IN THE APPELLATE TRIBUNAL FOR ELECTRICITY

AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 21 OF 2019

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APPEAL NO. 73 OF 2019

Dated: 28th August, 2020

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S. D. Dubey, Technical Member

In the matter of:-

APPEAL NO. 21 OF 2019

Talwandi Sabo Power Limited
Village Banawala, Mansa-Talwandi Sabo Road,
District Mansa, Punjab – 151302 **.... Appellant**

Versus

1. Punjab State Electricity Regulatory Commission
(Through its Secretary)
SCO NO. 220-221, Sector 34-A, Chandigarh - 160022

2. Punjab State Power Corporation Ltd.
(Through its Managing Director)
The Mall,Patiala, Punjab – 147001. **... Respondents**

Counsel for the Appellant(s) : Mr. Amit Kapur
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Mr. Pulkit Agarwal
Mr. Arvind Kumar Dubey for R.2

APPEAL NO. 73 OF 2019

Nabha Power Limited
Aspire Tower, 4th Floor,
Plot No.55, Industrial and Business Park,
Phase-I, Chandigarh-160 002 **…APPELLANT**

Versus

1. The Secretary
Punjab State Electricity Regulatory Commission
SCO 220-221, Sector 34-A
Chandigarh - 160022

2. Chairman & Managing Director
Punjab State Power Corporation Limited
The Mall,Patiala, Punjab – 147001. **... Respondents**

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Ms. Anushree Bardhan
Mr. Shubham Arya
Mr. Pulkit Agarwal
Mr. Arvind Kumar Dubey for R.2

JUDGMENT

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. Since the issues involved in both of these appeals are similar, above Appeals are disposed of by this common judgment.

Appeal No. 21 of 2019

2. This Appeal is preferred by the Appellant – Talwandi Sabo Power Limited (hereinafter referred to as **"Appellant/TSPL"**) challenging the

legality, validity and propriety of the order dated 21.12.2018 in Petition No. 44 of 2017 passed by Punjab State Electricity Regulatory Commission (hereinafter referred to as **"PSERC/Commission"**).

3. The brief facts which led to filing of the present Appeal are as under:

(i) The Appellant-TSPL is a generating company having a 3x660 MW Thermal Power Plant at Village Banawala, Mansa - Talwandi Sabo Road, District Mansa, Punjab. Respondent No. 1 is the Punjab State Electricity Regulatory Commission. Respondent No. 2, Punjab State Power Corporation Ltd. ("***PSPCL***"), formerly known as PSEB, is the principal distribution company in the state of Punjab.

(ii) On 19.01.2005, the Ministry of Power issued Competitive Bidding Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees ("***Bidding Guidelines***").

(iii) In terms of the said Notification, on 25.09.2007, a Request for Qualification ("***RFQ***") on behalf of PSPCL/Respondent No.2, formerly known as PSEB came to be issued, for procurement of power on long

term basis from the Power Station to be setup at village Banwala, Mansa – Talwandi Sabo Road. Thereafter, Request for Proposal ("***RFP***") was issued to qualified bidders on 18.01.2008. Sterlite Energy Ltd. (***"SEL"***) submitted the bid on 23.06.2008 and the Cut-off date is one week prior to the bid submission date i.e. 16.06.2008 ("***Cut-off date***"). Through the competitive bidding process, SEL was selected as the successful bidder. According to the Appellant, as on the Cut-off date, the law governing environmental protection norms of thermal power plants was in terms of Rule 3, Schedule I of the Environment Protection Rules, 1986. Subsequently, on 04.07.2008 a Letter of Intent (***"LoI"***) was issued by PSPCL/PSEB in favour of SEL calling upon it to acquire 100% shareholding in TSPL's Company. On 11.07.2008, the Ministry of Environment & Forests ("***MoEF"***) accorded Environmental Clearance ("***EC***") to TSPL. The said EC was amended on 25.03.2010, 17.06.2010 and further extended on 30.09.2013.

(iv) On 01.09.2008, the Share Purchase Agreement (SPA) was entered into between PSEB, the TSPL and SEL transferring 100% of

the shares of TSPL to SEL. Further, on the same day Power Purchase Agreement (PPA) was executed between TSPL and Erstwhile Punjab State Electricity Board for sale of power from its 1980 (3x660) MW Thermal Power Plant.

(v) On 07.12.2015, i.e. almost after 7 years of the Cut-Off date, the Environment (Protection) Rules, 1986 were amended by the ***MoEF*** and modified and/or introduced the standards of emission and the level of water consumption for all coal based thermal power plants in India by Notification. All operational thermal power stations and new thermal power stations in India are mandatorily required to comply with the new environmental norms introduced through the said Notification. Further, the MoEF Notification reduces the water consumption and emission limits of SPM and introduced new emission norms of Sulphur Dioxide ($S0_2$), Nitrogen Oxide (NO_x) and Mercury. Thermal power plants are required to adhere to the specified emission and water consumption limits based on the year of their commissioning.

(vi) According to the Appellant, it is required to incur expenditure to

comply with the said Notification and to undertake a variety of measures such as installation of Flue Gas Desulphurization equipment **("*FGD*"),** Selective Non Catalytic Reduction technology **("*SNCR*")** and a water treatment system amongst others. The said expenditure was not factored in at the time of Cut-off date under the Competitive Bidding Guidelines i.e. 16.06.2008.

(vii) The Appellant is required to comply with the new emission norms since its plant was commissioned in 2016 and it owns a Cooling Tower based thermal power plant comprising 3 Units of 660 MW each. According to the Appellant, the aforesaid MoEF notification is in the nature of a Change in Law event in terms of the PPA.

(viii) On 14.01.2016, the Appellant-TSPL intimated to PSPCL/Respondent No.2 regarding the aforesaid Notification being a Change in Law event and stated that it would have to comply with the new environmental norms, therefore it must be compensated in terms of Article 13.2 of the PPA.

(ix) Subsequent sequence of events and correspondence exchanged with PSPCL, in short, is as under:-

(a) TSPL once again sent a letter dated 16.09.2016 to the PSPCL reiterating the Change in Law brought by the Notification and notifying that it is in the process of undertaking discussions with expert technical consultants to evaluate various technologies/ equipment that would be required to be installed as well as an estimate of the financial implication to install the same.

(b) TSPL appointed Tata Consulting Engineers Limited (**"*TCE*"**) as its consultant for the purpose of evaluating various aspects of compliance with the MOEF Notification. Based on the available draft Feasibility Report, TSPL apprised PSPCL of the approximate financial implication of complying with the MoEF Notification and the time required for installation.

(c) PSPCL raised certain queries and sought specific information from TSPL. After discussions with PSPCL on 08.05.2017 and 07.06.2017, TSPL discussed the matter with TCE to update its draft report. Subsequently, TCE submitted their final 'Feasibility Report to meet New Emission Regulations of MOEF' **("Feasibility Report")** on 15.06.2017 to TSPL.

(x) To comply with the MoEF Notification, Appellant requires a significant additional expenditure towards the installation of the necessary equipment, operating expenditure, increase in auxiliary

power consumption, reduction in contracted capacity and other expenditure to the tune of approximately Rs. 2.31 Crores/MW (Including both CAPEX and OPEX as capitalized for 20 years).

(xi) On 29.06.2017, the Appellant approached the Punjab Commission by filing Petition No.44 of 2017 for approval of the MOEF Notification as a Change in Law in terms of Section 86(1)(b) of the Act.

(xii) On 05.09.2017, the Northern Regional Power Committee ("***NRPC***") notified that the Ministry of Power, Government of India has set a deadline of 31.12.2022 for implementing FGD and other systems in the country. Therefore, on 14.09.2017, a meeting was called by the NRPC. According to the Phasing Plan for implementation of FGD and other systems as framed by NRPC, and as recommended by the CEA, Appellant's Units are to comply with the norm in the MoEF Notification according to the following timelines:

(a) Unit No. 1- 31.03.2021

(b) Unit No. 2- 31.03.2021

(c) Unit No. 3- 31.12.2020

(xiii) On 09.10.2017 CEA asked TSPL to produce the yearly average SO_2 & NOx data and TSPL accordingly submitted the requisite data to CEA.

(xiv) On 11.12.2017, Central Pollution Control Board (CPCB) issued directions to TSPL directing that it shall:-

(i) meet emission limit of particulate matter by installing Electrostatic Precipitator (ESP);

(ii) install FGD by 31.12.2019 in Unit 1, 2 & 3 respectively so as to comply with SO_2 emission limit; and

(iii) immediately install low NOx burners, provide for Over Fire Air and achieve progressive reduction so as to comply NOx emission limit by the year 2019.

(xv) On 25.01.2018, TSPL filed modified feasibility report. On 16.02.2018, PSERC while observing that initiation of Competitive Bidding Process for furnishing of the said data was premature at that stage and directed to submit certain other documents. Accordingly, on 26.03.2018, TSPL filed an affidavit in compliance of the Order dated 16.02.2018.

(xvi) Pursuant thereto, on 21.05.2018, after receiving Recommendation Report of CEA on Installation of FGD to meet Environment (Protection) Amendment Rules, 2015, TSPL filed an affidavit enclosing the said report. On 30.05.2018, The Ministry of Power (***"MOP"***) issued direction to the Central Electricity Regulatory Commission under Section 107 of the Electricity Act, 2003 regarding mechanism for Implementation of New Environmental Norms for Thermal Power Plants supplying power to distribution licensees under concluded long term and medium-term power purchase agreements.

(xvii) After reserving order on 11.06.2018 in Petition No. 44 of 2017, TSPL was further directed to initiate the process to ensure installation of FGD by December 2019, as per the CPCB and recommendations of CEA. In pursuance thereto, TSPL has already initiated the competitive bidding process in co-ordination with PSPCL to implement FGD installation, other equipment etc. to meet the new emission norms.

(xviii) After hearing the parties, on 21.12.2018, PSERC passed the Impugned Order, wherein it disallowed the claim of the Appellant that

the MoEF Notification as a Change in Law event. Being aggrieved by the finding in the said order that Notification dated 07.12.2015 issued by *MoEF* to amend the Environment (Protection) Rules, 1986 after the Cut-off Date (16.06.2008) is not a Change in Law event in terms of Article 13 of the PPA dated 01.09.2008, the Appellant/TSPL filed the present Appeal praying for the following reliefs:

"**(a)** Allow the Appeal and set aside the Order to the extent of grounds set out in this Appeal;

(b) Hold that MoEF Notification dated 07.12.2015 is a Change in Law Event under the PPA and that the Appellant is entitled to relief in this behalf;

(c) Allow in-principle approval for the expenditure to be incurred towards the Change in Law events based on the benchmark cost basis, subject to true up/final approval of Project Cost, to enable it to avail financing as well as ensure timely implementation of required corrective measures to ensure compliance as per the revised norms;

(d) Direct the Ld. Punjab Commission to devise a mechanism for payment of compensation by the Procurers to the Appellant on account of the aforesaid Change in Law event in terms of and based on the principles under Article 13 read with Article 13.2 (b) of the PPA; and

(e) Pass such other Orders as this Hon'ble Tribunal deems fit and

proper in the facts and circumstances of the case."

APPEAL No. 73 of 2019

4. This Appeal is preferred by the Appellant–Nabha Power Limited (hereinafter referred to as "Appellant/NPL") challenging the legality and validity of the order dated 09.01.2019 in Petition No. 2 of 2018 passed by Punjab State Electricity Regulatory Commission (hereinafter referred to as "PSERC/Commission").

5. The brief facts, which led to filing of this Appeal, are as under:

(i) The Appellant/NPL is a generating company, which owns and operates 2×700 Rajpura Thermal Power Project at a site near Village Nalash, District Patiala, Punjab (for short "**the Project"**). Formerly, the Appellant was a Special Purpose Vehicle (**SPV**) company set up by the Punjab State Electricity Board (**PSEB**) [now Punjab State Power Corporation Limited (**Respondent No. 2/PSPCL**) for developing 1200 ± 10% MW Rajpura Thermal Power Project. Appellant/NPL's entire shareholding was subsequently transferred to L&T Power Development Limited (**L&T Power**) after it was selected

as the successful bidder under the tariff-based competitive bidding process under the Act and the Competitive Bidding Guidelines. Pursuant to the acquisition of the entire shareholding of the Appellant/NPL by L&T Power, the management and control of the Appellant/NPL is now transferred under L&T Power. Respondent No.1 is the Commission and Respondent No.2/PSPCL carries on the generation and distribution business of the erstwhile PSEB.

(ii) On 19.01.2005, the Ministry of Power issued Competitive Bidding Guidelines, which provided for two distinct routes for power procurement by the distribution companies.

(iii) The model Request for Proposal (**Model RFP**) which was part of the Standard Bidding Documents envisaged a project being set up under five scenarios. The Respondent No. 2 decided to develop as a Case 2, Scenario 4 project.

(iv) In terms of RFP, Respondent No. 2 was responsible for completing the following activities and/or obtaining the necessary consents and approvals prior to undertaking the bid for the Project:

(i) Site identification and land acquisition;

(ii) Environment clearance;

(iii) Forest clearance, if applicable;

(iv) Fuel arrangement;

(v) Water linkage; and

(vi)Requisite hydrological, geological, meteorological and seismological data necessary for preparation of Detailed Project Report (**DPR**).

(v) In terms of Competitive Bidding Guidelines, PSEB incorporated a special purpose vehicle (SPV) i.e., NPL to act as its authorized representative, for carrying out the pre-bid obligations such as obtaining Environment Clearance, acquiring land, etc. In this regard, Respondent No. 2 appointed Power Finance Corporation (**PFC**) as its consultant which, in turn, appointed Desein Private Limited (**DPL**) as its sub-consultant to undertake the necessary activities on behalf of Respondent No.2 for completing the pre-requisites for obtaining the Environmental Clearance for the Project.

(vi) On 08.01.2008, NPL made an application to the MoEF&CC for determining the ToR for obtaining the Environmental Clearance for the Project along with required documents. In May 2008, the Feasibility Report was prepared by NPL and in this report the only requirement was to keep adequate space for installing FGD system at a later date *if warranted under environmental regulations* and accordingly, necessary space provision was made in the plant lay-outs. After public hearing for the Project, on 08.08.2008, NPL submitted the final rapid EIA report along with the questionnaire for environmental appraisal of the Project and requested the MoEF&CC to take up the present Project at the earliest for the grant of Environmental Clearance.

(vii) NPL made a detailed presentation on 09.09.2008 for grant of Environmental Clearance for its Project demonstrating that an aggregate fund of Rs. 410.10 Crore had been earmarked towards environmental protection measures. The item-wise break-up of the aforesaid fund do not reflect any cost earmarked towards the installation of FGD and only refers to the cost towards installation of

Electrostatic Precipitator (**ESP**) in context of air pollution control measures.

(viii) Subsequently, on the recommendation of the Expert Appraisal Committee, the MoEF&CC issued the Environmental Clearance for the Project on 03.10.2008 to NPL, which *inter alia* stipulated that the total cost of the project is Rs. 5500.00 Crores, which includes Rs. 410.10 Crores for the environmental protection measures. Thus, it is apparent that all the documents based on which the Environmental Clearance was finally provided, did not stipulate and/or mandate earmarking of funds towards the installation of FGD system and/or SNCR system.

(ix) After obtaining the Environmental Clearance for the Project, on 10.06.2009, NPL issued the Request for Qualification (**RFQ**) and the Request for Proposal (**RFP**) for selection of a developer through tariff-based competitive bidding process for the procurement of power on long term basis from the Project. In response to the RFQ and RFP, among others, L&T Power submitted the technical and financial bid on 09.10.2009 i.e., the bid deadline. Accordingly, the cut-off date

which is 7 days prior to the bid submission date is 02.10.2009 (**Cut-off Date**). L&T Power was declared as the successful bidder. As on the Cut-off Date, the law governing environmental protection norms/emission norms for the TPPs was in terms of Rule 3, Schedule I of the Environment Protection Rules, 1986. According to the Appellant, in terms of the extant rules and regulations at the time of bid submission or under the Environment (Protection) Act, 1986 (EP Act) and the Environment (Protection) Rules, 1986 (EP Rules), *there were no norms for SO_2 and NOx emissions*.

(x) On 19.11.2009, the Respondent No. 2 issued a Letter of Intent (**LoI**) in favour of L&T Power calling upon it to acquire 100% shareholding of NPL. Thereafter as stated above, a Share Purchase Agreement was executed on 18.01.2010 between the Appellant , L&T Power and Respondent No.2 whereby 100% shares of NPL were transferred to L&T Power. Further, on the same day, a PPA was also entered into between the Appellant and PSEB (now PSPCL).

(xi) On 07.12.2015, approximately 6 years after the Cut-off Date, the MoEF&CC issued the aforementioned Notification effecting

amendments to the EP Rules by way of the Environment (Protection) Amendment Rules 2015.

(xii) Under the said Notification, the TPPs have been categorised into three categories, namely commissioned/to be commissioned; - (i) Prior to 2003 (ii) Between 2004 to 2016; and (iii) After 01.01.2017. According to the Appellant, as the power station of the Appellant is a Cooling Tower based thermal power plant comprising two units of 700 MW each which was commissioned in 2014. The same falls under the second category having achieved commissioning in the year 2014.

(**xiii)** All the new and existing TPPs were required to comply with the new norms within a period of two years from the date of the said Notification i.e., by 31.12.2017. It is the case of the Appellant that it was only post issuance of the aforesaid MoEF&CC Notification, which became effective from 31.12.2017, that the new norms qua SO_2 and NOx emission levels were introduced for the very first time and therefore, the aforesaid MoEF&CC Notification is unequivocally a

'Change in Law' event in terms of Article 13.1.1 (i) and 13.1.1 (iv) of PPA.

(xiv) Pursuant to issuance of the MoEF&CC Notification, the CEA in coordination with Four Regional Power Committees (**RPCs**) prepared the phasing plan for complying with the new revised environment norms on 25.05.2017. As per this phasing plan, the installation of FGD by NPL was to be complied with by March 2023 for Unit 1 and December 2021 for Unit 2 respectively. Subsequently, the Northern Regional Power Committee (**NRPC**) issued a phasing plan for the installation of FGD and other required systems by way of its letter dated 4.10.2017. The said phasing plan stipulated a timeline of March-April 2021 and Jan-February 2021 for Unit 1 and Unit 2 of the Project respectively. However, the Central Pollution Control Board (**CPCB**) issued directions to the Appellant by letter dated 11.12.2017 requiring the Appellant to install the FGD for the reduction in the SO_2 emissions and low NO_x burners, Over Fire Air systems (**OFA**) etc. for the reduction in NO_x emissions respectively by

December 2019, in order to comply with the new environmental norms brought by the said MoEF&CC Notification.

(xv) On 03.01.2018, the Appellant filed Petition No. 2 of 2018 before the Respondent-Commission seeking a declaration that the introduction of the new environmental norms by way of the Amendment Rules notified on 07.12.2015 by the MoEF&CC Notification amounts to a 'Change in Law' event under PPA and also an in-principle approval of the project cost to ensure timely implementation of the required measures to comply with revised norms by way of timely arranging requisite financing.

(xvi) Meanwhile, in response to the aforesaid letter issued by the CPCB dated 11.12.2017, the Appellant vide its letter dated 16.02.2018 informed the CPCB that based on the initial feasibility study, a period of thirty-six months from the date of award of contract would be required for the installation of the technology solution finalised and thus, the timelines communicated to it by way of the CPCB's letter dated 11.12.2017 are extremely stringent and not feasible from a technical perspective and requested the CPCB to

reinstate the timelines for the implementation of the revised environmental norms to April 2021 for Unit I and February 2021 for Unit II, as directed by the CEA and the Ministry of Power in the backdrop of its meeting with the MoEF&CC. CPCB vide its letter dated 21.03.2018 did not agree to reinstate the timeline to 2021 as sought by the Appellant and reiterated the requirement to comply by 31.12.2019 as set out in its letter dated 11.12.2017.

(xvii) Meanwhile, Petition was heard by the Respondent-Commission and the order was reserved on 12.09.2018. On 09.01.2019 disallowed the Appellant's 'Change in Law' claim holding that the issuance of the aforesaid Notification does not qualify as a 'Change in Law' event under the PPA as the environmental clearance dated 03.10.2008 granted for the 2 x 700 MW Rajpura Thermal Power Project already envisaged retrofitting of Flue Gas Desulphurization system (**FGD**) with the inclusion of cost towards all the environmental protection measures in the project cost and the aforesaid Notification merely confirmed the requirement of retrofitting of FGD intimated earlier by way of the Environmental Clearance

granted for the Project. Being aggrieved by the aforesaid findings in the impugned Order, NPL has preferred the present Appeal praying for the following reliefs:

(a) To set aside the Impugned Order dated 09.01.2019 passed by the Respondent Commission in Petition No. 02 of 2018;

(b) To hold and declare that the MoEF&CC Notification qualifies as a 'Change in Law' event in accordance with Article 13 of the PPA dated 18.01.2010 executed between the Appellant and the Respondent No.2 and that the Appellant is entitled to reliefs in terms of the aforesaid provision;

(c) To grant in-principle approval for the expenditure to be incurred by the Appellant towards implementing the necessary technology/equipment pursuant to the aforesaid Change in Law events, subject to true-up/final approval of the Project cost to enable it to avail requisite financing for ensuring expeditious implementation of the required measures to comply with the revised norms as per the MoEF&CC Notification;

(d) To hold and declare that additional capital cost and operational cost along with expenses on account of generation loss,

reduction in efficiency, deterioration of heat rate and other expense shall be considered on actual basis for change in law relief in relation to prayer (b) above in terms of PPA provisions to ensure that the Appellant is brought to the same economic position as if such Change in Law event has not occurred;

(e) To direct the Respondent Commission to devise a mechanism for payment of compensation by the Respondent No. 2/Procurer to the Appellant on account of the aforesaid Change in Law event in terms of based on the principles under Article 13 of the PPA read with Article 13.2(b) of the PPA.

6.. 1st Respondent – Commission (PSERC) filed reply, in brief as under:

(i) 1st Respondent-PSERC contends that grounds of appeals are misconceived and devoid of merit. 1st Respondent contends that the impugned orders dated 21.12.2018 and 09.01.2019 have been passed by the State Commission with due regard to regulatory jurisprudence and taking into account the provisions of the Power Purchase Agreement ("**PPA**") executed between the Appellants TSPL

& NPL and erstwhile Punjab State Electricity Board ("**PSEB**") on 01.09.2008 and 18.01.2010 respectively, to which the Punjab State Power Corporation Limited ("**PSPCL / Respondent No. 2**") is the successor-in-interest. *Inter alia*, the State Commission has further specifically considered the Environmental Clearance dated 11.07.2008 received by TPSL and received by NPL dated 03.10.2008 from the Ministry of Environment & Forests ("**MoEF**") prior to the commissioning of its power plant as also the findings of this Tribunal in the case of '***M/s JSW Energy Limited V/s Maharashtra State Electricity Distribution Co. Ltd and Another***' dated 21.01.2013 in Appeal No. 105 of 2011, which are directly and substantially applicable to the facts and circumstances of the present cases of the Appellants in view of the undeniable fact that the Environmental Clearance granted to JSW Energy Ltd. in the said case had the similar conditions as also envisaged in the present Appellants – TSPL and NPL's Environment Clearance dated 11.07.2008 and 03.10.2008 respectively. The State Commission had also considered the letter dated 30.05.2018 of the Ministry of Power which contains the exceptions to treating the impact of the Environment (Protection)

Amendment Rules, 2015 under '*Change in Law*' where such requirement of pollution control system was mandated under the environment clearance of the plant or envisaged otherwise before the notification of amendment of rules.

(ii) 1st Respondent-PSERC further submits that against the reliefs sought by the Appellants in these Appeals, the limited issues which are required to be considered by this Tribunal are (i) whether there has been any '*Change in Law*' in view of the notification of the Environment (Protection) Amendment Rules, 2015, resulting in alleged additional capital and operating expenditure, within the meaning and scope of the provisions of the Request for Qualification ("**RfQ**"), Request for Proposal ("**RfP**") issued and PPAs dated 01.09.2008 and 18.01.2010. (ii) whether the findings of this Tribunal in the case of '***M/s JSW Energy Limited V/s Maharashtra State Electricity Distribution Co. Ltd and Another***' dated 21.01.2013 in Appeal No. 105 of 2011 are applicable in the facts and circumstances of the present Appeals.

(iii) Further, the State Commission has also taken note of the terms and conditions stipulated under the RfQ and RfP, wherein obligation of Appellants to obtain and maintain the necessary clearances and permits at all times, including '*Change in Law*' provisions under the PPA dated 18.01.2010 as well as the applicability of the findings of this Tribunal in the case of '***M/s JSW Energy Limited V/s Maharashtra State Electricity Distribution Co. Ltd and Another***' dated 21.01.2013 in Appeal No. 105 of 2011.

(iv) 1st Respondent further submits that the main findings of the State Commission in regard to rejection of the claim of the Appellants for seeking '*Change in Law*' and alleged resultant tariff adjustment on this account, duly supported by detailed analysis and reasoning, can be summed up as under:

(i) (a) As per RfQ and Schedule 2 of the PPA, Environmental Clearance was one of the initial consents to be made available by the procurer of power to the bidders at the time of bidding. **Appellant-TSPL** was under obligation to obtain the Environmental Clearance. The Appellant chose to submit its bid

as per bid cut-off date (16.06.2008) under the RfQ without having received such Environmental Clearance at its own risk. As per Clause 2.7.2 of the RfP, the Appellant was required to make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions, circumstances and factors that may have effect on his Bid. While submitting the Bid, the Bidder is deemed to have examined the laws and regulations in force in India and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power. In fact, Appellant-TSPL also gave an undertaking as per Annexure-6 of the RfP document for unconditional acceptance to the RfP Project Documents.

(b) So also as per Article 5.5 of the PPA regarding 'Consents', the **Appellant-NPL**/seller is responsible for obtaining all Consents (other than those required for the Interconnection and Transmission Facilities and the Initial Consents) required for developing, financing, constructing,

operating and maintenance of the Project and maintaining/ renewing all such Consents in order to carry out its obligations under the PPA in general and Article 5 of the PPA in particular including responsibility of renewal of such consents and fulfillment of conditions.

(ii) Thereafter, the Appellants-TSPL and NPL received the Environment Clearance from the MoEF on 11.07.2008 and 03.10.2008 respectively, *inter alia*, with the following conditions:

"(vi) Space provision shall be kept for retrofitting of FGD, if required at a later date.

……..

(xxv) Separate funds shall be allocated for implementation of environmental protection measures along with item-wise breakup. 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."

As per Clause 3.1.2 (i) of the PPA, the Appellants-TSPL and NPL shall have received the initial consents either unconditionally or subject to conditions which do not materially prejudice its right or performance of its obligations under the

agreement. Having received the Environment Clearance from the MoEF on 11.07.2008 and 03.10.2008 respectively containing, *inter alia*, the above two conditions, the Appellants at no point of time raised any objection with regard to the direction by MoEF for space provisioning for retrofitting of FGD at a later stage and allocating funds for the same.

Also, the bidder after having been declared successful in the bidding process, opted to sign the Share Purchase Agreement and acquired 100% shares of the **Appellant-TSPL** and signed the PPA on 01.09.2008 with the erstwhile PSEB (now PSPCL) in its own wisdom without raising any objection/seeking clarification with regard to the requirement of providing funds for retrofitting of FGD at a future date having been made in the Environmental Clearance dated 11.07.2008, thereby accepting the same at bidding stage.

So also, after having signed the PPA and also not raising any dispute or demur with MoEF with regard to the stipulation

of earmarking separate funds, the claim of the **Appellant-NPL** for ‘Change in Law’ cannot be permitted at this stage which would vitiate the bidding process and prejudicially affect other bidders.

(iii) Under Clause 5.5 of the PPA, the **Appellant-TSPL** was responsible for obtaining consents (other than those required for the Interconnection and Transmission Facilities and the Initial Consents) required for developing, financing, constructing, operating and maintenance of the project. TSPL not only was responsible for obtaining, maintaining and renewing the initial consents but also for fulfilling all conditions specified therein. This clause has to be read with Clause 3.1.2 of the PPA which clearly shows that Appellant-TSPL did not raise any objections on the conditions imposed by the MoEF while granting the Environment Clearance on 11.07.2008. Once, the terms of the bid have been unconditionally accepted by the Appellant, and no objections were ever raised in respect

of the conditions imposed by the MoEF while granting the Environmental Clearance, the relief sought by the Appellant now, would defeat the sanctity of the competitive bidding process as the other bidders who had participated in the competitive bidding would be gravely prejudiced.

Similarly, though the Appellants complied with condition (vi) of the Environmental Clearance dated 03.10.2008 for providing space for retrofitting of FGD, it did not allocate funds for retrofitting FGD system. Thus, NPL did not fully comply with the requirement of FGD as contemplated in the Environmental Clearance.

(iv) The Environmental Clearance granted to the Appellants is similar to JSW Ltd's Project. There is no difference in the conditions for FGD in respect to JSW Ltd. and the Appellants under the Environmental Clearances granted to the two Projects by the MoEF.

(v) 1st Respondent-PSERC further submits that in fact a plain reading of condition (xxv) of the EC granted for the **Appellant-NPL**'s project and condition (xxv) of the EC granted for JSW project reveals that the language in NPL case is rather specific in so much as it uses the word "shall" while directing for (i) allocation of funds for implementation of environmental protection measures along with item-wise break-up, (ii) including these cost as part of the project cost and (iii) not diverting the said funds for other purposes, as compared to JSW case where the word used is "should" for similar directions.

(vi) It is clear that the allocation of funds for FGD/ SNCR had to be done at the beginning. Despite having the obligation to do so, Appellants failed to earmark the separate funds. Having failed to comply with the requirement of earmarking the separate fund for FGD/ SNCR at the beginning, the Appellants today cannot seek shelter of the '*Change in Law*' provisions as the said requirement was existing from the very beginning.

(vii) According to 1st Respondent-PSERC, the stipulation under the Environment Clearance from the MoEF dated 11.07.2008 and 03.10.2008 regarding earmarking of separate funds for FGD / SNCR would be meaningless if in case the requirement was not to be complied with by the Appellants. The Appellants have chosen not to comply with the condition of the Environmental Clearance for earmarking the funds separately at its own risk.

(viii) Further, the mandate of installing FGD / SNCR and envisaging of measures are two different considerations. Even if there is no specific mandate, the measures can still be envisaged. The JSW Case recognizes that the provision of space for FGD and costs for environmental measures mean that FGD was envisaged. The same conditions are envisaged even under the Environmental Clearance granted to the Appellants. Hence, when the measures to earmark the separate funds for installation of FGD / SNCR already existed in the case of the Appellants at the very beginning, there can be no claim of '*Change in Law*' on the basis of the Environment (Protection)

Amendment Rules, 2015 which reiterate the same measure as a mandate, at least so far as the Appellants are concerned.

(ix) 1st Respondent-PSERC further submits that on the proper consideration and careful perusal of the relevant clauses of the bidding documents comprising RfQ, RfP and PPA, Environmental Clearance dated 11.07.2008 and 03.10.2008, Notification dated 07.12.2015 issued by MoEF&CC and para 5.1 (b) of the Ministry of Power's letter dated 30.05.2018, the State Commission has rightly rejected the claim of the Appellants seeking alleged '*Change in Law*' as contemplated in the PPA.

7. 2nd Respondent – PSPCL filed reply, in brief as under:

(i) Respondent No. 2 – PSPCL contends that for the change in law, the law i.e., Article 13 of the PPA as prevailing on the cut off date for the Appellants are to be considered, including the requirement for various consents and clearances to be obtained and the conditions imposed therein. Both TSPL and NPL or L&T were aware as on cut off date that the project required various consents and clearances

especially the Environment Authorities could impose conditions for such clearances and conditions. Further the Environmental Clearance was prior to the cut off date and was available to all bidders. Therefore, to the extent that the Environmental Clearance imposes a condition on the operations of the NPL's power project prior to the Amendment to the Rules, then to that extent, the Amendment is not a change in law since NPL was already subject to the said conditions.

(ii) 2nd Respondent also contends that the then prevailing law required various clearances including power project to have Environment Clearance under the Notification dated 14.09.2006 issued under the Rule 5(3) of Environment Protection Rules 1986. The bidders were aware that an Environmental Clearance would be required and the same could be subject to various conditions for construction and operation of the power project and the project developer have to comply with such conditions. That apart, other consents and Clearances were also required under various Environment laws. According to 2nd Respondent, there was no

requirement that the Environment Clearance had to be obtained or made available to the bidders prior to the cut off date. TSPL/Sterlite did not raise any objection and in fact voluntarily participated in the Bidding process being well aware of the position.

(iii) 2nd Respondent further contends that the Amendment Rules 2015 are law, in as much as the measures contemplated were already envisaged prior to such law, therefore the Amendment Rules 2015 cannot be said to be a change in law. The Amendment can be considered as a Change in Law only if it imposes new conditions or makes the existing conditions more stringent. The above position has also been recognized in the Ministry of Power letter dated 30.05.2018 to the Central Electricity Regulatory Commission.

(iv) The Appellant-NPL is already meeting the emission limits for Suspended Particulate Mercury as well as for water consumption. Therefore, there is no claim for change in law in regard to the above. Further, the Environment Clearance required NPL to monitor the emission standards, inter alia, of SO2 and NOx and ensure that the

same are within prescribed limits. NPL was also not permitted to use coal with greater than 0.5% sulphur content. The National Ambient Air Quality Standards had also prescribed emission norms for the area. Therefore, it is quite possible that NPL was already subject to the said conditions by way of other clearances, consents or standards to meet the same standards as is required to be met now under the amended Rules.

(v) They further contend that the reference by CPCB to Amendment Rules is not a conclusion of inter se rights of the parties under the PPA. Similar letters were sent to many generators and not just Appellant. Further, merely because CPCB did not refer to the Environmental Clearance, it does not mean that Environmental Clearance did not provide for certain conditions. The said direction is a general direction and in fact even refers to equipment already installed and already envisaged to be installed. For example, the CPCB also requires installation of ESP and NOx burners which admittedly had been installed by NPL in terms of the Environment

Clearance. If the contention of NPL is accepted, then the CPCB should not have referred to ESP at all.

(vi) 2nd Respondent further contends that the effect of any change in law subsequent to the cut off date is restricted to the incremental cost or additional expenditure on installation or upgradation of the plant and equipment to be installed by reason of change in law over and above the expenditure which was in any event required to be incurred even in the absence of such change in law and not for the entire capital expenditure.

(vii) According to 2nd Respondent-PSPCL, the Appellants-TSPL and NPL had claimed the impact of change in law in respect of emission limits for Sulphur dioxide (which the Appellants claim necessitates Installation of Flue Gas Desulphurization equipment ('**FGD'**)) and emission limits for nitrogen oxide (which the Appellants claim necessitates Selective Non Catalytic Reduction ('**SNCR'**) Technology).

(viii) They further contend that with regard to **reduction of Sulpur Dioxide and installation of FGD**, the Appellants claimed the expenditure on installation of FGD as change in law on the premise that there was no stipulation or condition for installation of FGD as on the cut off date. Appellant-TSPL was not entitled to proceed on the basis that Environmental Clearance shall be absolute and unconditional. So also the Environmental Clearance dated 03.10.2008 to the Appellant-NPL was prior to the cut off date and provided for various conditions for the power project. Similarly, the Appellant-TSPL was aware of the requirement of Environmental Clearance and that the project was to be established and operated complying with the conditions imposed thereon.

(ix) 2nd Respondent-PSPCL also contends with regard to the obligations of PSPCL under the RFP or Guidelines to acquire Environmental Clearance is not relevant in the present case. The issue in the present case is not whose obligation it was to obtain the environment clearance but rather what were the implications of the conditions of such clearance. It is not the Appellants' case that it is

not subject to the conditions of the EC nor that it was PSPCL who was required to comply with the conditions in the Environment Clearance. In any case, it was the Appellants responsibility to maintain the Clearances and consents. Whether the Appellants were the Independent Power Producers obtaining EC on their own or whether the Appellants through PSPCL obtained the Environment Clearance is irrelevant. What is relevant is only if the Environment Clearance (which in this case was admittedly prior to cut off date), envisaged certain obligations on part of the Appellants. Thus, according to 2nd Respondent, what has to be considered is whether the requirement of installation of FGD was envisaged prior to amendment. Further, the Environment Clearance dated 11.07.2008 and 03.10.2008 envisaged the installation of FGD.

(x) According to 2nd Respondent-PSPCL, the contention of the Appellants that the Environment Clearance only provided for space for FGD and did not require the actual installation of FGD is contrary to the letter dated 30.05.2018 by Ministry of Power. The issue is whether the pollution control system was envisaged prior to

07.12.2015. Even otherwise, it is submitted that a letter under Section 107 of the Electricity Act 2003 by Ministry of Power is to the Central Commission and further may not be binding in view of the settled principles of this Tribunal. Therefore, even if the Environment Clearance does not mandate installation of FGD, it may still envisage the installation/retrofitting of FGD and in such cases also, there is no change in law with regard to FGD.

(xi) The Appellant-TSPL has sought to distinguish the term 'installation' and 'retrofitting'. There is no such distinction drawn in the Letter dated 30.05.2018. In any event, the term 'retrofitting' as opposed to 'installation' connotes a stronger emphasis that the FGD was envisaged at the time of the clearance.

(xii) 2nd Respondent further contends that the above aspect has also been considered by this Tribunal in M/s JSW Energy Limited v. Maharashtra State Electricity Distribution Co. Ltd and Another dated 21.01.2013 in Appeal No. 105 of 2011. The Environment Clearance granted to JSW had the similar conditions as cited above in the

Appellants-TSPL and NPL's Clearance and this Tribunal had held that the Environmental Clearance of JSW had already provided for installation of FGD and subsequently it was only a confirmation of the requirement. Further, the State Commission has rightly held that the decision of the Tribunal in JSW case is applicable to the case of the Appellants-TSPL/NPL and therefore rightly disallowed their claim.

(xiii) According to 2nd Respondent-PSPCL, once the FGD was envisaged, the subsequent confirmation of the requirement of FGD cannot be considered as change in law which is also consistent with the letter dated 30.05.2018 by Ministry of Power which provided that if FGD was already envisaged, there is no change in law. It does not change the premise of the Tribunal's decision that the original Environmental Clearance by requiring the space for FGD and earmarking of funds, had already envisaged the requirement of FGD and the installation of FGD subsequently is not a change in law. There would have been no need for provision of space for retrofitting of FGD if the requirement had not been envisaged. It is not open for the Appellant-NPL to now claim that there was no clarity in the

Environment Clearance on the required system of FGD. Even if the Environment Clearance does not mandate installation of FGD, it may still envisage the installation/retrofitting of FGD and in such cases also, there is no change in law with regard to FGD. In any case, this Tribunal has already interpreted the said condition for FGD in the case of JSW.

(xiv) 2nd Respondent also contends that the Appellants-TSPL/NPL have claimed installation of Selective Non Catalytic Reduction **('SNCR')** equipment for reduction of Nitrogen Oxide. However, Amendment Rules or any other Notification does not provide for installation of SNCR. Further, the CEA Report does not deal with the abatement of NOx emission and does not recommend any technology for the same. Therefore, the State Commission has rightly not allowed the claim of installation of SNCR. The existing units are presently equipped with the combustion control technology of Low NOx Burners (LNB) with supply of Over Fire Air, through the Close-Coupled Over Fire Air (COFA) ports as well as Separated Over Fire Air (SOFA) ports in the furnace. Admittedly, with tuned and

coordinated operation and regulated supply of optimal amount of excess air, the emission can be reduced by a minimum of 45%.The same is within the control of the Appellants-TSPL/NPL and no additional expenditure can be considered in this regard. The combustion technology is already existing and the Appellants are required to maintain it and with such measures, the existing emission can be reduced to the required level.

(xv) They further contend that the claim of the Appellants is that even with above technology, it cannot achieve the emission levels. However, this is not supported by any Authoritative document or notification. On the other hand, based on the submission of emission data by NPL to CEA (though actual data demonstrates lower emissions) and even as per actual measured emissions in the Feasibility Report submitted by NPL, the emissions can be controlled to below 300 mg/NM3 without SNCR.

(xvi) Further, though the Appellant-TSPL submitted a revised Feasibility Report after adjusting for certain errors, the Report is still

flawed as was pointed out by PSPCL before the State Commission. In any case such feasibility report is not relevant since the consideration of compliance with norms was considered by Central Electricity Authority. The estimates of cost by CEA are substantially lower than claimed by TSPL. Further, the CEA has not approved the technologies as recommended by TSPL. The estimated costs in the Feasibility Report are substantially higher as compared to the estimate by CEA as well as incurred by other power plants.

(xvii) TSPL's reliance on the decisions in Energy Watchdog v. Central Electricity Regulatory Commission and others (2017) 14 SCC 80, Sasan Power Limited 2017 ELR (APTEL) 0508 and Nabha Power Ltd v. Punjab State Power Corporation Limited 2014 SCC online APTEL 54 is misplaced. The issue in these decisions is completely different.

(xviii) According to 2nd Respondent-PSPCL, the principles of Section 61(a) are related to specifying by way of Regulations, the terms and conditions of tariff and do not relate to adjudication of change in law

clause in the PPA. Even otherwise, the Central Commission regulations are only one of the factors to be considered and are not binding precedent for State Commissions. It is trite that the decision of the Central Commission cannot be relied on contrary to the decision of the Tribunal.

(xix) According to 2nd Respondent-PSPCL, the Appellant-NPL claims that in the JSW case, there was a threshold limit for ground level concentration of SO2 of 30 ug/m3. The same is not reflected from the Order of the Tribunal in JSW Case and in fact this issue was not raised by NPL before the State Commission. Further, if the reason for provision of FGD in JSW Case was the applicable threshold level for SO2, then there was no reason for NPL to have similar condition for FGD. The fact that NPL and JSW Steel had same conditions in the Environmental Clearance demonstrate that there is no difference in the case of JSW and NPL.

(xx) 2nd Respondent further contends that the Appellant is trying to take advantage of its own wrong in not providing for funds required

under the Environment Clearance. The contention of NPL that there was no directive from the MOEF or any other authority to keep a separate fund for the installation of FGD equipment or that the Consent to Operate were being issued despite the above absence of funds is misconceived. Merely because no objection was raised by MoEF does not mean that the Environmental Clearance did not provide for the same. It was NPL's responsibility to conduct due diligence about the costs. The Ministry of Environment and Forests only sought information on expenditure made and not on earmarking of funds.

(xxi) According to 2nd Respondent-PSPCL, the jurisdiction in the case of dispute including changes in law between the Appellant and PSPCL is of State Commission and not of Central Commission. The issue has to be considered by this Tribunal in view of the law laid down in JSW Case and terms of the PPA and not on basis of the decision of the Central Commission. The State Commission is bound by the decision of this Tribunal in JSW Case and not by decision of Central Commission in CGPL or Sasan Power. The State

Commission noted that in case of TSPL, there were various environment clearances granted to power project as in the case of JSW and in fact to CGPL/Sasan/Adani. Therefore, TSPL should have done due diligence. The Central Commission failed to appreciate that the submission to MOEF was of expenditure incurred and not earmarking of funds and in any case the fact that no objection was raised by MOEF is not a relevant factor.

(xxii) Further, according to 2nd Respondent-PSPCL, with regard to the CEA Report on FGD, the costs can be considered only if there is a change in law. Further the costs can be considered only after actual expenditure. The State Commission has not considered the issue of costs. The CEA in its letter dated 25.09.2018 had informed that the price has come down to Rs. 0.4 crores per MW as ceiling. This is not acceptable to PSPCL.

(xxiii) 2nd Respondent further contends that there cannot be any upward revision in tariff for any change in law when the expenditure has not been incurred. Article 13.1.1 recognizes as change in law

only those events, which affect the cost and revenue from business of selling electricity. Therefore, unless there is an impact on cost or revenue, there can be no change in law. In the present case, it has been specifically disputed that such in-principle approvals for change in law are not envisaged in the PPA. Similarly, the judgments of the Central Commission do not consider the specific issue of whether the in-principle approval can be considered as per the change in law provisions of the PPA. Further, the time required for installation of equipment or the cost involved cannot be a reason to seek pre-mature adjudication of the issue by the State Commission. The alleged financial constraints faced by the NPL in the absence of regulatory approvals are also not acceptable. The obligation to comply with the Environmental norms is that of NPL and the same is not subject to any approval of the State Commission/Tribunal for reimbursement, if any, of costs by PSPCL. The obligation of PSPCL, if any, is under the contract i.e. the PPA and NPL cannot avoid or delay its statutory obligation under the law, based on any contractual issue with PSPCL. NPL cannot use the pendency of the proceedings

or rejection of change in law to avoid its obligations under the Environmental Laws.

(xxiv) According to 2nd Respondent-PSPCL, any financial constraint faced by NPL cannot be a ground for granting relief. Further, the Appellant-TSPL/NPL is not entitled to any amount from PSPCL and it is not appropriate for the Appellants to raise issues which are pending before the Hon'ble Supreme Court and before this Tribunal.

(xxv) 2nd Respondent-PSPCL further contends that the Appellants/TSPL and NPL are not entitled to any relief as claimed or otherwise. In particular, there cannot be any in-principle approval of expenditure or devising of any scheme for payment of compensation. During the hearing on 16.05.2018 as well as hearing on 12.09.2018 before the State Commission, NPL had restricted its case for the present only for in principle approval of the change in law and did not press for any in-principle approval of project costs.

(xxvi) With these averments, 2nd Respondent-PSPCL submits that there is no merit in the Appeals filed by TSPL and NPL and therefore, the Appeals may be rejected.

8. *Per contra,* the Appellants submitted rejoinder to the reply of Respondent No.1, in brief, as under:

(i) According to the Appellants, the Respondent Commission had incorrectly disregarded the 'Change in Law' claim of the Appellants based on the MoEF&CC Notification which for the first time introduced new emission norms for NO_x emissions thereby, necessitating installation of Selective Non-Catalytic Reduction (**SNCR**) technology / any other suitable technology, merely on the pretext that the Central Electricity Authority (**CEA**), in its Recommendation Report dated [20.07.2018], has not indicated any technology for meeting the NO_x emissions standards.

(ii) According to Appellants-TSPL and NPL in terms of the extant rules and regulations prevalent at the time of the bid submission i.e.,

the Environment (Protection) Act, 1986 (**EP Act**) and the Environment (Protection) Rules, 1986 (**EP Rules**), there were no norms for SO_2 and NO_x emissions and that such norms were introduced for the very first time by way of the MoEF&CC Notification after the cut-off date i.e., 02.10.2009 (**Cut-off Date**) (7 days prior to the bid deadline of 09.10.2009). As a result of the said MoEF&CC Notification, the Appellants are being compelled to incur additional expenditure towards the installation of all the requisite equipment to ensure compliance with the new norms i.e. FGD system and/or Selective Non-Catalytic Reduction technology (**SNCR**).

(iii) According to Appellants, the said additional installation of plant, machinery and equipment, with a view to comply with the new standards of the emissions prescribed by the Notification, will result in an additional capital expenditure and the operation and maintenance expenditure of the Project on account of FGD and SNCR having an impact on the operational parameters such as the Station Heat Rate as well as the Auxiliary Power Consumption etc. The said additional capital cost and the operation and maintenance expenditure would

not have been required but for the issuance of the Notification and therefore, the MoEF&CC Notification qualifies as a ‘Change in Law’ event in terms of the PPA. The Environmental Clearance only required the Appellants to provide for adequate space for installation of the above systems, which was duly complied with by the Appellants in terms of the land acquired by the Respondent No.2 prior to the submission of bids, as has rightly been noted by the Respondent Commission in paragraph 15(vi) of the Impugned Order. The Respondent Commission has gravely erred in law in stating that the Appellants did not fully comply with the aforesaid conditions stipulated in the Environmental Clearance granted for its Project, as it did not earmark funds towards installation of FGD. According to Appellant, the intention behind incorporation of the said provisions could not have been to factor in the capital, operation and maintenance cost associated with installation of the FGD system and/or SNCR system as well. This becomes apparent from the review of Para 7.2.1 of the Feasibility Report prepared by NPL in May 2008 (when it was wholly owned by PSEB). Thus, even the Feasibility Report clarifies that the only requirement was to keep adequate

space for installing FGD system at a later date if warranted under environmental regulations and accordingly, necessary space provision was made in the plant layouts.

(iv) Appellants further contend that the aforesaid conditions did not, in any manner whatsoever, envisage the installation of the FGD system, specifically in view of the following –

(a) Had the Appellant been in breach of the terms and/or conditions of the Environmental Clearance, on account of not earmarking the funds for FGD as part of environmental protection measures for the Project, the MoFF&CC, Central Pollution Control Board (**CPCB**) and the Punjab Pollution Control Board (**PPCB**) would have definitely taken punitive and harsh actions against the Appellant rather than (a) extending the Environmental Clearance for the Project twice i.e., in the year 2010 and 2014; and (b) renewing the Consent to Operate granted to the Appellant on 09.10.2013 and 17.04.2014, and was further extended in the years 2015, 2018 and 2019

respectively. Recently, on 01.04.2019, NPL received the Consent to Operate for air and water extended till 31.03.2022.In this regard, it is reiterated that the Appellant has been submitting the environmental compliance/monitoring reports on a periodical basis to the MoEF&CC since May 2011, giving a detailed item wise (different heads of environmental protection measures) break-up of the amount kept aside for the environmental protection measures. In these aforesaid reports, NPL has provided the cost with respect to each environmental protection measure envisaged under condition (xxv) of the Environmental Clearance and also, the corresponding/resultant progressive expenditure towards implementation of the same. The fact that the Appellant demonstrated the expenditure against each line item viz. environmental protection measures in the compliance/monitoring reports and that such reports did not include any expenditure/allocation towards FGD and/or SNCR system, shows that the expenditure and/or allocation of funds towards FGD and/or SNCR system was not envisaged under the Environmental Clearance, especially when the

MoEF&CC never raised any objections regarding the Appellant-NPL not earmarking funds towards installation of the aforesaid pollution control equipments/systems. In effect, this proves that the MOEF&CC never treated the two conditions stipulated at sr. no. (vi) and (xxv) of NPL's Environmental Clearance to mean that the Appellant was required to allocate any separate fund for the installation of FGD system and/or SNCR system. In other words, in a scenario involving breach of the Environmental Clearance by the Appellants, such Environmental Clearance granted for the Project would have been cancelled/withdrawn by the MoEF&CC on account of the failure on the Appellants part in complying with the conditions stipulated thereunder;

(b) The Appellant has been submitting the environmental compliance/monitoring reports on a periodical basis to the MoEF&CC since May 2011, giving a detailed break-up of the amount kept aside for the environmental protection measures. It is important to highlight that no separate fund was ever

earmarked for the purpose of installation of FGD and/or SNCR system and this fact was reported to MoEF&CC on a regular basis by way of submission of the aforesaid reports. Most importantly, the MoEF&CC never raised any objections regarding the Appellant-TSPL/NPL not earmarking funds towards installation of the aforesaid pollution control equipment.

(c) The environmental clearances, which the MoEF&CC was granting insofar as the installation of FGD system is concerned, were broadly of the following two categories viz. (a) the first category covered the projects which were given environmental clearances similar to that of NPL/TSPL with the condition that a space provision is to be kept for the installation of the FGD equipment, if required at a later stage by the MoEF&CC; and (b) the second category included environmental clearances wherein the MoEF&CC had specially mandated the installation of FGD equipment as a statutory condition. From the aforesaid, the only conclusion one could safely draw is that the space provision for the installation of FGD was in fact a standard

clause in the environmental clearances for majority of the power projects like the Project in the instant case. However, the MoEF&CC, at the time of grant of such environmental clearances, had not mandated the installation of the FGD equipment as stipulated in the case of the second category of the projects. This is further clear by the fact that all these power projects have been commissioned or are in the process of being commissioned without there being any insistence/requirement/legal mandate for the installation of the FGD equipment by the MoEF&CC until the issuance of the Notification.

(d) Further, the Respondent Commission, while dealing with the issue of requirement of earmarking of funds for FGD and holding that the details of the environmental protection measures were not spelt out in the Environmental Clearance but flowed from the conditions mentioned in the Environmental Clearance, ought to have considered the procedure for grant of the Environmental Clearance and also, the preparatory

documents/reports/presentations on the basis of which the Environmental Clearance was granted. Respondent No.2 ought to have brought to the notice of the Respondent Commission, the presentation dated 09.09.2008 made by NPL (when it was wholly owned by PSEB) before the Expert Appraisal Committee (on basis of which the Environmental Clearance dated 03.10.2008 was granted for the Project), it did not stipulate any earmarking of funds towards the installation of FGD and/or SNCR (when it was wholly owned by PSEB). Further, in the aforesaid presentation dated 09.09.2009 it demonstrated that a fund of total Rs. 410.10 Crore (i.e., the amount mentioned in the Environmental Clearance granted for the instant Project towards environmental protection measures) had been earmarked towards environmental protection measures. The item-wise break-up of the aforesaid fund does not reflect any cost earmarked towards the installation of FGD and/or SNCR system and only refers to the cost towards installation of Electrostatic Precipitator (**ESP**) in context of air pollution control measures.

(e) Further, the Respondent Commission also ought to have considered and appreciated that it was incumbent upon Respondent No.2 to have disclosed all such documents to the Respondent Commission.

(v) Appellant-NPL/TSPL further contend based on the erroneous contentions of Respondent No.2, the averments of the Respondent Commission qua the Environmental Clearance dated 03.10.2008 envisaged installation of the FGD system are without any basis and therefore, ought to be rejected. It ought to have held that MoEF&CC Notification, which for the first time introduced the emission norms for SO_2 and NOx and thereby, necessitated installation of FGD and/or SNCR/any other suitable technology after the Cut-off Date, is a 'Change in Law' event in terms of Article 13 of the PPA.

(vi) The Respondent Commission, in its findings in the Impugned Order, has completely obfuscated the issue of envisaging the installation of FGD system and/or SNCR technology/any other suitable technology in the absence of any existing emission norms for

SO_2 and NO_x emissions. Prior to the Cut-off Date, when the EP Act along with the EP Rules were prevailing, there were no specific emission norms which were applicable at the point of emission i.e. chimney which specified for SO_2 and NO_x respectively. Further, during the period prior to the Cut-off Date, only the ambient air quality standards (ground level concentration) for SO_2 and NOx gases were specified by CPCB which was/is known as NAAQ and the same is completely and significantly different from emission norms which were specified for the first time for SO_2 and NO_x, by way of issuance of the MoEF&CC Notification dated 07.12.2015. In order to meet the National Ambient Air Quality Standards (NAAQ) requirements for getting the Environment Clearance, the project proponent was required to build a 275 m high chimney/stack. This was the only requirement that the Environment Clearance necessitated to meet the NAAQ requirements for SO_2 and NOx, which was duly complied by the Appellants.

(vii) Appellant-NPL/TSPL further contends that the MoEF&CC Notification introduced new norms for emission for SO_2 and NOx at the outlet of the chimney. The new norms require the measurement of the SO_2 and NOx emission respectively at the outlet of the Chimney/Stack of a power plant/industry etc. whereas the ambient air quality is measured in the outdoor/open air and that too near ground level, so as to ascertain impact on general population. The Rapid EIA Report prepared by NPL (when it was wholly owned by PSEB) for the Project prior to the Cut-off Date, the reference has been made only to the NAAQ standards in the Rapid EIA conducted for the Project which in itself clearly shows that no emission norms existed for SO_2 and NOx respectively as on the Cut-off Date. Consequently, it was not possible for the Appellant to have estimated and earmarked the cost for the installation of any such FGD and/or SNCR system on any coherent and/or cogent basis. It was not incumbent on Appellant to have assumed some arbitrary emission norms and then to have kept aside funds to meet those norms after bidding.

(viii) According to Appellant-NPL/TSPL, all the documents based on

which the Environmental Clearance was granted to, did not envisage and/or mandate the installation of FGD system and/or SNCR system. The Respondent Commission ought to have considered which environmental protection measures flowed from the conditions mentioned in the Environmental Clearance, the procedure and preparatory documents/reports/presentations on the basis of which the Environmental Clearance was granted. This is so because the conditions mentioned in the Environmental Clearance flows from such aforesaid material/documents themselves. Therefore, the responsibility of earmarking of funds for implementation of FGD could not have been fastened upon the Appellant-NPL/TSPL without going into all the documents/reports/presentations etc. prepared and submitted to MoEF&CC by the Appellant (when it was wholly owned by PSEB) for obtaining the Environmental Clearance for the Project.

(xix) The preparatory activities, reports, documents and presentations made by Respondent No.2 (as it then owned the Appellant) for obtaining the Environmental Clearance for the Project gain absolute significance as they clearly demonstrate that it was

Respondent No.2's own understanding that there was no need to earmark fund for installation of FGD prior to the Cut-off Date and that the only requirement was to keep space provision for FGD in the layout of the Plant, if warranted under environmental regulations. The aforesaid becomes very relevant for the purpose of determining the implication of the conditions of the Environmental Clearance.

(x) The item-wise/head-wise break-up of the Environmental Protection Measures does not reflect any cost earmarked towards the installation of FGD and only refers to the cost towards installation of ESP in context of air pollution control measures.

(xi) They further contend that the only requirement was to keep adequate space for installing FGD system at a later date, if warranted under environmental regulations and accordingly, the necessary space provision was made in the plant layouts by the Appellants. As per the then existing emission standards (which remained same till the issuance of MoEF&CC Notification dated 07.12.2015 coming into effect on 31.12.2017), for controlling SO_2 emission, all that was

required for the Appellants was installation of stack/chimney with a minimum height of 275 m and thus, installation of FGD was never envisaged. Therefore, the Environmental Clearance which was issued on the basis of such documents could not have envisaged something diametrically in deviation from such reports. Therefore, all the averments of the Respondent Commission to the contrary are incorrect and misleading.

(xii) According to Appellants, the Respondent Commission has wrongly placed reliance on the order of this Tribunal in the case of ***M/s JSW Energy Limited vs. Maharashtra State Electricity Distribution Company Ltd. & Anr.*** dated 21.01.2013 in Appeal No. 105 of 2011 (**JSW Case**). In effect, according to the Respondent Commission, there is no material difference between the JSW Case and the present case especially in the light of the two conditions pertaining to FGD (i.e., dealing with keeping space provision for installation of FGD, if required at a later stage and earmarking of funds for environmental protection measures) as stipulated in the respective environmental clearances. In this regard, the Respondent

Commission has failed to appreciate that this Tribunal in the JSW Case had considered the aforesaid two conditions in the environmental clearance of JSW only in the specific facts and circumstances of the JSW case. The Respondent Commission in the Impugned Order has completely failed to appreciate the interplay of the two conditions of the environmental clearance (i.e., keeping space provision for FGD, if required at a later stage and earmarking of funds towards the environmental protection measures, as generic conditions) with the additional conditionality stipulated in the environmental clearance in the JSW case, which were inserted in the first place on account of the peculiar facts involved in the said case. These specific facts of the JSW Case are very crucial, and therefore, the Respondent Commission could not have mechanically applied the findings of the JSW Case in context of the Change in Law claim based on the MoEF&CC Notification. In this context, it is contended that the specific facts and circumstances of the JSW Case are significantly different from the following facts involved in the above appeals.

(a) The Respondent Commission failed to appreciate that there were not only two specific conditions (i.e. requiring space provision for FGD, if required at a later stage and earmarking of funds towards environmental protection measures) in the 1st environmental clearance dated 17.05.2007 which were considered by the Tribunal. The Tribunal in para 10, 11 and 38 of the judgment in the JSW Case had also analysed the condition of the environmental clearance which stipulated that "*(ii) the detailed study regarding the impact of the project, if any, on Alphanso mango and marine fisheries as recommended in the report of Dr. B.S. Konkan Krishi Vidyapith shall be undertaken*. *Based on the same, additional safeguard measures as may be required will be taken by the proponent with prior approval of the Ministry of Environment and Forests. A copy of the report will be submitted to the Ministry. The cost towards undertaking the* ***study and implementation of safeguard measures if any, will be borne by the project****."*

Appellants further contend that from the review of the above, it is clear that the said environmental clearance was subject to the condition that a detailed study regarding the impact of the project on the alphonso mango and marine fisheries shall be carried out at the cost of the project proponent and based on the study, the additional safeguards as may be required would be implemented by the project proponent i.e., JSW, and that the 2nd environmental clearance dated 16.04.2010, on the basis of the aforesaid study, stipulated the requirement of FGD installation. In stark contrast to the above, there was/is no such condition of carrying out a detailed study in the Environmental Clearance issued for the Project in the present case and that the requirement of FGD installation was on the basis of the MoEF&CC Notification. Further, in view of the above condition, it is clear that the Tribunal clearly considered at least one (crucial) condition other than the only two conditions which have been considered by the Respondent Commission in the Impugned Order. In light of same, *the plain vanilla conclusion drawn by the Respondent Commission* that considering the two conditions

(i.e., requiring space provision for installing FGD, if required at a later stage and earmarking of funds towards environmental protection measures) are same in both the cases, the JSW Case is ditto applicable and binding in the present case, cannot at all be sustained.

(b) *Responsibility of obtaining the environmental clearance*

Appellants also contend that in the JSW Case, the project was awarded under Case 1 route of the Competitive Bidding Guidelines read with the model RfP issued by the MoP as a part of the standard bidding documents. Therefore, the bidder i.e. JSW [which was an Independent Power Producer (IPP)] was responsible for the land acquisition and for obtaining the initial consents, including the environmental clearance. In the instant case, wherein the Project has been conceived and awarded under Case 2 Scenario 4, the responsibility of land acquisition and of obtaining the initial consents including the environmental clearance is on the procurer i.e. the Respondent No.2/PSPCL.

(c) They also contend that the 1st environmental clearance dated 17.05.2007 granted to JSW was conditional. In the JSW Case, the condition of keeping a space provision for the installation of the FGD equipment was based on the preliminary report of the Konkan Krishi Vidyapith, Dapoli (**KKVD**). In view of the sensitivity of the area around the project site, which included alphonso mango plantation and marine fisheries, the impact of sulphur dioxide emissions from the project on such plantation and fisheries were taken into consideration while granting the environmental clearance to JSW, dated 17.05.2007. The said environmental clearance was subject to the condition that a detailed study regarding the impact of the project on the alphonso mango and marine fisheries shall be carried out at the cost of the project proponent and based on the study, the additional safeguards as may be required would be implemented by the project proponent i.e., JSW.

They further contend that in the JSW Case, the Tribunal opined that the 2nd environmental clearance dated 16.04.2010

was a mere confirmation of the conditions stipulated under the environmental clearance dated 17.05.2007. In any event, this can't be the position in the present case as the MoEF&CC Notification (which is applicable in rem) which *inter alia* specified the emission norms of SO_2 and NO_x respectively cannot be construed to have reconfirmed in any manner the conditions in the Environmental Clearance dated 03.10.2008. If what the Respondent Commission is contending would have been true (i.e., FGD being not linked to additional study), then there would have been no reason to include such a condition in the environmental clearance. In contrast to JSW Case's, there is no specific and peculiar requirement of any study to be done and undertaking being given by the Appellant to implement the safeguards as set out by such committee. In NPL's case, simply the requirement was to keep space for installation of FGD, if required at a later stage and the same was not linked to any other stipulation. Moreover, in JSW Case, the Tribunal had held that the 2nd environmental clearance dated 16.04.2010 by the MoEF (now MoEF&CC) was a mere confirmation of the

conditions stipulated under the first environmental clearance dated 17.05.2007. Thus, there were two environmental clearances which itself is not there in the present case.

(d) Appellants also contend that there was a pending litigation qua the 1st environmental clearance dated 17.05.2007 granted to JSW. In the JSW Case, at the time of the submission of the bid, there was a pending litigation in relation to the environmental clearance which was not disclosed to the distribution licensee while the bid documents were submitted. The aforesaid environmental clearance granted to JSW was challenged by way of an appeal before the National Environmental Appellate Authority (**NEAA**) which was dismissed by the NEAA by its order dated 12.09.2008 and the said environmental clearance granted to JSW was upheld. Said order of NEAA dated 12.09.2008 was challenged by way of a Public Interest Litigation (**PIL**) in Writ Petition (Civil) No. 388 of 2009 before the Delhi High Court. The High Court by way of its order dated 18.09.2009, after detailing the peculiar factual

scenario surrounding the 1st environmental clearance of JSW, directed the Expert Appraisal Committee (Thermal) of the MoEF (now MoEF&CC) to re-examine the environmental clearance granted to JSW after considering the reports of KKVD.

According to Appellants, pursuant to the abovementioned direction, the said Committee upheld the environmental clearance granted to JSW. In the minutes of the 62nd meeting of the reconstituted Expert Appraisal Committee dated 11.01.2010-12.01.2010, the said Committee had observed that in the future if there was any evidence of damage to the mango, cashew and fisheries, adequate mitigation measures including the installation of FGD system would be adopted by JSW and it is only in this specific context that the 2nd environmental clearance dated 16.04.2010 stipulated the requirement of installation of FGD.

(e) Further, In the JSW Case, the condition of the installation of the FGD system was introduced prior to the commissioning of the project i.e. in the construction period and the said condition was specific for the JSW Project alone unlike the instant case wherein no condition was imposed, but the FGD system was necessitated post the commissioning of the Project i.e., in the operation period and that too because of amendment in the Environment (Protection) Rules, 1986 by way of the MoEF&CC Notification, which applies to all plants.

On the basis of the report of the KKVD, the specific condition that the FGD equipment shall be installed before the commissioning of the project, was imposed. In the instant case, there were no norms for the SO2 and NOx emissions respectively, at the time of the submission of the bids. The said emission norms were introduced for the first time by way of the issuance of the MoEF&CC Notification dated 07.12.2015, which is applicable to all the TPPs across India as a general law, rather than a condition specific to a plant.

(f) Appellants also contend that the ‘Change in Law’ clause under the PPA entered into between Maharashtra State Electricity Distribution Company Limited (MSEDCL) and JSW, does not include any change in the consents/approvals/licenses obtained for the project andthe cost of implementing Environmental Management Plan for the Power Station unlike the ‘Change in Law’ clause under the PPA in the instant case.

(xiii) Therefore, it is relevant for the Appellants to reiterate a settled legal principle which would be squarely applicable in the present case. According to this legal principle, “a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision” (refer Bhavnagar University v. Palitana Sugar Mills Pvt. Ltd. (2003) 2 SCC 111. This principle is also elucidated in the case of KTMTM Abdul Kayoom& Anr. v. Commissioner of Income Tax, Madras, AIR 1962 SC 680.

(xiv) Further, the various peculiar facts of the JSW Case, as have been delineated above, have also been taken into account by the

Central Electricity Regulatory Commission (**CERC**) vide its orders dated 28.03.2018, 17.09.2018 and 08.10.2018 in the cases of *Adani Power Limited vs. Uttar Haryana Bijli Vitran Nigam Limited& Anr.(Petition No. 104/MP/2017)* (**Adani Case**) *(paras 32 and 36)*, *Coastal Gujarat Private Limited vs. Gujarat Urja Vikas Nigam Limited &Ors.(Petition No. 77/MP/2016)* (**CGPL Case**)and *Sasan Power Limited vs. MP Power Management Company Limited &Ors. (Petition No. 133/MP/2016)* (**Sasan Case**) *respectively.* Also, CERC in its most recent order dated 06.06.2019 in *Adani Power (Mundra) Limited vs. Uttar Haryana Bijli Vitran Nigam Limited& Anr*(*Petition No. 214/MP/2018*), after allowing auxiliary consumption of FGD in the Energy Charge, in addition to capacity charge, further approved Foreign Exchange Rate Variation (FERV) and Interest During Construction (IDC) to Adani, thereby establishing that the claim of FGD as a change in law was not only considered and allowed, but additional benefits/compensation to the generators incurring additional cost for installing FGD, were also granted.

(xv) The Appellants further contend that additionally, the Maharashtra Electricity Regulatory Commission (**MERC**) vide its order dated 06.02.2019 in the case of *Adani Power Maharashtra Limited* (Case No. 300 of 2018) has also taken into account the peculiar facts of the JSW Case, as have been delineated hereinbefore. The aforesaid Commissions after taking into account the peculiar facts of the JSW Case have distinguished the respective cases with the JSW Case.

(xvi) Appellant contend that the specification of a technology by CEA is not a pre-requisite for determining as to whether the aforesaid MoEF&CC Notification amounts to a 'Change in Law' event under the PPA as the clauses of the PPA are required to be interpreted independently for determining the issue of Change in Law.

(xvii) The Respondent Commission for the first time in its Reply is treating installation of SNCR/ any other suitable technology with respect to NOx equivalent to installation of FGD despite not treating

these two on similar level in the Impugned Order. There is neither any condition for earmarking of fund for SNCR/any other suitable technology for controlling NOx emission nor any condition for keeping space for installation of any such technology is the stand of the Appellants.

(xviii) Appellants also contend that the emission norms stipulated by the MoEF&CC Notification with respect to NO_x cannot be achieved by the existing combustion control technologies even after suitable combustion tuning and optimization. Further, the low NO_x burners with Over Fire Assembly already installed by Original Equipment Manufacturer in the boiler of Appellant-TSPL/NPL's Plant do not reduce NO_x level within the stipulated requirement within the operating load range and this has been clearly mentioned in the Feasibility report prepared by Tata Consulting Engineers Limited (**TCE Report**) As a part of hardware systems, both the low NO_x burners and the Over fire Assembly are already installed in the Appellant's Plant. In addition, the process control and optimization by way of combustion tuning is also done, however, with all these, the

NO_x emission level cannot be brought down to 300 mg/Nm^3 i.e. the required level in compliance with the MoEF&CC's Notification throughout the period of operation of the Plant. The range of NO_x mentioned are after abatement by low NO_x burner with Over fire assembly provided by OEM. Paragraph 17.0 of the said TCE Report states that the permissible limit of 300 mg/Nm^3 would not be achievable at part and full load operations, with combustion control technologies alone. To achieve the desired limit at all loads with the given range of coal allocated for the Project, SNCR technology with a minimum designed reduction efficiency of 35% is recommended. Even otherwise, the range of 336 to 405 mg/Nm^3 is non-compliant with the prescribed limit of 300 mg/Nm^3. Further the value of NO_x mentioned as 560 mg/Nm3 @ 6% O_2 dry basis of flue gas is based upon stoichiometric formula.

(xiv) According to Appellants, the Respondent Commission has completely failed to appreciate that the MoEF&CC has introduced stricter emission norms for the purpose of strictly implementing such norms and accordingly, the Appellants-TSPL/NPL cannot rely only on

the NO_x burners to control the NO_x emission when it is clear that at part load with worst coal design, the likely NO_x emissions of 336 to 405 mg/Nm^3 will be significantly beyond the stipulated norm of 300 mg/Nm^3.

(xx) They further contend that till now there is no proven technology which has been recommended by the Central Electricity Authority (**CEA**) with respect to controlling NO_x emission level in terms of the Notification and certain pilot projects are being undertaken to test the technology. However, what certainly becomes apparent from the review of CERC's order in the CGPL Case is that certain additional hardware/system will be required to be installed in addition apart from the presently installed systems to comply with the MoEF&CC's Notification with respect to the stringent NO_x emission levels. This has exactly been the Appellants case before the Respondent Commission. Therefore, according to Appellants, introduction of the aforesaid new emission parameter which would require installation of SNCR/or any other suitable technology is clearly a 'Change in Law'

event in terms of Article 13 of the PPA and ought to have been decided in favour of the Appellants by the Respondent Commission.

(xxi) According to Appellants, the Respondent Commission is misinterpreting the letter dated 30.05.2018 issued by the Ministry of Power. It is the contention/finding of the Respondent Commission that even though the Environmental Clearance granted to TSPL/NPL did not mandate the installation of FGD, it envisaged the installation of FGD by way of requiring space to be kept for installing FGD at a later stage and thus, there is no 'Change in Law' as such. The Respondents are not ready to consider the various judgments of the CERC which have clearly recognized the MoEF&CC Notification as a 'Change in Law' event in cases of similarly placed generating companies selling power under competitive bidding in terms of similar PPAs (as involved in the present case), where such judgments have relied upon the aforesaid letter dated 30.05.2018 to approve "change in law". However, the Respondents are strongly relying upon the letter of the Ministry of Power issued to the CERC under Section 107 of the Electricity Act, 2003 to deny TSPL/NPL's claim that too by

misinterpreting the contents of the letter. No such similar letter has been issued to the Respondent Commission by the State Government under Section 108 of the Electricity Act, 2003. This clearly establishes the dual standards being adopted by the Respondents in the present case.

(xxii) The Respondent Commission has failed to understand that the expression "*or envisaged otherwise" before the notification of amended rules'* can only refer to the ***requirement of pollution control system being envisaged in any other document/statute except the environmental clearance***. This is because the word '***or***' before the expression '***envisaged otherwise'*** necessitates a literal interpretation of the provision. Moreover, CERC has specifically dealt with the Ministry of Power's letter dated 30.05.2018 in the CGPL Case and Sasan Case wherein it has particularly dealt with the scope and ambit of the aforesaid condition stipulated at para 5.1(b) properly in the right context and based on the same, has held in favour of the generating companies.

9. *Per contra,* Appellants-TSPL/NPL submitted rejoinder to the reply of Respondent No.2, in brief, as under:

Rejoinder by TSPL:

(i) On requirement of installation of FGD is a Change in Law event : the Appellant-TSPL in its rejoinder contends that it is settled position that the risk for procurer is higher in Case 2 bidding owing to the enlarged responsibility for providing/arranging land, fuel, and facilitation of initial clearances for the development of the Project. This mechanism envisages a unilateral obligation on the procurer to specify fuel linkage at a pre-identified site/location to the bidder prior to the publication of the Request for Qualification ("**RFQ**"). The Appellant contends that since the inception of the Project, it was PSPCL/PSEB's obligation to procure the Environment Clearance for the Project.

(ii) Appellant-TSPL further contends that MOEF Notification dated 07.12.2015 was issued over 7 years after the Cut-off Date dated 16.06.2008. The MOEF Notification, 2015 has prescribed new

emission limits for SO_2 and NOx. The Central Pollution Control Board ("***CPCB***") in its letter dated 11.12.2017 mandated installation of FGD equipment in all power plants to meet the emission limits prescribed by the MOEF Notification. While mandating the FGD installation, the CPCB letter specifically notes that the MOEF Notification ***prescribed new emission limits*** for SO_2 and NOx.

(iii) Since, the MOEF is a government instrumentality, thus, alteration of the applicable law/standards regarding emission limits by MOEF qualifies as a change in law event in terms of Article 13 of the PPA.

(iv) TSPL contends that change in Law provision under the PPA is not restricted by any such possible anticipations by parties since foresee ability of a subsequent event is not relevant. Reliance in this regard is placed on the Judgment of the Hon'ble Supreme Court in "*Ahmedabad Municipal Corp*. vs. *Haji Abdulgafur"* (1971) 1 SCC 757.

(v) PSPCL's contention that **FGD condition** was envisaged in the EC, if not mandated, is erroneous and contrary to the record.

Respondent-PSPCL's contention seeks to read an extraneous condition into the EC contrary to the language of the PPA. In this regard, the following submissions are noteworthy: -

(a) In the instant case, the EC was granted after the Cut-Off date on 11.07.2008. The EC required bidders to make provision only for land to 'retrofit' FGD, if required at a later date. Much later by virtue of the CPCB letter dated 11.12.2017 issued in pursuance to the MOEF Notification dated 07.12.2015 that FGD installation was 'stipulated' as a requirement for the first time.

(b) By no reasonable standard could TSPL have anticipated in 2008 that requirement to provide land can be to provide for Capex of FGD whose specifications were notified in 2015 and thereafter.

(c) The Sub-Committee referred differentiated between 2 distinct situations – (i) provision for retrofitting of FGD equipment and (ii) stipulation for FGD installation. In the event where retrofitting provision exists, stipulation for FGD

installation can be made only after examination of one-year post-project ambient air quality. [*In the present case, Cut off Date was 16.06.2008, the EC was issued on 11.07.2008, COD was 05.07.2014 (Unit I) and 25.11.2015 (Unit II), MOEF Notification i.e. Change in Law event is of 07.12.2015*]

(d) Funds can be ear-marked for environmental protection measures which either ‘existed’ or were ‘certain’. It would be contrary to the business efficacy test to extend the ear-marking of funds to environment protection measures on anticipation.

(e) Since FGD installation and its parameters came to be stipulated 7 years after (December 2015) the Cut-Off Date, FGD installation cannot be considered as an environment protection measure in terms of Paragraph “xxv” of the EC.

(vi) In order to meet varied emission limits, different kind of pollution control system (FGD) at different cost levels would be needed. The EC of 2008 provides a general condition for leaving space for FGD

alone. The cost associated with installation of FGD is directly proportional to the level of SO_2 emissions to be controlled.

(vii) TSPL contends that it is a settled position of law that plain and literal construction must be given to the contractual and statutory documents (which includes the EC). A bare perusal of the terms of the EC shows space to be kept for retrofitting of FGD but there is no specific provision in the EC mandating ear-marking of funds towards FGD installation. There are multiple environment protection measures detailed in the subsequent clauses, only those must be referred as stipulated measures.

(viii) Appellant-TSPL further contends that the EIA Report prepared by PSEB stipulated various mitigation measures to reduce adverse impact on the environment. The EIA Report did not stipulate installation of FGD. The measures contained in the EIA Report, *inter alia*, include:

(a) Electrostatic Precipitators (ESPs) to be designed to limit the particulates emission to 100 mg/Nm3 under worst operating

condition, which is well below the prescribed limit of 150 mg/Nm3.

(b) The entire system will be so designed as to keep the pollutant emission within specified norms under worst condition as per Punjab State Pollution Control Board's requirement.

(c) Special precautions will be taken to control the fugitive dust emission within and around coal handling plant.

(ix) The Appellant-TSPL also contends that the Central Commission allowed capitalization of the FGD system even where the provision regarding FGD had been contemplated in the EC.

(x) Reiterating that **TSPL's case is distinct from JSW Case (2013 SCC OnLine APTEL 16),** the Appellant-TSPL contends that PSPCL's reliance on the JSW case is devoid of reasoning and ought to be rejected.

(xi) Further, the facts of the case of TSPL are similar to the case of CGPL, wherein JSW has been distinguished.

(xii) The Appellant also contends that unlike TSPL's and CGPL's case where FGD requirement was not mandated and the EC was not issued before cut-off date, in JSW case, the EC dated 17.05.2007 was available to JSW prior to the submission of bid on 21.02.2008. Further, in the JSW case, obtaining Environment Clearance was the responsibility of the bidder, i.e., JSW. In contrast, TSPL's case being Case II, scenario IV under Competitive Bidding process (fuel and location is specified by the bidder) Guidelines, the responsibility for obtaining Environment Clearance is of the procurer. Also, it is a settled position of law that the ratio of any particular decision is based on the facts of that particular case and cannot be made applicable to cases having a different factual matrix. Reliance in this regard may be placed on (a) *Zee Telefilms Ltd.* vs*. Union of India* (2005) 4 SCC 638 (para 254); and (b) *P.S. Sathappan*vs*. Andhra Bank Ltd.* (2004) 11 SCC 672 (paras 146-147).

(xiii) Reading of EC Conditions in context of MoP letter dated 30.05.2018, the Appellant-TSPL contends that Para 5.1.b of MoP letter must be read disjunctively since it refers to two contingencies.

Therefore, exception to Change in Law event carved out in this para will only apply to cases where *such requirement of pollutions control system* was (a) either mandated under the environment clearance of the plant, or (b) Or envisaged in any other bidding document/statute **EXCEPT** the environmental clearance. (Envisaging cannot be under the EC). This is because use of the word "***or***" before the expression "envisaged otherwise" necessitates a literal interpretation of the provision.

(xiv) PSPCL stated that MOEF Notification does not mandate installation of Selective Non Catalytic Reduction ("**SNCR**") equipment. Recommendation Report of CEA dated 16.05.2018 issued by letter no. 44/FGD/UMPP/ CEA/ 2017/ 364 ("***CEA Report***") does not provide for any specific technology for abatement of NOx. TSPL can meet the stipulated NOx emission limits with the existing technology. PSPCL's contention is devoid of merits.

(xv) The permissible limit of NOx within 300 mg/Nm3 (6% O2, dry basis) would not be achievable at part load and full load operation with above cited existing NOx control technology alone. To

implement the above NOx control systems (primary control and SNCR) to achieve compliance of MOEF new emission Norms, certain CAPEX, OPEX and shutdown of plant are required and the same has been detailed in the feasibility report of TCE.

(xvi) The Report of TCE is based on a detailed and in-depth inquiry into the impact of the NOx levels and correction methods necessary.

(xvii) Consequently, the installation of SNCR, in addition to combustion tuning is a mandatory prerequisite to bring NOx levels down to comply with the standards set by the MOEF Notification.

(xviii) SNCR installation which flows out as an obligation under the MOEF Notification qualifies as a change in law event and TSPL is entitled to compensation on account of the same.

(xix) Appellant-TSPL further contends the Hon'ble Supreme Court in *PTC India Pvt. Ltd.* vs. *CERC* (2010) 4 SCC 603 held that provisions of the CBG is a sub-ordinate legislation, and can override contractual provisions. Further, TSPL made an effort to establish that (i) the EC procurement was incumbent on PSPCL and that (ii) the Punjab State

Commission wrongfully expanded the imputed knowledge on TSPL of a legal position that did not exist on the Cut-off date by observing that the bidders should have foreseen conditions regarding land and consents.

(xx) They also contend that TSPL duly satisfied PSPCL with respect to its concerns through letters dated 18.03.2017, 05.05.2017, 25.05.2017 and 23.06.2017 annexed as Annexure-13 in the Appeal. Further, it was only after discussions with PSPCL on 08.05.2017 and 07.06.2017, that TSPL discussed the matter with TCE to update its draft report. Subsequently, TCE submitted its final 'Feasibility Report to meet New Emission Regulations of MOEF' **("*Feasibility Report*")** on 15.06.2017.

(xxi) Appellant-TSPL further contends that no straight-jacket formula can be annexed to fix a uniform cost towards expenditure to be incurred for setting up FGD equipment. The estimation must instead be made on a fact-to-fact basis and this is what CEA has been doing. TCE expert body had conducted a detailed study of TSPL's Project in addition to the general standard set by Central Electricity Authority

("***CEA***"). TCE's Cost estimates were based on available information on the relevant date and no specific quotes were taken in relation to TSPL plant as the same was to be done after detailed engineering.

(xxii) According to Appellant-TSPL, it is noteworthy that the Environment Impact Assessment Report ("***EIA Report***") as prepared by PSEB/PSPCL through their consultant and shared with bidders is a pre-condition to the grant of EC in the light of Clause 8 of the MOEF Notification dated 14.09.2006 bearing S.O. No. 1533 issued under sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986. TSPL, in its Appeal, has placed reliance on Chapter 6 of the said EIA Report titled "Environmental Monitoring Programme". Therefore, the document is of considerable importance cannot be ignored.

(xxiii) According to the Appellant-TSPL, the moment a government instrumentality is involved, the concept of legitimate expectations kicks in. In the instant case, TSPL had a legitimate expectation that the general industry practice as (i) followed in various decisions of the Central Commission and (ii) aimed to achieve by the MOP by its letter dated 30.05.2018, would be followed even in this case. Additionally,

since the necessitated installation of (i) FGD equipment and (ii) SNCR equipment are pursuant to the MOEF Notification, the same shall be construed as change in law events.

(xxiv) Obtaining the EC was the sole responsibility of PSPCL as per the RFP, PPA and the various representations made by PSPCL. TSPL only came into the possession of the EC after the project had been transferred and the PPA had been executed. TSPL had no opportunity to examine the contents of the EC before submitting its bid.

(xxv) They further contend that a change in legal position during **"Operation Period"**, which shall have an adverse financial impact on the Project of TSPL (approximately to the extent of Rs. 45-50 Lakhs/MW on CAPEX (base nos. without taxes, duties etc.) as per CEA recommendation and additionally on OPEX), qualifies as a 'Change in Law' in terms of the PPA. Further, the financial impact has been estimated by TSPL in line with the CEA report and as per recent orders placed by NTPC Ltd. for its own plants.

Rejoinder by NPL to the reply of 2nd Respondent:

10. **(i)** In terms of the extant rules and regulations prevalent at the time of the bid submission i.e., the Environment (Protection) Act, 1986 (EP Act) and the Environment (Protection) Rules, 1986 (EP Rules), there were no norms for SO2 and NOx emissions and that such norms were introduced for the very first time by way of the MoEF&CC Notification after the cut-off date. The Appellant is compelled to incur additional expenditure towards the installation of all the requisite equipment, which will have an impact on the operational parameters such as the Station Heat Rate as well as the Auxiliary Power Consumption etc.

(ii) The Appellant-NPL also contends that the said conditions in the Environmental Clearance granted to NPL only required the Appellant to provide for adequate space for installation of the FGD systems, which was duly complied with by the Appellant in terms of the land acquired by the Respondent No.2 prior to the submission of bids, as has rightly been noted by the Respondent Commission in paragraph

15(vi) of the Impugned Order. The intention behind incorporation of the said provisions could not have been to factor in the capital, operation and maintenance cost associated with installation of the FGD system and/or SNCR system as well.This becomes apparent from the review of Para 7.2.1 of the Feasibility Report prepared by NPL in May 2008.

(iii) Thus, even the Feasibility Report clarifies that the only requirement was to keep adequate space for installing FGD system at a later date if warranted under environmental regulations and accordingly, necessary space provision was made in the plant layouts.

(iv) Further, in addition to and without prejudice to the above, they stated as under:

(a) Had NPL been in breach of the terms and/or conditions of the Environmental Clearance, on account of not earmarking the funds for FGD as part of environmental protection measures for

the Project, the MoFF&CC, Central Pollution Control Board (CPCB) and the Punjab Pollution Control Board (PPCB) would have definitely taken punitive and harsh actions against NPL rather than extending the Environmental Clearance and renewals.

(b) No separate fund was ever earmarked for the purpose of installation of FGD and/or SNCR system and this fact was reported to MoEF&CC on a regular basis by way of submission of the periodical reports. Most importantly, the MoEF&CC never raised any objections regarding NPL not earmarking funds towards installation of the aforesaid pollution control equipment;

(c) The environmental clearances, which the MoEF&CC was granting insofar as the installation of FGD system is concerned, were broadly of the following two categories viz. (a) the first category covered the projects which were given environmental clearances similar to that of NPL with the condition that a space provision is to be kept for the installation of the FGD equipment, if required at a later stage by the MoEF&CC; and (b) the second

category included environmental clearances wherein the MoEF&CC had specially mandated the installation of FGD equipment as a statutory condition. Therefore, FGD was in fact a standard clause in the environmental clearances for majority of the power projects like the Project in the instant case.

(d) The Respondent No.2 ought to have brought to the notice of the Respondent Commission, the presentation dated 09.09.2008 made by NPL (when it was wholly owned by PSEB) before the Expert Appraisal Committee (on the basis of which the Environmental Clearance dated 03.10.2008 was granted for the Project), which did not stipulate any earmarking of funds towards the installation of FGD. On the other hand, a total sum of Rs. 410.10 Crore (i.e., the amount mentioned in the Environmental Clearance granted for the instant Project towards environmental protection measures) had been earmarked towards environmental protection measures (item-wise).

(e) Further, the Appellant-NPL contends that it is also significant to submit that since the Respondent No.2 had undertaken all the

preparatory activities including submission of all the documents/reports/presentations etc. for the purpose of obtaining the Environmental Clearance for the Project, it was incumbent upon Respondent No.2 to have disclosed all such documents to the Respondent Commission.

(iv) Appellant-NPL, therefore, reiterates that the aforesaid MoEF&CC Notification, which for the first time introduced the emission norms for SO2 and NOx and thereby, necessitated installation of FGD and/or SNCR/any other suitable technology after the Cut-off Date, is a 'Change in Law' event in terms of Article 13 of the PPA.

(v) Respondent No.2, with the sole intent to obfuscate the issue at hand, has submitted that the Environmental Clearance granted for the instant Project required NPL to monitor the emission standards, inter alia, of SO2 and NOx and ensure that the same are within the prescribed limits. The Respondent No.2 has repeatedly stated denying that there were no norms at all for SO2 and NOx respectively, however, it has not stated anywhere that the emission norms for SO2 and NOx respectively prior to the Cut-off Dates. This

in itself demonstrates that the Respondent No.2 has no basis at all to counter the Appellant's 'Change in Law' claim. Further, during the period prior to the Cut-off Date, only the ambient air quality standards (ground level concentration) for SO2 and NOx gases were specified by CPCB which was/is known as NAAQ and the same is completely and significantly different from emission norms which were specified for the first time for SO2 and NOx, by way of issuance of the MoEF&CC Notification dated 07.12.2015.

(vi) The only requirement that the Environment Clearance necessitated to meet the NAAQ requirements for SO2 and NOx was to build a 275 m high chimney/stack, which was duly complied by the Appellant and nothing beyond that.

(vii) The new norms require the measurement of the SO2 and NOx emission respectively at the outlet of the Chimney/Stack of a power plant/industry etc. whereas the ambient air quality is measured in the outdoor/open air and that too near ground level, so as to ascertain impact on general population. It is relevant to highlight that in the Rapid EIA Report prepared by NPL (when it was wholly owned by

PSEB) for the Project prior to the Cut-off Date, the reference has been made only to the NAAQ standards in the Rapid EIA conducted for the Project which in itself clearly shows that there never existed any emission norms for SO2 and NOx respectively as on the Cut-off Date. Respondent No.2 ought to appreciate that while seeking Environment Clearance for the project logically and correctly deduced that there was no such requirement and therefore, did not include any cost for construction of FGD and SNCR in funds earmarked for environment management. Respondent No.2 has vaguely stated that NPL was also not permitted to use coal with greater than 0.5% sulphur content. The said averment of the Respondent No.2 does not explain the position qua the stipulation of SO2 emission standards as on the Cut-off Date. The condition relates to the quality of the coal to be used and not the emission levels of SO2.

(viii) It is significant to reiterate that the item-wise/head-wise break-up of the aforesaid Environmental Protection Measures does not reflect any cost earmarked towards the installation of FGD and only refers to the cost towards installation of ESP in context of air pollution control measures.

(ix) According to Appellant-NPL, all the aforesaid preparatory documents (including especially the Feasibility Report dated May 2008 referred in para 10 above) clearly stipulated that as per the then existing environmental laws, the only requirement was to keep adequate space for installing FGD system at a later date if warranted under environmental regulations and accordingly, the necessary space provision was made in the plant layouts by NPL (which was then owned by PSEB).

(x) They further contend that Respondent No.2 has wrongly placed reliance on the order of this Tribunal in the case of M/s JSW Energy Limited vs. Maharashtra State Electricity Distribution Company Ltd. & Anr. dated 21.01.2013 in Appeal No. 105 of 2011 (JSW Case). The various peculiar facts of the JSW Case have also been taken into account by the Learned Central Electricity Regulatory Commission (CERC) vide various orders. The aforesaid Commissions after taking into account the peculiar facts of the JSW Case have distinguished the respective cases with the JSW Case.

(xi) Appellant-NPL further contends that Respondent No.2 has not challenged the findings of the CERC in cases where they have allowed the Change in Law claims of the respective generators. It is not NPL's case that the said decisions are binding on this Tribunal. Further, NPL has placed reliance on the decisions of the CERC, MERC to highlight the fact that in similar 'Change in Law' cases filed by similarly placed generators based on the MoEF&CC Notification, the respective Commission, taking specifically into account (a) the revised parameters for, inter alia, SO2 and NOx emissions introduced by the MoEF&CC Notification after the cut-off date(s) of the respective project(s); (b) the two conditions of keeping a space provision and earmarking of funds towards environmental protection measures; and (c) the judgment of this Tribunal in the JSW Case, had unambiguously laid down that the said MoEF&CC Notification qualifies as a 'Change in Law' event in terms of the respective PPA(s). Further, Respondent No.2 is also one of the Respondents in the CGPL Case and the Sasan Case respectively wherein CERC has allowed the Change in Law claims raised by the aforesaid generating companies based on the MoEF&CC Notification. All

similarly placed persons are also entitled to get similar benefit principally.

(xii) According to the Appellant-NPL, the MOEF&CC Notification has necessitated the installation of SNCR/any other suitable NOx control equipment so as to achieve the stipulated emission norm of 300 mg/Nm3 for NOx. According to the Respondent No.2, the reduction in emission level of NOx is within the control of NPL by way of the existing combustion technology. The emission norms stipulated by the MoEF&CC Notification with respect to NOx cannot be achieved by the existing combustion control technologies even after suitable combustion tuning and optimization.

(xiii) To achieve the desired limit at all loads with the given range of coal allocated for the Project, SNCR technology with a minimum designed reduction efficiency of 35% is recommended. Even otherwise, the range of 336 to 405 mg/Nm3 is non-compliant with the prescribed limit of 300 mg/Nm3. Further the value of NOx mentioned as 560 mg/Nm3 @6% O2 dry basis of flue gas is based upon

stoichiometric formula. On a perusal of the excerpt from the TCE Report, it becomes abundantly clear that the Respondent No.2 is reading the TCE Report selectively and in isolation. Further, the Respondent No.2 has completely failed to appreciate that the MoEF&CC has introduced stricter emission norms for the purpose of strictly implementing such norms and accordingly, NPL cannot rely only on the NOx burners to control the NOx emission when it is clear that at part load with worst coal design, the likely NOx emissions of 336 to 405 mg/Nm3 will be significantly beyond the stipulated norm of 300 mg/Nm3.

(xiv) It is stated that CERC laid down that when the environmental clearance was made available to CGPL, there was no emission norms in the EP Rules, the requirement towards meeting new emission norms for NOx prescribed in the Notification qualifies as 'Change in Law' under the PPA. Therefore, SNCR with reduction efficiency of 35% appears to be the most feasible retrofitted technology as is recommended by TCE for NPL to reduce the NOx level for all the operating ranges. Accordingly, NPL will have to incur

additional expenditure towards the installation of the SNCR technology / alternate technology as may be recommended by CEA in order to comply with the emission limits of NOx, in terms with the MoEF&CC Notification. In any event, specification of a technology by the CEA is not a pre-requisite for determining as to whether the aforesaid amendment by way of the MoEF&CC Notification amounts to a 'Change in Law' event under the PPA or not as the clauses of the PPA are required to be interpreted independently for determining the issue of 'Change in Law'.

(xv) Appellant-NPL further contends that the directions of the CPCB vide its letter dated 11.12.2017 and the pending litigation before the Hon'ble Supreme to bring to the notice of this that both, the CPCB and the Hon'ble Supreme Court are monitoring the timely compliance of the new emission norms specified in the MoEF&CC Notification by the Thermal Power Plants, including, the Appellant's Plant. Moreover, in any event, it is quintessential that the issue of 'Change in Law' be decided by this Tribunal as expeditiously as possible because without there being clarity on the pass through of the

additional cost to be incurred by the Appellant for implementing FGD and/or SNCR under the PPA, the banks/financial institutions are not ready to fund the project specifically in view of the well-known fact that banks as well as the large financial institutions are already having huge exposure to the power sector generating companies which are in financially distressed situations. In addition, there is a much needed requirement of regulatory certainty on this issue of 'Change in Law' based on the MoEF&CC Notification as the CERC has already allowed the 'Change in Law' claims based on the said Notification for the other similarly placed generating companies. In addition, the MERC and RERC have also held the aforesaid view. It is only the Respondent Commission/PSERC which has decided against the generating companies like the Appellant and thus, there is need to have regulatory certainty on this issue.

(xvi) According to Appellant-NPL, on one hand, the Respondents are not ready to consider the various judgments of the CERC which has clearly recognized the MoEF&CC Notification as a 'Change in Law' event in cases of similarly placed generating companies selling

power under competitive bidding in terms of similar PPAs (as involved in the present case) where such judgments have relied upon the aforesaid letter dated 30.05.2018, however, on another hand, the Respondents are strongly relying upon the letter of the Ministry of Power issued to the Learned CERC under Section 107 of the Electricity Act, 2003 to deny NPL's claim that too by misinterpreting the contents of the letter. No such similar letter has been issued to the Respondent Commission by the State Government under Section 108 of the Electricity Act, 2003. This clearly establishes the dual standards being adopted by the Respondents in the present case.

(xvii) According to Appellant-NPL, Respondent No.2 has gravely misunderstood the expression "TPPs where such requirement of pollution control system was mandated under the environment clearance of the plant or envisaged otherwise before the notification of amended rules" in the Ministry of Power's letter dated 30.05.2018. Respondent No.2 has failed to understand that the expression "or envisaged otherwise" before the notification of amended rules' can only refer to the requirement of pollution control system being

envisaged in any other document/statute except the environmental clearance. Therefore, the expression 'envisaged otherwise' in para 5.1(b) should only be interpreted to mean 'envisaged in any document other than the environmental clearance'.

Analysis & Conclusion:

11. We have heard arguments of all the counsel at length through virtual hearing and gone through the written submissions filed by them in support of their contentions.

12. The Change in Law event in both the appeals, according to the Appellants, pertains to a standard that is to be maintained for emission of Sulphur Dioxide (SO_2) and Nitrogen Oxide (NOx). They further contended that the environment clearance certificates granted for the commissioning of the respective plants of the Appellants, did not mandate installation/retrofitting of FGD, except requiring the Appellants to earmark/arrange only space for installation of FGD if required at a future date. Common argument in both the Appeals is to the effect that space, if required at a later stage would mean, there was no certainty about the

nature/devise/mechanism i.e., what type of FGD installation would be suggested or required at a later date. They also contend that “if required at a later date” also denote the uncertainty of such requirement i.e., such installation may be required or not, therefore, Appellants contend that installation of FGD system and the ear marking of funds towards such FGD cannot be taken as a condition/obligatory requirement in the bid prices. They also contend that though some funds were allocated towards measures to be taken for environmental protection in the bid price, item-wise details clearly indicate that funds allocated did not include cost of the FGD equipment since there was no requirement of FGD installation at that time. It is their stand that after seven years of the cut-off date, for the first time while revising the norms for SO_2 and NOx as per notification of the concerned authority, the installation of FGD became a must requirement for the project. This is clear from the letter sent by CPCB dated 11.12.2017 wherein it refers to prescription of new emission norms for SO_2 and NOx.

13. Both the Appellants contend that the requirement of installation of FGD pertaining to revised emission limits is change in law in terms of Article 13 of the PPA. Since the change in consent occurs after the cut-off

date by virtue of statutory promulgation, it is change in law event. According to Mr. Kapoor, the Appellant-TSPL's project was set up based on the instructions of PSEB under Case II type competitive bidding guidelines. Therefore, obligation of the procurer is very clear that all initial consents including environment clearance has to be arranged by procurer. Therefore, it was obligatory on the part of PSEB to indicate cost so far as FGD prior to cut-off date or even at a later stage. This fact is substantiated from the contents of project report given by procurer to the bidders at the stage of RPF. Since PSPCL/PSEB had the obligation to procure the environment clearance for the project (TSPL was incorporated as a Special Purpose Vehicle by PSEB on 05.04.2007 to develop and to commission the project), it was the responsibility of PSPCL/PSEB to secure environment clearance. The bid was submitted by Sterlite Energy Limited only based on the specific intimation and assurances made by PSEB, presently PSPCL. Accordingly, it was selected as the successful bidder. Emission limits of SO_2 requiring FGD equipment installation was not prescribed by any law at that time i.e., 2008, therefore, no one including Appellants could visualize/anticipate possibility of revised/new norms being notified much later i.e., in the year 2015. For that matter, the Environment Clearance was

made available to TSPL only after the execution of SPA and PPA. Hence, question of TSPL (now owned Sterlite Energy Limited) objecting so far as the conditions in EC would not arise. They further contend that if the terms of contract were in a simple language and were clear without any ambiguity, the terms must be read as reflected in the contract. They also contend that change in law provision under PPA do not refer to any possible anticipation by parties. Therefore, the Respondent-Commission could not have imputed knowledge of new emission norms so far as TSPL is concerned. The circumstances existed at the time of bid did not indicate any such possible anticipation of revised norms is the stand of the Appellant-TSPL.

14. So far as FGD condition as termed in the EC, according to the Appellant, is only space if at all required in future has to be earmarked. For the first time, in pursuance of MoEF Notification dated 07.12.2015 followed by letter of CPCB dated 11.12.2017 installation of FGD was mandated as a condition. Therefore, funds which could be earmarked for existing environmental protection measures did not include cost towards FGD while earmarking 461 Crores of rupees towards environment protection. The

item-wise expenses towards environmental monitoring and equipment which was required in terms of norms existed at that time i.e., 2008 do not include cost of FGD. As per the new norms, FGD equipment itself is expected to cost about 1000 Crores in terms of recommendation of CEA in its report.

15. So far as clause (XXV) of EC, according to the Appellant, it does not refer to environment protection measure of FGD system. Clause (vi) only prescribes space to be kept for retrofitting of FGD if required and none of the provisions mandate earmarking of funds for FGD including EIA Report of 2008 prepared by PSEB.

16. Then coming to the letter of Ministry of Power dated 31.05.2018, according to Appellant, Para 5.1(b) of MoP letter refers to two contingencies i.e., either mandated under the environment clearance of the plant or envisaged in any other bidding document etc., except the environmental clearance before the date of Notification in question. The expression in the letter “or otherwise envisaged” otherwise would only mean envisaged in any document except environment clearance.

17. Coming to the observation of the Respondent-Commission pertaining to Judgment in JSW Energy Limited's case, according to the Appellants, the said judgment cannot be applied to the facts of the present appeals. The main difference pointed out is Environment Clearance was issued in favour of JSW prior to the cut-off date. Responsibility to obtain Environment Clearance was with the JSW. They also in detail refer to several distinguishing facts in both the cases. They also point out observations of MERC in its Order dated 25.05.2011 pertaining to JSW judgment and so also the judgment of the Tribunal dated 21.01.2013.

18. The Appellant contends that different Commissions have given findings/treated differently so far as the impact of the MoEF Notification of 2015 and they narrate different orders. According to the Appellants, change in legal position during operation period, may have serious financial impact on the project of PSPCL, since change in law in terms of PPA in the present case clearly takes within its ambit the transition during the operation period, which affects the commercial aspect of the Appellants project seriously. They also contend that the Respondent-Commission

totally ignored various measures, like primary NOx control and secondary NOx control if required resulting in SNCR installation. Appellant further contend that Respondent-Commission failed to take note of scientific, technical reports and other data furnished by Appellants which justifies the requirement of SNCR equipment in order to meet NOx emission limits in terms of notification of MoEF. The initial EC of 2008 did not stipulate such compliance pertaining to NOx emission control system. Now the revised norms makes it mandatory to comply with the emission limits of NOx as well. But with the existing primary NOx control system, it is not possible. Since the said requirement is on account of Notification of MoEF in 2015, it is change in law, is the stand of the Appellant.

19. Arguments of learned counsel for Appellant-Nabha Power Limited is that since the terms of extant Rules and Regulations, which existed at the time of bid submission for the Project did not specify any norms for SO_2 and NOx emissions, and such norms brought in nearly after six years for the first time, that too after the cut-off date in pursuance of MoEF and CC Notification of 2015, therefore, it amounts to Change in Law event in terms of Article 13. This introduction of new norms resulted in variance in the

conditions of several consents and approvals that were obtained for the Project, especially EC dated 03.10.2008 and so also consent to operate. The consequence of Change in Law event in question, as stated above, also results in change of cost of the environmental protection measures since new pollution control system like FGD and SNCR/other appropriate technology are mandated, and such installation of equipment involves huge additional cost for implementing the environmental management plan.

20. Learned senior counsel Mr. Poovayya arguing for Nabha Power Ltd. further contends that there is fundamental difference between emission norms of a particular gas vis-a-vis its ambient air concentration (ground level) NAAQ. The introduction of new norms for SO_2 and NOx emissions at the outlet of the Chimney requires compliance measurement of the SO_2 and NOx emissions, respectively, as compared to earlier ground level concentration of NAAQ. Therefore, installation of FGD/SNCR/any other suitable technology to comply with the mandate of new emission norms requires different mechanism. Therefore, 275 meter high chimney/stack, which was envisaged at the time of construction of the project for

measuring extant ambient air quality, which was mentioned in the EC obtained, will not be useful or will not cover the new emission norms of SO_2 and NOx. FGD and SNCR system was not at all envisaged at that point of time. Therefore, even the environmental clearance certificate specifies that only a provision for space had to be kept for FGD, if such installation/retrofitting required at a later date cannot be construed to mean that FGD installation was envisaged and the cost of such FGD was included, therefore, learned counsel contends that the approach of the Respondent-Commission is totally erroneous. He also points out that the feasibility report prepared by Nabha Power Limited way back in 2008 also substantiates the fact that only adequate space must be kept for installation of FGD system at a later date if required under the Environmental Regulations.

21. He also contends that all preparatory documents have to be read, which were prepared by PSPCL for environmental clearance and the environmental clearance obtained for the project cannot be read in isolation. The Commission ought to have looked into the legal frame work under the scheme of the present project, which was conceived as it existed

way back in 2008. Even the approved terms of reference indicate that even **the Environment Management Plan (EMP)** should delineate such environmental protection measures that were required for the project along with item-wise cost of implementation of only such measures. The Report dated 09.09.2008 prepared by Nabha Power Limited demarcate the item-wise break-up of the measures along with the cost of such measures. However, no where it refers to funds being earmarked for the installation of FGD or SNCR. Even the Expert Appraisal Committee did not point out funds being not earmarked towards FGD installation while sending its recommendation. The earmarked amount of Rs. 410.10 Crores mentioned in the EC do not cover or earmark any funds towards FGD system for the purpose of controlling SO_2 emissions. Similarly, it does not refer to any funds towards SNCR/any other suitable technology so far as measures to control NOx emissions. Therefore, Appellants stand is that Respondent-PSPCL had clear idea of the real purport of the applicable laws, guidelines for obtaining EC, hence except requirement of space provision, nothing further was certain, clear or mandated.

22. Learned counsel further contends that for failure of not earmarking funds for FGD as part of environmental protection measure for the project, if any, different authorities like MoEF and CC, CPCB and PPCB would have taken action against the Appellant. Therefore, Commission was not justified in saying MoEF and CC wanted to know only about the expenditure made on various environmental protection measures about earmarking of funds. To substantiate this contention, the Appellant refers to specific provision in the EC, which required the Appellant not only to allocate separate funds for implementation of environmental protection measures but also to provide item-wise break-up so also to provide half yearly reports to MoEF and CC on the expenditure of these funds.

23. According to learned senior counsel Mr. Poovayya while granting EC to thermal Projects prior to 2015, MoEF and CC were specifying two categories so far as installation of FGD system is concerned. According to learned counsel for the Appellant, Nabha Power Plant falls under the first category wherein only provision of space has to be accounted for in the EC. The second category covers such projects where MoEF and CC has provided/conditioned installation of FGD as a statutory requirement in the

environmental clearance i.e., wherever any thermal project or any associated assets of the project fell under ecologically sensitive areas such as Echo-Sensitive Zones, Coastal Regulation zones or other related environmental risks.

24. Therefore, the Commission failed to appreciate the provision for providing space only for the installation of FGD at a later date was in fact a standard clause in the environmental clearance for majority of the thermal power projects. Since the Appellant falls under first category, there is no such mandate for installation of the FGD equipment as stipulated in the case of second category.

25. Appellant stresses upon the argument that if relevant policy was announced much prior to the effective date but until and unless actual cause of action arises, law should not work on contemplation. Therefore, unless installation of FGD was a must at that point of time, it cannot be said FGD system was envisaged at that point of time.

26. Then coming to the reliance placed by Respondent-Commission on the order of this Tribunal in **JSW's case**, according to learned senior counsel Mr. Poovayya, Appellant's case is based on the promulgation of 2015 notification six years after the cut-off date, which warrants installation of FGD/SNCR or suitable technology. But in the case of JSW, the installation of FGD was referred to in the second EC since first EC was granted conditionally. The Respondent-Commission, according to learned Senior Counsel, totally failed to appreciate the issues involved in the present case and the case of JSW since both cases do not have similar material facts. The Change in Law clause of PPA pertaining to JSW is entirely different to the PPA pertaining to Change in Law clause of the Appellant. The most important and relevant difference is the change in law event happening in the case of the Appellant on account of MoEF and CC notification. Therefore, JSW case cannot be an example for comparison with the Appellant's case. Therefore, Appellants' counsel contend that reliance of any particular principle out of context or in isolation of the facts cannot be accepted.

27. Learned counsel also contend that the impugned order has resulted in uncertainty. On the issue of Change in Law so far as Regulatory Commissions are concerned, some Commissions have laid down that Notification of MoEF 2015 qualifies as Change in Law in terms of PPA and some other Commissions have opined that it does not qualify as “change in law” event. Details of such orders are brought on record by the Appellant.

28. Learned counsel for the Appellant further contends that in the case of CERC, as stated above, against the PSPCL opining on similar question of law, however, Respondent No.2 has not challenged the said order in the case of CGPL and SASAN case respectively, therefore, Respondent No.2 cannot approbate and reprobate. According to the Appellant, Respondent No.2 is estopped from urging a plea to the effect that installation of FGD was envisaged. Placing reliance on Clause 5.5. of the PPA Appellant contends that Appellant was not responsible for obtaining initial consents including EC since both the project in question is Case-2 type (iv) scenario where the obligation to obtain initial consents completely is with the procurer i.e., PSPCL. If PSPCL did not contemplate installation of FGD at

that time and did not earmark funds for the same, now it cannot find fault with the Appellant contending that FGD was envisaged in the EC.

29. Learned senior counsel with regard to installation of SNCR/any other suitable NOx control equipment contends that specification of a technology by the CEA is not a pre-requisite for determining as to whether Notification of 2015 amounts to Change in Law event since various clauses of PPA had to be judiciously interpreted for determining the issue of Change in Law event. The Commission also failed to note that the NOx emission norms stipulated in 2015 Notification cannot be achieved with the existing combustion controlling technologies in spite of best tuning and optimization. The new NOx emission parameters would require installation of SNCR/any other suitable equipment or technology amounts to Change in Law event.

30. Then coming to the binding implication of Letter of MoP dated 30.05.2018, the argument of learned counsel for the Appellant is to the effect that the aforesaid letter is not at all binding on any judicial/quasi judicial authority meant to adjudicate any Change in Law claim. The Respondent-Commission is the authority to interpret the above said

Notification of 2015 by applying its mind independently. In the **case of CGPL**, CERC did refer to the Letter dated 30.05.2018, so also in **Sasan's Case,** the CERC has analysed the ambit of condition stipulated in Para 5.1 (b) of the MoP letter in the right context and has expressed its opinion in favour of the generating companies. Case of the Appellant is also similarly placed. So far as compliance of some other parameters of 2015 Notification like particulate matter, mercury, water consumption etc., Appellant is not claiming Change in Law claims. The Appellant further contends that the instant claim of Change in Law would not vitiate bidding process as contended by the Respondent, since Notification of 2015 was notified after six years from the cut-off date and no other bidder would have contemplated promulgation of new norms for emission of SO_2 and NOx. No other bidder possibly would have included funds for such installation of FGD and SNCR. When PSPCL itself did not earmark any funds in its reports and presentations to MoEF based on which EC was granted, the possibility of any other bidder including such task is remote, therefore, interest of no other bidder is prejudiced.

31. The gist of the arguments of Respondent No.2-PSPCL as argued by Ms. Ranjitha Ramachandran is as follows:

Apart from amendment rules of 2015 in relation to SO_2 and NOx, there are other norms which are not claimed as Change in law by the Appellants. Those emission norms are suspended particulate, mercury and water consumption. They also contend that if existing Law already imposes a condition, mere introduction of new norms towards the same condition, does not amount to Change in Law. This view is supported by the Letter of MoP dated 30.05.2018. In the Appeal of GMR Kamalanga, this Tribunal while referring to another letter of the MoP pertaining to taxes and duties, the same was considered. The letter of MoP clearly mean that the pollution control system which was either mandated or otherwise envisaged prior to the Notification of Amendment Rules of 2015, there is no Change in Law. This letter refers to Pollution Control System and not Emission Standard. Therefore, even if EC does not refer to installation of FGD, it may still envisage such installation and in such cases also it cannot be Change in Law. Since, the words “mandate” or “envisage” would mean one and the same, therefore, contention of the Appellants that unless other

documents refer to word “envisaged”, it does not amount to Change in Law cannot be accepted. If interpretation leads to absurd result, then such interpretation cannot be accepted. Therefore, the only relevant consideration is whether the Pollution Control System was already envisaged prior to Amended Rules of 2015 is to be seen. The interpretation of letter of MoP by the State Commission is justified is the stand of the Respondents. So also they contend that Commission was justified in placing reliance on the judgment of the Tribunal in the case of JSW Energy Limited. Therefore, the EC issued to Appellants did envisage FGD system. Therefore, arguments of the Appellant that it envisaged only space for FGD system cannot be accepted.

32. Pertaining to argument of Appellants that EC refers to the word “if required” has to be understood as already envisaged, as held in JSW case, hence, the distinguishment of facts of the present appeals and case of JSW are irrelevant and inconsequential. The revised norms only confirmed subsequently the requirement of FGD. They further contend that issue is not the responsibility of who should obtain EC. But it is conditions envisaged in the EC, that are relevant. Terms and conditions have to be

complied with by the project developer including all consents and approvals. Therefore, Respondent No.2-PSPCL has no obligation of obtaining such approvals and consents as contended by the Appellants except the liability of paying the agreed tariff. This fact is substantiated from Clause 5.5 of PPA so also 3.1.2(i), therefore, the Appellants are responsible at all times for renewal of the initial approvals and consents including EC. The question is whether revised norms become Change in Law? Therefore, revision of environment rules resulting in FGD equipment will not take away the basis/basic principle for the decision in JSW Case. As long as the original EC already envisaged the FGD, subsequent confirmation of the same is not a Change in Law, therefore, contention of the Appellants that only if the FGD was already envisaged prior to 2015 amendment then in terms of letter of MoP, there is no Change in Law, cannot be accepted.

33. They also contend that the absence of additional safeguards in these appeals like that of JSW cannot be linked to requirement of space provision or installation of FGD. As on the cut-off date, no specific measures were provided in the case of JSW, but in the above Appeals a specific equipment

being FGD was recognized. In the case of JSW requirement of FGD was not referred to as additional safeguard measure due to the study being conducted regarding impact on Alphonso Mangoes and Marine Fisheries. The project in JSW undertook to comply with additional safeguarding measures if required.

34. It is further contended that like all other project proponents Appellants also agreed to comply with the conditions for the EC and the EC implied that FGD would be installed subsequently when confirmed.

35. They further refute the contention of the Appellants that since JSW project was in ecologically sensitive area, safeguard measures were undertaken after detailed study cannot be accepted, since the documents indicate activities in CRZ area but for the water intake and channel which connects CRZ power plant to the sea.

36. They further contend that if the reason for provision of FGD in JSW Case was the applicable threshold limit for Sulphur Dioxide, then there was no reason for NPL to have a similar condition for FGD.

37. Difference in the clause of PPA with regard to change in law in the present Appeals and ***JSW* case,** has no relevance.

38. The letter of MoP dated 30.05.2018 clearly indicate that if FGD was envisaged prior to 2015, then there is no change in law. Similar conditions of ***JSW*** case are noticed in the case of NPL, therefore EC does envisage FGD.

39. Pertaining to contention of Appellants with regard to capital cost, the 2nd Respondent contends that an amount of Rs.8000 crores for TSPL is only an estimate, since the project was not yet established, therefore, actual cost may differ. The capital cost estimate in the case of ***JSW*** and the Appellant-TSPL is comparable, is the stand of the 2nd Respondent. In fact, Rs.461 crores was for environment protection measures at the rate of Rs.4.0 crores per MW when compared to the case of ***JSW***, which was Rs.3.75 crores per MW.

40. Similarly, in case of Appellant-NPL, total cost of Rs.5500 crores include Rs.410.10 crores towards environment protection measures i.e., Rs.4.16 crores per MW. 2nd Respondent further contends that both the

Appellants' projects did not include cost of FGD but in the case of ***JSW***, cost of FGD was included.

41. 2nd Respondent contends that the basis for the Tribunal's opinion in the case of ***JSW*** was that the original EC required demarcation of space for FGD which include earmarking of funds, therefore EC already envisaged FGD, hence subsequent revision of emission rules do not amount to change in law. The same principle would apply to the facts of the present Appeals, even if distinguishable facts are noticed as contended by the Appellants.

42. Installation of FGD by the Appellant is part of the terms and conditions of EC, therefore any failure on the part of the Appellants not providing funds, the Appellants must be blamed for the same. Appellants cannot take advantage of their own wrong in not providing funds for FGD installation.

43. Pertaining to earmarking of funds, the obligation was on the Appellants to earmark funds for FGD installation. They are not correct in

contending that since environment authorities did not raise any objection for not earmarking funds, their obligation cannot be absolved. In this regard, 2nd Respondent further contends that MoEF had only sought details on expenditure and not earmarking of funds. The Appellants were to report year-wise expenditure in terms of EC conditions. This fact was also noticed by the State Commission by noting that the expenditure statements with regard to funds spent on environment protection measures did not refer to funds earmarked for FGD.

44. 2nd Respondent's counsel contends that Appellants are not justified in placing reliance on the decisions of other Regulatory Commissions since those findings are not binding on this Tribunal. In these Appeals, the Tribunal has to consider the correctness of the impugned decision.

45. Pertaining to directions given by CPCB with regard to revised rules of 2015, it is the stand of the 2nd Respondent that those directions are only referred and they are not relevant, since they are all general directions. The contents of the letter from CPCB are generic in nature and such letters were addressed to many generators. Therefore, they did not refer to the EC of the generator who would have different conditions. This generic

letter of CPCB cannot be taken into account is the stand of the 2nd Respondent.

46. According to 2nd Respondent, since many other bidders participated in the bid for the projects in question, now the Appellants cannot take a different stand, since the same would disturb the sanctity of the bid.

47. According to 2nd Respondent, since the Appellants were required to provide space for FGD, they were well aware of the kind of space which is required based on the existing FGD in the market, since FGD was available even in 2008 and 2009 and there is nothing on record to show that such FGD is different from what is to be installed subsequent to revised norms of emission. Many other plants, in fact had installed FGD prior to 2015 norms. Power plants like Adani Power Ltd. and JSW Energy Ltd. did have this FGD installation when there were no norms or parameters and the only requirement was to install FGD. This means that those two power plants were able to install since it was available in the market and the experts knew about it. Adani Power (Mundra) Ltd. did install FGD prior to 2015 for units 7 to 9, but did not claim any change in law compensation due to

upgradation of FGD after 2015 norms. Therefore, FGD which was envisaged prior to 2015 and post 2015 are one and the same.

48. So far as contention of proposal during environment impact assessment, it was PSEB who made proposal, then it was only a proposal and not final decision. The final decision would be to include such conditions in the EC.

49. The presentation made on 09.09.2008 given by PSPCL to Expert Committee of MOEF was much prior to EC in favour of the Appellant-NPL dated 03.10.2008. What is required to be considered now is whether EC did envisage FGD or not, therefore, presentation is irrelevant.

50. 2nd Respondent contends that EC in the case of NPL was very much in existence as on the cut-off date i.e., 02.10.2009, therefore reference to various documents as relied upon by the Appellant-NPL is of no consequence. So far as Appellant-TSPL, the Appellant was aware as on the cut-off date that the project requires various consents and clearances and the environment authorities were entitled to impose terms and conditions for such clearance. Therefore, Appellant-TSPL did know that

EC is a must in terms of EIA Notification of 2006. Therefore, there is no scope for any absolute and unconditional EC, is the contention of the 2nd Respondent.

51. Coming to the letter of MoP dated 30.05.2018, since FGD was envisaged prior to 2015, there is no change in law in terms of MoP letter.

52. Coming to the objections pertaining to claims of CGPL and Sasan Power Ltd. with regard to FGD issue, the 2nd Respondent did object the claim for change in law in these two projects also. Mere fact of not filing Appeals against the orders of CERC pertaining to those two power plants cannot become an estoppel as claimed by the Appellants. It is not hit by principles of *res judicata*.

53. Pertaining to NOx controls, the claim of the Appellants that installation of SNCR to control NOx amounts to change in law is not correct, since the projects of the Appellant are already equipped with low NOx burners prior to 2015 norms.

54. So far as TSPL in the diagram for existing system, TSPL has failed to show the existing low NOx burners. Therefore, the TSPL is already

equipped with the above measures and it does not require to install any new measures in terms of the revised norms. Even the feasibility report submitted to State Commission, which is on record, states that the existing units are equipped with combustion controlling technology of low NOx burners and the claim is only for installation of SNCR.

55. Coming to the case of NPL, this power plant also has low NOx burners and the Appellant-NPL has only claimed SNCR installation. At present, there is no direction for installation of SNCR by any concerned authority. As on today, direction was for low NOx burners with Over Fire Air. Therefore, the Commission was justified in not considering the issue of SNCR at this stage. Even otherwise in terms of the letter of MoP, both the Appellants cannot claim any cost related to prudent and efficient operation of the existing equipment. Both Appellants are required to act as per prudent utility practices in terms of PPA.

56. In the case of CGPL, the CERC asked CGPL to consult CEA for finalizing technology with regard to NOx issue. The CEA report did not indicate recommendation for SNCR at this stage, therefore considering SNCR would not arise. According to 2nd Respondent both the Appellants

have exaggerated emissions so far as NOx. If proper coordinated operations are taken up by the Appellants, the emissions so far as NOx can be reduced, is the contention of the 2nd Respondent. Therefore, the combustion technology which already exists must be maintained in a prudent manner. Therefore, there is no impact at present and therefore, there is no change in law as on today.

OUR CONCLUSIONS

57. It is not in dispute that on 19.01.2005, MoP issued competitive bidding guidelines for determination of tariff by bidding process. The relevant clauses are 3.2 and 4.7 relied upon by both the Appellants with reference to Rapid Environmental Impact Assessment and also Environment Clearance before PPA became effective. The said clauses read under:

> *"**3. Preparation for inviting bids***
>
> *…*
>
> *3.2 (I) In order to ensure timely commencement of supply of electricity being procured and to convince the bidders about the irrevocable intention of the procurer, it is necessary that various project preparatory activities are completed in time. For long-term*

procurement for projects for which pre-identified sites are to be utilized (Case 2), the following project preparatory activities should be completed by the procurer, or authorized representative of the procurer, simultaneously with bid process adhering to the milestones as indicated below:

….

(ii) Environmental clearance for the power station: Rapid Environmental Impact Assessment (EIA) report should be available before the publication of RFQ. Requisite proposal for the environmental clearance should have been submitted before the concerned administrative authority responsible for according final approval in the Central/ State Govt., as the case may be, before the issue of RFP. Environmental clearance should have been obtained before PPA becomes effective."

"4. 7: Any Change in Law impacting cost or revenue from the business of selling electricity to procurer with respect to the law applicable on the date which is 7 days before the last date for RFP Bid submissions shall be adjusted separately. "

58. TSPL was incorporated as a Special Purpose Vehicle (SPV) owned and controlled by PSEB to develop and establish a thermal power plant having 1800 +/- 10% MW capacity referred to as project. So also the Appellant-NPL was incorporated as Special Purpose Vehicle completely owned by PSEB.

59. Apparently, RFQs were issued in terms of the above notifications on behalf of the 2nd Respondent-PSPCL (erstwhile PSEB). Admittedly, Sterlite

Energy Ltd. submitted the bid on 23.06.2008 and the cut-off date is 16.06.2008. The said Sterlite Energy Ltd. became successful bidder. At that point of time, the environmental norms as protection measures so far as thermal plants were to be in terms of Rule 3 Schedule-1 of the Environmental (Protection) Act, 1986. Subsequently, the said Sterlite Energy Ltd. acquired 100% shareholding in TSPL's company at Mansa Talwandi Sabo Road in the district of Mansa.

60. It is not in dispute SPA and PPAs came into existence on 01.09.2008 between TSPL and erstwhile PSEB for sale of power from 1980 MW thermal plants.

61. The Appellant-NPL is operating 1200 thermal power project near Village Nalash in Patiala district of Punjab. Initially it was a SPV company set up by PSEB now referred to as PSPCL. Subsequently, the entire shareholding of NPL transferred to L&T Power Development Limited. This Appellant also became a successful bidder in terms of the competitive bidding guidelines. At present, the entire management of the Appellant-NPL is with L&T Power.

62. 2nd Respondent-PSPCL carries on the generation and distribution business of erstwhile PSEB. The case of both Appellants is Case-2 type (iv) Scenario. Both the Appellants (SPVs) were directed by PSEB to act as its authorized representatives for carrying out pre-bid obligations, such as environment clearance, acquiring land, forest clearance etc. 2nd Respondent appointed PFC as its consultant who in turn appointed DPL as its sub-consultant to undertake the necessary activities for completing prerequisites in respect of EC for the project of NPL. In response to application of the Appellant-NPL (when it was completely owned by erstwhile PSEB) to MOEF&CC for the purpose of determination of terms of reference, a feasibility report was prepared and apparently this report only refers to requirement of keeping adequate space for installing FGD system at a later date, if warranted under environmental regulations. It seems accordingly, necessary space was provided in the lay out while preparing the plans for the projects of the Appellant. Final rapid EIA was also submitted.

63. Several correspondences seem to have been made between Expert Appraisal Committee before whom Appellant-NPL made a detailed

presentation for grant of EC. Aggregate fund of Rs.410.10 Crores was earmarked for environmental protection measures and so far as TSPL an amount of 460 crores was earmarked. Apparently, no separate fund was provided for installation of FGD for both the projects. The item-wise breakup only refer to Electrostatic Precipitator (ESP) for the purpose of pollution control measures. Subsequently, on the recommendation of the Expert Appraisal Committee, EC was granted on 03.10.2008 to Appellant-NPL and the total cost of the project was Rs.5500 crores. Subsequently, NPL issued the RFQ and ultimately L&T Power was declared as successful bidder. The cut-off date so far as NPL is 02.10.2009.

64. Admittedly, MOEF amended Environment (Protection) Rules, 1986 in the year 2015 for thermal power plants. For different plants depending upon the date of commissioning of the projects, different norms were fixed. In terms of this revised standards of emission and the level of water consumption for all coal based thermal power plants, these revised rules would apply. In other words, the thermal power plants which are already operating and new thermal power plants are required to comply with the new environmental norms introduced through the notification dated

07.12.2015. It introduced new emission norms of Sulphur Dioxide (SO_2) and Oxides of Nitrogen (NOx) so also Mercury. Both the Appellants are required to adhere to new/revised norms of emissions in respect of SO2 and NOx.

65. It is not in dispute that thermal power plants of both the Appellants were commenced between 2004 and 2016. In terms of the notification, thermal plants had to comply with the norms stated below.

66. In terms of this notification of 2015, the new emission limits for SO_2 required installation of Flue Gas Desulphurization (FGD). It also required primary or secondary NOx control measures including Selective Non–Catalytic Reduction (SNCR) equipment. According to the Appellant, the above requirements were not contemplated in law at the time of bidding by both the Appellants. As on the cut-off date, the law in terms of Rule 3, Schedule 1 of the Environment (Protection) Rules of 1986 so far as thermal power plants, did not indicate such emission limits so far as SO_2 and NOx. The emission norms applicable before and after the cut-off date for all thermal power plants are tabulated as under:

<table>
<tr><th colspan="5">“Summary of Norms to be complied for Environment Protection Measures as per regulations applicable on various dates</th></tr>
<tr><th>S. No.</th><th>Parameters</th><th>As on bid cut-off date (16.6.2008)</th><th>As on EC dated 11.07.2008.</th><th>MOEF Notification No. S.O. 3305 (E) dated 7.12.2015*</th></tr>
<tr><td>1.</td><td>Particulate matter (mg/Nm³)</td><td>150 (For generation capacity 210 MW or more)</td><td>50</td><td>50</td></tr>
<tr><td>2.</td><td>SO2 (mg/Nm³)</td><td rowspan="3">No limit specified in Applicable Regulation</td><td rowspan="4">No limit specified in Applicable Regulation</td><td>200 (500 MW and above)</td></tr>
<tr><td>3.</td><td>NOx (mg/Nm³)</td><td>300 (500 MW and above)</td></tr>
<tr><td>4.</td><td>Mercury (mg/Nm³)</td><td>0.03</td></tr>
<tr><td>5</td><td>Specific water consumption (m³/MWh)</td><td>3.5”</td></tr>
</table>

67. All the power plants were to comply with the emission norms within a time frame.

68. From the above table, it is clear that the then existing norms applicable to the Appellants’ power plants, so also pollution control measures as on the cut-off date got altered substantively. One has to see whether Appellants for that matter any other generator could contemplate

in 2007 or 2008 at the time of bid the necessity for new system and the cost for the same.

69. It is noticed that as on the cut-off date, there was no standard norm applicable so far as SO_2 and NOx. After almost 7 years from the cut-off date, the requirement of FGD installation pertaining to SO_2 occurred.

70. In the case of Appellant-TSPL, EC was granted to PSEB owned SPV after the cut-off date. In the case of Appellant-NPL, EC was granted again to PSEB owned Special Purpose Vehicle – NPL.

71. The Appellant-TSPL contends that EC was made available to TSPL (as a subsidiary of SEL) only after signing PPA.

72. According to Appellant-NPL, the EC was already issued prior to cut-off date to SPV-NPL completely owned by PSEB.

73. In both the cases, the competitive bidding guidelines are one and the same. Both are Case-2 type (iv) scenario bidding. Relevant clauses are already mentioned above.

74. Since in both the Appeals, it was Case-2 type (iv) scenario bidding process, all obligations are to be procured and arranged by the distribution company. As against this, 2nd Respondent contends that no doubt, such obligations including EC is the responsibility of the procurer, but the conditions mentioned in the EC did envisage installation of FGD and the same was confirmed by notification of MOEF in 2015. On this issue whether the Appellants are justified or the 2nd Respondent is correct has to be seen.

75. In the case of Appellant-TSPL in terms of Clause 1.7 of RFQ, TSPL (then owned and controlled by PSEB) was obliged to obtain the EC before signing the Share Purchase Agreement (SPA) with the successful bidder after contemplating several activities like acquiring land for the power plant, fuel linkage, tying up water linkage and also obtaining EC. All these have to be completed before signing the documents with the successful bidder. It was to enable the bidder to calculate tariff which was to be made at the stage of RFP, since the above activities require expenditure which will be included in the project cost. Thereafter, RFP would be issued to qualified bidder. In terms of Clause 1.4 of RFP, the SPV of PSEB was required to

submit proposal for EC to MOEF within the time prescribed. Clause 2.7.2 of the RFP requires the successful bidder to only examine the law and regulations which are prevalent at that time in India. Therefore, in terms of RFP the rights and obligations of PSEB which owned and controlled the Appellants and all decisions taken by them prior to SPA and PPA are of binding nature. Therefore, all decisions and obligations arising out of such decisions would be the responsibility of the procurer (then PSEB) now the 2nd Respondent-PSPCL.

76. Similarly, Appellant-NPL place on record details of pre-bid obligations pertaining to the project like EC, land acquisition were undertaken as authorized representative of 2nd Respondent-PSPL (erstwhile PSEB). When Appellant-NPL made application to MOEF&CC for determination of terms of reference to prepare draft environment impact assessment report which included environment management plan, it referred to three protection measures required to be undertaken to reduce impact of the power project on environment. At that point of time, NPL was completely owned by PSEB. This was brought to the notice of Expert Appraisal Committee constituted by MOEF&CC during the presentation. The said

presentation demonstrated that total fund of Rs.410.10 crores was earmarked for environmental protection measures which was part of the power project cost. The item-wise break-up apparently did not reflect any fund earmarked towards the installation of either FGD pertaining to SO_2 or SNCR system pertaining to NOx. The item-wise breakup only reflects the cost towards installation of Electrostatic Precipitator (ESP) with reference to air pollution control measures. The break-up provided by NPL in its presentation dated 09.09.2008 demonstrates this fact as under

"RAJPURA THERMAL POWER PROJECT (NABHA POWER LIMITED)			
S. No.- xxxiv EMP to mitigate the adverse impacts due to the project along with item wise cost of its implementation (Contd…) ***Response: Cost of environmental protection measures (Rs. Lakhs)***			
S. No.	***Aspect***	***Recurring Cost per annum***	***Capital Cost (in lacs)***
1	***Air Pollution Control (ESP)***	*3,300*	*20,000*
2	*Water Pollution Control*	*1,320*	*10,000*
3	*Noise Pollution Control*	*-*	*Included in equipment cost*
4	*Environment Monitoring and Management*	*50*	*1000*
5	*Reclamation borrow/mined area*	*NA*	*-*
6	*Occupational Health*	*26*	*9250*
7	*Greenbelt*	*25*	*500*
8	*Others (pl. specify)*	*25*	*260"*

77. From the above facts it is clear that the approved terms of reference upon which EMP was prepared for the project indicated only those environment protection measures required to be undertaken for the project at that time along with item-wise cost of implementation of such measures which are mentioned above. But, there was no mentioning of FGD or SNCR in these protection measures. The item-wise breakup also did not include any funds earmarked for installation of FGD or SNCR. Similarly, Expert Appraisal Committee while recommending for issuance of EC in favour of the Appellant-NPL, it did not state anything with regard to earmarking of funds towards installation of FGD system to control SO_2 emission or SNCR system to control NOx emission. The amount of Rs.410.10 crores as cost to be spent for the above mentioned specific environmental protection measures is based on the report, documents etc. submitted by the PSEB owned NPL much prior to taking control of the power plant project by the present Appellant-NPL.

78. So far as Appellant-TSPL, as stated above till 01.09.2008, the obligation to obtain EC was with the SPV, which was owned by PSEB, including the details and information required for the same. Subsequent to

SPA dated 01.09.2008, 100% of the shares of TSPL were duly transferred to SEL. Thereafter on the very same day, PPA came to be entered into between Appellant-TSPL and PSEB (present PSPCL).

79. It is also relevant to mention that in terms of PPA pertaining to both the Appeals as defined, authorized representative shall mean TSPL and NPL the body corporate created/authorized by PSEB to carry out the bid process for the selection of the successful bidder. In terms of Article 1.1 of PPA, initial consents shall mean as listed in Schedule 2 of the PPA which includes EC. Therefore, authorized representative of PSEB i.e., the then TSPL and NPL were under the obligation to obtain initial consents which includes EC. These have to be made available to seller of the power on the effective date in terms of PPA. Therefore, in terms of Article 4.1.1(a) and 5.5 of the PPA, all consents except the initial consents, the seller is responsible. In other words, it means the seller is responsible only for maintaining/review of the initial consents and fulfilling all terms and conditions, if specified therein. Therefore, in terms of PPA, the procurer is obliged to fulfill all conditions undertaken by them.

80. In both the above Appeals, it is seen that SPVs were created and ECs were obtained by SPVs when they were fully owned and controlled by the erstwhile PSEB i.e., the present 2nd Respondent-PSPCL.

81. The contention of the Appellants is that in the ECs issued by MOEF&CC, none of the terms and conditions required the Appellants to earmark separate funds for installation of FGD or SNCR which are indicated in the revised norms issued in the notification of MOEF&CC in the year 2015.

82. According to Appellants, all conditions in the ECs were duly complied with which were regularly verified by Punjab Pollution Control Board so also Central Pollution Control Board. It is also noticed that even Environment Impact Assessment Report did not specify the requirement of the installation of FGD equipment or any fund to be earmarked for the said purpose.

83. The Appellant-TSPL appointed TCE as its consultant for the purpose of evaluating various aspects of compliance norms fixed by MOEF. The Appellant-TSPL intimated 2nd Respondent about the revised norms issued

by MOEF resulting in change in law event and requested 2nd respondent to compensate them in terms of PPA. Similar is the case of Appellant-NPL. After obtaining final feasibility report from TCE, TSPL submitted the same to the 2nd Respondent stating that a significant additional expenditure is required to achieve the revised emission norms and the expenditure approximately was Rs.2.31 crores per MW which included CAPEX and OPEX as capitalized for 20 years. Thereafter, the Appellant approached the Respondent-Commission under Section 86(1)(b) of the Act.

84. Appellant-NPL also approached the Respondent-Commission seeking a declaration that the revised emission norms by way of amended rules notified on 07.12.2015 by MOEF&CC amount to change in law and also sought approval of the additional cost for the project so as to ensure timely implementation to comply with the revised norms. Ministry of Power constituted Northern Regional Power Committee which had set a deadline as 31.12.2022 for implementing FGD and other system in the country. In terms of recommendation of CEA, the thermal plants have to comply with the directions and PSPCL was to produce yearly average SO_2 and NO_x data.

85. Meanwhile, CPCB issued a letter dated 11.12.2017 directing all the thermal units to meet emission limit of Particulate Matter and install FGD to comply with SO_2 emission limits. They also directed installation of NOx burners which provide Over Fire Air to achieve progressive reduction. Meanwhile, MoP on the recommendation of CEA pertaining to installation of FGD to comply with the revised Environment Rules of 2015 issued mechanism for implementation of new environmental norms for thermal power plants supplying power to DISCOMs which were concluded by long term and medium term PPAs. According to Appellant-NPL, based on the feasibility report, they informed that they require 36 months from the date of award of contract to install the new technology solution, since the terms and conditions imposed by CPCB letter dated 11.12.2017 were extremely stringent.

86. The Respondent-Commission disallowed the claim of Appellants so far as change in law claim by opining that the revised emission norms issued by MOEF notification did not qualify as change in law event in terms of Article 13 of the PPA.

87. We have to now examine whether the Respondent-Commission was justified in opining that the notification in question does not qualify as a change in law event, since it opines that the EC conditions did envisage installation of FGD system and the present revised norms of 2015 and allied directions are only confirmation of the conditions already envisaged in the EC issued to the Appellants. This view of the Commission is supported by 2nd Respondent-PSPCL on various grounds which are already stated in the above paras.

88. Then coming to the opinion of the Respondent-Commission pertaining to each issue, we proceed to analyse in the paragraphs below.

The relevant controversy pertaining to ECs issued to Appellants dated 11.07.2008 and 03.10.2008 and relevant conditions are as under:

"vi) Space provision shall be kept for retrofitting of FGD, if required at a later date."

"(xxv) Separate funds shall be allocated for implementation of environmental protection measures along with item-wise breakup. 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."

89. It is seen that the revised emission norms of 2015 requiring compliance of new mechanism/new system for the purpose of pollution control i.e., like FGD or SNCR is altogether different from what was in existence as on the cut-off date, which is clear from the table referred to above. As on the cut-off date, as pointed out by the Appellant - NPL only the ambient air quality standard at ground level concentration both for SO2 and NOx gases as indicated by CPCB was in existence. In order to maintain the required concentration in ambient air quality for SO2 in terms of required standard, it was 80 ug/m3 (annual average) and 120 ug/m3 (24 hrs average). This was required to be maintained as on the cut-off date. So also the concentration for NOx was 80 ug/m3 (annual average) and 120 ug/m3 (24 hrs average). To maintain this, NPL was required to build 275 meters high chimney/stack and this was stipulated in the environment clearance and there is no dispute that this was not complied with.

90. The new norms for SO2 and NOx emissions are introduced at the outlet of the chimney while existing norms required emission of a particular

gas vis-à-vis its ambient air concentration/ground level concentration. Therefore, there is vast difference between what was in existence at the time of cut-off date and the revised norms. Whether this change or difference between the two norms/standards would become Change in Law event has to be seen. From the documents mentioned above, definitely environmental clearance issued for the project did not envisage installation of the FGD or SNCR system and/or any other suitable technology. The same became a requirement to be complied with on account of promulgation of Notification in question, six years after the cut-off date in both the Appeals. The environmental clearance granted to the Appellants, as stated above, in terms of condition (vi) space provision had to be kept for FGD if such installation/retrofitting is required at a later date. This condition is read along with the feasibility report and other initial documents, the installation of FGD at a later date becomes mandatory requirement only if new norms are brought in as environmental regulations. The new norms in question which general in nature becomes statutory mandate for the Appellants when notification came into existence. Condition (xxv) as stated above required earmarking of funds item-wise in respect of those environmental protection measures on the basis of which

environmental clearance was granted and the same would be part of the project cost. It is relevant to point out that unlike condition (vi) for space provision for FGD installation/retrofitting if required at a later date, several other measures are required to be complied with. Therefore, condition (xxv) with reference to funds means such other protection measures other than FGD installation or SNCR. Apparently, Respondent-Commission failed to consider the environmental clearance conditions in the right perspective. This is substantiated by the contents of feasibility report at 7.2.1, which was prepared by the then NPL in 2008 (when it was completely owned by PSEB), which says the only requirement in respect of FGD was to keep adequate space for installing/retrofitting FGD system at a later date, if warranted under environmental Regulations. From this we presume that the then PSEB understood that the then existing laws at the time of submitting various reports prior to cut-off date required only adequate space for FGD, which is complied with by the Appellants.

91. The Condition (xxv) of the environmental clearance cannot be read in isolation or one has to read it in the context of the entire process,

preparatory documents and other reports, which were the basis for issuance of environmental clearance.

92. As stated above, Respondent No.2 - procurer intended to develop the projects in question under Case 2 type scenario bidding.

93. The amounts earmarked by both the Appellants for implementing environmental protection measures had to be spent only for such measures as contained in the ECs or other documents prior to notification in question. It was not possible for the Appellants, for that matter, any other generator, in the absence of any standard norms for SO2, to imagine the installation of FGD system so as to include cost towards the same. In the absence of any certainty about the required system for such emission norms, one cannot demarcate funds with certainty. If such funds are demarcated in the absence of norms, then also it is quite likely that such cost would be rejected on the ground that there is no requirement for such mechanism at that point of time.

94. Respondent No.2-PSPCL (the then PSEB procurer) did not propose requirement of installation of FGD and/or SNCR system or any other

suitable technology for SO2 and NOx respectively. Therefore, the presumption is that Respondent No.2 knew the real purport of the then existing laws for obtaining environmental clearance, hence, in the preparatory documents it did not earmark any funds towards FGD. In such a situation, Respondent No.2 is estopped from taking altogether a different stand now.

95. MoEF & CC from time to time would promulgate several environmental protection measures. These norms/standards have to be complied with by all the thermal power projects. The Central Pollution Control Board and the Punjab Pollution Control Board are the monitoring agencies to verify such compliance of the conditions mentioned in the environmental clearances. When revised norms were brought in by MoEF & CC in the year 2015, almost after two years i.e, in the year 2017, CPCB directed the Appellants to comply with the revised norms, mentioned above, in terms of Notification of 2015.

96. After issuance of environmental clearance, the CPCB and PPCB had to monitor whether the Appellants have complied with the conditions mentioned therein or not. Apparently, at no point of time, Appellants were

found fault with for not installing FGD so also for not earmarking of funds for FGD. Admittedly, both the Appellants did provide space for FGD installation. In all the six to seven years, these two authorities, who consistently and periodically monitored the power plants of the Appellants did not point out either non-installation of FGD or not earmarking of any funds for the same. There is no dispute that periodically the Appellants are submitting the reports to MoEF & CC. None of these reports refer to expenditure towards FGD and/or SNCR. No objection by any authority was raised on this aspect. This would support the case of the Appellants that there was no need to earmark cost of installation of FGD or SNCR except providing space for FGD. If Appellants committed any default of the conditions, the environmental clearance would not be renewed from time to time. Similarly, the Pollution Control Board would not renew the consent to operate the power plants. Therefore, it is clear that none of the concerned authorities ever pointed out any breach of the conditions.

97. It is also seen that the environmental clearance granted by MoEF & CC for thermal power projects prior to revised norms of 2015 with reference to installation of FGD system broadly categorized into two types. One

category covers the projects which were given environmental clearances similar to that of the Appellants envisaging a condition that a space provision is to be kept for the installation of the FGD equipment if required at a later stage in terms of environmental Regulations. The other category of environmental clearance is where MoEF & CC specifically mandated installation of FGD equipment as a statutory requirement.

98. Apart from the Appellants, between 2007 and 2008 two other power projects i.e., Corporate Ispat Alloys Limited in Jharkhand and Rayalseema Thermal Project were also required to keep only space provision for retrofitting of FGD unit if required at a later stage or at a later date. Pertaining to second category, installation of FGD was a statutory mandate, if such thermal power projects or any associated assets thereof fell under environmentally sensitive areas. The Appellants have provided two illustrations of such ECs where FGDs were mandated pertaining to thermal power plants in Assam and Chettinad Power Corporation Private Limited which are as under:

"Bongaigaon'sEnvironmental Clearance

*…**FGD system with 90% sulphur removal efficiency shall be installed,** Gypsum generated from FGD plant shall not be disposed in the ash pond. ...." [refer pg. no. 1594 of Annexure A-52(Colly) of Volume VI of Appeal Paper Book]*

Chettinad's Environmental Clearance

*"A. **Specific Conditions**:*
***CRZ clearance for permissible activities in CRZ area** (as may be applicable) shall be obtained before starting construction activity.*
…
*(viii), **Sulphur and ash contents in the coal to be used in the project should not exceed 0.6% and 34% respectively** at any given time. In case of variation of coal quality at any point of time, fresh reference shall be made to MOEF for suitable amendments to environmental clearance condition wherever necessary.*
…
*…**FGD shall be installed** as committed by the project proponent **before commissioning of the plant**."*

99. Therefore, in all those thermal power projects where there was requirement of only space provision, it is difficult to accept the contention of the Respondents that in spite of absence of specification and design for FGD, the Appellants were still required to estimate the cost and earmark funds anticipating revised norms after six years or so from the cut-off date. To substantiate their contention, Respondent No.2 submits that some

thermal plants did install the FGD system, therefore FGD system was available in the market. It is nobody's case that FGD was not available in the market. Depending upon the requirement in terms of conditions of EC recommended by relevant authority some thermal plants like JSW, Adani etc., might have installed FGD system. But one has to see what were the existing norms, conditions imposed in EC or other allied documents before notification in question and not the availability of FGD system in the market. As already stated, anticipating such change, substantial cost cannot be included as capital cost of the project at the time of bidding itself. If such requirement of FGD did not occur during the entire term of the Project, the consumer would be burdened with higher tariff. As a matter of fact, such substantial and significant cost as part of capital cost of the project would not have been approved at all.

100. "Whether the new emission norms for SO2 and NOx notified in the 2015 amounts to Change in Law event or not?"

101. What amounts to Change in Law and how parties are required to act in respect of Change in Law event, so also how the generator must be put back to same economic position as if no Change in Law event has

occurred are all spelt in the terms of PPA. Article 13 of PPA in both the appeals deal with this aspect. The relevant provisions of the PPA with respect to Change in Law are extracted as under:-

"1. ***ARTICLE 1: DEFINITIONS AND INTERPRETATION***

1.1 Definitions

''Indian Government Instrumentality" - means the GOI, Government of Punjab, and any ministry or, department or board or agency other regulatory or quasi- judicial authority controlled by ***GOI*** *or Government of the State where the Procurer and Project are located and includes the Appropriate Commission,*

"Law" means, in relation to this Agreement, all laws including Electricity Laws in force in India and any status, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission."

" Operating Period in relation to the Unit means the period from its COD and in relation to the Power Station the date by which all the Units achieve COD, until the expiry or earlier termination of this Agreement in accordance with Article 2 of this Agreement;

" 13. ARTICLE 13 CHANGE IN LAW

Definitions

In this Article 13, the following terms shall have the following meanings:

13.1.1 "Change in Law " means the occurrence of any of the following events after the date, which 7 ys prior to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in

interpretation of Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal Governmental Instrumentality Is final authority under law for such interpretation or (iii) change in any consents approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement, or (iv) any change in the (a) Declared Price of Land for the Project or (b) the cost of implementation of the resettlement any rehabilitation package of the land for the Project mentioned in the RJP or (c) the cost of implementing Environmental Management Plan for the Power Station (d) Deleted

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI charges or frequency intervals by an Appropriate Commission.

13.1.2 "Competent Court" means:

The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

13.2 Application and Principles for computing impact of Change in Law

While determining the consequence 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 this Article 13, the affected Party to the same economic as if such 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 governed by the formula given below:

For every cumulative increase/decrease of each ***Rs. 25,00,00,000/- (Rupees Twenty Five Crore)*** *in the Capital Cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall be an amount equal to* ***0.267% (percentage zero point two six seven)*** *of the Non Escalable Capacity Charges. Provided that the Seller provides to the Procurer*

documentary proof of such increase/decrease in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply.
It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of ***Rs. 25,00,00,000/- (Rupees Twenty Five Crore).***

(b) Operation Period

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Central Electricity Regulatory Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.

Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a Contract Year.

13.3 Notification of Change in Law

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

13.3.2 Notwithstanding Article 13.1.1, the Seller shall be obliged to serve a notice to the Procurer under this Article, if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

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

(a) the Change in Law; and

(b) the effects on the Seller of the matters referred to in Article 13.2.

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 Governmental Instrumental, if the Change in Law is on account of a change in interpretation of Law.

13.4.2 The payment for Changes 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."

102. The Respondent-Commission opined that requirement for installation of FGD equipment was already envisaged as part of environmental clearance for the project, therefore, it does not amount to Change in Law event. We note from the records and the documents relied upon by the Appellants that a standard clause was introduced in the ECs for many of the thermal power projects i.e., only the provision for space for the installation of FGD. As discussed above, there was no clarity on any of the norms for SO2 and NOx emission, which required specific FGD system and/or SNCR or any other suitable technology for achieving efficiency level

as existed at the time of granting ECs. One cannot find fault with the Appellants or any other project of similar nature with similar facts that they did not estimate and earmark funds for the installation of such mechanism as stated above. Therefore, we are of the opinion that installation of FGD and funds for the same was not contemplated or envisaged in the ECs, which were issued six year prior to the Notification in question.

103. It is pertinent to mention Para 58 of **"Energy Watch Dog & Ors vs. CERC**" (2017 (14) SCC 80) on this issue. The Hon'ble Supreme Court Categorically rejected the submissions advanced by the Appellants before the Apex Court that the relevant policy (controversy pertaining to Change in Law event in Energy Watch Dog's case) was announced much prior to the effective date, therefore, it has to be presumed that Generators were aware of such policy much prior to the effective date or promulgation of the revised norms. Para 58 of the said Judgment reads as under:

> *"58. However, Shri Ramachandran, learned senior counsel for the appellants, argued that the policy dated 18th October, 2007 was announced even before the effective date of the PPAs, and made it clear to all generators that coal may not be given to the extent of the entire quantity allocated. We are afraid that we cannot accede to this argument for the reason that the change in law has only taken place only in 2013, which modifies the 2007 policy and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from*

indigenous sources. It is to this limited extent that change in law is held in favour of the respondents. Certain other minor contentions that are raised on behalf of both sides are not being addressed by us for the reason that we find it unnecessary to go into the same. The Appellate Tribunal's judgment and the Commission's orders following the said judgment are set aside. The Central Electricity Regulatory Commission will, as a result of this judgment, go into the matter afresh and determine what relief should be granted to those power generators who fall within clause 13 of the PPA as has been held by us in this judgment."

104. It is clear from the above opinion of the Apex Court that Law does not work on contemplations unless an action factually takes place i.e., cause of action for such action. We also place reliance on the Judgment of the Hon'ble Supreme Court in "*Ahmedabad Municipal Corp*. vs. *Haji Abdulgafur"* (1971) 1 SCC 757. Therefore, we have no hesitation to opine that installation of FGD became mandatory only after the issuance of Notification in December 2015 and the strict compliance came to be implemented when directions of CPCB came to be issued in this regard.

105. According to the Respondents, the judgment of this Tribunal in JSW's case is binding on this Tribunal as settled position. Even otherwise, one has to see whether facts and circumstances in the instant appeals and facts and circumstances in JSW's case are one and the same. Based on

the judgment of JSW's case, the Respondent-Commission denied the claim of Appellants pertaining to Change in Law event.

106. On perusal of records and documents, we note that there were two ECs in the case of JSW. Appellants stand is that apart from requirement of space provision for installation of FGD, if required at a later stage, it also conditioned installation of FGD and earmarking of funds for environmental protection measures i.e., FGD system. The Appellant-NPL brings on record the distinguishing facts of their appeal with JSW case, which reads as under:

TABLE DISTINGUISHING THE JSW CASE WITH THE APPELLANT'S CASE

Sr. No.	***JSW Case***	***NPL/ Appellant's Case***
Responsibility of obtaining Environment Clearance (EC)		
1.	***Responsibility of obtaining the EC was that of the Generator, i.e. JSW*** *The project was awarded under Case 1 route of the Competitive Bidding Guidelines, wherein obtaining EC was the responsibility of the bidder, i.e. JSW.*	***Responsibility of obtaining the EC was that of the Procurer, i.e. PSPCL*** *The present Project has been conceived and awarded to NPL under Case 2 Scenario 4 (fuel and location is specified by the bidder) of the Competitive Bidding Guidelines, where the responsibility the Initial Consents (including EC) is of the procurer i.e. the*

		Respondent No.2/PSPCL. *(refer NPL RFP, Annexure-13 @ pg. 610, Vol. III)*
	Clause 5.4 of the JSW PPA provided that responsibility to obtain consents (including EC) was that of the seller. *(refer JSW PPA, Annexure-50 @ pg. 1520, Vol. VI)*	*Clause 5.5 of the NPL PPA read with Schedule 2, inter alia, provided that NPL being the procurer (when it was wholly owned by Punjab State Electricity Board (now PSPCL)) was responsible for obtaining Initial Consents (including EC) for the Project.* *While undertaking the actions for obtaining the EC,NPL (when it was wholly owned by PSEB) made the application and presentation dated 09.09.2008 before the Expert Appraisal Committee ('**EAC**') (on the basis of which the EC was granted for the Project) and the said presentation did not stipulate any earmarking of funds towards the installation of FGD.* *In the aforesaid presentation dated 09.09.2009, it wasdemonstrated that a fund of total Rs. 410.10 Crore had been earmarked towards environmental protection measures. The item-wise break-up of the aforesaid only refers to the cost towards installation of **Electrostatic Precipitator** (**ESP**) in context of air pollution control measures.* *(refer NPL Presentation, Annexure-9 @, pg. 380, Vol. II)*
Number of EC(s)		
2.	*There were two ECs in the JSW Case, i.e. the 1st EC dated*	*There is only one EC dated 03.10.2008 issued by MoEF&CC which dealt with*

	17.05.2007 and the 2nd EC dated 16.10.2010 issued by the MOEF&CC which dealt with the issue of FGD. *(refer JSW ECs, Annexure/A @ pg. 33, Rejoinder dated 12.06.2019)*	*the issue of FGD in NPL's Case.* *(refer NPL EC, Annexure-10 @ pg. 385, Vol. II)*
Relevant conditions in the EC(s)		
3.	*Condition (ii) in the 1st EC in JSW Case made the said EC conditional:* *The 1st EC in JSW Case was subject to the condition that a detailed study regarding the impact of the project on the* ***alphonso mango plantation and marine fisheriesshall be carried out at the cost of the project proponent and based on the study, the additional safeguards as may be required would be implemented by the project proponent*** *i.e., JSW.* *Relevant conditions are set out below:* *"(ii)The detailed study regarding the impact on Alphonso mango and marine fisheries as recommended in the report of Dr. B.S. Konkan Krishi Vidyapith shall be undertaken.* ***Based on the same, additional safeguard measures as may be required will be taken by the proponent.****A copy of the report will be*	*No additional conditions* *The EC granted to the Petitioner was* ***not*** *contingent on any "anticipated" or "likely" safeguard measures to be adopted to control the emission levels of SO2 and NOx.* *Relevant conditions are set out below:* *"(vi)* ***Space provision shall be kept for retrofitting of FGD****, if required, at later date.* *(xxv)* ***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***

	submitted to the Ministry. ***<u>The cost towards undertaking the study and implementation of safeguard measures, if any, will be borne by the project</u>***.	***<u>the Ministry</u>***"
	(iii) Space provision ***<u>shall be made for installation of FGD</u>*** *of requisite efficiency of removal of SO2, if required at later stage.*	*There is only one EC in the case of NPL and it does not mandate installation of FGD.*
	(xx) ***<u>Separate funds should be allocated for implementation of Environmental protection measures</u>*** *along with item wise break up. These cost should be included as part of the project cost.* ***<u>The funds earmarked for the environment protection measures should not be diverted for other purposes and year-wise expenditure should be reported to the Ministry</u>***.*"* *The 2nd EC mandated the installation of FGD and the relevant condition is set out below:* *"Flue Gas Desulphurization System (FGD)* ***shall be installed before commissioning*** *of the project and action in this regard shall be submitted within three/ months to the Ministry"*	
Undertaking given in the JSW Case		
4.	*<u>Undertaking given:</u>* *The above stipulated condition (ii) in the 1st EC required an undertaking to be given by the project proponent, i.e., JSW to implement the additional*	*<u>No such undertaking given in NPL's Case</u>*

	*safeguards, as maybe required, set out by the Konkan Krishi Vidyapith, Dapoli (**KKVD**), based on the detailed study regarding the impact of the project on the alphonso mango plantation and marine fisheries.*	
	Different Questions of Law	
5.	*JSW's claim was premised on the plea that imposition of additional conditions in the 2nd EC shall entitle the party to Change in Law relief. Plea was rejected since the PPA does not recognize 'additional conditions' being imposed to the 2nd EC as a Change in Law event.*	*NPL's claim pertains to the Change in Law relief on account of promulgation of strict emission standards by means of the **MoEF&CC Notification** having force of law. This Change in Law event claimed by the Appellant, i.e. a 'notification' falls under the definition of Change in Law in terms of Article 13.1.1 of the PPA.*
	Challenge to the 1st EC (pending litigation)	
6.	*The EC had to be re-examined on account of the likelihood of the Project causing damage to the ecology of alphonso mangoes and marine fisheries.* *(i) The 1st EC was challenged before National Environment Appellate Authority (**NEAA**), which dismissed the challenge in Order dated 12.09.2008.* *(ii) Subsequently, a Writ Petition namely Balachandra Bhikaji Nalwade vs. Union of India & Ors. 2009 SCC Online Del 2990, was filed before the Hon'ble Delhi High Court challenging the NEAA's Order claiming that the 1st EC*	*EC for NPL was not challenged at any stage before any authority.*

	granted to JSW was (i) illegal; (ii)contrary to statutory provisions and precautionary principle; and (iii) based on unconfirmed data and assumptions. The Hon'ble Delhi High Court by its Order dated 18.09.2009, directed EAC to re-examine the 1st EC, considering the likelihood of the Project causing damage to the ecology of alphonso mangoes and marine fisheries. Therefore, the 1st EC had to be re-examined on the directions of the Hon'ble Delhi High Court. *(Refer HC Order dated 18.09.2009, Annexure 49(Colly) @ pg. 1513, Vol. VI)*	
Re-examination of EC		
7.	*<u>Re-examination of EC was undertaken</u>* *On 11.01.2010, the EAC conducted a meeting and re-examined the EC conditions, based on the directions of the Hon'ble Delhi High Court.* *On 16.4.2010, the MoEF&CC issued a letter to JSW imposing 'additional conditions' including condition to install FGD prior to the commissioning of the project.*	*<u>No re-examination of EC in NPL's case</u>*
Timeline for installation of FGD		
8.	*<u>Prior to Commissioning</u>*	*<u>Post Commissioning</u>*

	The FGD was required to be installed prior to the commissioning of the power project in terms of the 2nd EC dated 16.04.2010. *This meant that during the construction period of the power project, FGD was to be installed.*	*The FGD is now required to be retrofitted post commissioning of the power project in terms of the MoEF&CC Notification dated 07.12.2015.* *This means that FGD is to be installed during the operation period of the power project.*
Change in Law Clause under the respective PPAs		
9.	*JSW PPA does not include any change in the consents/ approvals/ licenses obtained for the project and any change inthe cost of implementing Environmental Management Plan for the Power Station.* *The relevant excerpts of the JSW PPA are as under:* *"13.1.1 "Change in law" means the occurrence of any of the following events after the date, which is seven (7) days, prior, to the Bid Deadline:* *(i.) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of Law or (ii) a change in interpretation of any law by a competent court of law, tribunal or Indian Governmental Instrumentality provided such court of law, tribunal or Indian*	*The 'Change in Law' provision includes change in consents etc. and the cost of implementing Environment Management Plan under Article 13.1.1(i)(iii) and 13.1.1(i)(iv)(c) respectively, inter alia in terms of which 'Change in Law' claim has been claimed by the Appellant in the present case.* *The relevant excerpts of the NPL PPA are as under:* *"13.1.1 "Change in law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:* *(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such*

	Governmental Instrumentality is final authority under law for such interpretation. *but shall not include (i) any change in any withholding tax or income or dividends distributed to the shareholders of the Seller or (ii) change in respect of UI charges or frequency intervals by an appropriate commission."* *(refer JSW PPA, Annexure – 50 @ pg. 1515, Vol. VI and @ pg. 79 of PSPCL's Reply dated 25.05.2019)*	*interpretation or* ***(iii) change in any consent, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement,*** *or (iv) any change in the (a) Declared Price of Land for the Project or (b) cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RfP or* ***(c) cost of implementing Environmental Management Plan for the Power Station****(d) Deleted.* *but shall not include (i) any change in any withholding tax or income or dividends distributed to the shareholders of the Seller or (ii) change in respect of UI charges or frequency intervals by an Appropriate Commission."* *(refer NPL PPA, Annexure – 17 @ pg. 692, Vol. III)*

107. The Appellant-TSPL has also placed on record the differences between their appeal and JSW case, which is as under:

JSW's case (APTEL)	***TSPL's case***

JSW's case (APTEL)	***TSPL's case***
1. Date of EC	
EC for JSW was issued prior to the cut-off date: 17.05.2007 i.e. before the cut-off date (14.02.2008)	*EC for TSPL was issued after the cut-off date:* *11.07.2008 i.e. after the cut-off date (16.06.2008)*
2. Responsibility of obtaining EC	
EC was the responsibility was of the generator i.e. JSW *PPA pertained to an Independent Power Plant signed pursuant to a Memorandum of Understanding, wherein obtaining Environment Clearance was the responsibility of the bidder i.e. JSW.* *Clause 5.4 of JSW PPA provided that responsibility to obtain consents was of the seller.*	*EC was the responsibility was of the procurer i.e. PSPCL* *To the contrary, the present case is covered by Case II, scenario IV under Competitive Bidding (fuel and location is specified by the bidder) and therefore in terms of the Bid Guidelines, the responsibility for obtaining Environment Clearance is of the procurer.* *As per Clause 5.5 of the PPA read with read with Schedule 2 of the PPA, initial consent (including EC) was responsibility of the Procurer.(For detailed submissions, **please refer to paragraphs 22 to 24 above**)*
3. Different Questions of law	
JSW's claim was premised on the plea that imposition of additional conditions in the EC shall entitle the party to Change in Law relief. Plea was	*TSPL's claim pertains to the Change in Law relief on account of promulgation of strict emission standards by means of an MoEF Notification having force of*

JSW's case (APTEL)	***TSPL's case***
rejected since the PPA does not recognize 'additional conditions' being imposed to the EC as a Change in Law event.	*law. This Change in Law event claimed by TSPL, i.e. a 'notification' falls under the definition of Change in Law under Art. 13.1.1 of the PPA.*
4. Conditions under the EC	
(a)Initial EC Conditions (17.05.2007) -*The EC issued for JSW initially, was subject toadditional safeguard measures as may be required. The measures were to be met by the project proponent at its own cost. This was in addition to the space requirement.* *Relevant conditions:-* *(ii) The detailed study regarding the impact on Alphonso mango and marine fisheries as recommended in the report of Dr. B.S. Konkan Krishi Vidyapith shall be undertaken.* ***Based on the same, additional safeguard measures as may be required will be taken by the proponent.*** *A copy of the report will be submitted to the Ministry. The cost towards undertaking the study and implementation of safeguard measures, if any, will be borne by the project.* *(iii) Space provision shall be made for installation of FGD of requisite efficiency of removal of SO2, if required at later stage.*	***(a) EC Conditions (11.07.2008) -*** *The EC granted to TSPL was* ***not*** *contingent on any 'anticipated' or 'likely' safeguard measures to be adopted to control the emission levels of SO_2 and NOx.* *Relevant conditions:-* *(vi) Space provision shall be kept for retrofitting of FGD, if required at later stage.* *(xxv) Separate funds shall be allocated for implementation of environmental protection measures along with item-wise break up. Thesecost 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*

JSW's case (APTEL)	***TSPL's case***
(xx) Separate funds should be allocated for implementation of Environmental protection measures along with item wise break up. These cost should be included as part of the project cost. The funds earmarked for the environment protection measures should not be diverted for other purposes and year-wise expenditure should be reported to the Ministry."	
(b)Challenge to EC*– The EC had to be re-examined on account of the likelihood of the Project causing damage to the ecology of alphonso mangoes and marine fisheries (in line with the principles of sustainable development and precautionary approach).* *(i) The initial EC was challenged before National Environment Appellate Authority (NEAA), which dismissed the challenge inOrder dated 12.09.2008.* *(ii) Subsequently, a Writ Petition [Balachandra Bhikaji Nalwade vs. Union of India &Ors. 2009 SCC Online Del 2990] was filed before the Hon'ble Delhi High Court challenging the NEAA's Order claiming that the EC granted to JSW was (i) illegal; (ii)contrary to statutory provisions and precautionary principle; and (iii) based on unconfirmed data and assumptions. The Hon'ble Delhi High Court by its Order* ***18.09.2009****, directed Expert Appraisal Committee to re-examine the*	***(b)Challenge to EC -*** *EC for TSPL was not challenged at any stage before any authority and was not subject to any re-examination.* *In fact, while granting the EC to TSPL, MoEF specified that no ecologically sensitive area is located within 10 km radius of TSPL's project. (****@pg. 363, Vol I, Appeal****)*

JSW's case (APTEL)	***TSPL's case***
*Initial EC, considering the likelihood of the Project causing damage to the ecology of alphonso mangoes and marine fisheries. (**Para 32**).* *(iii) Therefore, Initial EC had to be re-examined.*	
(c) Re-examination *(i) On 11.01.2010, the EAC conducted a meeting and re-examined the EC conditions, based on the directions of the Hon'ble Delhi High Court.* *(ii) On 16.04.2010, the MoEF issued a letter to JSW imposing '**additional conditions'** including conditionto install FGD prior to the commissioning of the project.* *(iii) Initial EC read with the additional conditions imposed by letter dated 16.04.2010 is the amended EC.*	***(c) NO re-examination.***
(d) Amendment dated 16.04.2010 – *(i) Amended EC imposed the FGD Condition* *"Flue Gas Desulphurization System (FGD) **shall be installed before commissioning** of the project and action in this regard shall be submitted within three months to the Ministry"* *(ii) Mandate to install FGD was in the nature of '**additional conditions'** being imposed in the EC dated 17.05.2007 issued prior to cut off date (14.02.2008) not pursuant to any*	***(d)Amendments** –* *(i) FGD condition was not imposed in any of the amendments to the ECs dated25.03.2010, 17.06.2010 and 30.09.2013 (**@Pgs. 368-373, Vol II, Appeal**)* *(ii) Mandate to install FGD is on account*

JSW's case (APTEL)	***TSPL's case***
Change in Lawevent.[1] *(iii) MOEF letter imposing 'additional conditions' in the EC confirmed the Initial EC to the extent of specifying the stage of FGD installation.*	*of a* ***Change in Law*** *regarding permissible emission standards from the thermal power plants (pursuant to MOEF's Notification dated 07.12.2015), and subsequent direction by CPCB dated 11.12.2017.* *(iii) MOEF Notification, 2015 was the first time, FGD installation was mandated.*

108. The opinion of the MERC and this Tribunal pertaining to JSW Energy case are seen from the following extracts.

" MERC Observations: -

> "*12 (iv) As per the Environmental Clearance dated 17.05.2007, the direction was given to keep the space for installation of the FGD if required and also for allocation of separate funds for that purpose .The* ***letter dated 16.04.2010 issued by the GOI MoEF binds the Petitioner to install the FGD before commissioning of the project****. The Petitioner contended that this subsequent imposition of the condition is a change in law.* ***As per the above quoted provision of change in law, the contention of the Petitioner is nowhere sustained in the definition****.*

(vi) The Petitioner has made positive assertion/warranties in consonance with Condition 2.5 of Schedule 9 that no litigation was pending or threatened against the Petitioner. ***By such positive assertion the Petitioner suppressed the pendency of litigation regarding Environmental Clearance.*** *While the Commission records the above contention of Respondents and notes that the Petitioner has not disputed the same, this matter cannot be taken up in the present proceedings of the Petitioner."*

APTEL's findings: -

"30. As mentioned above, Environmental clearance dated 17.5.2007 provided for installation of the FGD at a later stage and further mandated that separate funds must be allocated for installation of the said FGD as well as for making such Environmental protection measures which are to be included in the project cost. Admittedly, this has not been complied with by the Appellant after getting the Environmental clearance. ***The letter dated 16.4.2010 issued by the Central Government merely confirms the requirement of installation of the FGD intimated earlier. It merely informs the Appellant the stage of installation. Therefore, there was no 'Change in Law' which has been occasioned as claimed by the Appellant.***

31. The contention of the Appellant regarding the status of it Environmental clearance and the connected claim of change in law has also to be appreciated in view of the observations made by Delhi High Court in the order dates 16.9.2009 regarding the Environmental clearance as under:

"20. After noticing the report of the KKVD and considering the recommendation made, the project was approved subject to conditions as under:-

"(i) No activities in CRZ area will be taken up without requisite clearance under the provisions of the CRZ Notification, 1991.

(ii) The detailed study regarding the impact on Alphonso mango and marine fisheries as recommended in the report of Dr. B.S. Konkan Krishi Vidyapith shall be undertaken. Based on the same, additional safeguard

measures as may be required will be taken by the proponent. A copy of the report will be submitted to the Ministry. The cost towards undertaking the study and implementation of safeguard measures, if any, will be borne by the project.

(iii) Space provision for FGD will be kept, if required at a later date.

(iv) Cooling water blow down will be discharge from the cold water side and not from the hot water."

(emphasis supplied)

21. There is contradiction between the minutes of the meeting of the Expert Appraisal Committee held on 9-10th January, 2007 and 12-14th March, 2007. On 9th-10th January, 2007, the application was decided to be kept in abeyance to await the report of KKVD which as per the said minutes would take six months. What was before the Committee on 12-14th March, 2007 was a preliminary report prepared within 2-3 months? The minutes dated 12- 14th March, 2007 record that as per the report submitted by KKVD it would take about four years of detailed study to effectively evaluate the impact of the proposed plant. KKVD on the basis of the existing material, in form of assessment studies conducted by EQMS India Pvt. Ltd., and predictions on the level of pollutants made by MPCB and Central Pollution Control Board, Delhi, had stated that it was likely that there would not be any adverse impact on horticulture, mango plantations or marine life, subject to the condition that the respondent no.3 strictly maintained adherence to their commitments. The so called report submitted by KKVD is extremely guarded and cautious. It was not based on their data and studies. It was not conclusive and does not give approval but qualified statements were made. Further KKVD in clear terms had stated that any final

assessment would require a detailed study for a period of four years to evaluate the impact on mango plantations and the marine life/fisheries. This was noted by the expert committee themselves in their minutes dated 12-14th March, 2007 quoted above. Further the issue of provision of FGD has been left to be decided at a later stage. Position before NEAA remained the same*"*

32. The observation of ***Delhi High Court particularly at paragraph-21 quoted above, clarifies the status of requirement of the installation of the FGD in the project.*** *The High Court has clearly stated that what the expert appraisal committee considered in its earlier meeting dated 14.3.2007 was only a preliminary report which was extremely guarded.*

33. In fact, the High Court has stated clearly in its order "Further the issue of provision of FGD has been left to be decided at a later stage. Position before NEAA remained the same".

34. This observation of the Delhi High Court read along with the mandate that the funds were to be separately allocated for the same which was to be included in the project cost clearly mandates that the situation as projected by the Appellant does not fall within "Change of Law". It is in this light that the Environmental clearance granted on 17.5.2007 has to be seen.

....

38. Let us again refer to the conditions in the Environmental clearance dated 17.5.2007:

"(ii) the detailed study regarding the impact of the project, if any, on Alphanso mango and marine fisheries as recommended in the report of Dr. B.S. Konkan Krishi Vidyapith shall be undertaken. Based on the same, additional safeguard measures as may be required will be taken by the proponent with prior approval of the Ministry of Environment and Forests. A copy of the report will be submitted to the Ministry. ***The cost towards undertaking the study and implementation of safeguard measures if any, will be borne by the project.***

(iii) Space provision shall be made for installation of FGD of requisite efficiency of removal of SO2, if required at later stage.

……

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

*39. So, the reading of the conditions **in entirety** referred to in the Environmental clearance would make it clear that there was a mandate with regard to the requirement of earmarking of funds for FGD as well. **The study to be carried out was specific to the case of the Appellant's** plant as it is recorded that the study is to be carried out in terms and the recommendations in the report of KKVD. This has been referred to in the order of the Delhi High Court while reference was made to the minutes of the 42nd Meeting of the Expert Appraise Committee."*

46. ….We find that prior Environmental Clearance granted was conditional and that the entire bid of the Appellant was on the basis of representation of the Appellant is indicative of the fact that the FGD was required to be installed by the Appellant and the Appellant was well aware of the terms."

109. It is well settled legal principle that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. In this regard, reliance is placed on the decisions of the Hon'ble Supreme Court in "***Zee Telefilms Ltd.* vs*. Union of India***" (2005 (4) SCC 638 (para 254); "***P.S. Sathappan* vs*. Andhra Bank Ltd.***" (2004 (11) SCC

672) "***Bhavnagar University v. Palitana Sugar Mills Pvt. Ltd."*** *(2003 (2) SCC 111)* and "***KTMTM Abdul Kayoom & Anr. v. Commissioner of Income Tax, Madras"*** (AIR 1962 SC 680).

110. Therefore, one significant factual difference can change the determination of a legal principle. It is also a well settled legal principle that each case has to be considered and disposed of in the factual matrix pertaining to the said case.

111. Before issuing ECs pertaining to the Appellants there must have been environment study of the area of the projects and also allied assets of the projects. In JSW case because of existence of marine life i.e., fisheries and Alphanso Orchids, Krishi Vidyapith was requested to make a study of environmental impact on the surroundings situated within 10 kms radius from the project and allied assets of the project. This study led to requirement of installation of FGD system and accordingly second EC incorporating above condition including earmarking of funds was mandated. JSW itself undertook to comply with the conditions recommended in the report of Krishi Vidyapith if necessary for controlling the impact of the power plant on the surrounding environment. Contrary to

this position, in the case of projects in question, there is no such ecologically sensitive area within 10 kms radius of the projects in question. As stated above, such conditions were imposed for the power projects of Assam and Chittinad. Therefore, we agree with the contention of the Appellants that though a standard condition of provision for space demarcation for FGD was mentioned in all the ECs, but depending upon facts and circumstances pertaining to each project, ECs were granted with condition of installation of FGD and the funds required for the same to be earmarked.

112. The ECs of the projects of the Appellants, no doubt, at condition (vi) only refer to provision of space if required at a later stage was made, but there was no specific condition mandating earmarking of funds for FGD installation for SO2 or SNCR or any other suitable mechanism for NOx.

113. One has to see in the above circumstances the actual purport, relevance and meaning of the word 'if' mentioned in the condition (vi) of the Environmental Clearances. The Hon'ble Supreme Court in ***"Head Master, Lawrence School, Lovedale vs. Jayanthi Raghu & Anr."*** (2012) 4 SCC

793, on the interpretation of a qualifying phrase, a word like "if" made the following observations : -

"**34.** ***It is worth noting that the use of the word "if" has its own significance****…*

36. *In State of T.N. v. Kodaikanal Motor Union (P) Ltd. [(1986) 3 SCC 91 : 1986 SCC (Tax) 461] the Court, while interpreting the words "if the offence had not been committed" as used in Section 10-A(1) of the Central Sales Tax Act, 1956, expressed the view as follows: (SCC p. 101, para 19)*

"19. … ***In our opinion the use of the expression 'if' simpliciter, was meant to indicate a condition****, the condition being that at the time of assessing the penalty, that situation should be visualized wherein there was no scope of committing any offence. Such a situation could arise only if the tax liability fell under sub-section (2) of Section 8 of the Act*."

37. Bearing in mind the aforesaid conceptual meaning, when the language employed under Rule 4.9 is scrutinized, ***it can safely be concluded that the entitlement to continue till the age of superannuation i.e. 55 years, is not absolute. The power and right to remove is not obliterated. The status of confirmation has to be earned and conferred***.

38. ***Had the rule-making authority intended that there would be automatic confirmation, Rule 4.9 would have been couched in a different language****. That being not so, the* ***wider interpretation cannot be placed on the Rule to infer that the probationer gets the status of a deemed confirmed employee*** *after expiry of three years of probationary period* ***as that would defeat the basic purpose and intent of the Rule which clearly postulates "if confirmed".****A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by*

the employer. In our considered opinion, an order of confirmation is required to be passed.

39. The Division Bench has clearly flawed by associating the words "if confirmed" with the entitlement of the age of superannuation without appreciating that the ***use of the said words as a fundamental qualifier negatives deemed confirmation****. Thus, the irresistible conclusion is that the present case would squarely fall in the last line of cases as has been enumerated in para 11 of Satya Narayan Jhavar [(2001) 7 SCC 161 : 2001 SCC (L&S) 1087 : AIR 2001 SC 3234] and, therefore, the principle of deemed confirmation is not attracted."*

In "***GS Ramaswamy* vs. *Inspector General of Police"*** (AIR 1966 SC 175) the Hon'ble Supreme Court held that qualifying terms/phrases do not contemplate automatic confirmation of the conditions so stipulated. The relevant extract is as under: -

"**8.** *…It is true that the words used in the sentence set out above are not that promoted officers will be eligible or qualified for promotion at the end of their probationary period which are the words to be often found in the Rules in such cases; even so, though this part of Rule 486 says that 'promoted officers will be confirmed at the end of their probationary period',* ***it is qualified by the words 'if they have given satisfaction'.Clearly therefore the Rule does not contemplate automatic confirmation*** *after the probationary period of two years, for a promoted officer can only be confirmed under this Rule if he has given satisfaction*."

114. On the present controversy pertaining to Change in Law event based on the MoEF & CC Notification of 2015, there are different opinions of

different State Commissions and so also CERC. Some State Commissions opined this as Change in Law event and some other State Commissions have rejected it as Change in Law event. CERC has opined this revised norms as Change in Law event. Respondents contend that none of the decisions of either CERC or State Commissions are of binding nature on this Tribunal and therefore, the reliance placed by the Appellants on various orders of CERC and other State Commissions are of no relevance. What we note is on the issue of regulatory certainty on the controversy in question, Appellants have pointed out how different Commissions have dealt with the said issue. There should not be regulatory uncertainty on the same Notification of 2015, otherwise it leads to chaos in the energy sector. Similarly placed generators in the country will have to face different orders of Regulatory Commissions on this issue. The objective of National Tariff Policy of 2016 is towards promotion of consistency and predictability in regulatory approaches across jurisdictions. As contended by the Appellants, the uncertainty has disturbed the energy sector pertaining to FGD installation. Such uncertainty is against the very spirit of the Electricity Act. The National Tariff Policy is a statutory document under Section 3 of the Electricity Act.

115. The Respondent-Commission has failed to appreciate the orders dated 28.03.2018 and 17.09.2018 of the Central Electricity Regulatory Commission in the case of "***Adani Power Limited vs. Uttar Haryana Bijli Vitran Nigam Limited& Anr.***" (Petition No. 104/MP/2017) and "***Coastal Gujarat Private Limited vs. Gujarat Urja Vikas Nigam Limited & Ors.***" (Petition No. 77/MP/2016) respectively, wherein it had been laid down by the CERC that the findings of the JSW case are not applicable to the aforesaid cases. The relevant paragraphs read as under:

Adani Power Limited's case

> *"32. It is evident from the above that the Petitioner had not earmarked funds for installation of FGD in the year-wise expenditure submitted to MOE&F on environmental protection measures in compliance with the ECs dated 13.8.2007 and 21.10.2008.* ***It is pertinent to mention that MOE&F had also not raised any objections for not earmarking funds towards installation of FGD in terms of the ECs dated 13.8.2007 and 21.10.2008 respectively. In this background, we are of the view that the installation of FGD in Phases I & II of the project was not mandatory, except for space provisions for FGD and the Petitioner could have reasonably assumed that similar condition would only be imposed for Phase III of the project.*** *Accordingly, the Petitioner could not have been expected to factor the cost of installation of FGD in the bid for Phase III.* ***We therefore conclude that the installation of FGD was not a mandatory requirement as on the cut-off date (19.11.2007)and was made***

<u>mandatory post the cut-off date vide the EC dated 20.5.2010</u> granted to the Petitioner for PhaseIII (units 7 to 9) of Mundra UMPP*…*

…

36.….The findings of the Tribunal in the case of JSW is that the EC dated 16.4.2010 is a mere confirmation of the earlier EC dated 17.5.2007 which is apparently based on the fact that the EC granted by MOE&F to JSW on 16.4.2010 makes reference of the EC granted by letter dated 17.5.2007 where there was a direction to make provisions for space for FGD. In the present case of the Petitioner, the EC granted by MOE&F on 20.5.2010 for Phase III was independent of the ECs granted by MOE&F on 13.8.2007 and 21.10.2008 respectively for Phases I and II of the project. However, in case of Phase III, there was no prior EC as in case of JSW and EC dated 20.5.2010 was granted by MOE&F at the first instance mandating the installation of FGD. ***The case of JSW is therefore distinguishable from the present case of the Petitioner and hence the judgment of the Tribunal dated 21.1.2013 cannot be made applicable in case of the Petitioner as contended by the Respondents/M/s Prayas****."*

(Emphasis Supplied)

<u>CGPL CASE</u>

"30. …In our view, ***requirement of compliance of new SO2 norms in terms of MoEFCC Notification, 2015 through installation of FGD in case of Mundra UMPP is covered under Change in Law since the Petitioner had no occasion to factor in the cost of FGD at the time of submission of the bid as it was the obligation of the Procurers to obtain environmental clearance****.*

…

32. In case of the Petitioner, the project was conceived as a UMPP. As per the RFP, it was the responsibility of the Procurers to obtain the initial consent which included environment clearance and provide the same to the successful bidder before the issue of LoI. On the contrary, JSW was an independent power producer which was required to obtain all clearances including the environment clearance on its own from MoEF. …

Further, condition in para 3(xxx) of the Environment Clearance dated 2.3.2007 provides for separate funds for environmental protection measures and reporting of year-wise expenditure to MoEF. The Petitioner has submitted that an amount of Rs.200 crore had been earmarked by the Petitioner for environment protection measures for a period of 25 years. The Petitioner has filed the copies of the letters under which the Petitioner has submitted the compliance reports regarding environment protection measures in terms of condition 3(xxx) of the EC dated 2.3.2007 for the years 2013-14, 2014-15, 2015-16 and 2016-17. Perusal of the said letters shows that the expenditure on FGD does not form part of the environment protection measures. ***The fact that no objection has been raised by MoEF&CC with regard to the expenditure earmarked/incurred for environment protection measures shows that FGD is not included in the expenditure under condition 3(xxx) of the EC. Therefore, it cannot be said that the Petitioner was required to include the expenditure on FGD to be incurred in future if required at a later stage in terms of condition 3(ii) of the EC dated 2.3.2007. In view of the above reasons, we hold that the judgement of the Appellate Tribunal in JSW case is not applicable in the case of the Petitioner****…"*

(Emphasis Supplied)

116. Further, in "***Sasan Power Limited vs. MP Power Management Company Limited & Ors.***" (Petition No. 133/MP/2016), CERC vide its order dated 08.10.2018 has once again distinguished the JSW Case from the Sasan Case. The relevant paragraphs in the said case read as under:

> *"36. In case of the Petitioner,* ***the project was conceived as a UMPP. As per the RFP, it was the responsibility of the Procurers to obtain the initial consent which included environment clearance and provide the same to the successful bidder before the issue of LoI. On the contrary, JSW was an independent power producer which was required to obtain all clearances including the environment clearance on its own from MoEFCC*** *…The Petitioner has submitted that an amount of Rs.865 crore had been earmarked by the Petitioner for environment protection measures as per the EIA study which includes only provision for space, if required in future and not actual installation of FGD.* ***Therefore, it cannot be said that the Petitioner was required to include the expenditure on FGD to be incurred in future if required at a later stage in terms of condition 3 (xii) of the EC dated 23.11.2006. In view of the above reasons, we hold that the judgement of the Appellate Tribunal in JSW case is not applicable in the case of the Petitioner. The requirement of installation of FGD for compliance with the revised norms for Sulphur Dioxide in terms of the MoEFCC Notification, 2015 is covered under Change in Law in terms of the PPA dated 7.8.2007****.*
>
> *…*
>
> *38. In the light of the above discussion, we are of the view that as on the cut-off date there was no requirement for installation of FGD for*

Sasan UMPP. ***The Environment Clearance dated 23.11.2006 only provided for making provision for space for FGD if required at a later stage. Even the Environmental Clearance dated 23.11.2006 was made available to the Petitioner on the date of signing of the PPA and the Petitioner could not have been expected to factor the cost of FGD in its bid. MoEFCC Notification, 2015 prescribed a limit for SO2 below 200 mg/ Nm3 for thermal power plants which require installation of FGD. Accordingly, we hold that the case of the Petitioner for installation of FGD at Sasan UMPP is covered under Change in Law in terms of the PPA dated 7.8.2007****."*

(Emphasis Supplied)

117. Maharashtra Electricity Regulatory Commission vide its orders dated 06.02.2019 in the case of "***Adani Power Maharashtra Limited vs. Maharashtra State Electricity Distribution Company Limited***" (Case No. 300 of 2018), while concluding observes that the MoEF&CC Notification qualifies as a 'Change in Law' event, and has appreciated the factual differences between the JSW Case and the Adani Power Maharashtra case and has laid down as under:

"13. As regards to Order in the matter of JSW, APML stated that the facts of the JSW case are different from the present case.

*….****Further from perusal of Order in Case of JSW, the Commission observed that factual aspect of the JSW matter was also different which are summarized below****:*

a. ***The Environmental Clearance granted to the JSW, inter-alia, had many conditions, few of them were as follows****:*

" 3. …. ii) ***The detailed study regarding the impact of the project, if any, on Alphanso mango and marine fisheries as recommended in the report of Dr. B. S. Konkan Krishi Vidyapith shall be undertaken. Based on the same, additional safeguard measures as may be required will be taken by the proponent with prior approval of the MoEF****. A copy of the report will be submitted to the Ministry. The cost towards undertaking the study and implementation of safeguard measures, if any, will be borne by the project.*

iii) Space provisions shall be made for installation of FGD of requisite efficiency of removal of SO2, if required at later stage*. ……"*

b. The ***Expert Appraisal Committee imposed additional conditions, which included that, in the event of any evidence of damage to the mango, cashew and fisheries, adequate mitigation measures including FGD should be adopted by the JSW****.*

c. ***After considering the recommendations of Expert Appraisal Committee, the Ministry of Environment & Forests, Government of India, imposed a condition that the FGD plants should be installed by the JSW prior to the commissioning of the Power Project****.*

Thus, requirement of installation of FGD by JSW was on account of the possibilities of any damage to the mango, cashew and fisheries in that area. Also, FGD was to be installed prior to commissioning of the project*. As Environmental Clearance obtained by JSW was prior to bid cut-off date and also includes mandatory requirement of taking measures for avoiding impact on mangos and fisheries,* ***JSW was aware of requirement of installing FGD before***

> ***bid deadline and hence the Commission has not allowed installation of FGD as Change in Law event for JSW. Whereas, in the present matter requirement of installation of FGD is on account of MoEF&CC Notification dated 7 December, 2015 which is applicable to all Thermal Power Stations and not on account of any specific issues related to APML's plant at Tiroda. Also, APML's plant is operational since 2012 without FGD as against JSW's plant which was mandated to commission with FGD only. In view of these factual differences in operating circumstances of these plants, the Commission is of the opinion that JSW case related to FGD cannot be relied upon in the present matter****…"***
>
> *(Emphasis Supplied)*

118. It is important to mention that vide order dated 25.05.2011, MERC by taking into consideration the facts of Adani's case and additional conditions in 1st EC of JSW case, held that JSW Case is different and cannot be relied upon to deny the claim of Change in Law in Adani's case before MERC, which was upheld by this Tribunal by its order dated 21.01.2013.

119. Further, Rajasthan Electricity Regulatory Commission in the case of "***Adani Power Rajasthan Limited vs. Jaipur Vidyut Vitran Nigam Limited & Ors." (Petition No. RERC-1394/18***) by its order dated 25.01.2019 clarified that the MoEF&CC Notification dated 07.12.2015

qualifies as a ‘Change in Law’ event even after taking into consideration the JSW Case . The relevant paras of the said order read as under:

> *“9.* ***Commission observes that the Ministry of Environment, Forest and Climate Change notified the revised parameters vide its Notification dated 07.12.2015 which provided for revised parameters for water consumption, particulate matters, Sulphur Dioxide, Oxides of Nitrogen and Mercury in respect of thermal power plants.*** *The cut-off date of the Petitioner is 30.07.2009 which is seven days prior to the bid deadline.*
>
> *10.* ***Since the MoEFCC Notification dated 07.12.2015 which seeks to revise the environmental norms prescribed in the Environment (Protection) Rules, 1986 has been issued after the cut-off date, the revised environmental norms qualify as events under Change in Law in terms of the PPA dated 28.01.2010.***
>
> *11. The Commission directs office to seek advice from the Central Electricity Authority on suitability of technology and specifications for implementation of revised environmental norms.”*

120. CERC, in “***Adani Power (Mundra) Limited v. Gujarat Urja Vikas Nigam Ltd. & Ors***.” (Petition No. 332/MP/2018) (**Adani Case II**) once again distinguished the JSW Case from the Adani Case II, while allowing the Change in Law claim of the Petitioners by its Order dated 28.10.2019. The relevant paras read as follows:

"36. As per the above judgement, ***JSW Energy Ltd. had a conditional environmental clearance wherein environmental clearance mandated detailed study regarding the impact of the project, if any, on Alphanso mango and marine fisheries as recommended in the report of Dr. B.S. Konkan Krishi Vidyapith, whereas there was no such condition in environmental clearance granted to the Petitioner. Further, the present case is similar to the Gujarat Bid 01 PPA and Haryana PPAs, in terms of non-availability of environmental clearance(s) as on cut-off date, whereas JSW Energy Ltd had environmental clearance as on bid date with certain conditions stipulated therein****. Thus, the environmental clearance granted to the Petitioner was not conditional and was independent of any specific study.* ***Accordingly, in terms of the above decision of the Commission and order of APTEL, the case of JSW Energy Ltd., is distinguishable from the present case of the Petitioner. Therefore, the judgment of APTEL dated 21.1.2013cannot be made applicable to Gujarat Bid 01 PPAs. The need for installation of FGD has arisen on account of the 2015 MoEF&CC notification dated 7.12.2015 vide which the Ministry has notified stringent norms to be complied by the thermal power generating stations within two years.*** *The Petitioner has achieved COD and has been supplying power to GUVNL till date without FGD. While there were no norms specified for NOx emission by Thermal Power generating stations as on cut-off date, the Nox norms as per MoEF&CC notification is 600 mg / Nm3 for unit size less than 500 MW…*

43. In view of the above discussion, ***we conclude that on account of the 2015MoEF&CC Notification, the Petitioner is affected by Change in Law in terms of Article 13of respective PPAs*** *due to change in norms for 1) Particulate Matter (Units 1 and 2 of Mundra Power Project) for GUVNL Bid-01 PPA;* ***2) Sulphur Dioxide (SO2) for GUVNLBid-01 PPA; and 3) Oxides of Nitrogen (NOx)*** *for both the PPAs i.e. GUVNL Bid-01 PPA and Haryana PPAs."*

121. According to Appellants, Respondent No.2 is taking different stands on the very same disputed issue before different Commissions. Therefore,

Respondent No.2 cannot be allowed to approbate and reprobate. Appellants brought to the notice of the Tribunal two judgments pertaining to CERC on similar Change in Law event where similar factual matrix existed. In those matters there were identical conditions pertaining to ECs and the claim of the generators was that the revised norms amounts to Change in Law event. Respondent No.2 herein was the Discom opposing the claims of the generators. It is noticed from the orders of the CERC that in those matters CERC allowed claims of Change in Law event, which occurred on account of the very same MoEF & CC Notification of 2015. Surprisingly, and strangely Respondent No.2-PSPCL has not challenged those orders of CERC in the following cases. Is it proper now on the part of Respondent No.2-PSPCL to agitate against the claims of the Appellants in these appeals since it has accepted the verdict of CERC in the following cases in similar facts and circumstances?

Sr. No.	Details of the Petition	Forum	PSPCL as Respondent
1.	***Coastal Gujarat Private Limited vs. Gujarat Urja Vikas Nigam Limited & Ors.***(CGPL Case)	CERC	Respondent No. 6

	[Petition No. 77/MP/2016]		
2.	***Sasan Power Limited vs. MP Power Management Company Limited & Ors.***(Sasan Case) [Petition No. 133/MP/2016]	CERC	Respondent No. 12

122. We accept the argument of the Appellants that it is in violation of the settled principles of law arising out of legal maxim '*quod approbo non reprobo*' (reliance is placed on the judgment of the Apex Court in the case of ***"State of Punjab & Ors. vs Dhanjit Singh Sandhu"*** (2014 (15) SCC 144).

123. If Respondent No.2 accepts the orders of CERC, mentioned above, in similar factual matrix pertaining to installation of FGD and/or SNCR or any other suitable technology, which qualifies as Change in Law event, it is estopped from taking a contrary view/stand in respect of the projects in the instant cases.

124. It is seen that based on the Expert Appraisal Committee report, ECs were granted. In both the reports Expert Appraisal Committee while granting recommendation for ECs did not state anything with regard to

earmarking of funds towards installation of FGD for SO2 and any suitable system to control NOx emissions. Out of total cost of the project of Rs.8000 Crores, a sum of Rs. 461 Crores was earmarked for the existing environmental protection measures so far as Appellant-TSPL's project is concerned. As far as the Appellant-NPL is concerned, the total cost of the project was about Rs.5500 Crores, which included Rs. 410.10 Crores for environment protection measures. In none of the documents, based on which ECs were provided, there is no mandate for installation of FGD and no separate fund was directed to be earmarked for FGD installation and/or SNCR system.

125. The contention of Respondent No.2 that it was the responsibility of the Appellants to include such costs towards FGD and SNCR, and if the Appellants fail to include such cost, they must blame themselves, cannot be accepted for the simple reason that the EC pertaining to Nabha Power was obtained much prior to cut-off date. In terms of RFP and RFQ and other documents, the procurer had to undertake the responsibility of obtaining several consents and clearances including ECs. So also in the case of TSPL except for the fact that EC was issued after cut-off date, the

same responsibility of obtaining several consents and clearances including EC was that of the procurer. If Respondent No.2 authorises the Special Purpose Vehicles completely owned and controlled by the then PSEB, the work done by authorized representative (SPVs) of PSEB has to be treated as the work done by the PSEB. If any rights and obligations arise out of discharging such duties by the authorized representatives, the principal i.e., erstwhile PSEB (Respondent No.2-PSPCL) has not only enjoys the fruits of rights accrued but also has to bear the consequences of default. Therefore, the inference that could be drawn is that the then PSEB was well aware of the then existing laws, guidelines and other formalities to obtain ECs and it knew very well that the only requirement pertaining to FGD was provision for space and no requirement of installation of FGD or funds being demarcated existed. Accordingly, Respondent No.2 did not earmark any such fund in all the preparatory documents/ reports and presentations. In terms of all the agreements between the parties including PPA, the initial consent/clearance included environmental clearance. The procurer was under obligation to comply with these requirements. The seller of power has to only maintain and seek renewal of such consents and clearances. The relevant authorities while renewing consents and

clearances never pointed out any default of the seller pertaining to installation of FGD.

126. Coming to prescription of new NOx emission limits, on account of Notification of 2015, the Respondent-Commission denied the said claim as Change in Law event, like FGD for SO2 to achieve the stipulated NOx norms i.e., 300 mg/Nm3 for NOx. The Respondent-Commission rejected the same on the ground that as on today no particular technology for meeting the NOx emission standards was indicated in the CEA report. Primary control measures, and if required secondary NOx control measures become mandatory if NOx levels in terms of MoEF Notification has to be maintained.

127. It is relevant to mention that so far as FGD installation is concerned, right from 2015 the litigation battle before various Commissions is still going on i.e., whether it is Change in Law event or not. One should not have such uncertainty on these issues. We are of the opinion that another prolonged litigation battle should be discouraged if revised NOx control measures are introduced and it becomes imperative for thermal plants to implement such mechanism to control NOx levels to the standards

approved by MoEF Notification of 2015. At this stage, may be, there is no definite recommended technology which has to be implemented. The Appellants seems to be having primary NOx control measures as on today. They are not claiming any amount as Change in Law event for this. In case installation of SNCR/any other suitable technology for NOx levels control system is brought in, it would amount to Change in Law. Apparently, in ECs pertaining to the instant appeals there is no condition of earmarking of funds for SNCR/any other suitable technology for controlling NOx emissions. It is not in dispute that the existing low NOx burners with over fire assembly installed may not ultimately achieve the prescribed NOx levels. This is clearly mentioned in the feasibility reports prepared by Tata Consulting Engineers Limited. In terms of PPA, change in legal position during “operation period”, which has an adverse financial impact on the projects of the Appellants, would definitely quality as a Change In Law event.

128. Then coming to the letter of Ministry of Power dated 30.05.2018, the contents of this letter were relied upon by both the parties. However, both

Appellants and Respondent interpret same clauses differently. The relevant portions of the said letter are as under:

> *"5.1 The 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."*

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

130. It is needless to say that the opinion expressed in this letter is not having any binding effect on any judicial/quasi judicial authority meant to adjudicate the dispute pertaining to Change in Law claim arising out of

MoEF & CC Notification. No one can deny the fact that it was within the domain of Respondent-Commission to adjudicate the same initially when dispute was raised before it. In view of hierarchy of authorities, this Tribunal as Appellate Authority has the jurisdiction to interpret whether Commissions' interpretation was right or wrong and further express opinion whether the revised norms amounts to Change in Law event or not. However, one cannot find fault with the issuance of such letter by MoP since it has to coordinate with various departments including MoEF and then discharge its functions on various issues pertaining to environment. Under such circumstances, this letter has come into existence.

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

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

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

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

"148. *In order to steer clear of the above interpretation of Section 11(2) learned counsel for the employees put forward the argument that the word "or" occurring in the section should not be read as a disjunctive and should be given the meaning "and" so that the two clauses forming the conditions about which the Central Government has to be satisfied before it can act under the section are taken to be one single whole; but we do not see any reason why the plain meaning of the word should be distorted to suit the convenience or the cause of the employees. It is no doubt true that the word "or" may be interpreted as "and" in certain extraordinary circumstances such as in a situation where its use as a disjunctive could obviously not have been intended (see Mazagaon Dock Ltd. v. Commissioner of Income Tax and Excess Profits Tax [AIR 1958 SC 861 : 1959 SCR 848]).* ***Where no compelling reason for the adoption of such a course is, however, available, the word "or" must be given its ordinary meaning, that is, as a disjunctive. This rule was thus applied to the interpretation of clause (c) of Section 3(1) of the U.P. (Temporary) Control of Rent and Eviction Act, 1974 in Babu Manmohan Das Shah v. Bishun Das [AIR 1967 SC 643 : (1967) 1 SCR 836] by Shelat, J.:***

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

134. The context, under which the expression ‘or envisaged otherwise’ before the Notification in question, if compared with the first situation, certainly would mean that such condition of pollution control system was indicated in any other document other than the environmental clearance that must have come into existence before the Notification in question. Therefore, we entirely agree with the arguments of Appellants that the scope of condition at para 5.1(b) of the aforesaid letter would actually mean that a party is not entitled to seek Change in Law claim in respect of any control system, which is already installed in terms of environmental clearance or otherwise required by any other document other than EC. For example, both the Appellants have already complied with some of the parameters envisaged i.e., particulate matter, mercury, specific water consumption, but Appellants have not sought Change in Law claim for these parameters.

135. Pertaining to the stand of Respondent No.2 that if installation of FGD is opined as Change in Law event in compliance of conditions of Notification in question, it would vitiate bidding process since it would prejudice other bidders, on this point, we accept the arguments of the

Appellants. The Change in Law event in question has occurred six years after cut-off date. Having regard to the wording of the condition (vi) in the ECs in question, if read with other preparatory documents including competitive bidding guidelines, we are of the opinion that no other bidder could have anticipated/contemplated emerging of new emission norms for SO2 and NOx of the present nature.

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

space for FGD system alone was the requirement. This would mean the necessity may arise or may not arise in future since it depends upon environmental protection measures from time to time which may be statutorily mandated by MoEF & CC and other concerned authorities.

137. Then coming to Clause "xxv" condition of ECs it has to be read to understand under what context what was mandated as measures or conditions. In other words, Clause "xxv" should be read to include only the stipulated measures and not anticipated or potential measures. Such an interpretation of Clause "xxv" of the EC confirms to the business efficacy test laid down by the Hon'ble Supreme Court in "***Transmission Corpn. of Andhra Pradesh Ltd.*** **vs.** ***GMR Vemagiri Power Generation Ltd****.,"* (2018) 3 SCC 716 in the following terms:

> **26.** ***A commercial document cannot be interpreted in a manner to arrive at a complete variance with what may originally have been the intendment of the parties.*** *Such a situation can only be contemplated when the implied term can be considered necessary to lend efficacy to the terms of the contract.* ***If the contract is capable of interpretation on its plain meaning with regard to the true intention of the parties it will not be prudent to read implied terms on the understanding of a party, or by the court, with regard to business efficacy as observed in Satya Jain v. Anis Ahmed Rushdie****...*

> **34.** *'… An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract:* ***it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.****...*
>
> **35.** *The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been* ***clearly intended by the parties at the time of making of the agreement****…"*
>
> (Emphasis Supplied)

138. Additional cost for installation of FGD in terms of recommendations obtained from CEA should become part of capital cost. The capital cost already approved and being paid in the form of tariff does not include the cost towards installation of FGD. This additional cost again has to be invested by the generators. We are of the opinion that the Appellants are entitled for carrying cost also. Appellants are justified to claim carrying cost and they have rightly substantiated their claim as under:

> "As per the settled principle of law (Hon'ble Supreme Court Judgment dated 25.02.2019 in Civil Appeal No. 5865 of 2018. *UHBVNL &Anr.* vs. *CERC &Ors.),* the affected party has to be compensated for a Change in Law event along with carrying cost from the effective date till the date of approval"

139. It is also seen additional funds including debt funds, which will not be sanctioned by lenders (as amount involved is significantly high) in the absence of regulatory certainty for the methodology/mechanism of arriving at compensation to mitigate the impact of Change in Law event.

140. In the light of our discussion and reasoning, we are of the opinion that the impugned Orders, dated 21.12.2018 and 09.01.2019 challenged in both the appeals deserve to be set aside and accordingly set aside by allowing the appeals.

a) The MoEF & CC Notification dated 07.12.2015 is a Change in Law event under PPAs in question having regard to the facts and circumstances of the case of the Appellants.

b) The installation and operation of the FGD and associated system to comply with emission levels of SO2 is Change in Law and additional expenditure for the same including all allied cost like taxes, duties etc., has to be included as Additional Capital Cost to be incurred by the Appellants.

c) In case technology for installing and operating SNCR and/or any other appropriate technology is mandated in future for complying with the emission levels of NOx in terms of Notification of 2015, it also amounts to Change in Law event.

d) The Respondent-Commission is directed to devise a mechanism for payment of above amounts by the procurers to both the Appellants towards additional cost and other expenses in relation to procurement, installation, commissioning, operation and maintenance of FGD for SO2 as approved by the concerned authority, after prudence check.

e) Appellants are entitled for carrying cost in terms of provisions of the PPAs to bring the seller-Appellants to the same economic position as if such Change in Law event has not occurred.

141. All the Pending IAs, if any shall stand disposed of. There shall be no order as to costs.

142. Pronounced in the Virtual Court on this **28th day of August, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

✓

REPORTABLE / ~~NON-REPORTABLE~~

ts/tpd