatment of additional capital cost, the State Commission has decided that the in-principle approval for additional capitalisation is not permitted in terms of the UPERC Generation Tariff Regulations 2019 and therefore the same cannot be granted by the State commission.

(ii) On the issue of MOEFCC notification dated 7.12.2015 being change in law, the commission has decided that the petitioner would be required to specify the obligations/conditions/standards as applicable prior to the commercial operation date to enable the state commission to consider the aspect of change in law.

(iii) On the aspect of prior declaration of change in law, the commission has decided that PPA does not contemplate any such prior declaration of change in law and therefore the same cannot be granted by the commission. The commission has further observed that it is the petitioner’s obligation to comply with prevalent laws and ensure that all the consent and approval required for the project are obtained by it.

Submissions of the Appellant

The Appellant have made following submissions:

39. As per Article 13.1.1 of the PPA, the MoEFCC notification dated 07.12.2015 is a change in law, as it has been notified after the Effective Date.

40. There was no applicable standard for emission of Sulphur Dioxide (SO_2) and Nitrogen Oxide (NOx) as on -
    - Environmental Protection Rules 1986
    - Effective Date
    - Environmental Clearance dated 31.03.2011granted to LPGCL's project
    - Consent to Establish dated 11.04.2011, and
    - Consent to Operate dated 19.06.2015, 21.01.2016 and 18.07.2016

41. The Appellant was only required to comply with the condition relating to stack height, as provided in Schedule I to the Environment (Protection) Rules, 1986 and emission level of Particulate Matter as prescribed in the EC dated 31.03.2011. The Appellant is already in compliance of the norms pertaining to stack height and Particulate Matter. Accordingly, LPGCL has conceptualized its Project on the then existing laws and government policies including the applicable environmental policies. Since the PPA is a long-term agreement (for a period of 25 years), it was contemplated in the PPA that adjustment may be required to off-set

the impact of certain events beyond the control of the parties which have an impact on the Project.

42. On 31.03.2011, i.e., after the Effective Date, the Environment Clearance was issued for the Project, which did not mandate FGD installation or earmarking of funds towards FGD: -

    (a) The only mention of FGD in the EC pertained to the requirement for installation of the same in future, as under: -

        "(xiv) Provision for installation of FGD shall be provided for future use."

        The phrase "*shall be provided for future use"* conveyed that LPGCL may or may not be required to install the system at all. Since, no requirement for an equipment was mandated and only space/provision was to be provided, LPGCL has duly provided space for FGD. Hence, it cannot be argued that LPGCL was required to include cost of FGD installation in the Project Cost, especially when FGD installation was not mandatory on the Effective Date.

43. The State Commission has arbitrarily dismissed the Petition filed by the Appellant stating that in terms of the Generation Tariff Regulations, 2019, appropriate stage for seeking approval of additional capital expenditure on account of MoEFCC Notification would be at the time of truing-up (i.e., after such expenditure has been actually incurred by the Appellant). Relevant extract of the Impugned Order is as under: -

    "Commission's decision and analysis:

    …………..

    The Petitioner in its own wisdom has approached the Commission by filing the current Petition for in principle

approval of expenditure on installation of various emission control systems, which is incorrect. The Commission is of the view that appropriate stage at which this Hon'ble Commission may be approached for approval of any additional capital expenditure would be at the time of trueing up as per Generation Tariff Regulations, 2019."

44. The aforesaid direction is contrary to the State Commission's directions in previous Orders dated 18.12.2017 and 08.04.2019. Further, the State Commission has failed to appreciate that without any legal certainty on recovery of cost with regards to installation of various emission control systems in compliance of MoEFCC Notification, the lenders will not grant the funds required for compliance of MoEFCC Notification. In this regard it is submitted that: -

    (a) The State Commission in the Order dated 18.12.2017 passed in Petition No. 1263 of 2017 had directed LPGCL to approach the State Commission for approval of Change in Law and in-principal approval of the additional capital expenditure at an appropriate stage i.e., after seeking CEA's approval on specific optimum technology and associated cost qua installation of FGD system as under: -

    "the petitioner is directed to approach the Central Electricity Authority to decide specific optimum technology, associated cost and major issues to be faced in installation of different system like SCR, *etc. The petitioner is also directed to take up the matter with the Ministry of Environment and Forest for phasing of the implementation of the different environmental measures. Accordingly, the petitioner is granted liberty to file appropriate petition at an appropriate stage based on approval of CEA and direction of MoEF&CC which shall be dealt with in accordance with law"*

(b) Subsequent to Order dated 18.12.2017: -

   (i) On 28.12.2017, LPGCL wrote to CEA seeking its recommendation on specific technology and cost for compliance of Emission Norms prescribed in MoEFCC Notification

   (ii) On 22.02.2018, LPGCL wrote to CPCB informing about the State Commission's directions in Order dated 18.12.2017

   (iii) On 06.02.2019 and 11.02.2019, LPGCL requested UPPCL to nominate its representative for monitoring tendering process of FGD system

   (iv) On 21.02.2019, CEA issued its recommendation qua technology and indicative cost for installing FGD system.

   (v) On 05.04.2019, LPGCL informed UPPCL qua CEA's recommendation dated 21.02.2019

   (vi) On 21.05.2019, LPGCL filed Petition No. 1468 of 2019 before the State Commission seeking in-principal approval of additional capital and operational cost to be incurred in compliance of Emission Norms. CEA's recommendation dated 21.02.2019 was placed on record by Application dated 07.10.2019.

(c) In view of the above it is evident that in compliance of the State Commission's Order dated 18.12.2017, LPGCL acted diligently and approached CEA in a timely manner and upon receipt of its recommendation, LPGCL filed Petition No. 1468 of 2019 before the State Commission seeking in-principal approval of FGD cost. It is to be noted that the Impugned Petition was filed in compliance of the State Commission's directions in Order dated

18.12.2017 as continuity of earlier proceedings i.e., Petition No. 1263 of 2017.

(d) Further, the State Commission has already concluded what is going to be the "appropriate stage" for filing of Petition with regards to approval of additional capital expenditure for installation of FGD system and has directed various generators to approach the Commission after finalizing of bids for the proposed work but before placing the order. In this regard reliance is placed upon the State Commission's Order dated 08.04.2019 passed in Petition No. 1381 of 2018. Relevant extract of the Order is reproduced as below: -

> *"9. The Commission directed UPRVUNL that it must follow the procedure prescribed in the PPA for invoking change in law. There is no provision in the Generation Tariff Regulation to accord in principal approval. The Petitioner can approach the Commission again after adopting the procedure for 'change in law' and finalisation of bids for the proposed work but before placing the order."*

(e) In terms of the directions in Order dated 18.12.2017 and 08.04.2019, LPGCL has approached the State Commission at the appropriate stage i.e., after: -

   (i) Seeking CEA's approval/advisory on specific optimum technology and associated cost qua installation of FGD system; and

   (ii) Finalizing of bids for the proposed work and before placing the order for erection and commissioning of FGD system.

(f) However, the State Commission has yet again not granted relief to the Appellant under the guise of Generation Tariff Regulations, 2019, holding that the appropriate stage for

seeking approval of additional capital expenditure on account of MoEFCC Notification would be at the time of truing-up (i.e., after such expenditure has been actually incurred by LPGCL). The Appellant has submitted that the State Commission has been continuously shifting the goalpost, which is in defiance of statutory mandate of regulatory certainty. Further, the Hon'ble Supreme Court and this Tribunal in catena of judgments has held that after the passing of the Order, the Court, Tribunal or the State Commissions becomes *functus officio* and thus being not entitled to vary the terms of the Orders earlier passed. In this regard reliance is placed upon the following Judgments: -

(i) *Dwaraka Das v. State of M.P,* (1999) 3 SCC 500 [Para 6]

(ii) *Deputy Director, Land Acquisition v. Malla Atchinaidu* [AIR 2007 SC 740]

(iii) This Tribunal Judgment dated 23.09.2015 passed in Appeal No. 57 of 2015 titled Chhattisgarh *State Power Distribution Company Limited v. Chhattisgarh State Electricity Regulatory Commission* [Para 15]

(g) Therefore, in so far as the appropriate stage for approaching The State Commission for approval of MoEFCC Notification as Change in Law event and additional capital expenditure on account of the same are concerned the same has attained finality in the Orders dated 18.12.2017 and 08.04.2019. Such actions of the State Commission are arbitrary and impermissible in law and hence ought to be set aside.

45. Substantial investment is required to carry out capital works to meet the Revised Emission Norms. This would require installation of Emission Control Systems, for which substantial capital expenditure

is required. In addition to the above, there would be substantial impact on Operation & Maintenance costs, impact on plant efficiency parameters such as Auxiliary Consumption, Unit heat rate etc. These factors would have a bearing on the costs of power generation and the net power output of the generating Units. Given the implications of implementing these changes to meet the Revised Emission Norms prescribed by MoEFCC, it is important that there is a certainty of regulatory treatment of these costs and charges. The in-principle regulatory approval of the cost would be critical for arranging funds for implementation of Emission Control Systems.

46. In view of the above it is submitted that the State Commission by denying in-principal approval of the cost has failed to appreciate that LPGCL will not be able to issue EPC contract for installation of FGD system in its Project without additional funding from the lenders. In this regard it is pertinent to mention that in spite of MoP's directions on 30.05.2018 issued to Ld. CERC, lenders are reluctant to provide funding to the generating companies for compliance of MoEFCC Notification without a change in law declaration of the said Notification and in-principal approval of the associated cost from the concerned Regulatory Commission and on account of the following reasons:-

    (a) Prevalent Stress in the sector.
    (b) Inordinate delay in Regulatory approvals
    (c) Exhaustion of bank exposure limit
    (d) Outstanding dues from Discoms to generators
    (e) Risk relating to whether tariff compensation is sufficient to make FGD system implementation viable
    (f) Risk relating to ability to recover costs in the intervening period

between commissioning of FGD system and regulatory approval of tariff compensation

47. In this regard it is pertinent to note that: -
    (a) On 08.08.2018, Indian Banking Association ("IBA") wrote to Association of Power Producers ("APP") and highlighted their inability to fund Power sector for installation of FGD/emission control equipment. In view thereof, APP requested MoP through various communications for: -
        (i) Provision of payment security mechanism for IPPs as suggested by High Level Empowered Committee ("HLEC")
        (ii) Separate window for financing of emission control equipment.
        (iii) Approval of provisional tariff by Regulatory Commissions.
    (b) On 20.04.2020, MoP issued an Office Memorandum enclosing Minutes of Meeting chaired by Secretary (Power) on 09.04.2020. During the meeting, Secretary (Power) taking note of the concerns raised by representative from State Bank of India suggested Ld. CERC and SERC to decide FGD Petitions within three months, as investment approval to power plants for installation of FGD based on the CEA's benchmark cost and indicative technologies would encourage banks to fund the FGD installation.

48. The Appellant has submitted that without in-principal approval providing 'regulatory certainty' on the treatment of MoEFCC Notification and associated cost, it would be near impossible for LPGCL to install FGD system to meet the mandatory revised emission norms. It is submitted that non-compliance of MoEFCC

Notification will result in violation of:-

(a) Environment Protection Act, 1986 and Environment Protection Rules, 1986 and the consequences of such non-compliance are to be faced under Section 14 read with Section 26 & 27 of the National Green Tribunal Act, 2010.

(b) Terms and conditions prescribed under the Environmental Clearance issued to the Plant, which will entail revocation and closure of Plant operation.

(c) CPCB direction dated 11.12.2017, which will entail levy penalty by way of Environment Compensation and penal action against the Directors of LPGCL under the Environment Protection Act, 1986.

Accordingly, prior in-principle approval of the resultant expenditure on account of installation of FGD System is required in order to: -

(a) Obtain/deploy additional funds including debt funds, which will not be sanctioned by lenders in the absence of regulatory certainty with regard to the methodology/mechanism of arriving at compensation to be provided to LPGCL to mitigate the impact of Change in Law event;

(b) Ensure that the entire process of compliance is carried out in a transparent manner under the orders of the State Commission and with the cooperation of UPPCL.

(c) Prevent multiplicity of proceedings which may crop up on account of disputes in relation to change in law claims; and

(d) Ensure that project economics and time value of money is secured, which will also be beneficial to the Procurers who can avoid incurring interest / carrying cost.

(e) Avoid violation of Environment Protection Act, various Statutory directions/Notifications and EC and the consequential penal action and closure of Plant.

In any way, presently the in-principal approval of additional capital expenditure sought by LPGCL is only an estimate based on preliminary study and CEA's advisory. However, actual adjustment of tariff will be based on actual capital and operational expenditure incurred by LPGCL subject to prudence check by the State Commission. Therefore, consumer interest also stands protected.

49 The Appellant has submitted that in the present case, the State Commission has neither declared the MoEFCC Notification as Change in Law event for LPGCL nor provided in-principal approval of the cost. By doing so, the State Commission has prevented LPGCL from complying with the mandatory obligations imposed by the said Notification, which in result may lead to revocation of the EC granted to the Project and penal actions under the Environment Protection Act 1986. Therefore, it is humbly prayed that this Tribunal may direct the State Commission to grant in-principal approval of the additional capital expenditure to be incurred in compliance of MoEFCC Notification.

50. The Appellant has submitted that the State Commission has wrongly held that in-principle approval for additional capital expenditure on account of MoEFCC Notification cannot be granted, since the same is not permitted in terms of UPERC Generation Tariff Regulations 2019. Relevant provision of the Impugned Order is as under: -

"Based on the perusal of Regulation 20(2) of the UPERC Generation Tariff Regulations 2019, it is amply clear that the additional capital expenditure to be incurred by a generator is subject to approval by this Hon'ble Commission in terms of its Prudence but only after it has been actually incurred by the Petitioner. When the UPERC Generation Tariff Regulations 2019 permit the Petitioner to seek approval of additional capital expenditure for a Change in law event once it has been incurred, the Petitioner cannot be permitted to claim the same in any other manner. Therefore, the Petitioner needs to make its claim in the manner as provided under the UPERC Generation Tariff Regulations 2019 and in-principle approval for additional capitalization is not permitted in terms of the UPERC Generation Tariff Regulations 2019."

51. The Appellant has submitted that Appellant's tariff is determined by the State Commission under Section 62 of the Electricity Act (on cost-plus basis) in terms of applicable Generation Tariff Regulations. Under the cost-plus regime, any increase in capital cost is a pass through in tariff subject to prudence check by the State Commission. Further, pending adjudication of tariff proceedings, the generating companies following cost plus model are granted provisional tariff in line with applicable Tariff Regulations. However, unlike cost-plus regime, for PPAs executed under Section 63 of the Act, any additional capital or operational expenditure is to be allowed after adjudication of change in law claims by the Appropriate Commission. In Section 62 PPAs, the Appropriate Commission will conduct prudence check on the cost proposed to be incurred by the generating company and accordingly, in-principle approval for the same becomes necessary.

52. The State Commission has been vested with the "Power to

Regulate" the tariff of LPGCL under Section 86(1)(b) of the Electricity Act, 2003. The Power to Regulate has a broad impact having wide meaning and cannot be construed in a narrow manner. In this regard reliance is placed upon the Judgment of Hon'ble Supreme Court in *Energy Watchdog v. CERC* [(2017) 14 SCC 80], wherein it was held that Section 79(1)(b) akin to Section 86(1)(b) of the Act is a wider source of power to "Regulate" tariff. It was further held that in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation then Commission's general regulatory powers under Section 79(1)(b) or 86(1)(b) can be used to grant the necessary relief. The relevant portion of the judgment is reproduced below: -

"20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and

conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."

53. Further, the scope of power to 'Regulate' has been discussed by the Hon'ble Supreme Court in the following judgments as under: -

    (a) In *U.P. Co-operative Cane Unions Federation v. West U.P. Sugar Mills Association*, reported as (2004) 5 SCC 430, it was held that the word 'Regulate' has a broad impact having wide meaning and cannot be construed in a narrow manner. The relevant extract of the judgment is reproduced as below: -

    "20. ..... "Regulate" means to control or to adjust by rule or to subject to governing principles. It is a word of broad impact having wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context in which it has been used and the purpose of the statute".

(b) In *V.S Rice and Oil Mills And Ors v. State of Andhra Pradesh* reported as AIR 1964 SC 1781 it was held as under: -

> *"20. Then it was faintly argued by Mr Setalvad that the power to regulate conferred on the respondent by Section 3(1) cannot include the power to increase the tariff rate; it would include the power to reduce the rates. This argument is entirely misconceived. The word "regulate" is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices……..."*

(c) In *Uttar Pradesh Power Corporation Limited Vs National Thermal Power Corporation Limited &Ors*' reported as (2009) 6 SCC 235 it was held as under:-

> *"48. The power to regulate may include the power to grant or refuse to grant the licence or to require taking out a licence and may also include the power to tax or exempt from taxation. It implies a power to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary to conduct the business in a proper and orderly manner. It also includes the authority to prescribe the reasonable rules, regulations or conditions subject to which the business may be permitted or may be conducted"*
>
> *(Emphasis Added)*

54. In view of the above-referred judgments the concept of regulatory jurisdiction provides for: -

(a) Comprehending all facets not only specifically enumerated in the Act or Regulation, but also embraces within its fold the powers incidental to the regulation.

(b) Power to prescribe and enforce all such proper and reasonable rules and directions as may be deemed necessary to conduct the business in a proper and orderly manner.

(c) Granting the necessary relief to a party, in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation.

55. It is settled position of law that framing, or existence of a Regulation is not a pre-condition for granting any relief under a Statute, as affirmed by Hon'ble Supreme Court in the following Judgments:-

(a) *PTC India Ltd. v. Central Electricity Regulatory Commission*, (2010) 4 SCC 603 [Para 55 and 56]

(b) *UPSEB vs. City Board, Mussoorie* AIR 1985 SCC 883 [Para 7]

(c) *Rajiv Anand & Ors. Vs. UoI & Ors* AIR 1998 (45) DRJ (DB) [Pg 390]

56. The Appellant has further submitted that the Rule/Regulation making Authority, which is the State Commission in the present case, has power to fill up gaps in supplementing the rules/regulations by issuing instructions if the existing rules/regulations are silent on the subject, provided that such instructions are not inconsistent with the mandate of the Act. In this regard reliance is placed upon the following judgments of Hon'ble Supreme Court:-

(a) *Sant Ram Sharma vs State of Rajasthan &Ors* AIR 1967 SC 1910 [Para 7]

(b) *Union of India &Anr vs. Charanjit S. Gill &Ors* (2000) 5 SCC 742 [Para 25]

(c) *Union of India vs. Association of Democratic Reforms &Anr* (2002) 5 SCC 294 [Para 20]

57. As deliberated above, non-existence of a Regulation or any provision in an existing Regulation does not preclude the State Commission to pass appropriate Orders/directions upholding the object of the Electricity Act. In this regard it is pertinent to mention that even Regulation 41 and 42 of UPERC Generation Tariff Regulation 2019 provides that the State Commission is not barred from dealing with any matter or exercising any power (in consonance with the Electricity Act) for which no Regulations have been framed as under: -

> *41. Nothing in these Regulations shall bar the Commission from adopting, in conformity with the provisions of the Act, a procedure, which is at variance with any of the provisions of this Regulation, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters.*
>
> *42. Nothing in these Regulations shall, expressly or impliedly, bar the Commission dealing with any matter or exercising any power under the Act for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a matter it deems fit.*"

58. In view of the above it is unequivocal that the State Commission under its regulatory jurisdiction has incidental powers to do things, which are not specifically provided in the Generation Tariff Regulation 2019. Accordingly, the State Commission being the custodian of power sector in the State of Uttar Pradesh, in exercise of its Regulatory Powers can issue any form of direction in furtherance to the object of the Electricity Act, 2003. For this purpose, it is essential to consider the relevant object of the Act and Policies framed thereunder: -

(a) Section 61 of the Act provides that Generation, transmission, distribution and supply of electricity are to be conducted on ‘commercial principles’.

(b) The twin objectives of financial viability/sustainability and consumer interest are the cornerstone of the electricity sector as provided under the preamble of the Act.

(c) In exercise of powers under Section 3 of the Act, the Central Government on 12.02.2005, prepared and published the National Electricity Policy. Clause 5.8.8 of the Policy provides that Electricity Regulatory Commissions should take steps to address the need for regulatory certainty based on independence of the regulatory commissions and transparency in their functioning in order to generate investor’s confidence.

59. In view of the above it is submitted that: -

(a) Granting in-principal declaration of FGD Notification as an event of Change in Law and in-principal approval of the additional capital expenditure to be incurred on account of compliance of such Change in Law event/FGD Notification would provide legal certainty qua reimbursement of the cost of FGD system through Tariff and would further aid in arranging funds from lenders/outside sources, as the quantum of investment required for installing FGD system is not something that can be arranged internally.

(b) In-principal approval would also be in consonance with commercial principles and the twin objective of ensuring financial viability and consumer interest as:-

(i) LPGCL is seeking in-principal approval qua the cost, which is a statutory expense being uncontrollable in nature and has to be mandatorily incurred.

(ii) Final tariff determination on account of installation of FGD system will be based on actual cost incurred by LPGCL subject to Prudence Check by the State Commission, hence consumer interest remains protected as tariff will be the reflection of the actual cost incurred by LPGCL.

60. Therefore, regardless of whether Generation Tariff Regulations 2019 contemplates a scenario or not, the State Commission under Section 86(1)(b) of the Act i.e., "Power to Regulate" can issue direction granting in-principal approval of the additional capital expenditure to be incurred by LPGCL on account of a Statutory mandate and Change in Law event, i.e., MoEFCC Notification, as the same would be consistent with the mandate of Electricity Act, Clause 5.8.8 of National Electricity Policy, commercial principles and regulatory certainty.

61. The Regulation 11 of CERC (Terms and Conditions of Tariff) Regulation 2019 ("*CERC Tariff Regulation 2019*") provides for grant of in-principal approval of additional expenditure to be incurred by generating company on account of Change in Law events. Pursuant thereto, Ld. CERC by its various Orders has accorded in-principal approval of capital expenditure proposed to be incurred by Thermal Power Plants for installing FGD system and other emission control systems in compliance of the emission norms prescribed under MoEFCC Notification, which was held to be an event of Change in Law, as under: -

(a) Order dated 11.11.2019 passed in Petition No. 152/MP/2019 titled *Maithon Power Limited vs. Tata Power Delhi Distribution Limited &Ors* ("*Maithon Order*"). Relevant extract of Maithon Order is as under: -

"17. On the issue of in-principle approval of capital expenditure, the petitioner has submitted that conjoint reading of the Regulations 11, 26 and 29 of the Tariff Regulations, 2019 reveals that the Petitioner herein is required to obtain prior approval of this Commission before undertaking the expenditures for meeting the revised emission standards. While clause (1) of the Regulation 29 specifically mandates filing a Petition before Commission for undertaking additional capital expenditure for compliance of the revised emissions standards, clause (4) of Regulation 29 requires filing of a Petition for determination of tariff due to the implementation of revised emission standards for such additional capital expenditure actually incurred or projected to be incurred.

18……….The petitioner has already informed the beneficiaries about the estimated expenditure which exceeds the limit of Rs.100 crore specified under the Regulation. As such, the proposed expenditure on FGD is squarely covered within the Regulation, 11 of the 2019, Tariff Regulations. Accordingly, it is held that proposed expenditure qualifies for the In-principle approval, subject to further scrutiny of the proposed expenditure."

(b) The Central Commission in Order dated 23.04.2020 passed in Petition No. 446/MP/2019 titled *Sasan Power Limited vs MP Power Management Company Limited &Ors* ("Sasan Order") taking note of the fact that banks/lenders have expressed difficulty in funding for FGD installation without prior cost approval from Regulatory Commissions, approved provisional capital cost and other costs related to installation of FGD

system. The Central Commission also stated that any further delay in securing loan from financial institutions is likely to further delay installation of FGD system. Relevant extract of Sasan Order is as below: -

"18. We have considered the submissions of the Petitioner and the Respondents. There has been material change in the situation as regards the Petitioner after the Commission issued orders in Petition No. 133/MP/2016 wherein request for in-principle approval was denied since no such provision existed in the PPA. As per directions of the Commission, the Petitioner approached CEA that has indicated the appropriate technology for installation of FGD system in the Project. CEA has also indicated tentative base cost for such installation. Through competitive bidding process, the Petitioner has selected a vendor for installation of FGD system. The Petitioner has approached financial institutions for loans where the banks through IBA have expressed difficulty in funding in view of prevailing situation in the power sector. Similar is the case with PFC that has informed the Petitioner that it needs comfort in terms of approval of the Commission so that there are no problems in debt servicing of loans that may be availed by the Petitioner. Commission is also conscious of the fact that the installation of FGD system in thermal power stations is being monitored by the Hon'ble Supreme Court. Any further delay in securing loan from financial institutions is likely to further delay installation of FGD system.

……………..

29. In view of the above, the Commission accords approval to the petitioner for following capital cost on provisional basis:

S.No	*Description*	*SPL Capex Estimate (Rs. Cr)*	*SPL Capex Estimate (Rs. Cr/MW)*	*Capex allowed (Rs. Cr/MW)*
1.1	*FGD main*	*1663*	*0.40*	*0.40*

	package			
1.2	*Electrical power supply package*		*0.02*	*0.02*
2	*Total FGD EPC Basic Cost*	*1663*	*0.42*	*0.42*

30. The Commission also allows the petitioner to claim expenditure towards IDC, taxes & duties, FERV (if any) and expenditure towards project management & engineering services at actuals after commissioning of the FGD system, which may be allowed after prudence check. As regards pre-operative expenses, the cost may be allowed subject to proper justification for such expense and after prudence check by the Commission……………………………….

39. We note that few other similar petitions have been filed by other generating companies in respect of their generating stations wherein tariff has been determined through the tariff based competitive bidding route under Section 63 of the Act. PPAs in their case also contain similar provisions as clause 13.2(b) of the instant Petition i.e. there is no explicit provision with regard to methodology for compensation for Change in Law events which occur during the operation period. In their case too, the PPAs have left it for the Commission to decide at the compensation for any increase/ decrease in revenues or cost on account of change in law during the operation period. Since the FGD system is required to be installed by all thermal generating stations as per the 2015 Notification, several more such Petitions are likely to be filed by generating companies for determination of compensation on account of change in law during operation period. Therefore, it would be appropriate to adopt a uniform compensation mechanism in respect of all such generating stations.

40. We have approved provisional capital cost and other costs related to installation of FGD system that is likely to provide enough comfort to financial institutions. However, we recognise that certainty of stream of cash flow in form of tariff is likely to give further comfort to these financial institutions and that it is also equally important for the procurers as well as sellers to know the tariff implications

on account of installation of FGD system."

62. In this regard it is submitted that where State Commission's Tariff Regulations are silent on financial and operations norms, the Central Commission's tariff regulations would be applicable in light of Section 61 of the Electricity Act, 2003, which provides as under: -

> "*61. The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-*
> ……………….
> *(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
> *(b) ....*"

63. This Tribunal has upheld the said position of law in the case of *Lanco Amarkantak Power Ltd vs HERC &Ors* reported as 2014 ELR (APTEL) 0416 ("*Lanco Judgment*"). Relevant portion of the Lanco Judgment is reproduced hereunder: -

> *"44. […] But for any financial and operational parameters, if the State Commission's Regulations do not have any specific provision, then the State Commission has to be guided by the relevant Tariff Regulations of the Central Commission […]"*

64. In view of the above, it is unequivocal that in the absence of a provision for in principal approval in the UPERC Generation Tariff Regulations 2019, the State Commission was duty bound to follow the principles and methodologies enunciated by Ld. Central Commission in its Tariff Regulations, which duly provides for in-principal approval of such cost. Therefore, the State Commission

ought to have granted in-principle approval to LPGCL for the increase in cost/or revenue expenditure on account of implementation of revised emission norms, as it will aid LPGCL in securing the required funds from the lenders for complying with the mandate of MoEFCC Notification.

65. In terms of Article 13.3.1 of the PPA, LPGCL has to inform the Procurer i.e., UPPCL about the occurrence of Change in Law event as soon as reasonably practicable. Article 13.3.1 is as under: -

> *"13.3 Notification of Change in Law*
> *13.3.1 If the Seller is affected by* a *Change in Law in accordance with Article13.2 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 ofthe Change in Law.*

66. Even though the contractual Change in Law Notice qua MoEFCC Notification was served to UPPCL on 17.03.2020, since inception, UPPCL has been aware of Appellant's obligation to install FGD system at its Plant in mandatory compliance of MoEFCC Notification dated 07.12.2015, which is a Change in Law event, as evident from the following: -

(a) After CPCB directions to mandatorily install FGD and other emission control systems in the Plant, the Appellant filed Petition No. 1263 of 2017before the State Commission, seeking in-principal approval of such additional capital expenditure on account of compliance with MoEFCC Notification, which is a Change in Law. UPPCL was a party to the proceeding and was

duly informed about the mandate to install FGD by way of Statutory Notice issued by the State Commission in November 2017 and by actively participating in the proceedings before the Commission.

(b) On 06.02.2019 and 11.02.2019, Appellant had requested UPPCL to nominate its representative for participating in the tendering process/competitive bidding process for procurement, erection and commissioning of FGD system at the Plant. UPPCL, acting upon the same by its letter dated 06.02.2019 & 11.02.2019 nominated representative from UPRUVNL and by letter dated 17.02.2020 nominated representative from UPPPCL for monitoring the tendering process and awarding of contract for installation of FGD system.

(c) UPPCL has been kept in loop in all communicating and development relating to installation of FGD and its tendering process.

(d) UPPCL participated in the pre bid conference held on 18.02.2020 at Noida.

(e) UPPCL and Government of U.P. were informed directly by MoEFCC at the relevant time, since copies of MoEFCC Notification were addressed to all the concerned.

67. Therefore, UPPCL at this belated stage cannot contend that Change in Law Notice under Article 13.3 has not been issued by LPGCL. The requirement of Article 13.3.1 is to inform UPPCL qua the occurrence of Change in Law, which has been duly complied by LPGCL. In fact, as on date UPPCL is even involved in the tendering process of FGD. It is submitted that the State Commission cannot negate restitutive relief in light of procedural bias/technical pleas as

per the settled position of law that procedure cannot obstruct justice and a party cannot be refused or denied relief on account of procedure. The Hon'ble Supreme Court has held in a catena of cases that procedure is the hand maiden of justice as under:

(a) Rani Kusum v. Kanchan Devi, (2005) 6 SCC 705 (Paras 10-14)
(b) MahilaRamkali Devi v. Nandram, (2015) 13 SCC 132 (Para 20)
(c) PasupuletiVenkateswarlu v. Motor and General Traders, (1975) 1 SCC 770 (Para 4)

68. Without prejudice to the above, it is submitted that Appellant's tariff is determined under Section 62 of the Act in terms of applicable Generation Tariff Regulations, which does not envisages providing Notice for Change in Law event, as any additional capital expenditure is to be mandatorily pass through in tariff subject to prudence check by the State Commission. Therefore, not providing a Change in Law Notice under the PPA cannot be a ground for denying the relief sought by the Appellant, as it is a settled position of law the Regulations override PPA as upheld by the Hon'ble Supreme Court in *PTC India v. CERC &Ors* (2010) 4 SCC 603.

69. The State Commission while examining whether MoEFCC Notification qualifies as an event of Change in Law for LPGCL, held that LPGCL would be required to demonstrate (by providing relevant data) the changes in norms/emission level on account of MoEFCC Notification vis-a-vis the pre-existing obligations/conditions/norms, stipulated under the Environment Clearance and other Consents and Clearances granted for the Project. In this regard it is submitted that: -

(a) Appellant's by way of Additional Submission dated 10.02.2020 had placed on record data along with relevant documents evincing the emission norms applicable to Appellant's Plant prior to MoEFCC Notification (i.e., by way of Environmental Clearance and various Consents issued by UP Pollution Control Board). The Appellant had clearly demonstrated that there was no stipulation or limit prescribed in the EC or Consents with regard to emission level/norms of NOx and SOx. Therefore, MoEFCC Notification clearly qualifies as an event of Change in Law for LPGCL. However, the State Commission erroneously dismissed the Petition without considering the Additional Submission dated 10.02.2020.

(b) The State Commission, although suo-motu, attempted to examine whether MoEFCC Notification qualifies as an event of Change in Law for LPGCL. However, throughout the proceeding, the State Commission never sought such data from the Appellant. Rather, disposed the Petition with such prejudicial observation qua lack of data.

(c) The State Commission held that "*the petition has no specific prayer for declaring the notification dated 07.12.2015 amounts to change in law, the Commission, to meet ends of justice, has dealt with this issue*". It is clear that once the State Commission was of the view that no relief has been sought qua Change in Law in the Petition, there was no reason for the State Commission to further proceed and provide detailed findings on the issue. Such an approach clearly amounts to procedural irregularity, and cuts the Appellant both ways, in as much as the Appellant was not afforded an opportunity to establish that MoEFCC Notification dated 07.12.2015 is a change in law

event and the State Commission despite not being required to deal with said issue as no prayer was sought, dealt with it and gave detailed findings resulting in closure of all remedies for the Appellant in future as well.

70. In view of the above, the appellant has prayed that the present Appeal may kindly be allowed, and the consequent relief be granted to the Appellant.

Submission of the Respondent No. 1/State commission

71. Mr C.K. Rai, the learned council representing the Respondent No.1 (State Commission) submitted as under:

72. There is “no mechanism under the existing tariff regulations notified by the state commission for granting **in-principle approval** for additional capital cost.

73. The tariff regulations provide for mechanism for approval of additional capitalisation, after prudence check, at the truing up stage. i.e. after the expenditure has been actually incurred.

74. The council has further submitted that the issue regarding the ‘in principle approval of additional capitalisation on account of the change in law’ was raised by the stakeholders before the state commission, when it was framing the tariff regulation, 2019, and the same was consciously rejected by the state commission.

75. These regulations have not been challenged till date.

76. The state commission, exercising its regulation making powers under section 181 of the electricity act, have framed these regulations and the same are binding on the parties.

77. The state commission has acted in accordance with the tariff regulation, 2019 and have rejected the prayer of the Appellant for 'in principle approval' for additional capitalisation on account of change in law.

78. The state commission has not decided the issue of change in law and has kept the same open to be decided at the appropriate stage of true up.

79. The additional submissions dated 10th of February 2020, filed by the appellant could not be considered by the state commission as it had already passed the impugned order on 7th of February 2020. The Appellant may file these documents at the stage of truing up proceedings which is the appropriate stage for deciding the issue of additional capitalisation.

80. With respect to contention of the Appellant that the provisions for granting 'in-principle approval' of additional capital cost as laid down by the Central Commission in CERC (Terms & Conditions of Tariff) Regulations, 2019 is applicable to the facts of the present case, the learned council has submitted that such contention is not tenable in view of the *full bench judgment of this Hon'ble Tribunal in Appeal No. 103 of 2012M/s Maruti Suzuki India Ltd. v. HERC &Anr. &*

Appeal No. 200 of 2011 M/s Maruti Suzuki India Ltd. v. HERC wherein this Tribunal while laying the meaning of the term 'shall be guided' as provided in Section 61 of the Electricity Act, 2003 has held that the phrase '*shall be guided by'* in Section 61 of the Electricity Act, 2003 is not mandatory and only having persuasive value to be followed while laying down the Regulation and once the Regulations are framed then Regulations are to be followed as they stand in higher pedestal being subordinate legislation. The relevant graph of the judgment is reproduced below:

"….48. In this connection, it is also necessary to refer to the judgment of this Tribunal in Haryana Power Generation Corporation Limited. In that case, contention of the Appellant therein was that the State Commission had neither followed the principles and methodology specified by the Central Commission nor followed the provisions of the Tariff Policy and the National Electricity Policy. The Tribunal held that Section 61 of the said Act mandates the State Commissions to frame Regulations fixing terms and conditions for determination of tariff and in doing so it is to be guided by the principles and methodology specified by the Central Commission, National Electricity Policy and Tariff Policy etc., but once the State Commission has framed the Regulations it shall determine tariff in accordance with its own Regulations. The relevant graph of the said judgment reads as under: -

"Bare reading of section 61 would make it clear that the State Commission have been mandated to frame Regulations for fixing tariff under Section 62 of the Act and while doing so i..e, while framing such Regulations, State Commissions are required to be guided by the principles laid down by the Central Commission, National Electricity Policy, Tariff Policy etc. It also provide that while framing the Regulations, the State Commissions shall ensure that generation, transmission and distribution are conducted on commercial principles; factors which would encourage competition and safe guard consumer's interest. Once the

State Commission has framed and notified the requisite Regulations after meeting the requirement of prior publication under Section 181 (3), it is bound by such Regulations while fixing Tariff under Section 62 of the Act and the Central Commission's Regulations have no relevance in such cases. However, the State Commission may follow the Central Commission's Regulations on certain aspects which had not been addressed in the State Commission's own Regulations. The Haryana Electricity Regulatory Commission has framed Terms and Conditions for determination of tariff for generation in the year 2008 and the State Commission is required to fix tariff as per these Regulations."

49. The above observations of this Tribunal support our conclusion that the word "shall" appearing in the term "shall be guided" used in Sections 61, 79 and 86 of the said Act is not to be read as "must". It has a persuasive flavour. The National Electricity Policy and the Tariff Policy can only be guiding factors. If there are Regulations framed under Sections 178 and 181 in the field, they will rank above them being subordinate legislation. …."

Submissions of the respondent No. 2/UPPCL

81. Mr Hemant Sahai, learned counsel representing the respondent No. 2 (UPPCL) submitted as under:

82. The central regulations contemplate a 2-stage process, i.e. stage I – a declaration that the MoEFCC notification, in the facts, as applicable to the generating company constitutes a change in law, that requires generating companies to incur additional capital expenditure and stage II - determination of the quantum of such additional expenditure which is subject to prudence check by the CERC.

83. The in-principle approval that the appellant seeks based on the CRC regulations is merely an in-principle approval for incurring

such expenditure. The quantum of the additional Action is subject to prudence check.

84. There is no difference between the central regulation and the state regulation as regards the in-principle approval as both sets of regulation requires a prudence check only after the expenditure has been incurred.

85. In the instances, where the generators approached the Central Commission for grant of in-principle approval for additional capitalisation, on account of change in law, the Central Commission has granted the same but the cost has been approved on provisional basis and the same is subject to prudence check by the Central Commission after the expenditure has been incurred.

86. The state regulation shows that once a generator demonstrates that a change in law event, like the MoEFCC Notification requires it to undertake additional capex then the generator is entitled to such additional capex. The quantum of additional capex will be subject to prudence check by the State Commission, similar to as contemplated in the central regulations.

87. A declaration that the change in law requires the generator to undertake additional capex amounts is in effect nothing but an in-principle approval and is therefore similar to as contemplated in the central regulations.

88. The MOPs direction dated 30th of May 2018 is not a blanket dispensation and has specific carve out for projects where such requirements of pollution control systems was mandated under

the environmental clearance or envisaged otherwise before the said notification. The relevant extract of the MOP's letter is reproduced below:

"5. After considering all aspects and with due regards to the need for safeguards against environmental hazards, and accordingly to ensure timely implementation of new environment norms, the Central Government has decided that –

5.1 The MoEFCC 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".

89. Under the Environmental Clearance ("**EC**") dated 31.03.2011 granted by the MoEFCC to LPGCL the following conditions have been expressly mentioned:

"A. Specific Conditions

…

(xiv) Provision for installation of FGD shall be provided for future use.

…

(xvi) Stack of 275m height shall be installed and provided with continuous online monitoring equipment for Sox, NOx and $PM_{2.5}$ & $PM_{10.}$ Exit velocity of flue gases shall not be less than 22 m/sec. Mercury emissions from stack may also be monitored on periodic basis.

…

B. General Conditions:

…

(xvi) Sate funds shall be allocated for implementation of environmental protection measures along with item-wise

break-up. These costs shall be included as part of the project cost. The funds earmarked for the environment protection measures shall not be diverted for other purposes and year-wise expenditure should be reported to the Ministry"

Therefore, it is for LPGCL to prove the factual position regarding previous emission levels prior to the MoEFCC notification, etc. for claiming its entitlement to incur additional capex on account of Change in Law. Further, since the question of Change in Law is a question of fact, it should be determined on a case to case basis and the orders of other State Commissions do not aid the case of the Appellant in this regard.

90. The declaration that the MoEFCC Notification is a change in law that requires LPGCL to incur additional capex, is a question of fact that can be determined only by UPERC. LPGCL has at no stage whatsoever, before the UPERC, even sought a prayer for such a declaration. The burden of demonstrating this is on LPGCL, which it has not discharged.

91. The comfort provided by the "in-principle" approval of cost by the CERC is no better than the comfort of declaration of Change in Law if so given by the UPERC. If the declaration is made (after hearing UPPCL's objections) that the MoEFCC notification requires LPGCL to incur additional capex, then this declaration itself is adequate and for all practical purposes, including the issues of perceived uncertainty raised by LPGCL. This declaration will amount to and have the same effect -s an "in principle" approval, equivalent to the CERC in principle approval.

92. The appellant has not placed the relevant material before the State commission in support of its claim for change in law and the requirement of additional capital expenditure on account of change in law as a result of notification issued by MOEFCC.

93. Sections 101 to 103 of the Evidence Act provides that the onus for proving the contents of the petition are on the petitioner. The council has placed reliance on the Judgement passed by the Apex court in the case of Anil Rishi v. Gurbaksh Singh; (2006) 5 SCC 558wherein the apex court has observed that the initial burden of proof would be on the plaintiff and pleadings is not evidence, far less proof

94. The appellant has submitted fresh documents i.e. selective data/documents regarding Environmental impact assessment, etc. for the 1st time in an Appeal before this Tribunal and is urging the Tribunal to get into an enquiry on facts on the basis of fresh documents which were withheld from the state commission and UPPCL. The Appellant is seeking adjudication of an issue that it wilfully neglected to address during the course of hearing before the state commission.

95. The Hon'ble Supreme Court in the case of *Karpagathachi v. Nagarathinathachi* reported as *AIR 1965 SC 1752* has held that new contentions requiring investigation into questions of fact cannot be raised for the first time in appeal. In the present case, the issue of Change in Law is an issue which requires further investigation. Hence, such contention cannot be raised for the first time in appeal.

96. Respondent No. 2 has submitted that that it is a settled position of law that parties cannot urge new facts or advance new grounds at appellate stage and has placed reliance on the Judgement passed by the Hon'ble Supreme Court in the case of *Modern Insulators Ltd. v. Oriental Insurance Co. Ltd.* reported as *(2000)2 SCC 734*.

97. It is of utmost relevance to note that LPGCL has filed the present Appeal with additional documents which never formed a part of the record before the UP Commission. It is settled law that a litigant who has been unsuccessful in the lower court cannot be permitted to adduce additional evidence at appellate stage to patch up weak parts of its case and fill up omissions. In support of its appeal, LPGCL has put on record 32 annexures (excluding the Impugned Order). Out of this, 20 annexures do not form part of the original records before the UP Commission. Documents such as the Environmental Impact Assessment, Consent to Establish, Consent to Operate, etc. were available throughout with LPGCL but were never placed on record before the UP Commission. He has placed reliance on the Judgement passed by the constitutional bench of the Hon'ble Supreme Court in the case of State of U.P. v. Manbodhan Lal Srivastava reported as AIR 1957 SC 912.

98. It is of utmost relevance to note that LPGCL has filed the present Appeal with additional documents which never formed a part of the record before the UP Commission. It is settled law that a litigant who has been unsuccessful in the lower court cannot be permitted to adduce additional evidence at appellate stage to patch up weak parts of its case and fill up omissions. In support of its appeal,

LPGCL has put on record 32 annexures (excluding the Impugned Order). Out of this, 20 annexures do not form part of the original records before the UP Commission. Documents such as the Environmental Impact Assessment, Consent to Establish, Consent to Operate, etc. were available throughout with LPGCL but were never placed on record before the UP Commission. In this regard, the constitutional bench of the Hon'ble Supreme Court in the case of *State of U.P. v. Manbodhan Lal Srivastava* reported as *AIR 1957 SC 912*, has observed as follows-

> "*3. Before dealing with the merits of the controversy raised in these appeals, it is necessary to state that Mr Mathur appearing on behalf of the appellant, proposed to place before this Court, at the time of the argument, the original records and certain affidavits to show that, that as a matter of fact, all the relevant facts relating to consultation between the State Government and the Commission had not been placed before the High Court and that if the additional evidence were taken at this stage, he would satisfy this Court that the Commission was consulted even after the submission of the respondent's explanation in answer to the second show-cause-notice. Without looking into the additional evidence proposed to be placed before us, we indicated that we would not permit additional evidence to be placed at this stage when there was sufficient opportunity for the State Government to place all the relevant matters before the High Court itself. We could not see any special reasons why additional evidence should be allowed to be adduced in this Court. It was not suggested that all that matter which was proposed to be placed before this Court was not available to the State Government during the time that the High Court considered the writ petitions on two occasions. It is well-settled that additional evidence should not be permitted at the appellate stage in order to enable one of the parties to remove certain lacunae in presenting its case at the proper stage, and to fill*

in gaps. Of course, the position is different where the appellate court itself requires certain evidence to be adduced in order to enable it to do justice between the parties. In this case, therefore, we have proceeded on the assumption that though the Commission was consulted as to the guilt or otherwise of the respondent and the action proposed to be taken against him after he had submitted his explanation in answer to the first show-cause-notice, there was no consultation with the Commission after the respondent had submitted his more elaborate explanation in answer to the second show-cause-notice."

99. Regarding the LPGCL's contention that the issue of whether MoEFCC's Notification is an event of Change in Law is no longer *res-integra* since- (a) MoP vide directions dated 30.05.2018 has already been held MoEFCC Notification to be a Change in Law; and (ii) other Commissions like CERC and MERC have allowed it as a Change in Law the Respondent has submitted that MoPs direction dated 30.05.2018 is not a blanket dispensation and has specific carve out for projects where such requirements of pollution control systems was mandated under the environment clearance **<u>or</u>** envisaged otherwise before the said notification. In the context of the above directions issued by the MoP, it is pertinent to refer to the Environmental Clearance ("**EC**") dated 31.03.2011 granted by the MoEFCC to LPGCL. Under the EC the following conditions have been expressly mentioned:

"A. Specific Conditions

…

(xiv) Provision for installation of FGD shall be provided for future use.

…

(xvi) Stack of 275m height shall be installed and provided with continuous online monitoring equipments for Sox, NOx and

$PM_{2.5}$& $PM_{10.}$ Exit velocity of flue gases shall not be less than 22 m/sec. Mercury emissions from stack may also be monitored on periodic basis.

…

B. General Conditions:

…

(xvi) Separate funds shall be allocated for implementation of environmental protection measures along with item-wise break-up. These cost shall be included as part of the project cost. The funds earmarked for the environment protection measures shall not be diverted for other purposes and year-wise expenditure should be reported to the Ministry"

Therefore, it is for LPGCL to prove the factual position regarding previous emission levels, etc. for claiming its entitlement to Change in Law. Further, since the question of Change in Law is a question of fact, it should be determined on a case to case basis and the orders of other State Commissions do not aid the case of the Appellant.

100 LPGCL has further erroneously contended that it had placed some of the documents before the UP Commission on 10.02.2020.In this context, it is pertinent to note that the arguments before UP Commission were concluded on 10.10.2019and the matter was reserved for judgment. The Impugned Order is dated 07.02.2020 which was uploaded on UP Commission's website on 10.02.2020. Interestingly, LPGCL waited for almost 4 months and decided to file the Additional Submissions on the very day when the judgment was uploaded on the website of UP Commission. Even otherwise, under these Additional Submissions, LPGCL only placed 4 documents on record i.e., 3 documents relating to Consent to Operate and the MoP directions dated 30.05.2018 before the UP Commission. LPGCL did not place the documents which are now placed before

this Tribunal. LPGCL's allegation that UP Commission did not consider the additional documents filed by LPGCL on 10.02.2020 is completely baseless. Once the order is signed on 07.02.2020, UPERC is not bound to consider subsequent filings by parties attempting to re-open the case.

101. LPGCL has further averred that the jurisdiction of this Tribunal is very wide. This Tribunal is the first appellate court, therefore, LPGCL is entitled to full, fair and independent consideration of the entire evidence adduced. In this context, LPGCL has relied upon a Supreme Court judgment in the case of *Union of India v. K.V. Lakshman,* (2016)13 SCC 124. In this regard, it is submitted that the case of K.V. Lakshman does not support the case of LPGCL as it merely renders a finding on re-appreciation of evidence and not appreciation of fresh evidence. As already discussed in the preceding paragraphs, new documents requiring an inquiry into facts cannot be adduced before the first appellate court.

102. The reliance placed by LPGCL upon Order 41 Rule 27 is completely misplaced**.** LPGCL has incorrectly averred that the new evidence sought to be placed on record are public documents and are also available with UPPCL***.***

It is settled law that the power available to the appellate court under Order 41 Rule 27 is discretionary and must be used judiciously and with circumspection. It is equally settled that Order 41 Rule 27 cannot be resorted to when documents within the knowledge of party at the stage of trial is produced belatedly in appeal. The

Hon’ble Supreme Court in the case of *State of Karnataka v. K.C. Subramanya, (2014)13 SCC 468* has held that:

“4. However, we do not feel impressed with this argument and deem it fit to reject it in view of Order 41 Rule 27(1)(aa) which clearly states as follows:

*“27. (1)(a)****

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

*(b) ***”*

<u>On perusal of this provision, it is unambiguously clear that the party can seek liberty to produce additional evidence at the appellate stage, but the same can be permitted only if the evidence sought to be produced could not be produced at the stage of trial in spite of exercise of due diligence and that the evidence could not be produced as it was not within his knowledge and hence was fit to be produced by the appellant before the appellate forum</u>.

5. It is thus clear that <u>there are conditions precedent before allowing a party to adduce additional evidence at the stage of appeal, which specifically incorporates conditions to the effect that the party in spite of due diligence could not produce the evidence and the same cannot be allowed to be done at his leisure or sweet will</u>.

6. In the instant matter, the appellants are a public authority and have sought to produce a road map which, it is unbelievable, was not within the knowledge of the appellants indicating a road to the disputed land. Therefore, the rejection of the application of the appellants to rely on the said map has rightly not been entertained at the stage of first appeal. The impugned order [State of Karnataka v. K.C. Subramanya, Regular First Appeal No. 1765 of 2005, decided on 26-7-2011 (KAR)] thus does not suffer from legal infirmity so as to interfere with the same.”

Further, the Hon’ble Supreme Court in the case of *Satish Kumar Gupta v. State of Haryana*, (2017) 4 SCC 760has held that:

"19. The other part of the impugned order permitting additional evidence and remanding the case for fresh decision is uncalled for. No case was made out for permitting additional evidence on settled principles under Order 41 Rule 27 CPC. The provision is reproduced below:

…

20. It is clear that neither the trial court has refused to receive the evidence nor it could be said that the evidence sought to be adduced was not available despite the exercise of due diligence nor it could be held to be necessary to pronounce the judgment. Additional evidence cannot be permitted to fill in the lacunae or to patch up the weak points in the case [N. Kamalam v. Ayyasamy, (2001) 7 SCC 503, pp. 514-16, para 19]. There was no ground for remand in these circumstances."

(i) (Emphasis supplied)

It is submitted that it was the duty of LPGCL, being the Petitioner, to place the evidence on record before the UP Commission which it has miserably failed at. Documents relating to its Project are old documents which were available with LPGCL even while the matter was being contested before the UP Commission and LPGCL has wilfully abstained from placing them on record before the UP Commission. Having failed to establish its case before the UP Commission, LPGCL is now seeking to adduce these documents before this Tribunal to fill in the gaps or lacunae in its case.

103 LPGCL's prayer seeking directions to UPERC for grant of in-principle approval of cost cannot be sustained as UP Commission in its Order dated 18.12.2017 in Petition No. 1263 of 2017 filed by LPGCL had already refused grant of in-principle approval basis a reading of the UPERC Tariff Regulations. The relevant extract of the said order is reproduced herein below for ready reference-

"*10. The Commission observed that the Generation Tariff Regulation, 2014 which are squarely applicable to the case do not provide for grant of in-principle approval for the capital expenditure. Hence, the prayer of the petitioner for in-principle approval of Capital Cost for installation of FGD System and associate facility can not be accepted.*

…

11. The Commission in a similar matter in Petition No. 1132 of 2016 vide order dated 25.05.2017 had directed the RPSCL to approach Central Electricity Authority and MoEF in line with the CERC order dated 20th March 2017. Relevant extract of the order is as follows:

"….the petitioner is directed to approach the Central Electricity Authority to decide specific optimum technology, associated cost and major issues to be faced in installation of different system like SCR, etc. The petitioner is also directed to take up the matter with the Ministry of Environment and Forest for phasing of the implementation of the different environmental measures. Accordingly, the petitioner is granted liberty to file appropriate petition at an appropriate stage based on approval of CEA and direction of MoEF which shall be dealt with in accordance with law."

12. Hence, in line with the aforementioned order of the Commission, the petitioner is directed to approach CEA for the Central Electricity Authority to decide specific optimum technology, associated cost and major issues to be faced in installation of different system like SCR, etc. The petitioner is also directed to take up the matter with the Ministry of Environment and Forest for phasing of the implementation of the different environmental measures.

13. Accordingly, the petitioner is granted liberty to file appropriate petition at an appropriate stage based on approval of CEA and direction of MoEF which shall be dealt with in accordance with law."

LPGCL never challenged this order and allowed the above order to reach finality. Since the UP Commission had already concluded on this issue and had become *functus officio,* LPGCL should not have filed Petition no. 1468 of 2019 (i.e., the second petition) as the

position as per the tariff regulations was settled and already known to it and should have instead initiated steps towards installation of FGD. The attempt on the part of LPGCL to re-agitate a settled issue was clearly barred by the principles of *res-judicata*.

104. UP Commission, under the Impugned Order (Petition No. 1468 of 2019), has merely reiterated what it had already concluded/held in the earlier order dated 18.12.2017 in Petition No. 1263 of 2017. In line with its earlier order and with specific reference to it, UP Commission under the Impugned Order, has observed that LPGCL has incorrectly approached it by filing the second petition. UP Commission has again held that in-principle approval of any additional capital expenditure is impermissible as the terms of the UPERC (Terms and Conditions of Generation Tariff) Regulations, 2019 ("UPERC Tariff Regulations, 2019") are specific and that additional capitalization can be considered only at the time of truing up.

105. Under its appeal, LPGCL is harping on the point of 'comfort of lenders' with a view to misguide this Tribunal. As is evident from the letters dated 21.10.2019 and 20.04.2020 issued by the MoP, the lenders would not find any comfort with an "in-principle" approval of cost and are desiring a further revision to the CERC Tariff Regulations, 2019.

106. Pertinently, the entire case of LPGCL is based on the erroneous assumption that the UP Commission's tariff regulations are silent on the issue. UP Commission, by way of its Tariff Regulations, 2019 consciously decided not to incorporate a specific provision for in-

principle approval of any additional capitalization. Such an understanding is further buttressed by a perusal of the Statement of Reasons issued by the UP Commission for its Tariff Regulations, 2019. The relevant extract of the Statement of Reasons is reproduced herein below for ready reference-

"*1.4 The Commission held a public hearing on July 05, 2019 at 3:30 pm at the Commission's Office, Lucknow in which stakeholder submitted their comments and suggestions. The comments / suggestions offered by the stakeholders on the then proposed Regulations and the Commission's decision thereon are discussed hereunder:*

Particulars	*Draft Regs No.*	Comments of the Stakeholders	Commission's view
…	…	…	…
In-principle approval in specific circumstances		*RPSCL- Regulation pertaining to seeking in principle approval for undertaking any additional capitalization on account of change in law events or force majeure conditions may be incorporated.*	*No Change*

"

In view of the specific and conscious stand taken by the UP Commission, it cannot be said that the UPERC Tariff Regulations, 2019 are silent in the present case.

107. This Tribunal in the case of *M/s Maruti Suzuki India Ltd. v. HERC* in Appeal No. 200 of 2011 has held that that usage of the phrase '*shall be guided by'* in Section 61 of the Electricity Act, 2003 indicates that

the factors given in Section 61 (a) to (i) are not mandatory. Further, this Tribunal has also held that if the principles and methodology laid down by CERC were to be followed by State Commissions mandatorily, there was no need to empower the State Commissions to make their own regulations. The relevant extract of the said judgment is reproduced herein below for ready reference-

"*39. Now, let us examine the usage of term 'shall be guided' in Section 61 as reproduced below:*

…

40. Bare reading of the above section would make it amply clear that the factors given in clauses (a) to (i) are guiding in nature and cannot be held to be mandatory. For example, clause (i) refers to multi-year tariff principles. What are multi-year tariff principles? These are not defined or prescribed anywhere in the Act or Rules made thereunder. If the term 'shall be guided' is to be construed as 'shall be followed', then which are the multi-year tariff principles the Commissions are expected to follow? Each Commission has framed multi-year tariff Regulations depending upon specific requirements of the respective state.

41. Further, Section 61(a) states that the Appropriate Commission shall be guided by the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees. Section 61 is equally applicable to the Central Commission. Thus, for the Central Commission, the Section 61(a) would imply that the Central Commission shall follow the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees. Naturally, this provision cannot be made mandatory for the Central Commission. Again, if the principles and methodology laid down by the Central Commission for determination of tariff applicable to generating stations and transmission licensee has to be followed by the State Commissions, as contended by the Appellant, then there was no need to give powers to State Commissions to make Regulations under Section 61. The Parliament could have simply stated that the State

Commissions shall follow the Regulations laid down by the Central Commission under Section 61. Every State Commission has framed Tariff Regulations under Section 61 specifying various normative parameters which may or may not be in conformity with the normative parameters specified by the Central Commission.

42. In view of above discussions, we are of the opinion that the term 'shall be guided' used in Section 61, 86 and 79 of the Act cannot be considered to be mandatory in nature and any direction hampering the statutory functions of the Commission cannot be considered as binding upon the Commission."

108. LPGCL, by way of the present Appeal, has also erroneously placed reliance upon the judgment passed by the Hon'ble Supreme Court in the case of *Energy Watchdog v. CERC* reported as (2017) 14 SCC 80to contend that the UP Commission should have exercised its general regulatory powers to grant in-principle approval. In this regard, it is humbly submitted that the said judgment explicitly clarifies that when regulations governing a specific situation have been framed, the Commission would be bound by such regulations and any exercise of general regulatory powers must be in accordance with such regulations. The relevant extract of the said judgment is reproduced herein below for ready reference-

"*20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the*

statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."

As is evident from the above, general regulatory powers can only be exercised in a situation wherein no regulations have been framed at all or when the regulations do not deal with a given situation. In the present case, UPERC Tariff Regulations, 2019 explicitly provide that prudence check of the additional capitalization would be taken into consideration only at the stage of truing up i.e., after such expenditure has already been incurred. Hence, it is impermissible for LPGCL to seek in-principle approval under general regulatory

powers of the UP Commission *dehors* the express provisions of Regulation 16 and 20(2) UPERC Tariff Regulations, 2019.

109. LPGCL, by way of the present Appeal, has also erroneously placed reliance upon Regulation 41 and 42 of the UPERC Tariff Regulations, 2019 to contend that UPERC is not precluded from exercising any power (in accordance with Electricity Act, 2003) for which no regulations have been framed. The relevant extract of the UPERC Tariff Regulations, 2019 is reproduced herein below for ready reference-

> "*41. Nothing in these Regulations shall bar the Commission from adopting, in conformity with the provisions of the Act, a procedure, which is at variance with any of the provisions of this Regulation, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters.*
>
> *42. Nothing in these Regulations shall, expressly or impliedly, bar the Commission dealing with any matter or exercising any power under the Act for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a matter it deems fit.*"

110. In respect of Regulation 41 above, it is humbly submitted that the said regulation is in the nature of discretionary inherent power which is to be exercised in extraordinary/special circumstances and is ancillary in nature i.e., subject to the specific stipulations under the other regulations. Such power cannot be resorted to arbitrarily for giving preferential treatment to one party. LPGCL in the present Appeal cannot seek arbitrary preference in terms of in-principle approval as against all other similarly places IPPs and State-owned generating companies in the State of Uttar Pradesh.

111. In respect of Regulation 42 above, it is reiterated that specific regulations governing additional capitalization on account of Change in Law have been framed under the UPERC Tariff Regulations, 2019. Hence, in view of the express language of Regulation 42 and judgment passed by the Hon'ble Supreme Court in the case of *Energy Watchdog v. CERC* reported as (2017) 14 SCC 80,UPERC's general regulatory power cannot be invoked by LPGCL.

112. In this regard it is also pertinent to note that the Hon'ble Supreme Court in the case of *Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) (P) Ltd* reported as (2017) 16 SCC 498 has held that inherent powers can only be exercised in situations wherein the regulations are silent. Further, the Hon'ble Supreme Court also held that such inherent power cannot be invoked to grant a relief contrary to the express provisions of the Regulations. The relevant extract of the said judgment is reproduced herein below for ready reference-

> *"34. Regulations 80 to 82 are instances of such powers specified by the Commission. Regulation 80 has provided for the inherent power of the Commission to the extent of making such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Commission. It has to be borne in mind that such inherent powers are to be exercised notwithstanding only the restrictions on the Commission under the Conduct of Business Regulations, meaning thereby that there cannot be any restrictions in the Conduct of Business Regulations on exercise of inherent powers by the Commission. But the specified inherent powers are not as pervasive a power as available to a court under Section 151 of the Code of Civil Procedure, 1908:*

"151. Saving of inherent powers of court.—Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the court."

However, the Commission is enjoined with powers to issue appropriate orders in the interest of justice and for preventing abuse of process of the Commission, to the extent not otherwise provided for under the Act or Rules. In other words, the inherent power of the Commission is available to it for exercise only in those areas where the Act or Rules are silent.

35. Under Regulation 81, the Commission is competent to adopt a procedure which is at variance with any of the other provisions of the Regulations in case the Commission is of the view that such an exercise is warranted in view of the special circumstances and such special circumstances are to be recorded in writing. However, it is specifically provided under Section 181 that there cannot be a Regulation which is not in conformity with the provisions of the Act or the Rules.

36. Under Regulation 82, the Commission has powers to deal with any matter or exercise any power under the Act for which no Regulations are framed meaning thereby where something is expressly provided in the Act, the Commission has to deal with it only in accordance with the manner prescribed in the Act. The only leeway available to the Commission is only when the Regulations on proceedings are silent on a specific issue. In other words, in case a specific subject or exercise of power by the Commission on a specific issue is otherwise provided under the Act or the Rules, the same has to be exercised by the Commission only taking recourse to that power and in no other manner. To illustrate further, there cannot be any exercise of the inherent power for dealing with any matter which is otherwise specifically provided under the Act. The exercise of power which has the effect of amending the PPA by varying the tariff can only be done as per statutory provisions and not under the inherent power referred to in Regulations 80 to 82. In other words, there cannot be any exercise of inherent power by the Commission on an issue which is otherwise dealt with or provided for in the Act or the Rules.

…

38. Regulation 85 provides for extension of time. It may be seen that the same is available only in two specified situations — (i) for extension of time prescribed by the Regulations, and (ii) extension of time prescribed by the Commission in its order for doing any act. The control period is not something prescribed by the Commission under the Conduct of Business Regulations. The control period is also not an order by the Commission for doing any act. Commissioning of a project is the act to be performed in terms of the obligation under the PPA and that is between the producer and the purchaser viz. Respondent 1 and appellant. Hence, the Commission cannot extend the time stipulated under the PPA for doing any act contemplated under the agreement in exercise of its powers under Regulation 85. Therefore, there cannot be an extension of the control period under the inherent powers of the Commission.

39. The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act.

…

58. By a reading of Regulation 80, it is clear that inherent powers of the State Commission are saved to make such orders as may be necessary: (i) to secure the ends of justice; and (ii) to prevent abuse of process of the Commission. The inherent powers being very wide and incapable of definition, its limits should be carefully guarded. Inherent powers preserved under Regulation 80 (which is akin to Section 151 of the Code) are with respect to the procedure to be followed by the Commission in deciding the cause before it. The inherent powers under Section 151 CPC are procedural in nature and cannot affect the substantive right of the parties. The inherent powers are not substantive provision that confers the right upon the party to get any substantive relief. These inherent powers are not over substantive rights which a litigant possesses.

59. The inherent power is not a provision of law to grant any substantive relief. But it is only a procedural provision to make orders to secure the ends of justice and to prevent abuse of

process of the Court. It cannot be used to create or recognise substantive rights of the parties…

Hence, considering that the UPERC Tariff Regulations, 2019 explicitly stipulate the procedure and appropriate stage for additional capitalization on account of Change in Law, it is humbly submitted that LPGCL cannot be permitted to claim in-principle approval under UP Commission's inherent powers or general power to regulate.

113. It is most humbly submitted that the present Appeal filed by LPGCL is a blatant attempt to override and circumvent the explicit provisions of UPERC Tariff Regulations, 2019 by way of obtaining a judicial order from this Tribunal which is impermissible. Under the garb of the present appeal, LPGCL is challenging the UPERC Tariff Regulations, 2019 before this Tribunal. In this regard, a constitutional bench of the Hon'ble Supreme Court in the case of *PTC India Ltd. v. Central Electricity Regulatory Commission* reported as (2010) 4 SCC 603 ("PTC Case") has held that regulations framed by electricity regulatory commissions under Electricity Act, 2003 are in the nature of delegated legislation. Consequently, their validity can only be tested in judicial review proceedings before the courts and not by way of appeal before this Tribunal under Section 111 of the Electricity Act, 2003. The relevant extract of the said judgment is reproduced herein below for ready reference-

"*92. Summary of our Findings*

…

(iii) A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by

way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act."

(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.

114. The Hon'ble Supreme Court in the case of *State of U.P. v. Mahindra & Mahindra Ltd.* reported as(2011) 13 SCC 77 has held that the Constitution of India specifically demarcates the ambit of power and the boundaries of the three organs, viz. Legislature, Executive and Judiciary for carrying out democratic functioning. Subordinate legislation is framed by exercising power of delegated legislation and the judiciary has been vested with the power to interpret the aforesaid legislations and give effect to them since the parameters of both organs are earmarked. Further, the Hon'ble Supreme Court has held that it would be inappropriate for the court to issue a mandate to legislate an Act or make a subordinate legislation in a particular manner. The relevant extract of the said judgment is reproduced herein below for ready reference-

"*10. Within our Constitution, we have specifically demarcated the ambit of power and the boundaries of the three organs of the society by laying down the principles of separation of powers, which is being adhered to for carrying out democratic functioning of the country. So far as the legislation is concerned, the exclusive domain is with the legislature. Subordinate legislations are framed by the executive by exercising the delegated power conferred by the statute, which*

is the rule-making power. The judiciary has been vested with the power to interpret the aforesaid legislations and to give effect to them since the parameters of the jurisdiction of both the organs are earmarked. Therefore, it is always appropriate for each of the organs to function within its domain. It is inappropriate for the courts to issue a mandate to legislate an Act and also to make a subordinate legislation in a particular manner. In this particular case, the High Court has directed the subordinate legislation to substitute wordings in a particular manner, thereby assuming to itself the role of a supervisory authority, which according to us, is not a power vested in the High Court."

115. Further, the Hon'ble Supreme Court in the case of *Union of India v. Deoki Nandan Aggarwal* reported as1992 Supp (1) SCC 323has held that courts cannot enlarge the scope of legislation or intention of the legislature when the language of provisions are unambiguous. Further, the Hon'ble Supreme Court has held that courts cannot rewrite, recast or reframe legislation for the reason that courts cannot legislate. The relevant extract of the judgment is reproduced herein below for ready reference-

"*14. We are at a loss to understand the reasoning of the learned Judges in reading down the provisions in paragraph 2 in force prior to November 1, 1986 as "more than five years" and as "more than four years" in the same paragraph for the period subsequent to November 1, 1986. It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court could not go to its aid to correct or make up the deficiency. Courts*

shall decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities. Vide P.K. Unni v. Nirmala Industries [(1990) 2 SCC 378, 383-84 : (1990) 1 SCR 482, 488] , Mangilal v. Suganch and Rathi [(1964) 5 SCR 239 : AIR 1965 SC 101] , Sri Ram RamNarainMedhi v. State of Bombay [1959 Supp 1 SCR 489 : AIR 1959 SC 459] , Hira Devi (Smt) v. District Board, Shahjahanpur [1952 SCR 1122, 1131 : AIR 1952 SC 362] , NalinakhyaBysack v. Shyam Sunder Haldar [1953 SCR 533, 545 : AIR 1953 SC 148] , Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha [(1980) 2 SCC 593 : 1980 SCC (L&S) 197 : (1980) 2 SCR 146] , G. Narayanaswami v. G. Pannerselvam [(1972) 3 SCC 717 : (1973) 1 SCR 172, 182] , N.S. Vardachari v. G. Vasantha Pai [(1972) 2 SCC 594 : (1973) 1 SCR 886] , Union of India v. Sankal Chand HimatlalSheth [(1977) 4 SCC 193 : 1977 SCC (L&S) 435 : (1978) 1 SCR 423] and CST v. Auriaya Chamber of Commerce, Allahabad [(1986) 3 SCC 50, 55 : 1986 SCC (Tax) 449 : (1986) 2 SCR 430, 438] . Modifying and altering the scheme and applying it to others who are not otherwise entitled to under the scheme, will not also come under the principle of affirmative action adopted by courts sometimes in order to avoid discrimination. If we may say so, what the High Court has done in this case is a clear and naked usurpation of legislative power."

116. UPERC Tariff Regulations, 2019 have been applied by UPERC on a non-discriminatory basis to all IPPs and State-owned Generating Companies alike operating in the State of Uttar Pradesh. Further, the regulations have been uniformly applied for all claims of additional capital expenditure and not only FGD. In this regard, the relevant findings of UPERC in Rosa Power Supply Company's FGD Petition, Order dated 25.05.2017 in Petition No. 1132/2016 are reproduced herein below-

"10. The Commission observed that the Generation Tariff Regulation, 2014 which is squarely applicable to the case do not provide for the grant of in-principle approval for the capital expenditure. Hence, the prayer of the petitioner for in-principle approval of Capital Cost for installation of FGD System and associate facility by invoking Article 12 of the Power Purchase Agreement is not maintainable.

11. Taking into consideration and in line with the CERC order dated 20th March, 2017, the Commission also finds that since the implementation of new norms in the existing and under construction thermal generating stations would require modification of their existing system and installation of new systems such as Retro-fitting of additional fields in ESP/replacement of ESP, etc. to meet Suspended Particulate Matter norms, installation of FGD system to control SOx and Selective Catalytic Reduction (SCR) systems for DeNox, the petitioner is directed to approach the Central Electricity Authority to decide specific optimum technology, associated cost and major issues to be faced in installation of different system like SCR, etc. The petitioner is also directed to take up the matter with the Ministry of Environment and Forest for phasing of the implementation of the different environmental measures. Accordingly, the petitioner is granted liberty to file appropriate petition at an appropriate stage based on approval of CEA and direction of MoEF which shall be dealt with in accordance with law."

Hence, non-grant of in-principle approval to LPGCL is not an isolated dispensation and selective divergence only qua LPGCL cannot be permitted as the same would have a cascading impact on all claims and matters in relation to additional capitalization.

117. LPGCL, by way of the present Appeal, has erroneously claimed that it had approached UPERC at the 'appropriate stage' i.e., post finalization of the bids for procurement of FGD. LPGCL's submissions before this Tribunal are reproduced herein below for ready reference-

"*(e) In terms of the directions in Order dated 18.12.2017 and 08.04.2019, LPGCL has approached Ld. UP Commission at the appropriate stage i.e., after: -*

(i) Seeking CEA's approval/advisory on specific optimum technology and associated cost qua installation of FGD system; and
(ii) Finalizing of bids for the proposed work and before placing the order for erection and commissioning of FGD system."

Above statements are completely false and have been made solely in an attempt to mislead this Tribunal. As per LPGCL's letter dated 24.01.2020 addressed to UPPCL, sale of tender documents was completed on 10.01.2020. The relevant extract of LPGCL's letter is reproduced herein below for ready reference-

"*Dear Sir,*

With reference to our earlier letter no. LPGCL/FGD/UPPCL/004 dated 06.01.2020 we would like to inform you that sale of tender Document was completed on 10th Jan'2020 for the work of Design, Procurement, Erection and Commissioning of Flue Gas Desulphurization (WLFGD) Plant at Lalitpur for 3x660 MW units. However, based on requests for time extensions for the aforesaid bid by many participants, we have extended the Pre-Bid conference and BID submission dates for aforesaid bid as under:-
…"

The deadline for LPGCL to install FGD is by December 2020, February 2021 and October 2021 in Unit 1, 2 & 3 respectively, so as to comply with the SO_2emission limit. The bidding process was initiated by LPGCL on 28.12.2019. As on date, the bidding process has not been finalized and, in fact, the last date of submission has been extended to 15.07.2020 by LPGCL by granting 4 extensions. Clearly, there is a lack of proactiveness on the part of LPGCL in

complying with the timelines prescribed by the MoEFCC. Rather, LPGCL is clearly attempting to circumvent the timelines prescribed by the MoEFCC and shift the blame by repeatedly filing pre-mature and unwarranted petitions and appeals before different forums.

118. It is noteworthy that the Central Commission's orders and MoP letters relied upon by LPGCL are inapplicable in the present facts and circumstances. Notably, these letters and orders are in the context of CERC Tariff Regulations, 2019 which are completely different from the UPERC Tariff Regulations, 2019. Further, the judgments relied upon by LPGCL pertain to power plants which had specifically sought a prayer for Change in Law and had already concluded their bidding process for procurement of FGD. In the case of Sasan Power Limited ("SPL") (446/MP/2019), CERC's order dated 23.04.2020 explicitly records SPL's submissions that commercial negotiations with technically qualified bidders was concluded. The relevant extract is reproduced herein below for ready reference-

"*Submissions of the Petitioner*

6. The petitioner has made the following submissions vide its affidavit filed with the main Petition:

…

c) On 15.3.2019, Development Consultant Private Limited ("DCPL"), SPL's technical consultant for bid evaluation finalized the Technical Evaluation Report of the ICB and on 21.3.2019, SPL completed the commercial negotiations with the technically qualified vendors."

Hence, LPGCL's reliance upon the above order passed by the CERC is completely misplaced.

119. In the case of Maithon Power Limited ("MPL") (152/MP/2019), CERC vide its Order dated 11.11.2019 had recorded that base cost was finalized and bidding for procurement of FGD was concluded. The relevant extract of the said order is reproduced herein below:

"*(m) The break-up of proposed Capital Expenditure for the Wet Limestone based FGD system for 2x525 Units of MPL estimated on the basis of bidding results of two main packages (FGD Main System and Electrical System) is as follows:*

Sr. No.	*Description*	*MPL Capex Estimate*	*MPL Capex Estimate*	*CEA Report indicative cost*
…	*…*	*…*	*…*	*…*
11	*Total Capital Expenditure including IDC*	*777.14*	*0.740*	*0.420*

(n) It may be seen from the above comparison that the proposed cost of the FGD system is higher than indicative cost given by CEA mainly on account of higher cost discovered through open competitive bidding process…."

120. Further, even the case of Sembcorp before the Central Commission (Petition no. 209/MP/2019) was completely different from the present case. The relevant extracts of the order are reproduced herein below for ready reference:

"17. The Commission vide ROP of the hearing dated 27.2.2020, directed the Petitioner to provide the following details:
(a) Environment Clearance in respect of Project;
(b) Upfront allocation of funds for the environmental protection measures at the inception of the Project, if any;
(c) Details of cost estimates submitted to lenders for financial closure of the Project;

(d) Clarify as to whether the requirement of FGD was envisaged in the
Investment Approval;
(e) Six monthly report filed before CPCB for any period around December,2015; and
(f) Cost benefits analysis of the selected technology out of the two technologies suggested by CEA in its recommendation dated 15.4.2019.

18. The Petitioner vide affidavit dated 13.3.2020 in its reply to the directions of the Commission has submitted a copy of the Environment Clearance and stated that an amount of approximately Rs. 933.5 crore was allocated for environment protection measures. The activities for which this amount was allocated in terms of the Environmental Clearance were limited to Electrostatic Precipitator/ Bagfilters; desalinization plant; ash handling system; dust extraction and suppression system; sewage collection, treatment and disposal; Green Belt, afforestation, and landscaping; environmental laboratory equipment (including online emission monitoring system); cooling towers etc. The Petitioner has submitted that no funds were allocated towards FGD system as the same was not envisaged under the Environmental Clearance. The Petitioner has also submitted that the requirement of FGD was not envisaged in the Investment Approval. In this regard, the Petitioner has placed on record the stack emission data from January 2016 to December 2019. The Petitioner has also submitted cost benefit analysis of the selected technology (wet limestone based FGD system) out of the two technologies recommended by CEA.

…

29. Thus, the Central Government in exercise of its power under Section 107 of the Act has declared that the 2015 Notification requiring compliance of Environment(Protection) Amendment Rules, 2015, is of the nature of Change in law event except in cases (a) where the Power Purchase Agreements of such thermal power plants have been determined under Section 63 of the Act having bid deadline on or after7.12.2015; or (b) thermal power plants 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. In the case of the Petitioner, the bid deadline was 1.10.2010 and therefore, the case of the Petitioner does

not fall within the first exception as per the aforesaid letter. As regards the second exception, at (b) above, the environmental clearance of the Petitioner's Project did not envisage installation of FGD and SNCR systems. On a specific query by the Commission to clarify whether the requirement of FGD was envisaged in the investment approval, the Petitioner has submitted that the requirement of FGD was not envisaged in the investment approval."

Sembcorp has sought a specific prayer for declaration of Change in Law before the Central Commission and placed all the relevant documents relating to pre-existing obligations, conditions, investment approvals, etc. before the Central Commission for substantiating its claim for Change in Law and the in-principle cost approval granted to it is subject to further prudence check on the basis of actuals. To the contrary, LPGCL wilfully chose not to seek this prayer for Change in Law before the UP Commission and is seeking this prayer for the first time before this Tribunal and, that too, basis documents that it withheld from UP Commission.

121. In view of the submissions and case laws cited above the prayers sought by LPGCL in the present Appeal are not maintainable and the Appeal deserves to be dismissed being devoid of merit.

Findings and analysis

122. Having heard the Appellant, both the Respondents and having gone through the appeal, the replies/rejoinders filed by all parties we are of the opinion that following issues arise in this appeal for our consideration:

Issue No.1

"Whether the State Commission has erred in deciding that the in-principle approval for additional capitalization is not permitted in terms of the UPERC Generation Tariff Regulations 2019?"

Regulations 41 and 42

123. The state commission in the impugned order dated 07.02.20 20 has highlighted regulation 20 (2) of the Generation Tariff Regulations, 2019 which provide the framework qua additional capital expenditure. The regulation 20 (2) of the tariff regulations, 2019 reads as under:

"Additional capitalization:

*Subject to the provisions of clause (3) of this Regulation, **the capital expenditure** of the following counts for new or existing projects **actually incurred** after the cutoff date may be admitted by the Commission, subject to prudence check:*

(i) Liabilities to meet award of arbitration or for compliance of the directions or Order of any statutory authority, or Order or decree of a Court;

(ii) Change in Law

…"

14[1]. Truing up of Capital Expenditure and tariff for the period 2019-24:

(1) The Commission shall carry out Truing up exercise along with the tariff Petition filed for the next tariff period, for the following, after prudence check.:

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[1]*There is a minor typo under the Impugned Order. Regulation 16 of UPERC Tariff Regulations, 2019 has been misquoted as Regulation 14.*

(a) Capital Expenditure including Additional Capital Expenditure incurred up to 31.03.2024.
(b) Capital Expenditure including Additional Capital Expenditure incurred up to 31.03.2024, on account of uncontrollable factors.
(2) The generating company make an Application, in hard and soft copy in specified formats as per ***Appendix II*** *to these Regulations, for carrying out Truing up exercise in respect of the generating station or any of its units or block of units thereof by 30.11.2024.*

15[2]. Controllable and Uncontrollable factors:

The following shall be considered as controllable and uncontrollable factors leading to time over-run, cost escalation impacting Contract Prices, IDC and IEDC of the project:

*(1) The "**Controllable factors**" shall include but shall not be limited to the following:*
(a) .. …
*(2) The "**Uncontrollable factors**" shall include but shall not be limited to the following:*
(a) Force Majeure events; and
(b) Change in law.

124. On the issue of – Regulatory uncertainty qua treatment of additional capital cost, the State Commission in the impugned order dated 07.02.20 20 have decided as under:

"Based on a perusal of Regulation 20(2) of the UPERC Generation Tariff Regulations 2019, it is amply clear that the additional capital expenditure to be incurred by a generator is subject to approval by this Hon'ble Commission in terms of its Prudence but only after it has been actually incurred by the Petitioner. When the UPERC Generation Tariff Regulations 2019 permit the Petitioner to seek approval of additional capital expenditure for a Change in Law event once it has been incurred, the Petitioner cannot be permitted to claim the same in

[2] *There is a minor typo under the Impugned Order. Regulation 19 of UPERC Tariff Regulations, 2019 has been misquoted as Regulation 15.*

any other manner. Therefore, the Petitioner needs to make its claim in the manner as provided under the UPERC Generation Tariff Regulations 2019 and in-principle approval for additional capitalization is not permitted in terms of the UPERC Generation Tariff Regulations 2019."

125. The State Commission has observed that as per the generation tariff regulations 2019 notified by the State Commission, the additional capital expenditure to be incurred by a generator is subject to approval by the State Commission in terms of its prudence but only after it has been actually incurred by the petitioner. The Commission has clarified that when the regulations permit the approval of additional capital expenditure for a change in law event once it has been incurred the same cannot be permitted to be claimed in any other manner.

The Commission has further clarified that the in-principle approval for additional capitalization is not permitted in terms of the UPERC Generation Tariff Regulations 2019 and the petitioner (Appellant in this appeal) cannot be permitted to claim the same in any other manner.

126. The Appellant has submitted that the in-principle approval for additional capitalisation on account of change in law is required for regulatory certainty as the Appellant is required to obtain/deploy additional funds including debt funds, which are unlikely to be sanctioned by lenders in the absence of regulatory approval for such capital expenditure from the state commission.

The Appellant has clarified that in any case the tariff impact of the additional capital expenditure towards installation of FGD system and other associated facilities and other relevant cost shall be claimed as per applicable tariff regulation of the State Commission.

127. Respondent No. 2 has submitted that the central (CERC) regulations contemplate a two-stage process:

- stage I – a declaration that the MOEFCC notification, in the facts, as applicable to the generating company constitutes a change in law, that requires generating company to incur additional capital expenditure and
- stage II - determination of the quantum of such additional expenditure which is subject to prudence check by the Central commission

128. The Respondent No. 2 has further submitted that there is no difference between the central regulation and the state regulation as regards the in-principle approval as both sets of regulation require a prudence check only after the expenditure has been incurred. The Central Commission has granted the in-principle approval but the cost has been approved on provisional basis and the same is subject to prudence check by Central Commission after the expenditure has been incurred.

129. The counsel representing the State Commission has submitted that there is no mechanism under the existing tariff regulations notified by the state commission for granting in principle approval for additional capital cost. The tariff regulations provide for approval of

additional capitalisation, after prudence check, at truing up stage i.e. after the expenditure has been actually incurred.

130. The Appellant has submitted that non-existence of a regulation or any provision in the existing regulation does not preclude the State Commission to pass appropriate orders/directions upholding the object of the Electricity Act. Regulations 41 and 42 of the State's Generation Tariff Regulation 2019 provide that the State Commission is not barred from dealing with any matter or exercising any power (in consonance with the Electricity Act, 2003) for which regulation has been framed. These regulations read as under:

> *41. Nothing in these Regulations shall bar the Commission from adopting, in conformity with the provisions of the Act, a procedure, which is at variance with any of the provisions of this Regulation, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters.*
>
> *42. Nothing in these Regulations shall, expressly or impliedly, bar the Commission dealing with any matter or exercising any power under the Act for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a matter it deems fit.*"

However, the Respondent No.2 has submitted that the reliance placed by the Appellant on Regulations 41 and 42 is erroneous. Regulation 41 is in the nature of discretionary inherent power which is to be exercised in extraordinary/special circumstances and is ancillary in nature i.e. subject to the specific stipulations under the other regulations. Such power cannot be resorted to arbitrarily for giving preferential treatment to one party. Appellant cannot seek

arbitrary preference in terms of in-principle approval. Whereas in respect of Regulation 42 it has been submitted that specific regulations governing additional capitalization on account of Change in Law have been framed under the UPERC Tariff Regulations, 2019.

In this regard reliance has been placed on the judgment passed by the Hon'ble Supreme Court in the case of *Energy Watchdog v. CERC* reported as (2017) 14 SCC 80. The relevant extract of the said judgment is as under:

"*20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In*

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

131. From the reading of Regulations 41 and 42, we observe as under:

a) These Regulations allow the State Commission in special circumstances to deal with any matter for which no regulations have been framed.
b) The State Commission may adopt a procedure which is at variance with any of the provisions of these regulations.
c) The State Commission should analyse the situation to satisfy itself that it qualifies as a special circumstance and requires the Commission to exercise powers given to it under regulation 41 and 42 of the State Tariff Regulation 2019 to deal with the situation in conformity with the provisions of the Act and the Commission should record in writing its analysis in detail.

132. We agree with the submission of the Appellant that non-existence of a regulation or any provision in the existing regulation does not

preclude the State Commission to pass appropriate orders/directions upholding the object of the Electricity Act. Regulations 41 and 42 of the State's Generation Tariff Regulation 2019 provide that the State Commission is not barred from dealing with any matter or exercising any power (in consonance with the Electricity Act, 2003) for which no regulation has been framed.

133. These Regulations allow the State Commission in special circumstances to deal with any matter for which no regulations have been framed and the State Commission may adopt a procedure which is at variance with any of the provisions of these regulations. The State commission should analyse the situation to satisfy itself that it qualifies as a special circumstance and requires the commission to exercise powers given to it under regulation 41 and 42 of the state tariff regulation 2019 to deal with the situation in conformity with the provisions of the Act and the Commission should record in writing its analysis in detail.

134. However, from the reading of the impugned order it is evident that no such analysis has been done by the Commission to ascertain whether the issue in hand regarding the in-principle approval sought by the Appellant qualifies as a special circumstance necessitating the Commission to exercise its powers provided to it under the under the regulations 41 and 42 of the state's tariff regulation 2019.

135. The State Commission has not returned any finding on the following submissions made by the Appellant:

(i) Substantial investment would be required to carry out capital works to meet the revised emissions norms. The in-principle approval is sought for seeking requisite funds from the financial institutions. There would also be substantial impact on operation and maintenance cost, in fact on plant efficiency parameters such as auxiliary consumption, unit heat rate etc. In view of these important implications the Appellant has sought certainty of regulatory treatment. The in-principle regulatory approval is critical for arranging funds for implementation of emission control system.

(ii) In spite of MOP's directions on 30.5.2018 issued to CERC, the lenders are reluctant to provide funding to the generating companies for compliance of MOEFCC Notification without a change in law declaration of the said Notification and in principle approval of the associated cost from the concerned Regulatory Commission and on account of the following reasons:

- prevalent distress in the sector
- inordinate delay in regulatory approvals
- exertion of bank exposure limit
- outstanding dues from discounts to generators
- risk relating to whether tariff compensation is sufficient to make FGD system implementation viable
- Risk relating to ability to recover cost in the intervening period between commissioning of FGD system and regulatory approval of tariff compensation

(iii) The Appellant has submitted that without the in-principle approval providing regulatory certainty on the treatment of MOEFCC Notification and associated cost it would be near impossible for LPGCL to install FGD system to meet the mandatory revised emission norms.

(iv) Detailed programme for installation of FGD system in a phased manner by the thermal power plants in the country has been drawn up and stiff timelines have been given to the power stations including the appellant.

(v) The Appellant has further submitted that non-compliance of revised emission norms notified by MOEFCC vide its notification dated 07.12.2015 will result in violation of:

- Environment Protection Act, 1986 and Environment Protection Rules, 1986 and the consequences of such non-compliance are to be faced under section 14 read with section 26 and 27 of the National Green terminal Act, 2010.
- Terms and conditions prescribed under the Environmental Clearance issued to the plant which will entail revocation and closure of the plant operation
- CPCB direction dated 11.12.2017, which will entail levying penalty by way of environment compensation and penal action against the directors of LPGCL under the Environment Protection Act, 1986.

136. The Appellant has referred to the National Electricity Policy, 2005 and Tariff Policy, 2016 issued by MOP, under section 3 of the Electricity Act, 2003 which provides that steps should be taken to ensure regulatory certainty so as to minimise perception of regulatory risk, ensure financial viability of the sector and generate investor’s confidence to attract investment.

137. The Commission has disposed of this petition simply on the grounds that under the state tariff regulation 2019, there is no provision for

granting in-principle approval and therefore the same cannot be granted by the Commission.

138. There is no discussion in the impugned order regarding special circumstances as submitted by the Appellant requiring the in-principle approval/ regulatory certainty.

The last sentence of the impugned order which reads as- ***"It is the petitioner's obligation to comply with the prevalent laws and ensure that all the consent and approval is required for the project are obtained by it"*** gives an impression that the commission has nothing to do with the issues raised by the appellant and it is for the appellant to sort them out at his level.

139. In view of the above we are of the opinion that the State Commission has shown complete insensitivity to an important issue of National Importance having commercial implications on the Appellant, the consumers and the power sector at large. We disapprove this type of lackluster approach of the State Commission in dealing with such an important issue of environmental compliance with commercial implications on the operation of the Appellant.

Power to Regulate as per 86 (1) (b) of the Electricity Act, 2003

140. The Appellant has submitted that the State Commission has been invested with the "powers to regulate" under 86 (1) (b) of the Electricity Act, 2003, the tariff of LPGCL. The Section 86 (1) (b) of the Electricity Act, 2003 is reproduced below:

"Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -

(a)……………………..

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;"

141. The Appellant has also placed reliance on the following judgments passed by Supreme Court wherein the scope of power to 'Regulate' has been discussed as under: -

(a) In *U.P. Co-operative Cane Unions Federation v. West U.P. Sugar Mills Association*, reported as (2004) 5 SCC 430, it was held that the word 'Regulate' has a broad impact having wide meaning and cannot be construed in a narrow manner. The relevant extract of the judgment is reproduced as below: -

"20. ..... "Regulate" means to control or to adjust by rule or to subject to governing principles. It is a word of broad impact having wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context in which it has been used and the purpose of the statute".

(b) In *V.S Rice and Oil Mills And Ors v. State of Andhra Pradesh* reported as AIR 1964 SC 1781 it was held as under: -

"20. Then it was faintly argued by Mr Setalvad that the power to regulate conferred on the respondent by Section 3(1) cannot include the power to increase the tariff rate; it would include the power to reduce the rates. This argument is

entirely misconceived. The word "regulate" is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices…….."

(c) In *Uttar Pradesh Power Corporation Limited Vs National Thermal Power Corporation Limited &Ors*' reported as (2009) 6 SCC 235 it was held as under:-

"48. The power to regulate may include the power to grant or refuse to grant the licence or to require taking out a licence and may also include the power to tax or exempt from taxation. It implies a power to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary to conduct the business in a proper and orderly manner. It also includes the authority to prescribe the reasonable rules, regulations or conditions subject to which the business may be permitted or may be conducted"

142. The Appellant has also placed reliance on the following judgments regarding the position of law that framing or existence of a regulation is not a precondition for granting any relief under a statute-

(a) *PTC India Ltd. v. Central Electricity Regulatory Commission*, (2010) 4 SCC 603 [Para 55 and 56]

(b) *UPSEB vs. City Board, Mussoorie* AIR 1985 SCC 883 [Para 7]

(c) *Rajiv Anand &Ors. Vs. UoI&Ors* AIR 1998 (45) DRJ (DB) [Pg 390]

143. The word regulate has a wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces

within its fold the powers incidental to the regulation envisaged in a good faith and its meaning has to be ascertained in the context in which it has been used and the purpose of the statute.

144. Having gone through the submissions of the Appellant in regard to the provisions of Electricity Act and the provisions of the Regulations notified by the State Commission which give clarity to the exercise of regulatory powers and also the judgments cited by the Appellant in the preceding paragraphs, there is abundant clarity regarding the exercise of regulatory powers of the State Commission especially when there are no guidelines framed at all or the guidelines do not deal with a given situation.

The State Commission can use its regulatory powers to grant the necessary relief sought by the petitioner in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation under Section 86(1)(b).

145. The State Electricity Regulatory Commission has been created under the Electricity Act, 2003 and have been conferred powers to Legislate, Adjudicate and Administer. It is a unique statutory body of its kind and have been assigned roles and responsibilities to oversee the operation and development of power sector in the State on commercial principals as per the provisions of law. The reading of the impugned order dated 07.02.2020 passed by the State Commission gives an impression that the State Commission declined the in-principle approval to the Appellant because it was constraint by the absence of the specific regulation in this regard. A

statutory body like the State Electricity Regulatory Commission having all the powers under the law to adjudicate on matters of importance regarding the functioning of power sector cannot decline to consider a request like the one in question i.e. in-principle approval for additional capitalization on account of change in law sought by the Appellant in spite of the fact that there is abundant clarity on the subject of the regulatory powers conferred on the State Electricity Regulatory Commission under the Act. Inherent powers of the State Commission are saved to make such orders as may be necessary: (i) to secure the ends of justice; and (ii) to prevent abuse of process of the Commission.

146. We are of the opinion that the State Electricity Regulatory Commission has powers under the Act to fill up the gapes in supplementing the rules/regulations by issuing instructions if the same are silent on certain aspects provided that such instructions are consistent with the Act.

CERC Tariff Regulation 2019

147. The Appellant has submitted that though the Generation Tariff Regulations 2019 notified by the State commission do not provide for "in principle approval" but the regulation notified by Central Commission being the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 have explicit provision for "in principle approval" as under:

"11. In-principle approval in specific circumstances*: The generating company or the transmission licensee undertaking any additional capitalization on account of change in law events or force majeure conditions may file petition for in-*

principle approval for incurring such expenditure after prior notice to the beneficiaries or the long term customers, as the case may be, along with underlying assumptions, estimates and justification for such expenditure if the estimated expenditure exceeds 10% of the admitted capital cost of the project or Rs.100 Crore, whichever is lower.

…..

…..

29. ***Additional Capitalization on account of Revised Emission Standards:*** *(1) A generating company requiring to incur additional capital expenditure in the existing generating station for compliance of the revised emissions standards shall share its proposal with the beneficiaries and file a petition for undertaking such additional capitalization.*

(2) The proposal under clause (1) above shall contain details of proposed technology as specified by the Central Electricity Authority, scope of the work, phasing of expenditure, schedule of completion, estimated completion cost including foreign exchange component, if any, detailed computation of indicative impact on tariff to the beneficiaries, and any other information considered to be relevant by the generating company.

(3) Where the generating company makes an application for approval of additional capital expenditure on account of implementation of revised emission standards, the Commission may grant approval after due consideration of the reasonableness of the cost estimates, financing plan, schedule of completion, interest during construction, use of efficient technology, cost-benefit analysis, and such other factors as may be considered relevant by the Commission.

(4) After completion of the implementation of revised emission standards, the generating company shall file a petition for determination of tariff. Any expenditure incurred or projected to be incurred and admitted by the Commission after prudence check based on reasonableness of the cost and impact on operational parameters shall form the basis of determination of tariff."

148. The Appellant has also placed reliance on following various orders passed by the Central Commission granting in-principle approval of FGD cost as recommended by CEA to various generating companies in accordance with the CERC Tariff Regulation 2019 as under:-

(i) Ld. CERC Order dated 28.03.2018 in Petition No. 104/MP/2017 - *Adani Power Limited vs. Uttar Haryana Bijli Vitran Nigam Limited &Anr.*

(ii) Ld. CERC Order dated 20.07.2018 in Petition No. 98/MP/2017, *NTPC Ltd. vs. UPPCL* [Paras 20 & 21]

(iii) Ld. CERC Order dated 17.09.2018 in Petition No. 77/MP/2016 - *Coastal Gujarat Power Ltd. vs. Gujarat Urja Vikas Nigam Ltd. &Ors.*

(iv) Ld. CERC Order dated 08.10.2018 inPetition No. 133/MP/2016 – *Sasan Power Ltd. vs. MPPMCL &Ors*[Paras 22, 24, 32, 33, 36, 38].

(iv) Ld. RERC Order dated 25.01.2019 in Petition No. RERC 1394/18 –*Adani Power Rajasthan Ltd. vs. Jaipur Vidyut Vitran Nigam Ltd.* [Para 10]

(v) Ld. MERC Order dated 06.02.2019 in Case No. 300 of 2018 - *Adani Power Maharashtra Ltd. vs. MSEDCL* [Paras 15,17,25]

(vii) Ld. CERC Order dated 12.06.2019 in Petition No. 118/MP/2018 - *TRN Energy Private Limited vs. Paschimanchal Vidyut Vitran Nigam Ltd.* [Para 161]

(viii) Ld. CERC Order dated 11.11.2019 passed in Petition No. 152/MP/2019 - *Maithon Power Limited vs. Tata Power Delhi Distribution Limited &Ors.*[Para 17, 18]

(ix) Ld. CERC Order dated 20.11.2019 in Petition No. 346/MP/2018 – *Udupi Power Corporation Ltd vs. PCKL&Ors.* [Paras 39, 40, 43]

(x) Ld. CERC Order dated 23.04.2020 in Petition No. 446/MP/2019

- *Sasan Power Ltd vs. MPPMCL.*[Para 18, 39 & 40]

(xi) Ld. CERC Order dated 06.05.2020 in Petition No. 209/MP/2019 - *Sembcorp Energy India Ltd vs. SPDCL &Ors.*[Para 40, 41].

(xii) Ld. CERC Order dated 18.05.2020 in Petition No. 210/MP/2019

- *Sembcorp Energy India Limited vs. SPDCL &Ors.*

149. It is the case of the Appellant that in the absence of any provision in the state regulation, the State Commission may take decision as per the Central Regulation. In this case also, the State Commission should have allowed the "in-principle approval" on the basis of the regulations notified by the Central Commission.

150. The Respondent no. 2 has submitted that the regulations notified by State Commission and by Central Commission are similar in respect of the additional capitalisation on account of change in law and therefore has argued that there is no need to rely on the Central Regulation.

151. The Central regulation contemplate a 2 stage process i.e. stage I – a declaration that the MOEFCC notification, in the facts, as applicable to the generating company constitute a change in law, that requires generating companies to incur additional expenditure and stage 2, determination of quantum of such additional expenditure which is subject to prudence check by the CERC.

The Respondent No. 2 has submitted that the in-principle approval sought by the appellant based on the Central regulation is merely an in-principle approval for incurring such expenditure. The

quantum of expenditure is subject to prudence check. As such there is no difference between the Central regulation and the state regulation.

152. Regarding the orders passed by the Central Commission granting the in-principle approval, the Respondent No. 2 has submitted that though the central commission has granted the in-principle approval but the same is on provisional basis and the same is subject to prudence check by the central commission after the expenditure has been incurred. The Appellant has submitted that he is also seeking in-principle approval based on CEA's recommendation with a view to enable the appellant to avail/deploy debt finance for installation of FGD system. Final pass through of cost in tariff can be determined by the State commission after the appellant has actually incurred such cost after prudence check.

153. On plain reading of both the regulations we find that in the Central Regulation there is an explicit provision in the form of Regulation 11 which deals with the "in-principle approval". As such we do not agree with the submission made by the Respondent no. 2 that the Central and State Regulations are same in respect of "in-principle approval" and therefore, we reject this submission.

154. Respondent No. 2 has submitted that once a generator demonstrates that a change in law event like MOEFCC notification requires it to undertake additional capex then the generator is entitled to such additional capex. Quantum of such additional capex will be subject to prudence check by the State commission, similar to as contemplated in the Central regulation. The argument of the

Respondent No. 2 is that the declaration that the change in law requires the generator to undertake additional Capex is in effect nothing but an in-principle approval and is therefore similar to as contemplated in the Central regulation. We do not agree with this argument simply because such declaration is in the nature of a self-declaration and does not have the approval of the regulator i.e. the State Commission and it will not give regulatory certainty as being sought by the Appellant.

155. The respondent distribution company has also placed reliance on *full bench judgment of this Tribunal in Appeal No. 103 of 2012 M/s Maruti Suzuki India Ltd. v. HERC &Anr. & Appeal No. 200 of 2011 M/s Maruti Suzuki India Ltd. v. HERC* wherein this Tribunal while laying the meaning of the term 'shall be guided' as provided in Section 61 of the Electricity Act, 2003 has held that the phrase '*shall be guided by'* in Section 61 of the Electricity Act, 2003 is not mandatory and only having persuasive value to be followed while laying down the Regulation and once the Regulations are framed then Regulations are to be followed as they stand in higher pedestal being subordinate legislation. The relevant graph of the judgment is reproduced hereunder: -

"….48. In this connection, it is also necessary to refer to the judgment of this Tribunal in Haryana Power Generation Corporation Limited. In that case, contention of the Appellant therein was that the State Commission had neither followed the principles and methodology specified by the Central Commission nor followed the provisions of the Tariff Policy and the National Electricity Policy. The Tribunal held that Section 61 of the said Act mandates the State Commissions to frame Regulations fixing terms and conditions for determination of tariff and in doing so it is to

be guided by the principles and methodology specified by the Central Commission, National Electricity Policy and Tariff Policy etc., but once the State Commission has framed the Regulations it shall determine tariff in accordance with its own Regulations. The relevant graph of the said judgment reads as under: -

"Bare reading of section 61 would make it clear that the State Commission have been mandated to frame Regulations for fixing tariff under Section 62 of the Act and while doing so i..e, while framing such Regulations, State Commissions are required to be guided by the principles laid down by the Central Commission, National Electricity Policy, Tariff Policy etc. It also provide that while framing the Regulations, the State Commissions shall ensure that generation, transmission and distribution are conducted on commercial principles; factors which would encourage competition and safe guard consumer's interest. Once the State Commission has framed and notified the requisite Regulations after meeting the requirement of prior publication under Section 181 (3), it is bound by such Regulations while fixing Tariff under Section 62 of the Act and the Central Commission's Regulations have no relevance in such cases. However, the State Commission may follow the Central Commission's Regulations on certain aspects which had not been addressed in the State Commission's own Regulations. The Haryana Electricity Regulatory Commission has framed Terms and Conditions for determination of tariff for generation in the year 2008 and the State Commission is required to fix tariff as per these Regulations."

49. The above observations of this Tribunal support our conclusion that the word "shall" appearing in the term "shall be guided" used in Sections 61, 79 and 86 of the said Act is not to be read as "must". It has a persuasive flavour. The National Electricity Policy and the Tariff Policy can only be guiding factors. If there are Regulations framed under Sections 178 and 181 in the field, they will rank above them being subordinate legislation. …."

156. In the above judgment this Tribunal has very clearly clarified that:

> "***However, the State Commission may follow the Central Commission's Regulations on certain aspects which had not been addressed in the State Commission's own Regulations.***"

157. In this case there is a clear distinction between the state and central regulations in respect of the treatment pertaining to "in principle approval". Whereas the state regulation does not have any provision for "in principle approval", a fact which has been stated by the state commission in the impugned order, there is an explicit provision in the form of regulation 11 in central regulation, which deals with the "in principle approval" in detail.

158. Therefore, in view of the fact that the aspect of "in-principle approval" has not been addressed in the State Regulation and also in line with the full bench judgment of this Tribunal in Appeal No. 103 of 2012 M/s Maruti Suzuki India Ltd. v. HERC & Anr. & Appeal No. 200 of 2011 M/s Maruti Suzuki India Ltd. v. HERC wherein it has been clarified that "the State Commission may follow the Central Commission's regulations on certain aspects which had not been addressed in the State Commission's own regulations", we are of the considered opinion that the State Commission should have followed the Central Commission's regulations on the aspect of "in-principle approval".

Issue No.2

"Whether the MOEFCC notification dated 07.12.2015 requiring the thermal generating stations to implement the revised environmental norms amounts to change in law in terms of the provisions of the PPA and 2014 tariff regulations?

159. The State Commission in the impugned order dated 07.12.2015 have recorded that "though the petition has no specific prayer for declaring the notification dated 07.12.2015 amounts to change in law, the commission, to meet the ends of justice, has dealt with this issue".

160. The State Commission has noted that the Environment (Protection) Rules, 1986 have been notified by Central Government in exercise of the power vested under section 6 and 25 of the Environment Protection Act, 1986. Rule 3 of the Environment (Protection) Rules provides standards for emission or discharge of environmental pollutants. The said rules have been amended vide notification dated 7.12.2015. The State Commission has also given a summary of new norms, as notified by MOEFCC.

161. Let us have a look on the chronology of events regarding the applicable norms for Sulphur Dioxide and Nitrogen oxides as under:

(i) On 31.03.2011, MOEFCC accorded EC and subsequently it was amended on 20.05.2014 and 30.05.2016 to incorporate changes with respect to change in source of coal from imported to domestic. The EC, *inter-alia*, had the following clauses: -

"A. Specific Conditions

….

(xiv) Provisions for installation of FGD shall be provided for future use.

(xv) The project proponent shall undertake measures and ensure that no fugitive fly ash emissions take place at any point of time.

(xvi) Stack of 275 m height shall be installed and provided with continuous online monitoring equipment for SOx, NOx and PM2.5 & PM10. Exit velocity of flue gases shall not be less than 22m/sec. Mercury emissions from stack may also monitored on periodic basis.

(xvii) High Efficiency Electrostatic Precipitators (ESPs) shall be installed to ensure that particulate emission does not exceed 50 mg/Nm3

(xviii) Adequate dust extraction system such as cyclones/bag filters and water spray system in dusty areas such as in coal handling and ash handling points, transfer areas and other vulnerable dusty areas shall be provided.

….

B. General Conditions

….

(vii) Regular monitoring of ambient air ground level concentration of SO2, NOx, PM2.5 & PM10 and Hg shall be carried out in the impact zone and records maintained. If at any stage these levels are found to exceed the prescribed limits, necessary control measures shall be provided immediately. The location of the monitoring shall be decided in consultation with SPCB. Periodic reports shall be submitted to the regional office of this ministry. The data shall also be put on the website of the company."

(ii) On 11.04.2011, Uttar Pradesh Pollution Control Board accorded **<u>Consent to Establish</u>** to LPGCL for the Project. The relevant extracts are as under: -

74. "Do not start trial production in the Industry until they have obtained consent from the Board under the Air and Water Act. For obtaining water and air consent, the consent applications prescribed at least 2 months before the date of commencement of production in the unit must be submitted to this office mentioning the first application before production. If the industry does not comply with the above, legal action can be taken against the industry under the said act without any prior notice…

8. Ensure implementation of Water/Air pollution control plan before starting the production."

(iii) *On 19.06.2015,* Uttar Pradesh Pollution Control Board accorded **<u>Consent to Operate</u>** to LPGCL for the Project under Air (Pollution prevention and control) Act 1981 and Water (Pollution prevention and control) Act 1974. The relevant extracts are as under: -

"1. The hourly maximum emission volume of flue gas should not exceed the quantity emitted by the Chimney given below;

Source of Air pollution	*Fuel*	*Established pollution control system*
(i) 1983 Ton/Hr capacity boiler: 03 nos.	*Coal: 31237 Ton/day*	*ESP/ every Boiler, Chimney 275 Mtr.*

2. The quantities emitted by various Chimneys in the atmosphere confirm to the Board standards

(x)	*Suspended Particulate Matter (SPM)*	*mg/Nm^3*
(xi)	*Metal dust (Iron, Zink, Copper etc.)*	*-*
(xii)	*Hydrogen, sulfur trioxide sulfide mist)*	*-*
(xiii)	*Sulfur dioxide*	*(PCM)*
(xiv)	*Carbon Monoxide*	*-*
(xv)	*Hydrocarbon*	*-*

(xvi) *Ammonia* -
(xvii) *Fluorine* -
(xviii) *Mercaptan*
……………..

8. All arrangements should be made to monitor emissions from the stack of the unit within one month of the date of issue of consent order."

(iv) On 07.12.2015, MoEFCC notified the Environment (Protection) Amendment Rules, 2015 that mandates all Thermal Power Plants installed till December 2016, like LPGCL's Project, to comply with the Revised Emission Norms and other terms and conditions stipulated therein on or before 06.12.2017 (i.e., within a period of 2 years from the date of MoEFCC Notification). In terms of the MOEFCC Notification, norms applicable for Units having capacity above 500 MW and installed between 01.01.2003 and 31.12.2016 (which are applicable to LPGCL's Project), are as under:-

(a) Emission limit for Particulate Matter is 50 mg/Nm^3. In LPGCL's case, the Project is designed for PM of maximum 50 mg/Nm3 as the condition for PM limit of 50 mg/Nm3 was specified in the EC dated 31.03.2011 for the Project.

(c) Oxides of Nitrogen emission limited to 300 mg/Nm$^{3.}$ (*new norm*)

(d) Sulphur Dioxide emission limited to 200 mg/Nm^3 (*new norm*).

(e) Mercury emission limited to 0.03 mg/Nm^3 (*new norm*).

162. From the above chronology of events it is evident that there were no applicable standards for Sulphur Dioxide (SO_2) and Nitrogen Oxide (NOx). It is only on 7.12.2015 that the MOEFCC notified the new norms for Sulphur dioxide and Oxides of Nitrogen. However, we observe that the state commission has not made such specific findings in regard to applicability of emission norms which have a direct bearing on the aspect of change in law.

163. Regarding the Environment Clearance, the state commission has observed as under:

"Environment Clearance dated 31.03.2011 and amended vide letters dated 20.05.2014 and 30.05.2016 in respect of Lalitpur Power Station has condition that the Sulphur and ash content of coal shall not exceed .5% and 34% respectively and also that provision for installation of FGD shall be provided. Also, the petitioner is required to regularly monitor ambient air for ground level concentration of SO2, NOX, PM 2.5 and PM 10 and Hg that these do not exceed the prescribed limits. The past data of various omissions has not been placed on record of the commission to compare the level pre and post MOEFCC notification dated 7.12.2015 to take a decision on merit of the case. Therefore, extent of applicability of "change in law" to every Thermal Power Plant would be governed by its pre-existing obligation, conditions, standards, norms, applicable regulations and PPA."

164. The state commission has also referred to the communication dated 30.05.2018 of the central government wherein the central

government has held that the notification dated 07.12.2015 issued by M0EFCC is of the nature of change of law except the following cases:

(a) Power Purchase Agreements 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 a requirement of pollution control system was mandated under the Environmental Clearance of the plant or envisaged otherwise before the notification of Amendment rules;

165. Regarding the condition of the Environmental Clearance i.e. *"provision for installation of FGD shall be provided for future use" the* appellant has submitted that it merely requires the appellant to provide space and connectivity for FGD equipment if mandated in future. Accordingly, the appellant has already made provision for land for installation of FGD for future use. The appellant has submitted that the appellant has not included the cost of FGD under in-principle capital cost agreed by UPPCL and has neither considered the cost of FGD in the tariff petition.

Though this submission of the appellant has been recorded in the impugned order but there is no discussion or any finding on this important aspect having direct bearing on change in law.

166. LPGCL has conceptualised its project on the then existing laws and government policies including the applicable environmental policies. Since the PPA is a long-term agreement (for a period of 25 years), it was contemplated in the PPA that adjustment may be required to

offset the impact of certain events beyond the control of the parties which have an impact on the project.

167. It is the case of the appellant that the phrase ‘shall be provided for future use’ conveyed that LPGCL may or may not be required to install the system at all. Since, no requirement for the equipment was mandated and only space/provision was to be provided, LPGCL has duly provided space for FGD. Hence, it cannot be argued that LPGCL was required to include cost of FGD installation in the project cost especially when installation of FGD was not mandatory on the effective date.

168. As regards, the funds for environmental protection measures, the provision for earmarking did not include FGD equipment installation. The provision in EC read as under: -

“(xvi) Separate funds shall be allocated for implementation of environmental protection measures along with item-wise breakup. These costs shall be included as part of the project cost. The funds earmarked for the environment protection measures shall not be diverted for other purposes and year-wise expenditure should be reported to the Ministry.”

The aforesaid is an omnibus clause with no specification for FGD. Since no mandate for FGD equipment existed, no fund was allocated towards the same.

169. It is the case of the Appellant that all conditions under the EC were duly complied with by LPGCL. The compliance was regularly

verified by UPPCB/CPCB and at no point was an issue with regard to lack of funds towards FGD equipment was raised. Under the Environment Impact Assessment (EIA) Report, various mitigation measures were proposed to reduce adverse impact on the environment. However, EIA report does not specify installation of FGD on which the EC was granted.

170. Seven days prior to the Effective Date, there did not exist any regime with respect to FGD installation or any indication whatsoever for earmarking funds for setting up of FGD system (Even when the EC was issued in 2011). Therefore, in 2011, LPGCL by no reasonable standard could have predicted the possibility or anticipated, that requirement to provide provision/space can be to provide for Capex of FGD and its installation whose specifications were notified in 2015 and thereafter.

171. Subsequently on 07.12.2015, MOEFCC, in exercise of its powers under Section 6 and Section 25 of the Environment (Protection) Act, 1986, amended the Environment (Protection) Rules, 1986 *vide* the Environment (Protection) Amendment Rules 2015, *inter-alia*, prescribing: -

a) limit of emission of SO_2 upto 200 mg/Nm^3 *(new norm)*
b) limit of emission of NOx upto300 mg/Nm^3 *(new norm)*
c) Directed all TPPs with Once-Through Cooling (OTC) to install Cooling tower (CT).

172. Pursuant to MoEFCC Notification, CPCB by its letter dated 11.12.2017 mandated installation of FGD equipment in all power plants to meet the emission limits prescribed by the MOEF&CC

Notification. While mandating the FGD installation and installation of low NOx burners, providing Over Fire Air (OFA) etc., the CPCB letter specifically notes that MOEF&CC Notification *prescribed new emission limits* for SO_2 and NOx. As a result, installation of FGD system became a necessary requirement for LPGCL's Project to meet these new emission norms.

173. In view of the above the Appellant has submitted that the EC only mandated to provide provisions for installing FGD for future use. However, MOEF&CC Notification read with CPCB letter dated 11.12.2017 has mandated LPGCL to comply with new emission level for SO_2 which requires installation of a specific type of FGD. Therefore, the mandate and scope of both are different. The cost and technology associated with installation of FGD is directly proportional to the level of SO_2 emissions to be controlled, which was not prescribed in the EC and has only been notified in 2015.

174. For compliance with the MoEFCC Notification, LPGCL is mandated to install/retrofit FGD System in the Project. Statutory compliance of these Revised Emission Norms stipulated therein will require LPGCL to carry out major capital works, thereby incurring substantial additional capital expenditure and recurring operational expenditure.

175. From the impugned order dated 07.02.2020, we observe that under the heading "Respondent/UPPCL reply dated 11.09.2019", under item No. 14, it has been recorded as under:

"14. Under the EC the following conditions have been expressly

mentioned by the MOEFCC:

*a. Provision for installation of a Flue Gas Desulphurization (“**FGD**”) shall be provided.*

b. …………………..”

As per the environmental clearance accorded by MoEFCC dated 31.03.2011 this condition reads as under:-

Provision for installation of FGD shall be provided **for future use.** We therefore observe the phrase for future use is missing in the impugned order.

176. In view of the above we agree with the submission made by the Appellant that at the time of environmental clearance there were no applicable emission norms for Sulphur Dioxide (SO_2) and Nitrogen Oxide (Nox) and LPGCL conceptualised the plant according to the applicable emission norms prevailing at that time. It is also important to note that pursuant to MOEFCC notification dated 07.12.2015, CPCB mandated installation of FGD equipment in all power plants to meet the emission limits prescribed of MOEFCC. Prior to Effective Date, there did not exist any regime with respect to FGD installation or any indication whatsoever for earmarking funds for setting up of FGD system. In the absence of emission norms, decision regarding the selection of appropriate technology and cost thereof was just not possible. Accordingly the Appellant neither considered the cost of FGD installation in the tariff petition nor has included the same under in-principle capital cost agreed by UPPCL.

177. However, from the impugned order we note that there is no

discussion or any finding on this submission of the Appellant regarding none inclusion of the cost of installation of FGD in the in-principle capital cost and also non-inclusion of the same in the tariff petition filed by the appellant even the respondent UPPCL has also not replied on these submissions. The State Commission in the impugned order have recorded that though there is no specific prayer for declaring the MOEFCC notification dated 07.12.2015 amounts to change in law the Commission to meet the ends of justice, has dealt with this issue. Under these circumstances it was imperative on the part of the State Commission to have a detailed discussion and specific findings on the submission on capital cost and recovery of the same in the form of tariff. It is also important to observe here that this is a section 62 project wherein the capital cost have been approved by none other than the State Commission and the tariff also has been determined by none other than the State Commission and in all these hearings the respondent UPPCL has been associated as the procurer of the power generated from this plant.

178. The State Commission vide order dated 18.12.2017 in petition no. 1263 of 2017 directed the Appellant to approach CEA for the Central Electricity Authority to decide specific optimum technology, associated cost and major issues to be faced in installation of different system like SCR etc. The Appellant was also directed to take up the matter with the Ministry of Environment and Forest for phasing of the implementation of the different environmental measures. Accordingly, the Appellant was granted liberty to file appropriate petition at an appropriate stage based on approval of CEA and direction of MOEFCC to deal with the same in accordance

with law.

179. Accordingly, the Appellant approached CEA and CEA vide its letter dated 21.02.2019 has provided a recommendation report. CEA has sent copies of the report to UPERC and UPPCL and Appellant has also given a copy to UPPCL.

180. However, there is no discussion whatsoever regarding the contents of the report of CEA and there is no finding whatsoever regarding recommendation of CEA.

181. It appears from the reading of the impugned order that though the Commission preferred to deal with the issue of change in law to meet the ends of justice however the same spirit is not visible from the impugned order. It is a very sketchy order and lacks sincerity and seriousness in dealing with such a sensitive issue of national importance having significant commercial implication on the plant and the power sector as a whole.

Conclusion:

182. In view of the above, we are of the considered opinion that the impugned order dated 07.02.2020 is bad in law and is therefore set aside.

183. MOEFCC Notification dated 07.12.2015 is a change in law and the in-principle approval for additional capitalization on account of change in law, as sought by the Appellant, can be granted in terms of the Central Electricity Regulatory Commission (Terms and

Conditions of Tariff) Regulation, 2019 and the recommendations of CEA, as given in its report submitted to the state commission. The tariff impact of the additional capital expenditure incurred on account of change in law shall be claimed by the Appellant as per applicable Tariff Regulations.

184. We remit this matter back to the UPERC and direct them to consider the matter afresh in view of this Judgment and pass appropriate orders in accordance with law. Given the rigid time frame for installation of FGD we direct the State Commission to take up the proceedings on fast track mode and pass the orders within four weeks. We direct the Appellant to approach the State Commission within two weeks.

No order as to costs.

Pronounced in the Virtual Court through video conferencing on this ***13th day of November, 2020.***

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

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REPORTABLE/NON-REPORTABLE
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