

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 33/MP/2016
along with IA No. 6 of 2016**

Coram:

Shri P.K.Pujari, Chairperson

Dr. M.K.Iyer, Member

Date of Order: 20th February, 2019

In the matter of

Petition under Section 79 (1) (a) of the Electricity Act, 2003 read with CERC (Terms and Conditions of Tariff) Regulations, 2014 for relief on account of 'Change in Law' affecting Badarpur Thermal Power Station.

And

In the matter of

NTPC Limited
NTPC Bhawan
Core-7, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi - 110 003

...Petitioner

Vs

1. BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place,
New Delhi -110019

2. BSES Yamuna Power Limited
Shakti Kiran Building, Karkardooma,
Delhi -110092

3. Tata Power Delhi Distribution Ltd.
Grid Sub-station Building, Hudson Lines,
Kingsway Camp
New Delhi -110 009

4. New Delhi Municipal Council
Palika Kendra Building, Parliament Street,
New Delhi - 110001

5. Military Engineering Services
Delhi Cantonment, New Delhi -110010

6. State Load Despatch Centre
Minto Road, New Delhi - 110002

....Respondents



Parties present:

Shri Sitiesh Mukherjee, Advocate, NTPC
Shri Divyanshu Bhatt, Advocate, NTPC
Shri Deep Rao, Advocate, NTPC
Shri Nishant Gupta, NTPC
Shri Kousik Mandal, NTPC
Shri Manoj Kr. Sharma, NTPC
Shri E.P.Rao, NTPC
Shri Buddy Ranganadhan, Advocate, BRPL & BYPL
Shri Hasan Murtaza, Advocate, BRPL & BYPL
Ms. Bushra Waseem, Advocate, BRPL & BYPL
Shri Kanishk, BRPL
Shri Nishant Grover, BYPL
Shri Apoorva Misra, Advocate, TPDDL
Shri Varun Kapoor, Advocate, TPDDL
Ms. Shefali Sobti, TPDDL
Shri Uttam Kumar, TPDDL
Shri S.K.Singh, Advocate, SLDC
Ms. Sonali Garg, SLDC
Shri B.L.Gujar, SLDC

ORDER

The Petitioner, NTPC has filed the present Petition seeking the following reliefs:

“(a) Declare that the change by the DPCC in emission norms contained in the Consent to Operate dated 2.1.2014 is a "Change in Law" in accordance with the PPAs;

(b) Direct the Respondents to make the payment of the fixed charges incurred by the petitioner from 31.12.2015 for all 4 units till they are permitted to operationalize.

(c) Pass such other and further orders and/or directions as this Hon'ble Commission may deem fit and proper...”

Background

2. Badarpur Thermal Power Station (hereinafter called 'BTPS') with a total capacity of 705 MW (3 x 95 MW + 2 x 210 MW) was originally set up by the Govt. of India in 1973 and was later transferred to the Petitioner with effect from 1.6.2006. The COD of the different units of Stages-I & II of BTPS are as under:



Stage- I	Stage-II
Unit-1 (95 MW): 1.11.1973	Unit-4 (210 MW) : 17.3.1980
Unit-2 (95 MW): 1.9.1974	Unit-5 (210 MW) : 1.4.1982
Unit-3 (95 MW): 1.4.1975	

3. Subsequent to the transfer, Delhi Transco Ltd entered into PPA with NTPC on 21.3.2007 for purchase of power. Pursuant to the Delhi Electricity Regulatory Commission's (DERC) order dated 1.4.2007, the said PPA along with other PPAs were re-assigned to the various distribution licensees in Delhi. Accordingly, NTPC has the following PPAs with the distribution licensees in Delhi for sale of the entire quantum of power generated by BTPS.

Sl. No	Distribution licensees	Date of PPA	Capacity Allocation (in MW)
1.	NDMC	6.5.2008	125
2.	TPDDL	8.5.2008	176
3.	BRPL	5.6.2008	236
4.	BYPL	5.6.2008	118
5.	MES	31.7.2008	50

4. The Petitioner has been operating and selling power to the above said distribution licensees (Respondents 1 to 5 herein) and the scheduling of power from BTPS is carried out by the State Load Despatch Centre, Delhi (hereinafter called 'the Delhi SLDC'), the Respondent No. 6 herein.

Submissions of Petitioner

5. The Petitioner in this Petition has made the following submissions:

(a) On 24.3.2008, Delhi Pollution Control Committee (DPCC) requested BTPS to take necessary action to meet the standard of 50 mg/Nm³ for Particulate Matter (PM) emission in the stacks of BTPS. Subsequently, the Petitioner vide letter dated 29.3.2008 informed DPCC, amongst others, that 'Comprehensive renovation and modernization package specification for improvement in ESP efficiency to achieve emission <50 mg/Nm³ in 2 x 210 MW units has been finalized at an estimated cost of ₹40 crore and expected date of NIT for this package is by the end of June, 2008.



(b) On 29.5.2008, DPCC again requested the Petitioner to take necessary action to meet the standard of 50 mg/Nm³ for PM emission in all the five units of BTPS. Thereafter, on 28.1.2011, the DPCC sought an action plan from the Petitioner on how it would achieve Suspended Particulate Matter (SPM) reduction to 50 mg/Nm³ from the Petitioner. The Petitioner vide letter dated 28.2.2011 stated that R&M activities would be undertaken in respect of Stage-II and that it was considering replacing Stage-I with a gas-based plant.

(c) On 2.1.2014, the DPCC issued a Consent to Operate (Renewal) to the Petitioner for BTPS under section 21 of the Air Act and section 25 and 26 of the Water Act, 1974. The said Consent To Operate (CTO) was issued under Orange Category (under the Air and Water Acts) with a condition that the standard of PM emissions shall not exceed 150 mg/Nm³ and was valid upto 31.1.2018. The CTP was issued despite the DPCCs aforesaid correspondence with BTPS. Thus, the norm for PM emissions applicable to BTPS was 150 mg/ Nm³ and not 50 mg/ Nm³. The Petitioner is still complying with this norm of 150 mg/ Nm³.

(d) On 8.7.2015, the DPCC issued a show cause notice under section 31 (A) of the Air (Prevention and Control of Pollution) Act, 1981 to the Petitioner seeking reasons as to why BTPS ought not to be closed down for failing to bring its PM emission level below 50 mg/Nm³. The DPCC also provided opportunity to the Petitioner to submit its reply as to why the Consent to operate dated 2.1.2014 should not be revoked with immediate effect. On the same day, DPCC issued another show cause notice asking the Petitioner to submit its reply as to why the units of BTPS should not be closed with immediate effect.

(e) The Petitioner vide letter dated 21.7.2015 informed DPCC that it had considered the proposal for development of gas based thermal power plant in place of BTPS. However this was not viable because of the unavailability of sufficient quantities of gas. Due to the unavailability of gas, the Central Electricity Authority (CEA) vide Circular dated 19.3.2012 advised that project developers ought not to plan projects based on gas till 2015-16. Therefore, the replacement of BTPS with a gas based power plant was not a viable option.

(f) The only other option available to the Petitioner to bring down its emission levels was to install an additional pollution mitigation system to comply with the abruptly revised emission norms of 50 mg/Nm³. With respect to Stage II, the Petitioner provided the said pollution mitigation system through Renovation and Modernization (R&M) at a cost of ₹59.42 crore. The said R&M activities were approved by the Commission. Further, with respect to Stage-I, the Petitioner filed Petition No.288/GT/2014. The Petitioner does not have any other mechanism through which to upgrade its existing technology to lower emission levels.



(g) During a meeting held on 25.8.2015, the DPCC advised the Petitioner to provide for additional pollution control systems in order to bring down the PM emission level to 50 mg/Nm³, failing which the Petitioner was advised to replace BTPS with a gas based plant. The Petitioner had apprised the status of its pollution mitigation measures to the DPCC on 2.12.2015.

(h) On 8.12.2015, the DPCC reiterated that additional pollution control systems were to be installed in BTPS, in the absence of which BTPS would have to be shut down till 15.3.2016. This is indicative of the fact that the DPCC did not provide the Petitioner with any reasonable or adequate time to initiate appropriate technological up-gradation measures to reduce emission levels. The said indications by DPCC are shocking in the light of the fact that the Consent to operate itself stipulate that the emission norms for BTPS would be 150 mg/Nm³. A rough estimate of the time which would be required to upgrade Stage-I of BTPS is approximately 19 months.

(i) DPCC vide its direction dated 31.12.2015 required the Petitioner not to operate 4 out of the 5 units of BTPS up to 15.3.2016 with immediate effect. Thus, the Petitioner was not given any reasonable time to comply with the DPCC's demands of reducing the PM emissions. Thus, the Change in Law adversely impacted 4 out of 5 units of BTPS on 31.12.2015. Consequently, the Petitioner ought to be entitled to relief from the date of its shut down by DPCC till such time it is permitted to resume operations.

(j) In the present case, the Petitioner has incurred expenses due to shut down of 4 out of 5 units and the SLDC is allowing the Petitioner to issue Declared Capability (DC) for only one unit of 210 MW. Thus, the Petitioner is being denied DC and consequently recovery of fixed charges for 4 out of 5 units of BTPS on account of change in the norms of Consent to Operate.

(k) Vide letter dated 30.12.2015, the Petitioner informed the Secretary Power, Government of NCT, Delhi that Electro Static Precipitators (ESPs) in Unit-I of Stage-II (Unit-4) have been modified to comply with the revised emission norms of DPCC. However, the said unit has also wrongfully been directed to shut down operations despite being capable of maintaining PM emission below 50 mg/Nm³ on a sustainable basis. Further, SLDC is also not permitting the Petitioner to declare availability on the basis of DPCC's direction. It is, therefore, requested that Unit-I of Stage-II (Unit-4) should be allowed to resume operations as it is capable of complying with the emission norms. In the alternate, the Petitioner should be allowed to recover fixed charges for the closure of the said unit by the DPCC.

(l) On 11.2.2016, the DPCC modified the norms for PM emission of the petitioners Consent to Operate dated 2.1.2014 from 150 mg/Nm³ to 50 mg/Nm³. The tariff for the electricity supplied by the Petitioner is to be determined by this Commission under the Central Electricity Regulatory Commission (Terms and



Conditions of Tariff) Regulations, 2014 (Tariff Regulations). Regulation 3(9)(d) of the Tariff Regulations clearly provides that a change in any of the conditions of a consent amounts to Change in Law.

(m) The Consent to Operate issued by the DPCC is essential for all units of BTPS to lawfully operate. The change by DPCC in its norms is a Change in law event under the Tariff Regulations. A generating company faced with a circumstance of Change in Law, would apply for the recovery of tariff in the form of a true up petition in accordance with Regulation 8 of the Tariff Regulations. The Tariff Regulations thus expressly recognise the potential adverse impact of a Change in Law on a generating company and provide that the costs arising as a consequence of such Change in Law would be trued up and passed on to the distribution companies in the form of tariff.

(n) The present circumstances are unique and exceptional because BTPS is approaching the end of its project life in respect of Stage-I given that a true up petition is permitted to be filed only after the present control period. It is therefore not feasible for the Petitioner to seek a true up of the present Change in law event as the life of the project may expire prior to the expiry of the current control period, which ends on 31.3.2019. Consequently, it is financially debilitating and prejudicial for the Petitioner to remain unpaid for the enormous fixed costs it is incurring on account of the shut-down of 4 of its units directed by DPCC.

(o) It would be a huge financial liability for the Respondents 1 to 5 to at once pay for the entire quantum of losses being suffered by the Petitioner on account of Change in law and adversely affect the cash flows of the Respondents. This in turn would jeopardise the Petitioner's ability to recover the costs incurred by it in the future. It is therefore submitted that it would be appropriate for the Respondents 1 to 5 to pay the Petitioner fixed charges as relief from Change in law, as part of the present tariff cycle.

6. Based on the above, the Petitioner has submitted that the financial losses incurred by the Petitioner due to shut down of 4 out of 5 units of BTPS on account of Change in the norms for PM emission of Consent to Operate by DPCC, is recoverable from the discoms through tariff.

7. The Petitioner has also filed Interlocutory Application (IA No. 6/2016) seeking directions on Respondent Nos. 1 to 5 to make payment of fixed charges incurred by the Petitioner from 31.12.2015 for all 4 units pending disposal of the Petition.

Thereafter, the Petitioner vide affidavit dated 25.4.2016 has filed additional



documents with a prayer to consider the same as part of record and has submitted the following:

(a) A meeting was held on 15.3.2016 between the Department of Power, DPCC, Delhi Transco Ltd, SLDC, Discoms, BTPS and Rajghat Power House and it was decided to allow the operation of the two units of 210 MW of BTPs (Units 4 and 5 of Stage-II).

(b) Thereafter, DPCC vide letter dated 21.3.2016 informed the petitioner that it is allowed to operate the two units of 210 MW of BTPs. Subsequent to this, the SLDC considered the DC for Unit-II of Stage-II (Unit-5) from 1.1.2016 and for Unit-I of Stage-II (Unit-4) from 21.3.2016 in the energy account. However, SLDC has been considering the DC of Stage-I units of BTPs as 'nil' in the energy account being issued by them.

(c) It transpires that whenever Delhi Discoms wanted to avail the generation from these units of BTPs, DC has been considered and reflected in the energy accounts of SLDC and whenever the Discoms did not want the generation, the DC of Stage-I of BTPs was not accepted, thereby declining the claim of fixed charges during the period.

(d) Without prejudice, the financial loss incurred by the Petitioner due to shut down of Unit-4 from 31.12.2015 to 20.3.2016 as a result of directions issued by DPCC is recoverable from Discoms through tariff.

(e) During the meeting on 15.3.2016, it was decided that DTL and SLDC shall submit proposal for running of units/plants which have been shut down by DPCC due to their failure to meet the standards of PM, on account of an emergency situation with respect to power supply.

(f) Stage-I units of BTPs had been directed to shut down since 31.12.2015 by DPCC due to their failure to meet the standard of PM. Therefore, pursuant to the meeting dated 15.3.2016, the Petitioner vide letter dated 18.3.2016 requested SLDC to decide on the requirement to operate Stage-I of BTPs considering that the generation level from BTPs in the year 2014-15 during the peak summer was 500-520 MW.

Accordingly, the Petitioner has submitted that the above documents are essential for deciding the issue and may be treated as part of the submissions in the present Petition.

8. The Petition was admitted on 26.4.2016 and notice was issued to the respondents. Reply to the Petition has been filed by the Respondents BRPL & BYPL



(affidavit dated 23.5.2016), TPDDL (affidavit dated 30.6.2016) and the Delhi SLDC (affidavit dated 5.9.2016). The Petitioner has filed its Rejoinder to the said replies vide affidavits dated 26.7.2016, 4.8.2016 and 17.10.2016 respectively. Based on the request of NTPC during the hearing of the Petition on 30.6.2016, this Petition was listed for hearing along with Petition No. 86/MP/2016 (filed by BYPL & BRPL) and Petition No. 91/MP/2016 (filed by TPDDL).

Reply of Respondents

BYPL & BRPL

9. The Respondents, BRPL & BYPL has mainly submitted the following:

(a) The Petition filed on the basis that the Pollution Control norm of 50 mg/Nm³ was made applicable only by the Consent to Operate dated 8.7.2015 is erroneous, since the emission norm of 50 mg/Nm³ was in fact in force and applicable from 28.2.2008. Thus, there is no question of Change in law as it was the law applicable to the Petitioner from 2008.

(b) If the permissible norm of 50 mg/Nm³ was in force even in 2012 when tariff was determined by the Commission, there can be no question of change in law as the law/norm even as on the date of tariff determination it was 50 mg/Nm³. The mere fact that the same norm is being enforced by the Pollution Control Committee in 2015-16 is no ground to presume that the law has changed.

(c) The only relief, if at all, that the Petitioner could even claim under the 2009 Tariff Regulations on the basis of change in law could be only for additional capitalisation. Even assuming, without admitting that such a claim were change in law under the 2014 Tariff Regulations, the only consequence thereof under this regulations could be a true-up of tariff under the 2014 Tariff Regulations. There is no provision, under the 2014 Tariff Regulations, for payment of full fixed charges when the plant is shut on account of change in law.

(d) The payment of Capacity charges is on the basis of DC certified by SLDC. If the plant is shut, the deemed availability is 'nil' and hence there is no question of any capacity charges.

(e) The PPA between the Petitioner and the Respondents limits the effect of change in law to the recovery of any 'expenses' on account of change in law as approved by this Commission. Hence, the claim of the Petitioner for capacity charges on account of change in law is not maintainable under the regulations



of this Commission or under the PPA.

(f) By letter dated 31.12.2015, the DPCC has clarified that the Pollution control norm of 150 mg/Nm³ as prescribed under the Environment Protection Act, 1986 has changed to 50 mg/Nm³ in the year 2000 and DPCC in its Board decision dated 22.6.2000 had decided to apply the said norm and accordingly directed NTPC by letter dated 24.3.2008 to apply the said norm. Hence, no claim can be made by NTPC after such a long gap. By letter dated 30.12.2015, the Petitioner informed the Govt. of NCT that the norm of 50 mg/Nm³ was being complied with.

(g) By letter dated 11.2.2016, the DPCC has in fact continued to apply the same norm of 50 mg/Nm³ on the Petitioner's plant as had been decided vide its Board decision dated 22.6.2000. As is evident from records, the Petitioner has always acted in order to reduce its emission levels below the PM emission norm of 50 mg/Nm³ and therefore by its own conduct, the Petitioner cannot claim relief for the alleged modification of norms from 150 mg/Nm³. Hence, the present Petition is liable to be dismissed with costs.

(h) Even if it is to be considered that the Pollution Control norm of 150 m/Nm³ as prescribed under the Environment Protection Act and the Rules made thereunder has changed to 50 mg/Nm³, the same has changed in the year, when the DPCC in its board decision dated 22.6.2000 decided to apply the pollution control norm of 50 mg/Nm³ and asked the Petitioner by letter dated 24.3.2008 to apply the said norm. After expiry of 15 years, the Petitioner cannot claim that it is affected by change in law. In fact, the letter of DPCC dated 2.1.2014 has to be construed in a manner that the pollution control norm of 150 mg/Nm³ was not modified on 2.1.2014 but was modified in Board decision of 22.6.2000 and thereafter applied by letter dated 24.3.2008. Hence, the Petition is barred by limitation.

(i) The Petition is defective for non-joinder of necessary and proper parties. It is submitted that the DPCC, Govt. of NCTD, Delhi and the SLDC are necessary parties in view of the averments made in the Petition and to effectively adjudicate the present matter.

(j) The DPCC has issued orders directing the closure of 3 units of 95 Mw of BTPS. These are statutory directions issued under the Air (Prevention & Control of Pollution) Act, 1981 and Water (Prevention & Control of Pollution) Act, 1974. As such there cannot be any legally enforceable contract in case of orders/directions, if any, of the supervening authority. Therefore, the question of payment of any charges based on change in law cannot arise in the light of the fact that the BTPS plant cannot operate as per statutory directions. When units have been directed to be shut down, the question of incurring fixed costs should not arise and is not a valid claim.



Based on the above, the Respondents have submitted that the Petition is not maintainable and the same may be rejected.

TPDDL

10. The Respondent, TPDDL has made submissions similar to those made by the Respondents BRPL & BYPL as above. In addition, the said Respondent has submitted that it was open to the Petitioner to initiate appropriate legal proceedings against the DPCC orders and file requisite appeal and take appropriate action. Since this has not been done, the last order/direction of DPCC has attained finality by the Petitioner's own waiver and conduct. The Respondent has further stated that Stage-I units have outlived their useful life and are not required for meeting the power requirement obligations and hence needs to be closed or phased out. Accordingly, the Respondent has submitted that the Petition may be rejected.

SLDC (DTL)

11. The Respondent, Delhi SLDC vide affidavit dated 5.9.2016 has submitted that it is certifying DC of BTPS Units as per their availability after considering the directions of DPCC. It has also submitted that it discharges the duties and responsibilities of system operator for ensuring secure and reliable grid operation. Accordingly, SLDC has placed on record the DC of BTPS machines after considering the directions of DPCC regarding non- allowing of operations of Stage-I units due to non- compliance of pollution norms.

Rejoinder of NTPC

12. The Petitioner in its rejoinders to the above said replies of the Respondents has submitted the following:

- (a) The CTO (Consent to Operate) dated 2.1.2014 issued by DPCC to BTPS



clearly provides that the SPM emission norm applicable to BTPS up to 31.1.2018 is 150 mg/Nm³. The CTO is a mandatory consent under the Air (Prevention & Control of Pollution) Act, 1981 and Water (Prevention & Control of Pollution) Act, 1974 issued to the Petitioner by DPCC. Thus, the law applicable to BTPS from 2.1.2014 to 31.3.2018 in this regard was 150 mg/Nm³ as the CTO is an essential statutory consent required by the Petitioner to operate the BTPS. Hence, a change in any of the conditions of CTO after 2.1.2014 amounts to a change in law under the Tariff Regulations and the off-take arrangements executed between the Petitioner and Respondents 1 to 5. The events which transpired prior to 2.1.2014, when the CTO was issued to the Petitioner are wholly immaterial and irrelevant to the adjudication of this Petition.

(b) The present Petition is confined to seeking relief on account of change in law from 31.12.2015 onwards when 4 out of five units of BTPS were ordered not to operate by DPCC. The Tariff Regulations are designed in a manner to shield generating companies from uncontrollable factors such as change in law and the risk thereof has been apportioned to discoms. The discoms are to bear the costs associated with changes in law as per the tariff regulations as part of tariff recoverable by a generator.

(c) It is not feasible for the Petitioner to seek truing-up of the change in law event as the life of the project may expire prior to the expiry of the present control period which ends on 31.3.2019. Notwithstanding all prior communications from DPCC, the PM emission norm prescribed in the CTO issued to the Petitioner was 150 mg/Nm³ and any such norm is to be examined after such date and not before. Thus, it is denied that the emission norm of 50 mg/Nm³ was applicable to the Petitioner from 28.2.2008 onwards when the CTO dated 2.1.2014 clearly stipulates the norm as 150 mg/Nm³.

(d) The emission norm in all the CTO issued to the Petitioner has been 150 mg/Nm³. It was only on 31.12.2015 that the norms of 50 mg/Nm³ was enforced by DPCC against the Petitioner and 4 out of 5 units were ordered not to operate, which is when the Change in Law took effect. The CTO issued to the Petitioner was formally amended by DPCC by its letter dated 11.2.2016. Thus, the Change in Law took place only after 2.1.2014 when the norms of 150 mg/Nm³ were reduced to 50 mg/Nm³.

(e) The Commission has not ordered the complete shut-down and winding up of Stage-I of BTPS. Until such time, it is necessary for Stage-I to be kept in a state of readiness to generate power should it become necessary to service the demand of consumers in the NCT of Delhi. By letter dated 31.12.2015, DPCC had only requested for Stage-I and one Unit of Stage-II of BTPS to be remained closed upto 15.3.2016. In preserving a thermal power plant of BTPS nature in a state of readiness to generate power, the Petitioner naturally incurs fixed charges. It is these fixed charges that the Petitioner has been constrained to



incur for the entire period during which the units of BTPS have been directed to remain closed by DPCC.

(f) The Petitioner is required to comply with the conditions of the statutory consent as per its express terms and not with previous correspondence. Thus, the law applicable to the Petitioner from 2.1.2014 onwards is a norm of 150 mg/Nm³ which was subsequently changed to 50 mg/Nm³. It is this change which constitutes change in law and there is no question of the matter being barred by delay or laches.

(g) The Petitioner has not claimed any relief against the DPCC and any facts, to which only DPCC is privy, has not been disputed. It is open for this Commission to decide the present dispute independent of the tariff proceedings and any financial adjustments which become necessary may be made in due course.

(h) The Petitioner was never bound to comply with the norm of 50 mg/Nm³ till the change in law event occurred on 31.12.2015. The change in law event claimed by the Petitioner is subsequent to the date when the CTO was issued to the Petitioner after 2.1.2014.

(i) In addition to the fixed costs, which the Petitioner is incurring on account of change in law, it is also incurring costs to preserve the closed units of BTPS in state of readiness to be operationalized at a short notice, should the power demand in the NCT of Delhi so necessitate. Under the pretext of consumer interest, the Respondents cannot escape its legal obligation to compensate the Petitioner for a change in law.

(j) Subsequent to DPCC orders, Delhi SLDC has not been considering the DC of Stage-I units with effect from 1.1.2016 while certifying the availability of BTPS. The Petitioner is incurring costs to keep the units available, but its legitimate fixed cost on this count is being denied.

(k) In view of reliability and security of the grid, the Petitioner is keeping the Stage-I units ready for operation and incurring substantial costs. Delhi SLDC has envisaged operation of Stage-I units in case of emergency in grid. Therefore, Delhi SLDC is utilizing the technical capability of Stage-I units by keeping them ready for operation in case of emergency and not considering the DC for commercial purposes which is not justified.

Accordingly, the Petitioner has submitted that the submissions of the Respondents may be rejected and the prayer of the Petitioner may be allowed.



13. The Petition was heard on 8.12.2016 along with other Petitions and the Commission vide ROP directed the staff of the Commission to refer the Petitions to CEA and seek its technical advice with regard to closing down or phasing out of the units of BTPS, keeping in view the islanding scheme and grid requirement of NCT of Delhi in consultation with NRLDC and SLDC Delhi. CEA vide its letter dated 13.10.2017 has submitted its comments, during the pendency of these Petitions. Thereafter, Petition No. 86/MP/2016 was heard separately and the same was disposed of by Commission's dated 3.12.2018. During the hearing of this Petition on 13.12.2018, the learned counsels appearing for the Petitioner and the Respondents BRPL & BYPL, TPDDL and SLDC mainly reiterated the submissions made in their Petition/replies/rejoinder filed by them. Accordingly, the Commission reserved its order in this Petition. Since the prayer of the Petitioner in the IA No. 6/2016 is the same as in the Petition, we propose to dispose of the same by this order.

Analysis and Decision

14. Based on the submissions of the parties, the following issues emerge for consideration:

Issue No.1: Whether the directions of DPCC for closure of Stage-I units and one unit of Stage-II of BTPS is a Change in law event;

Issue No.2: Whether the Petitioner is entitled for capacity charges during the period of closure of the said units;

Issue No.1: Whether the directions of DPCC for closure of Stage-I units and one unit of Stage-II of BTPS is a Change in law event;

15. Under Section 4 of the Water (Prevention and Control of Pollution) Act, 1974 and Section 6 of the Air (Prevention and Control of Pollution) Act, 1981 the Central Pollution Control Board (CPCB) is empowered to perform the functions of the State Pollution Control Board for all Union Territories. However, Section 4(4) of the



Water (Prevention and Control of Pollution) Act, 1974 and Section 6 of the Air (Prevention and Control of Pollution) Act, 1981 provides that the CPCB may delegate all or any of its powers and functions of a State Board in a Union Territory (UT) under the said Acts to such person or body of persons as the Central Government may specify. The CPCB has delegated all its powers and functions as a State Board in respect of the UT of Delhi to DPCC (a committee of officials as specified by the Central Government) vide Notification No. S.O.198 (E) dated 15.3.1991.

16. DPCC on 24.3.2008 had requested the Petitioner to take necessary action to meet the standard of 50 mg/Nm³ for Particulate Matter in the stacks of BTPS. The relevant portion of the letter dated 24.3.2008 is extracted hereunder:

“Therefore, by way of this letter, you are requested to take necessary action to meet the standard of 50 mg/Nm³ for Particulate Matter emission in the stacks of the power plant. In case high emission is caused due to high ash content in coal, the ash content may be reduced in the fuel (coal)....”

17. Thereafter, DPCC vide its letter dated 28.1.2011 sought an action plan from the Petitioner on how it would achieve reduction of SPM to 50 mg/Nm³. In response, the Petitioner vide letter dated 28.2.2011 had submitted that R&M activities would be undertaken replacing Stage-I with a gas based plant. However, the DPCC on 2.1.2014 granted Consent to Operate (CTO) to the Petitioner for BTPS, valid till 31.1.2018, under Section 21 of the Air Act and Sections 25 and 26 of the Water Act, 1974, The CTO issued to BTPS was subject to the condition, amongst others, that the PM emission norms shall not exceed 150 mg/Nm³. The relevant portion of the CTO dated 2.1.2014 is extracted hereunder:

“(1) Conditions under Water Act

xxxx

(2) Conditions under Air Act



“i)The existing two main stacks of 150 meters height each should be maintained properly. All the ducts carrying the flue gases should be properly insulated so that no loss of heat takes place and proper plume rise is achieved.

ii) Particulate Matter (PM) emissions shall not exceed 150 mg/Nm³

iii) xxxxxxxx..”

Thus, the norm for PM emission applicable to BTPS from 2.1.2014 till validity of CTO was 150 mg/Nm³.

18. While so, DPCC on 8.7.2015 issued show cause notice to the Petitioner under section 31 (A) of the Air Act, 1981 seeking reasons as to why BTPS ought not be closed down for failing to bring its PM emission level below 50 mg/Nm³. On the same day, another show cause was issued by DPCC asking the Petitioner to submit its reply as to why the units of BTPS should not be closed with immediate effect. Though the Petitioner had apprised DPCC of the status of pollution mitigation measures on 2.12.2015, the DPCC on 8.12.2015 reiterated that the additional pollution control systems were to be installed in BTPS, in the absence of which BTPS would have to be shut down till 15.3.2016. Subsequently, DPCC vide its letter dated 31.12.2015 directed the Petitioner not to operate four out of five units of BTPS (Three units of Stage-I and One unit of Stage-II) up to 15.3.2016 with immediate effect. The relevant portion of the letter dated 31.12.2015 is extracted hereunder:

“In view of the above, the Badarpur Thermal Power Station is directed under Section 31 (A) of the Air Act, 1981 that it shall not operate the 4 units out of 5 units of the plant upto 15.3.2016 except one existing unit of 210 MW which is in operation subject to the meeting with the standard of Particulate Matter i.e 50 mg/Nm³ as decided in the meeting held on 30.12.2015.”

19. The Petitioner has contended that the PM emission norm in all the Consent to Operate, including the CTO dated 2.1.2014 issued by DPCC to the Petitioner in respect of BTPS has been 150 mg/Nm³. It has stated that only on 31.12.2015, the PM emission norm of 50 mg/Nm³ was enforced by DPCC and ordered not to operate



4 out of the five units of BTPS. According to the Petitioner, when the CTO dated 2.1.2014 prescribed the norm of 150 mg/Nm³, the reduction of the same to 50 mg/Nm³ and enforcement by DPCC is a change in law event which has adversely impacted four (4) out of five (5) units of BTPS. *Per contra*, the Respondents have argued that the PM emission norm of 50 mg/Nm³ was in force and applicable from 28.2.2008 in terms of the DPCC Board decision dated 22.6.2000 and hence there has been no change in law. They have further contended that the said norm of 50 mg/Nm³ was modified in the Board decision dated 22.6.2000 and applied by DPCC's letter dated 24.3.2008 but was not modified by the CTO dated 2.1.2014.

Stage-I of BTPS

20. The submissions have been considered. As stated, Stage-I of BTPS comprises of three units of 95 MW each and Stage-II comprises of two units of 210 MW each. The grant of Consent to Operate by DPCC empowered the Petitioner to operate BTPS uninterruptedly, subject to compliance with all environmental norms. DPCC by its letters dated 18.8.2004, 27.7.2007 and 11.5.2010 had earlier granted Consent to Operate BTPS, under section 21 of the Air Act, 1981 and section 25/26 of the Water Act, 1974 which were valid for a period of three years upto 21.3.2007, 21.3.2010 and 16.2.2013 respectively. In all these consents, it was prescribed that the PM emission shall not exceed 150 mg/Nm³. Further, DPCC on 2.1.2014 granted CTO valid till 31.1.2018, inter alia prescribing the environmental norms to be adhered by BTPS, including the PM emission norm not exceeding 150 mg/Nm³. Hence, the submissions of the Respondents that DPCC vide its Board decision dated 22.6.2000 has prescribed more stringent norms for thermal power plant and that there has been no change in the norm of 50 mg/Nm³ prescribed originally by DPCC is devoid of merits. Therefore, the law applicable to the



Petitioner with regard to PM emission norm for BTPS was 150 mg/Nm³ as per CTO dated 2.1.2014 which was valid till 31.1.2018. This being so, the enforcement of the norm of 50 mg/Nm³ by DPCC and its direction not to operate the four units (three units of Stage-I and one unit of Stage-II) of BTPS has adversely impacted the said units by denial of DC and consequent recovery of fixed charges. In our considered view, by enforcement of the PM emission norm of 50 mg/Nm³, (when the norm of 150 mg/Nm³ was in force), the DPCC has in effect overridden the CTO dated 2.1.2014 and had shutdown the four units of BTPS by DPCC on 31.12.2015. This according to us would constitute a change in law event, entitling the Petitioner to be entitled for relief from the date of shutdown of the said units till such time it was permitted to resume operations. It is however noticed that the statutory CTO dated 2.1.2014 was later modified by DPCC vide its letter dated 11.2.2016, wherein BTPS has been directed to meet the PM emission norm of 50 mg/Nm³. The relevant portion of the letter dated 11.2.2016 is extracted hereunder:

“DPCC has also clarified to NTPC/ BTPS that the standard of particulate matter in Delhi is 50 mg/Nm³ and accordingly consent to operate issued on 02.01.2014 and valid till 31.01.2018 stands modified. The standard of 50 mg/Nm³ would be enforced.”

21. With the modification in the CTO dated 21.2.2014 by DPCC with effect from 11.2.2016, the four units of BTPS, which were under shut down based on DPCC directions, were required to comply with the emission norm of 50 mg/Nm³, instead of 150 mg/Nm³. It is however noticed that the Stage-I units of BTPS (3 x 95 MW) continued to remain under shut down on account of its failure to meet the PM emission norm of 50 mg/Nm³. Hence, it can be concluded that the shutdown of Stage-I units from 31.12.2015 till 10.2.2016 based on DPCC's enforcement of PM emission norm of 50 mg/Nm³ (instead of 150 mg/Nm³) falls within the scope of



change in law under the 2014 Tariff Regulations and accordingly the Petitioner would be entitled for relief for the said period and we direct accordingly.

Unit-I of Stage-II of BTPS

22. As stated above, the DPCC on 31.12.2015 had enforced the PM emission norm of 50 mg/Nm³ despite granting CTO on 2.1.2014 that permitted PM norm of 150 mg/Nm³ and had directed the closure of four units of BTPS, viz., the three units of Stage-I and Unit-I of Stage-II. As regards Unit-I of Stage-II of BTPS, it is noticed that this unit was compliant with all environmental norms. However, the DPCC, by issuing directions dated 31.12.2015 had ordered the closure of the said unit (along with Stage-I units) from 31.12.2015. The Petitioner in this Petition has stated that Unit-I of Stage-II, despite being capable of maintaining PM emission below 50 mg/Nm³ on a sustainable basis, has been wrongfully directed by DPCC to shut down operations. Accordingly, the Petitioner has prayed that the said unit should be allowed to resume operations or in the alternate, the Petitioner should be allowed to recover fixed charges for the closure of the said unit by the DPCC.

23. The matter has been examined. It is noticed that the Petitioner vide its letter dated 30.12.2015 had informed the Secretary, Power Department. GoNCTD, that the ESPs in Unit-I of Stage-II of BTPS have been modified to comply with the revised emission norm of 50 mg/Nm³ enforced by DPCC. Despite this, the DPCC had ordered the same to be closed from 31.12.2015. Subsequently, after the statutory Consent to Operate granted to BTPS was modified by DPCC on 11.2.2016, a meeting was held on 15.3.2016 between the Department of Power, Department of Environment, DPCC, Delhi Transco Ltd., SLDC, discoms, BTPS and Rajghat Power House, wherein, it was decided to allow the operation of two units of Stage-II of BTPS. The relevant extract of the MoM is as under:



“M/s Badarpur Thermal Power Station has stated that it has retrofitted pollution control devices in two of its five units of 210 MW and the two units of 210 MW will meet the standards of Particulate matter of 50 mg/Nm³....”

Accordingly, it was decided to allow operation of two units of 210 MW. Monitoring by way of random picking of samples will be done...”

24. Based on the above, DPCC vide its letter dated 21.3.2016 informed the Petitioner and SLDC that Stage-II units of BTPS has been allowed to be in operation. The contents of the letter are extracted hereunder:

“Direction u/s 31 (A) of the Air (prevention & Control of Pollution) Act, 1981, as amended to date were issued to M/s Badarpur Thermal Power Station for closure of its 4 units out of 5 units upto 15.03.2016. The matter has again been reviewed.....”

In view of the above, the Badarpur Thermal Power Station is allowed to operate its two units of 210 MW which have been retrofitted with additional electrostatic precipitators subject to meeting the standard of Particulate Matter i.e. 50 mg/Nm³....”

25. The Petitioner has submitted that in terms of the above letter, SLDC considered the DC of Unit-I of Stage-II from 21.3.2016 and DC of Unit-II of Stage-II from 1.1.2016 in its Energy accounts. It is therefore evident that the DPCC by issuing directions dated 31.12.2015 has ordered the closure of Unit-I of Stage-II from 31.12.2015 till 20.3.2016 without taking into account the fact that the said unit was compliant with all environmental norms, including the PM emission norm of 50 mg/Nm³. In our considered view, the closure of stage-II units based on DPCC directions has resulted in the fundamental condition of uninterrupted applicability of Consent to operate being altered. The suspension of operation of Unit-I of Stage-II on 31.12.2015 and the revocation thereof on 21.3.2016 by the statutory authority is in our view a change in the consent granted to BTPS and would therefore constitute a change in law event entitling the Petitioner for compensation through tariff payments. Accordingly, the submissions of the Respondents are rejected and we hold that the shutdown of Unit-I of Stage-I of BTPS from 31.12.2015 to 20.3.2016 during which period the DPCC directions were



in operation, falls within the scope of Change in law and the Petitioner is entitled for relief for the said period. We direct accordingly.

Issue No.2: Whether the Petitioner is entitled for fixed charges during the period of closure of the said units;

26. The Petitioner has submitted that DPCC has abruptly modified the norms for PM emission under the CTO dated 2.1.2014 issued to the petitioner and such change in the norms constitutes a Change in law event and there is no bar under the Tariff Regulations notified by the Commission to award compensation to the Petitioner. The Petitioner has also submitted that it continues to incur O&M costs, Depreciation, Interest on loan etc., and is therefore entitled to recover such fixed costs on account of change in law. The Petitioner has further submitted that the Tariff Regulations at Regulation 3(9) read with Regulation 8 expressly recognise that the generating company which has suffered a change in law is to be compensated by its off takers in the form of tariff. The Respondents, BRPL & BYPL have submitted that the claim of the Petitioner of financial losses on account of change in norms to be recoverable from discoms through tariff is barred by delays and laches. The Respondent, TPDDL has however submitted that clause 5.3.3 of the PPA limits the effect of change in law to the recovery of expenses on account of change in law as are approved by this Commission. It has also submitted that the Petitioner is not claiming 'expenses', but only fixed charges, which is not maintainable under the various regulations of the Commission or under the PPA. The respondent has stated that the fixed cost cannot be allowed for units which are under shut down for any reason as per DPCCs statutory directions. Accordingly, these Respondents have sought for rejection of the prayer of the Petitioner on this ground.



27. We have in this order decided that the shutdown of operation of Stage-I units (from 31.12.2015 to 10.2.2016) and Unit-I of Stage-II (from 31.12.2015 to 20.3.2016) of BTPS constitutes a Change in law event in terms of Regulation 3 (9) (d) of the 2014 Tariff Regulations. Therefore, these units which were in compliance with the environmental norms prescribed in the CTO dated 11.1.2014, were capable of generating power during the said period but were prevented from doing so in terms of the directions of DPCC dated 31.12.2015.

28. Proviso to Regulation 30 (2) of the 2014 Tariff Regulations provides as under:

“Provided that in case of generating station or unit thereof or transmission system or an element thereof, as the case may be, under shutdown due to Renovation and Modernization, the generating company or the transmission licensee shall be allowed to recover part of AFC which shall include O & M expenses and interest on loan only.”

29. In terms of the above proviso, the generating station which is under shutdown due to R & M is permitted to recover part of annual fixed charges which shall include O & M expenses and interest on loan only. In the present case, the shutdown of Stage-I units and Unit-I of Stage-II is in terms of the directions of DPCC and the same was beyond the control of the Petitioner. In our view, since the generating station is allowed to claim part of the fixed charges in the form of O & M expenses and interest on loan during the period of R & M which is a planned shutdown, we find no reason as to why the Petitioner should be disallowed similar treatment for the shutdown of the plant on account of DPCC directions which was beyond the control of the Petitioner. In our view, the provisions of Regulation 3 (9) (d) needs to be read with Regulation 30 (2) of the 2014 Tariff Regulations in a purposive manner in order to cover the situations where the generating company is unable to recover its fixed charges on account of shut down of the plant due to change in Consent to operate by DPCC. Therefore, in relaxation of the above provision, we direct that the Petitioner shall be entitled to part annual fixed



charges in the form of O & M expenses and interest on loan for the period from 31.12.2015 to 10.2.2016 (Stage-I units) and from 31.12.2015 to 20.3.2016 (Unit-I of Stage-II).

30. The Petitioner has submitted that SLDC has been considering the DC of Stage-I units of BTPS as 'nil' in the Energy Accounts being issued to them. The Petitioner has further submitted that whenever Delhi discoms wanted to avail generation from the units of BTPS, DC has been considered and reflected in the Energy Accounts of SLDC and whenever the discoms did not want the generation, the DC of Stage-I units of BTPS was not accepted, thereby declining the claim for fixed charges during the period. The Petitioner has further submitted that by letter dated 20.4.2016 it had requested SLDC for correction of energy accounts and the same is yet to be done by SLDC. In view of the relief granted to the Petitioner in this order, we direct the Delhi SLDC to accept the DC issued by BTPS for the months of January 2016, February 2016 and March 2016 and publish the same in the periodical energy accounts for the purpose of billing the respondents.

31. The Petitioner has submitted that by letter dated 18.3.2016 it had requested SLDC to decide on the requirement to operate Stage-I of BTPS considering that the generation level from BTPS in the year 2014-15 during the peak summer was 500-520 MW. The Petitioner has also submitted that it is not operating Stage-I units of BTPS on account of the DPCCs directions, but that does not disentitle it from receiving compensation on account of change in law. It has stated that neither the DPCC nor this Commission has directed the Petitioner to completely close down and dismantle Stage-I of BTPS and hence it is imperative that Stage-I be preserved and kept in a state of readiness till such time the complete winding up or dismantling of Stage-I is ordered. Accordingly, the Petitioner has submitted that in



the interregnum, it is entitled to receive compensation for the losses on account of change in law. The Respondents have objected to the said submissions.

32. We have considered the matter. The Commission vide ROP of the hearing dated 8.12.2016 had directed the staff of the Commission to refer the Petitions to CEA and seek its technical advice with regard to the closedown or phasing out of the units of BTPS, keeping in view the islanding scheme and grid requirement of NCT of Delhi in consultation with NRLDC and SLDC Delhi. CEA vide letter dated 13.12.2017 has filed its technical report with regard to closing down or phasing out of units of BTPS and has stated the following:

“Hence, keeping in view the islanding scheme and grid requirement of Delhi, CEA is of the opinion that BTPS may be decommissioned after commissioning of 400/200 kV Tughlakabad S/S and 220 kV lines emanating therefrom”

33. It is noticed that in Petition No. 86/MP/2016 filed by BRPL & BYPL seeking de-commissioning and/or closure of Stage-I units and determination of annual fixed charges for Stage-II units of BTPS, the Petitioner herein vide affidavit dated 5.11.2018 placed on record that the operation of Stage-I & II units of BTPS has permanently been discontinued with effect from 15.10.2018. The relevant portion of the submission is extracted hereunder:

“By this affidavit, NTPC is placing on record the fact that operation of BTPS has permanently been discontinued with effect from 15.10.2018 924.00 hrs). All the units of BTPS i.e Stage-I units (3 x 95 MW) and Stage-II units (2 x 210 MW) have been permanently ceased to operate.”

34. It is further noticed that in Petition No. 86/MP/2016, the Petitioner herein had submitted that it would be entitled to all costs and capacity charges including compensation on account of closure /de-commissioning of BTPS and the Commission vide order dated 3.12.2018 disposed of the said prayer as under:

“11. With regard to the submission of NTPC that it would be entitled to all costs and capacity charges including compensation on account of closure/ decommissioning of



BTPS, NTPC is at liberty to approach the Commission with an appropriate application with all relevant documents/ information which will be considered in accordance with law.

35. The Petitioner in this Petition has submitted that even though it is not operating Stage-I units on account of DPCC directions, it does not disentitle it from receiving compensation under change in law, considering the fact that Stage-I is to be kept in the state of readiness till such time complete winding up or dismantling is ordered by the Commission. We find no reason to examine the same in this order. However, in line with the above decision, liberty is granted to the Petitioner to place its submissions along with all relevant documents /information and the same will be considered in accordance with law.

36. Petition No. 33/MP/2016 along with IA No. 6 of 2016 is disposed of in terms of the above.

Sd/-
(Dr. M.K. Iyer)
Member

Sd/-
(P.K.Pujari)
Chairperson

