



Petition No. 1468 of 2019

BEFORE

THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

LUCKNOW

Date of Order: 07.02.2020

PRESENT:

Hon'ble Shri Raj Pratap Singh, Chairman

Hon'ble Shri Kaushal Kishore Sharma, Member

IN THE MATTER OF

PETITION UNDER SECTION 86 OF THE ELECTRICITY ACT, 2003 READ WITH REGULATIONS 6 (5) (b) AND 22 (2) (ii) OF THE UPERC (TERMS AND CONDITION OF TARIFF) REGULATIONS 2014 FOR APPROVAL OF EXPENDITURE ON INSTALLATION OF VARIOUS EMISSION CONTROL SYSTEMS FOR COMPLIANCE WITH REVISED EMISSION NORMS FOR THERMAL POWER STATIONS AS PER MINISTRY OF ENVIRONMENT AND FORESTS AND CLIMATE CHANGE, GOVERNMENT OF INDIA NOTIFICATION DATED 07.12.2015

M/s Lalitpur Power Generation Co. Ltd.
B-10, Sector-3, Jamunalal Bajaj Marg,
Noida – 201301

..... Petitioner

UP Power Corporation Ltd. (through its Managing Director),
7th Floor, Shakti Bhawan, 14- Ashok Marg, Lucknow

..... Respondents

The following were present:

1. Ms Puja Priydarshini, Advocate, UPPCL
2. Shri Nived, Advocate, UPPCL
3. Shri V.K. Asthana, CE, UPPCL
4. Shri Haroon Aslam, EE, UPPCL
5. Shri Surendra Sharma, ED(LPGCL)
6. Dr. A V Singh CSO, LPGCL
7. Shri Rajeev Kumar, AVP, LPGCL
8. Shri Amit Kumar Pandey, Officer, LPGCL
9. Shri A K Srivastava, OSD, THDC



ORDER
(Date of Hearing 10.10.2019)

Background

1. The Petitioner is a Generating Company within the meaning of Section 2 (28) of the Electricity Act, 2003 ("2003 Act") has set up a 1980 MW (3x660 MW) coal fired Lalitpur Super Thermal Power Project as an Independent Power Producer (IPP) at Boragaon in District Lalitpur (Uttar Pradesh) and has entered into a Power Purchase Agreement ('PPA') dated 10.12.2010 read with supplementary PPA dated 15.06.2011 with UPPCL for supplying 100% of Saleable Power.
2. MoEF&CC Notification dated 07.12.2015 has amended the existing/applicable environmental norms, for all existing as well as future Thermal Power Projects. Therefore, the Petitioner is required to install at Lalitpur TPP, Flue Gas Desulphurization System, Nox system, SPM system and other associated system. The amended norms are tabulated as below:

Sr. No	Industry	Parameter	Standard
1	2	3	4
"5A.	Thermal Power Plant (Water consumption limit)	Water consumption	I. All Plants with Once Through Cooling (OTC) shall install Cooling Tower (CT) and achieve specific water consumption up to maximum of 3.5m ³ / MW/hr within a period of two years from the date of publication of this notification. II. All existing CT-based plants reduce specific water consumption upto maximum of 3.5m ³ / MW/hr within a period of two years from the date of publication of this notification. III. New Plants to be installed after 1 st Janaury 2017 shall have to meet specific water consumption upto maximum of 2.5m ³ /MW/hr and achieve zero waste water discharged
"25.	Thermal Power Plant	TPPs (Units) installed before 31 st December, 2003*	

[Signature]

[Signature]



	Particulate matter	100 mg/Nm ³
	Sulphur Dioxide (SO ₂)	600 mg/Nm ³ (Units Smaller than 500 MW capacity units) 200 mg/Nm ³ (for units having capacity of 500 MW and above)
	Oxides of Nitrogen (NO _x)	600 mg/Nm ³
	Mercury (Hg)	0.03 mg/Nm ³ (for units having capacity of 500 MW and above)
	TPPs (units) installed after 1st January, 2004, upto 31st December, 2016	
	Particular Matter	50 mg/Nm ³
	Sulphur Dioxide (SO ₂)	600 mg/Nm ³ (Units smaller than 500 MW capacity units) 200 mg/Nm ³ (for units having capacity of 500 MW and above)
	Oxides of Nitrogen (NO _x)	300 mg/Nm ³
	Mercury (Hg)	0.03 mg/Nm ³
	TPPs (units) to be installed from 1st January, 2017**	
	Particular Matter	30 mg/Nm ³
	Sulphur Dioxide (SO ₂)	100 mg/Nm ³
	Oxides of Nitrogen (NO _x)	100 mg/Nm ³
	Mercury (Hg)	0.03 mg/Nm ³

3. Earlier Petition No. 1263/2017 was filed by the Petitioner for approval of Capital Cost for installation of FGD and other associated system along with DPR dated Oct'17 prepared by Tata Consulting Engineers. As per Commission's order dated 18.12.2017, the Petitioner had approached CEA and CEA vide its letter dated 21.02.2019 has provided a recommendation report detailing suggested technology and total indicative cost of installation of FGD system.
4. The Petitioner has filed the present Petition to seek regulatory certainty qua the treatment of such costs and in-principal approval and seek approval of operation & maintenance cost of FGD and other associated System with following Prayers:
 - a. Allow in principle approval for capitalization of actual capital cost incurred as per books of accounts based on CEA recommendation/report as per applicable Tariff Regulations towards installation of the Emission Control System and other associated facilities for the project.



- b. Allow incremental auxiliary consumption on the basis of actuals or as per norms to be approved by this Hon'ble Commission for computation of tariff post commissioning of the Emission Control System and other associated facilities at Lalitpur.
- c. Allow incremental operation & maintenance cost based on CEA report for installation of Emission Control System and other associated facilities.
- d. Allow shutdown period required for installation and commissioning of the Emission Control System at the Projects as Deemed Availability for payment of Capacity charges.
- e. Allow increased expenditure on water cost required for operation of the Emission Control System and other associated facilities at actuals.
- f. Allow Procurement cost of Limestone for operation of Emission Control System at actuals.
- g. Allow Consumption cost of various reagents like Limestone for operation of Emission Control System at actuals.
- h. Allow dumping area cost and additional cost associated with continuous dumper transportation for gypsum disposal.
- i. Allow to approach to UPERC for remaining Emission Control System which is not being implemented presently, but may be required in future based on actual assessment to comply revised environmental Norm.

Brief Facts of the Case:

5. MOEFCC vide letter dated 11.12.2017 has issued following directions to Petitioner;
 - i) That plant shall meet emission limit of PM immediately by installing Electrostatic Precipitator (ESP)
 - ii) That plant shall install FGD by December 2020, February 2021 & October 2021 in unit 1, 2, & 3 respectively so as to comply SO₂ emission limit.
 - iii) That plant shall take immediate measure like installation of low NOx burners, providing Over Fire Air (OFA) etc. and achieve progressive reduction so as to comply NOx emission limit by the year 2022.

The Petitioner has submitted that point i) and point iii) is not applicable in case of LPGCL as Electrostatic Precipitator (ESP) and low NOx burners are already installed as per MoEF&CC norms.

6. The Petitioner approached CEA vide its letter dated 28.12.2017 and CEA has provided its recommendations dated 21.02.2019 with indicative cost for CAPEX & OPEX on account of installation of FGD without taxes & duties and other financing costs, IEDC



and miscellaneous costs. The Petitioner has submitted that costs indicated by CEA are tentative and subject to final discovery of rates through competitive bidding process yet to be undertaken by LPGCL. The Petitioner has also submitted that CEA report has made generic recommendations which need to be tailored to suit site conditions and placed certain features/observations for adoption in case of LPGCL Power Station.

7. Regulation 6 (5) (b) and 22 (2) (ii) of the UPERC (Terms and Conditions of Tariff) Regulation 2014 provide as follows:

Regulation 6 (5)

"(5) The Commission shall carry out truing up of tariff of generating stations based on the performance of following uncontrollable parameters:

- (a) Force Majeure;*
- (b) Change in Law; and*
- (c) Primary Fuel Cost"*

Regulation 22 (2)

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

(i) Liabilities to meet award of arbitration or for compliance of the order or decree of a court;

(ii) On account of change in law;

(iii)

(vi)

(3) Any expenditure on minor items/assets like normal tools and tackles, personal computers, furniture, air-conditioners, voltage stabilizers, refrigerators, fans, coolers, TV, washing machines, heat-convector, carpets, mattresses etc. brought after the cut-off date shall not be considered for additional capitalization for determination of tariff. The said items are illustrated and may include any other similar items."

8. Further, Ministry of Power vide letter dated 30.05.2018 addressed to Chairman, CERC and circulated to Chief Secretaries of all states govts and UTs and Principal Secretary (in charge of energy) of all State Govts. and UTs has provided the following in exercise of power conferred under Section 107 of the Electricity Act'03 (Para 6 of the letter):



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

5.1 The MoEFCC Notification requiring compliance of Environment (Protection) Amendment Rules, 2015 dated 7th December, 2015 is of the nature of Change in Law event except in following cases:

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

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

9. The PPA defines 'Change in -Law' and Article 13.1.1, 13.2 and 13.2(a) & (b) of the PPA provides for the consequences of Change in Law. The relevant provisions of the PPA are being reproduced herein below:-

Article 13.1 of the PPA:

13.1.1

a. "Change in Law" means: - The occurrence of any of the following events after the date, which is seven (7) days prior to the Effective Date:

- i. any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law;
- ii. any Change in interpretation of any law by a competent court of Law, tribunal or Indian Governmental Instrumentality provided such court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or;
- iii. any change in any consents, approvals or licenses available or obtained for the project, otherwise than for default of the seller, which results in any change in any cost of or revenue from the business of



selling electricity by the seller to the Procurers under the terms of this Agreement, or

iv. Any Change in the cost of implementing Environmental Management Plan for the Power Station

b. Article 13.2 of the PPA defines Application and Principles for computing impact of change in law as under:

"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 Article 13, the affected party to the same economic position as if such Change in Law has not occurred."

Further Article 13.2 (a) provides that "As a result of any change in law, the impact of increase/decrease of capital cost of the project in the Tariff shall be as approved by UPERC. In case of Dispute, Article 17 shall apply."

Article 13.2 (b) further provides that

"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 Appropriate Commission whose decision shall be final and binding on both the parties, subject to rights of appeal provided under applicable law."

10. Further, Petitioner has submitted that Hon'ble Maharashtra Electricity Regulatory Commission in Case No. 300 of 2018 vide Order dated 06.02.2019 in the matter of Adani Power Maharashtra Ltd. has ruled that the MoEF&CC Notification dated 07.12.2015 is an event of Change in Law and also ruled that the additional capital and operation expenditure and other consequential impacts shall be considered on actual basis for reimbursement under Change in Law subject to prudence check. The relevant extract of the Order is reproduced below:

"25. In view of the foregoing, the Commission rules that the MoEF&CC Notification dated 7 December, 2015 is an event of Change in Law. Further the Commission also rules that the additional capital and operation expenditure and other consequential impacts shall be considered on actual basis for reimbursement under Change in Law subject to prudent check."



Accordingly, APML shall approach the Commission at later date for determination of increase in cost or/and revenue expenditure on account of implementation of revised norms in accordance with the Guidelines to be issued by CEA, if any and the mode of recovery of the same through tariff".

11. Petitioner has submitted that the revised emission norms as per MoEFCC Notification would result in:-

- a. Incurring of capital expenditure towards installation of FGD System and other associated system in order to comply with the Amendment Rules by the Petitioner. The cost incurred towards financing /interest and other incidental expenditure would be additional.
- b. Increased auxiliary consumption of Lalitpur TPP.
- c. Increase in the operation and maintenance cost of the Lalitpur TPP
- d. Loss of power station availability & corresponding generation loss due to installation and commissioning activities of the FGD System
- e. Increase in water cost required for operation of the FGD System
- f. Procurement cost of Limestone for operation of the FGD System

12. The Petitioner is required to obtain/deploy additional funds including debt funds, which are unlikely to be sanctioned by lenders in the absence of regulatory approval for such capital expenditure from the Hon'ble Commission. The tariff impact of the aforesaid additional capital expenditure towards installation of FGD system and other associated facilities and other relevant cost shall be claimed as per applicable Tariff Regulations of the Hon'ble Commission and order/directions.

Proceedings in the Matter

The hearing in the matter was held on 03.09.2019. The Respondent, UPPCL has filed its reply on 11.09.2019 and the Petitioner has submitted its rejoinder on 09.10.2019. The final hearing in the matter was held on 10.10.2019

Respondent / UPPCL Reply dated 11.09.2019

13. There is no change in law. The letter dated 30.05.2018 issued by the Ministry of Power, categorically states that the MoEF&CC notification dated 07.12.2015 would constitute as a change in law event except in cases wherein such requirements of pollutions control system was mandated under the environment clearance or envisaged otherwise before the said notification.



14. Under the EC the following conditions have been expressly mentioned by the MoEFCC:
- a. Provision for installation of a Flue Gas Desulphurization ("FGD") shall be provided.
 - b. Separate funds shall be allocated for implementation of the environmental protection measures along with item-wise break-up included in the cost of the project.

Thus, a conjoint reading of the EC and the MoP Letter would reveal that, the requirement to comply with the Environment (Protection) Amendment Rules, 2015 dated 07.12.2015 in the present case does not constitute a change in law as, LPGCL was well aware that it was required to set up a FGD Plant. Further, the EC has also provided that separate funds shall be earmarked for implementation of environment protection measures.

15. Under the change in law provision under the PPA, i.e. Article 13, there is no change in cost as the EC expressly mandated that an FGD Plant would be installed and funds comprising of the total project cost shall be set aside and ear marked for implementing pollution control systems. Therefore, The present Petition filed by LPGCL is pre-mature and does not merit any consideration by this Hon'ble Commission at this stage as, the Uttar Pradesh Electricity Regulatory Commission (Terms and Conditions of Generation Tariff) Regulations, 2014 ("**UPERC Tariff Regulations, 2014**") do not contain any provision for the grant of an in-principle approval as sought by LPGCL.
16. Petitioner, by virtue of the present Petition has not approached this Hon'ble Commission at the appropriate stage. The appropriate stage at which this Hon'ble Commission may be approached for approval of any additional capital expenditure would be after such capital expenditure has been actually incurred and upon obtaining the duly certified and audited accounts.
17. As per Article 13.3 of the PPA, if Petitioner desired to claim a "Change in Law" it was obligated to intimate UPPCL of the same immediately with precise details of the change in law and its impact. However, LPGCL has evidently failed to adhere to this process. The relevant extracts of Article 13 are reproduced herein below for ready reference:

"13.3 Notification of Change in Law



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

...

13.3.3 *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"*

In the present case, LPGCL has failed to notify UPPCL with regards to the change in law event although the MoEF&CC Notification was issued on 07.12.2015. Petitioner, in a letter dated 05.04.2019 addressed to UPRVUNL, has indicated that it would file a petition before this Hon'ble Commission and thereafter commence the bidding process. Further, in this letter, LPGCL stated that it would take 32 months to install the FGD Plant from the date of ordering.

Petitioner / LPGCL Reply dated 09.10.2019

18. The specific condition only mentions for provision of installation of FGD and Petitioner has already made provision for land for installation of FGD for future use. The estimation of cost of FGD was not taken as a part of capital cost at that time as the prevailing environmental norms were being complied without installing FGD.
19. That regarding change in law under UPERC (Terms & Conditions of Generation Tariff) Regulations, 2014 Regulation 16 of Chapter 2 under the head definitions defines change in law as under:
 - "(10) 'Change in law' means occurrence of any of the following events:*
 - (a) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law; or*
 - (b) change in interpretation of any law by a competent court, Tribunal or Indian Governmental Instrumentality which is the final authority under law for such interpretation;*
 - (c) change by any competent statutory authority, in any consent, approval or license available or obtained for the project; or*



(d) coming into force or change in any bilateral or multilateral agreement/treaty between the Government of India and any other Sovereign Government having implication for the generating station regulated under these regulations."

As it is clear from the above, that no distinction has been made on account of change in law either during the commissioning of the project or after commissioning of the project.

20. That Environmental Clearance ("EC") accorded vide letter dated 31.03.2011 and amended vide letter dated 20.05.2014 and 30.05.2016 in respect of Lalitpur Power Station merely requires the Petitioner to provide space and connectivity for FGD equipment if mandated in future. Further, Article 13.1.1 (iv) of the PPA in terms of change in law clearly provides that any change in the cost of implementing environmental management plant for the power station should constitute a change in law.

The Petitioner has neither considered the cost of FGD installation in the Tariff Petition nor has included the same under in-principle capital cost agreed by UPPCL. The Petitioner has already made available a copy of the said report of CEA to UPPCL even though CEA while submitting the said report through letter dated 21.02.2019 already marked a copy to Secretary – UPERC and Chief Engineer (PPA), UPPCL and the letter was annexed with the present Petition. At this stage Petitioner is seeking comfort or in-principle approval to facilitate to secure loan from financial institutions. Therefore, the contention of Respondent is denied in totality and the same is liable to be rejected.

21. The Petitioner has appointed TCE as a consultant for preparation of tendering documents of FGD. While preparing the tender document, TCE will take care the recommendation of CEA regarding chimney selection. During bid evaluation, the best option will be finalized in consultation with UPPCL. Further, it is pertinent to mention that UPPCL vide letter dated 06.02.2019 & 11.02.2019 has already nominated its representative for monitoring the process of tendering and awarding the contract.

Commission's decision and analysis:

The Commission vide order dated 18.12.2017 in Petition No. 1263/2017 had directed the Petitioner the following:



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

The Petitioner in its own wisdom has approached the Commission by filing the current Petition for in principle approval of expenditure on installation of various emission control systems, which is incorrect. **The Commission is of the view that appropriate stage at which this Hon'ble Commission may be approached for approval of any additional capital expenditure would be at the time of trueing up as per Generation Tariff Regulations, 2019.**

The Commission has gone through the Petition, reply and rejoinder of both the parties and following issues emerge to be dealt in accordance with law:

Issue 1: Regulatory uncertainty qua treatment of additional capital cost

The Petitioner has sought certainty about treatment of this additional capital cost vis-à-vis Change in law event. The Tariff Regulations clearly provide the procedure to be adopted for the approval of additional capital expenditure to be incurred by Petitioner on account of a Change in Law event. At this juncture it is relevant to highlight Regulation 20(2) of the Generation Tariff Regulations, 2019 which provides the framework qua the additional capital expenditure applicable to the Petitioner. The Regulation 20(2) of the Tariff Regulations, 2019 is replicated herein below:

Additional Capitalization

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

- (i) *Liabilities to meet award of arbitration or for compliance of the directions or Order of any statutory authority, or Order or decree of a Court;*
- (ii) *Change in Law;*

..."

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

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



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

15. Controllable and Uncontrollable factors:

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

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

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

Issue No. 2: Whether the MOEFCC Notification dated 7.12.2015 requiring the thermal generating stations to implement the revised environmental norms amounts to Change in Law in terms of the provisions of the PPA and 2014 Tariff Regulations?

Though the Petition has no specific prayer for declaring the Notification dated 7.12.2015 amounts to Change in Law, the Commission, to meet the ends of justice, has dealt with this issue in following paras:



The Environment (Protection) Rules, 1986 have been notified by the Central Government in exercise of the power vested under sections 6 and 25 of the Environment Protection Act, 1986. Rule 3 of the Environment (Protection) Rules provides Standards for emissions or discharge of environmental pollutants. The said Rules have been amended vide notification dated 7.12.2015. A summary of new norms, as notified by MOEF &CC are as follows:

NEW REGULATIONS ON EMISSION

Date of Installation (Plant COD)	PM	SO ₂	NO _x	Mercury (Hg)
Before 31-12-2003	100 mg/Nm ³	600 mg/Nm ³ for <500MW 200 mg/Nm ³ for ≥500MW	600 mg/Nm ³	0.03 g/Nm ³ for ≥500MW
Between 01-01-2003 & up to 31-12-2016	50 mg/Nm ³	600 mg/Nm ³ for <500MW 200 mg/Nm ³ for ≥500MW	300 mg/Nm ³	0.03 mg/Nm ³
On or after 01-01-2017	30 mg/Nm ³	100 mg/Nm ³	100 mg/Nm ³	0.03 mg/Nm ³

The Petitioner has admitted in the current Petition that in terms of directions of MOEFCC vide letter dated 11.12.2017, Electrostatic Precipitator (ESP) and low NO_x burners are already installed as per MoEF&CC norms.

The Central Government vide its letter ref. no. in23/22/2018-R&R dated 30.05.2018 has held that the said notification is of the nature of Change of Law except in following cases:

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

The Commission has observed that the Environment Clearance dated 31.03.2011 and amended vide letter dated 20.05.2014 and 30.05.2016 in respect of Lalitpur Power Station has condition that the Sulphur and ash content of coal shall not exceed 0.5% and 34% respectively and also that Provision for installation of FGD shall be provided. Also, the

Petitioner is required to regularly monitor ambient air for ground level concentration of SO₂, NO_x, PM_{2.5} and PM₁₀ and Hg that these do not exceed the prescribed limits. The past data of various emissions has not been placed on record of the Commission to compare the level pre and post MOEF notification dated 7.12.2015 to take a decision on merit of the case. **Therefore, extent of applicability of "Change in law" to every Thermal Power Plant would be governed by its Pre-existing obligation, conditions, standards, Norms, applicable Regulations and PPA.**

The Petitioner would be required to demonstrate that the changes in norms on account of MoEF&CC's Notification vis-à-vis the pre-existing obligations / conditions / norms as provided by the Environment Clearance for the Project and produce pre and post MOEFCC notification date emission levels, all Environment Compliance reports since COD of respective units, CTO, CTE and Environmental Impact Assessment Report and Expert Appraisal Committee Report etc. given to the Petitioner's Project. The Petitioner would be required to specify the obligations/conditions/standards as applicable prior to the Commercial Operation Date to enable this Hon'ble Commission to consider the aspect of Change in Law.

For example, if a condition was envisaged under the Environmental Clearance, without being a part of the Environment (Protection) Rules it means that the Petitioner was already subject to the said condition at the time of grant of environmental clearance and there is no change in law.

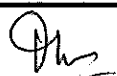
Issue 3: Whether PPA mandates prior declaration of change in law

The PPA being a commercial arrangement between the parties allocates certain obligations, functions and risks to respective parties. The Change in Law has to be dealt in terms of the express provisions of the PPA. As per Article 13.3 of the PPA, for claiming a "Change in Law" Petitioner was obligated to notice UPPCL of the of the same as soon as reasonably practicable after becoming aware of the same.

"13.3 Notification of Change in Law

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

...



Commission finds that as per PPA, the Respondent, UPPCL is required to be prior notified of such events as is reasonably practicable. The Petitioner has submitted that UPPCL vide letter dated 06.02.2019 & 11.02.2019 has already nominated its representative from UPRVUNL for monitoring the process of tendering and awarding the contract. Involving UPRVUNL in the contract award committee cannot be interpreted as consent of UPPCL for the bidding and package award process as both are separate entities.

The Commission is of the view that the PPA nowhere stipulates that the Petitioner has to approach the Hon'ble Commission for seeking a prior declaration of Change in Law event as defined under the PPA. Since, the PPA does not contemplate any such prior declaration of Change in Law, the same cannot be granted to the Petitioner. Further, it is the Petitioner's obligation to comply with prevalent laws and ensure that all the consent and approvals required for the Project are obtained by it.

The Petition is disposed off in terms of above.



(Kaushal Kishore Sharma)
Member



(Raj Pratap Singh)
Chairman

Place: Lucknow
Dated: 07.02.2020