CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 131/MP/2022

Coram:

Shri Jishnu Barua, Chairperson
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member

Date of Order: 16th April, 2024

In the matter of:

Petition under Section 79(1)(b) and (f) of the Electricity Act, 2003 seeking implementation of order in Petition No. 283/MP/2019 and for directions to the Respondents to make payments towards additional expenditure incurred / to be incurred on account of increased auxiliary consumption, O&M expenditure, consumption of raw material & waste/contaminated water disposal cost and additional working capital costs.

And

In the matter of:

Jhajjar Power Limited
Village Khanpur, Tehsil Matenhail
District Jhajjar, Haryana – 124142 **...Petitioner**

Vs

1. Uttar Haryana Bijli Vitran Nigam Limited
   Vidyut Sadan, Plot No. C-16, Sector 6
   Panchkula, Haryana - 134112

2. Dakshin Haryana Bijli Vitran Nigam Limited
   Vidyut Nagar, Vidyut Sadan
   Hissar, Haryana – 125005

3. Tata Power Trading Company Limited,
   'A' Block, 34, Sant Tukaram Road
   Carnac Bunder, Mumbai – 400006

4. Tata Power Delhi Distribution Limited,
   NDPL House, Hudson Lines
   Kingsway Camp, Delhi-110009 **…. Respondents**

Parties Present:

Shri Vishrov Mukherjee, Advocate, JPL
Shri Damodar Solanki, Advocate, JPL
Shri Jogendra Behera, JPL
Ms. Poorva Saigal, Advocate, UHBVN & DHBVN
Ms. Anumeha Smiti, Advocate, UHBVN & DHBVN
Shri Venkatesh, Advocate, TPTCL
Shri Suhael Buttan, Advocate, TPTCL
Shri Vedant, Advocate, TPTCL
Shri Nimesh Jha, Advocate, TPDDL
Shri Deepak Thakur, Advocate, TPDDL

ORDER

Petition No. 131/MP/2022 has been filed by the Petitioner, Jhajjar Power Limited (in short "JPL") seeking the following relief(s):

(a) *Direct the Respondents to make payments towards Additional Expenditure claimed by JPL in accordance with the Order dated 07.01.2022 in Petition No. 283/MP/2019 and the Order dated 13.08.2021 in Suo Motu Petition No. 6/SM/2021, as under:*

*A. Supplementary Capacity Charge (**SFC**):*

(i) Servicing of Additional Capital Expenditure:

*(a) Depreciation (**DEPe**); and*

*(b) Cost of Additional Capital Expenditure (**COCe**);*

*(ii) Additional Operation and Maintenance Expenses (**O&Me**);*

*(iii) Additional Interest on Working Capital (**IWCe**); and*

*(iv) Additional Capacity Charges due to Additional Auxiliary Energy Consumption (**ACCe**).*

*B. The supplementary Energy Charge **(SEC**):*

*(i) Expenses towards consumption of reagent (**CORe**); and*

*(ii) Additional Energy Charges due to Additional Auxiliary Energy Consumption (**AECe**).*

(b) *Allow consequent increase in tariff on account of additional expenditure so as to restore JPL to the same economic position as if change in law did not take place; and/or*

(c) *Pass such order(s) as this Hon'ble Commission may deem fit and proper in facts and circumstances of the present case.*

2. The Petitioner, in support of above prayers, has submitted the following:

(a) JPL is a wholly owned subsidiary of Apraava Energy Private Limited

(formerly 'CLP India Private Limited') and is a generating company as defined in Section 2(28) of the Electricity Act, 2003 (in short, the 'the Act'). It owns and operates a coal based thermal generating station of 1320 MW capacity, comprising two units of 660 MW ('the Project') at Village Khanpur, Tehsil Matenhail, District Jhajjar, Haryana. The Project supplies power to the State of Haryana and the National Capital Territory of Delhi.

(b) The Respondent Nos. 1 and 2, i.e., Uttar Haryana Bijli Vitran Nigam Limited and Dakshin Haryana Bijli Vitran Nigam Limited (hereinafter collectively referred to as "Haryana Discoms") are distribution licensees in the State of Haryana. The Respondent No. 3, Tata Power Trading Company Limited (in short 'TPTCL'), is a trading licensee, having a back-to-back arrangement for the sale of the power procured from JPL to the Respondent No. 4, Tata Power Delhi Distribution Limited ('TPDDL') and JPL does not have any privity of contract with TPDDL.

(c) JPL executed a PPA dated 7.8.2008 (as amended vide amendment agreement dated 17.9.2008) with the Haryana Discoms (in short, 'the Haryana PPA'). Since the Project fell under the category of Mega power projects, it was required under the Mega power policy of the Ministry of Power, Government of India (MOP, GOI) that the balance, 10% of the capacity of the Project, be sold outside the State of Haryana. JPL, therefore, executed a PPA dated 20.1.2009 (as amended vide amendment agreement dated 21.10.2010) with TPTCL (in short, 'the TPTCL PPA') and TPTCL has a back-to-back contract with TPDDL.

(d) Units 1 and 2 of the Project were commissioned on 29.3.2012 and 19.7.2012, respectively. JPL has installed both the units of the Project with wet FGD system, at an initial capital expenditure of Rs. 299.02 crores. The FGD system was commissioned in October 2013.

(e) On 7.12.2015, MoEF&CC, GOI issued a notification, inter-alia, amending the standards of emissions of SO_2 to less than 200 mg/Nm^3 (measured on a dry basis at 6% O_2) for thermal power plants with units having capacity of 500 MW and above, which were installed between 1.1.2003 and 31.12.2016.

(f) On 27.7.2016 and 13.12.2018, JPL issued notices under the respective PPAs apprising the Respondents of the MoEFCC Notification dated 7.12.2015, being the Change in law event. Thereafter, JPL filed Petition No. 283/MP/2019.

(g) Petition No. 283/MP/2019 was filed seeking a declaration that the MoEFCC Notification dated 7.12.2015, revising the emission norms of SO_2 and mandating the installation of FGD system is a Change in law event. JPL did

not claim the initial capital expenditure of Rs. 299.02 crores incurred for the installation of the existing FGD system and, therefore, claimed the following reliefs:

(i) Revision of the Contracted Capacity,

(ii) Revision of Quoted Non-Escalable Capacity Charges,

(iii) Revision of Quoted Net Heat Rate on account of increased auxiliary consumption,

(iv) Compensation for cost of raw material consumption required for operating the FGD System,

(v) Compensation of costs due to increased operational and maintenance expenses, and

(vi) *Increased interest on working capital*.

(h) Petition No. 283/MP/2019 was disposed of by the Commission, vide order dated 7.1.2022 (in short 'the 283/MP order).

(i) The Petitioner wrote to the Haryana Discoms and TPTCL on 24.1.2022 stating that it would share the relevant calculations for the reliefs in terms of the 283/MP order and the expenditure incurred/ to be incurred for continuous operations of the FGD system for both units of the Project from 1.2.2019. However, the Respondents, by way of letters dated 11.2.2022, 14.2.2022 and 13.4.2022, have contended that JPL is not entitled to any compensation in terms of the said order. The aforementioned responses by the Respondents are in complete contravention of the directions in the 283/MP Order.

(i) On 17.3.2022, JPL issued notice to the Respondents Haryana Discoms and TPTCL, in terms of the 283/MP Order, the Suo Motu order, and the CIL Rules read with Article 13 of their respective PPA.

(j) APTEL, in its order dated 5.4.2022 in OP Nos. 1 & 2 of 2000 (in short, 'the OP order dated 5.4.2022'), held that the CIL Rules apply prospectively and the change in law claims initiated after 22.10.2021 cannot be applied retrospectively, particularly where the cause of action had already arisen before the CIL Rules, came into existence.

(k) The Respondents Haryana Discoms and TPDDL replied on 13.4.2022 and denied the claims of JPL. The Respondents have rejected JPL's claims on wholly erroneous, unlawful and untenable grounds despite the 283/MP order entitling JPL to recover the compensation towards the additional expenditure in terms of the Suo Motu order.

(l) The 283/MP order further allowed JPL to claim the additional expenditures on account of change in law events, in accordance with the dispensation / mechanism put in place in paragraphs 35 and 36 of the Suo Motu order.

(m) The 283/MP Order is binding on parties as it has not been set aside till date. Consequently, the Respondents are obligated to compensate JPL in accordance with the Suo Motu order and the 283/MP order.

(n) The refusal of the Respondents to make payments is a violation of the 283/ MP Order. This Commission has the power to issue directions to implement its own orders as held by the Hon'ble Supreme Court in its judgment dated 8.10.2021 titled *Maharashtra State Electricity Distribution Company Limited vs Maharashtra Electricity Regulatory Commission & Ors*.

(o) The Respondents, vide its letters dated 11.2.2022, 14.2.2022 and 13.4.2022, have stated that JPL is not entitled to any compensation towards the additional expenditure incurred on account of the change in law events (MoEFCC Notification dated 7.12.2015) *inter alia* on the submissions made by them before this Commission in Petition No. 283/MP/2019. The Respondents cannot be permitted to re-agitate the same issues which already stand decided by the 283/MP Order. The Respondents have taken erroneous and untenable grounds regarding JPL's claims, and consequently, JPL has been unable to recover any compensation towards the additional expenditure incurred to date.

(p) The 283/MP Order, had allowed reliefs to JPL qua the additional expenditure and directed JPL to take recourse under the CIL Rules. Subsequently, the approach adopted by the Commission in applying the CIL Rules retrospectively was challenged in OP Nos. 1 & 2 of 2022 before APTEL, wherein APTEL vide the OP order dated 5.4.2022, *inter-alia,* held that that the CIL Rules would apply prospectively to change in law claims, i.e., claims initiated after 22.10.2021 cannot be applied retrospectively.

(q) The directions passed by the APTEL vide the OP order dated 5.4.2022 are applicable to the present Petition since:

(i) The change in law event, MOEFCC Notification dated 7.12.2015, occurred prior to the notification of the CIL Rules on 22.10.2021.

(ii) Notice regarding the change in law event has been issued by JPL to the Respondents on 27.7.2016 and 13.12.2018, i.e., prior to notification of the CIL Rules.

(iii)The Petition No. 283/MP/2019 was filed by JPL on 27.8.2019 i.e., prior to notification of the CIL Rules.

(iv) The 283/MP order has relegated JPL to the CIL Rules.

Therefore, the CIL Rules would not be applicable in the present case. Para 39 of the 283/MP order directing the parties to settle the change in law claims in terms of the CIL Rules has been rendered in-operative vide OP order dated 5.4.2022.

(r) The only remedy available to JPL is to approach this Commission for implementation of the 283MP order. The said order, read with Article 13 of the Haryana PPA and the TPTCL PPA, entitles JPL's right to be restored to the same economic position as if a change in law did not take place. It is settled law that where there is a right, there is a remedy and courts are obligated to protect the rights of the parties, as upheld by the Hon'ble Supreme Court in *Sardar Amarjit Singh Kalra v. Pramod Gupta* (2003) 3 SCC 272.

(s) In Para 36 of the 283/MP Order, the additional expenditure has been allowed to JPL. The Respondents have denied JPL's claims on merits; the Commission ought to issue appropriate directions to the Respondents to make payments towards the additional expenditure claimed by JPL in terms of 283/MP order read with the Suo Motu order.

(t) JPL's contracted capacity with the Respondents Haryana Discoms and TPTCL has been consequently revised/reduced from 1113.50 MW to 1101.62 MW and 123.72 MW to 122.40 MW, respectively, with effect from 1.4.2022. Thus, no compensation on account of 'Additional Capacity Charges due to Additional Auxiliary Energy Consumption (ACCe)' has been claimed by JPL till March 2022.

3. Accordingly, the Petitioner, in the present Petition, has prayed to issue appropriate directions to the Respondents to make the payments towards additional expenditure claimed by JPL, in accordance with Article 13 of the Haryana PPA and the TPTCL PPA, so as to restore JPL to the same economic position, as if change in law did not take place.

Hearing dated 11.10.2022

3. The Petition was admitted on 11.10.2022, and the Commission ordered notices on the Respondents, with directions to parties, to complete the pleadings in the matter.

Reply of the Respondents Haryana Discoms

4. The Respondent, Haryana Discoms, vide reply affidavit dated 11.11.2022, have mainly submitted as under:

(a) The implementation of the 283/MP order, as sought by JPL, is not maintainable since no decree was passed in favour of JPL, and there has been no adjudication upon the rights of JPL. The matter was not decided in finality vide 283/MP order, and the parties were merely directed to settle the change in law claims in terms of the CIL Rules, 2021.

(b) If the CIL Rules 2021 had been implemented, the Commission would have examined the JPL's claims at a later stage, based on the outcome of the process provided in the Rules. The Commission has not, therefore, considered or decided any of the JPL's claims on merits.

A. Issues of change in law not adjudicated/determined by the Commission to date

(c) JPL has been making erroneous contentions that the Commission had allowed the compensation for the additional cost incurred during the operation of the FGD system by relying on the Suo Motu order. Only reference was made to the Suo Motu order and the claims in respect of change in law were not decided.

B. Claims of the Petitioner have to be adjudicated in terms of the PPA and the bidding documents

(d) The effect of change in law has to be considered with reference to the specific claims in the context of Article 13 of the Haryana PPA, the bidding documents and the documents submitted by the Petitioner in regard to FGD.

(e) JPL has not claimed the capital cost incurred for the instalment of the FGD System. In the present Petition, JPL is seeking additional expenditure incurred due to the operation of the FGD System. JPL, at the initial stage, itself did envisage all costs/inputs associated with the installation of existing FGD. This can be ascertained from the technical description of FGD submitted while seeking the approval of MOEF&CC on 16.3.2010, which clearly indicates all the operational parameters and their impact, which have been duly considered by JPL.

(f) All the factors for the operation of the FGD system, like limestone consumption, water consumption, power, gypsum generation, gypsum storage, wastewater generation, capital and recurring cost of operation, were

clearly envisaged by JPL. Therefore, it is not entitled to any additional costs for the operation of the FGD system on account of the MoEF&CC Notification dated 7.12.2015, as these costs were duly considered prior to installing the FGD.

C. Applicability of the Suo Motu order dated 13.8.2021 in Petition No. 6/SM/2021

(g) JPL had already installed the FGD and had considered its operational costs prior to the MoEF&CC Notification dated 7.12.2015 therefore the Suo Motu order cannot be ipso facto applied to the facts of the present case, as the Suo Motu order has been passed while dealing with the mechanism for compensation for the generating companies, which installed the FGD system in terms of the MoEFCC Notification dated 7.12.2015.

(h) The compensation payable under Article 13 of the Haryana PPA, if any, are subject to requirement, prudency and checks as deemed appropriate by the Commission. However, in the present case, JPL has only provided a summary of its claims in the form of a monthly statement for the period from February 2019 to April 2022 while raising a total claim for Rs. 120.31 crore. JPL has not provided the auditor's certificate, invoices, O&M contract etc. or any documentary evidence in support of its claims.

(i) JPL is not entitled to benefit from any increase in auxiliary consumption leading to a consequential reduction in the contracted capacity. The relief (if any) can be considered a difference between the auxiliary consumption already considered by JPL (0.5%) and actual auxiliary consumption or auxiliary consumption allowed by the Suo Motu order (a maximum of 1%), whichever is lower.

(j) Reliance is placed on the (i) APTEL judgment dated 19.4.2017 in Appeal No. 161 of 2015 (SPL v *CERC)*, (ii) APTEL judgment dated 14.8.2018 in Appeal No. 111 of 2017 (*GMR WEL v. CERC & Anr)* and (iii) APTEL judgment dated 21.12.2018 in Appeal No. 193 of 2018 (*GMRKEL V CERC),* that held that tariff under the competitive bidding process under Section 63 of the Act cannot be bifurcated into individual tariff elements, as done in the case of Section 62 PPA

Reply of the Respondent TPTCL

5. The Respondent, TPTCL, vide reply affidavit dated 14.11.2022, has mainly submitted the following:

(a) TPTCL is an electricity trader in terms of Section 2(26) of the Electricity Act and has been granted an inter-state trading license under Sections 12 and

14 of the Act. TPTCL is merely an intermediary, and the arrangement in question is on a back-to-back basis, in the sense that JPL sells power to TPPDL through TPCL as per PSA dated 20.1.2009 with TPDDL. TPDDL is the ultimate beneficiary of the project, and the impact of the purported change in law event is to be borne by the beneficiary TPDDL only.

(b) The prayers sought by JPL in the present Petition, as well as in Petition No. 283/MP/2019, are essentially qua the Haryana Discoms and TPDDL, who are the end Procurers/beneficiaries. Therefore, any liability in respect of the additional expenditure incurred by the Petitioner qua the change in law event, i.e. the MoEF&CC Notification dated 7.12.2015, cannot be foisted upon TPTCL, being an intermediary procurer.

A. Role of the Respondent, TPTCL

(c) Pursuant to the competitive bidding process conducted by the Haryana Power Generation Corporation Limited, on behalf of Haryana DISCOMs, and in accordance with the competitive bidding guidelines, JPL was declared as successful. Through the Haryana PPA, JPL was required to supply 90% of the net power generated from the plant to the Haryana Discoms. The balance 10% of the power was required to be sold outside the State of Haryana, and for that very purpose, JPL executed TPTCL PPA, pursuant to which TPTCL has a back-to-back arrangement with TPDDL through PSA dated 20.1.2009 on the same tariff.

(d) In the wake of the Commission's order dated 18.4.2016 in Petition No. 319/MP/2013, TPTCL's role is only to facilitate the process of supply of electricity. Hence, TPTCL is a mere intermediary, and the PSA and the PPA are completely dependent on each other.

B. Claims with respect to change in law events

(e) MoEF&CC has notified the revised emission norms on 7.12.2015, which mandatorily requires all thermal power plants to comply with the revised norms on or before 6.12.2017, i.e., within two years of the said notification. The said time period has been extended on a case-to-case basis up to 31.12.2024, in respect of category A plants, by virtue of the notification dated 5.9.2022 issued by MoEF&CC.

(f) The relief sought by JPL is ultimately borne by the beneficiary, TPDDL, under the PSA owing to the back-to-back arrangement between the parties.

Reply of the Respondent, TPDDL

6. The Respondent, TPDDL, vide its reply affidavit dated 24.11.2022, has adopted

the submissions of Respondent Haryana Discoms. However, in addition to this, the Respondent TPDDL has submitted the following:

(a) The 283/MP order considered the MOEF&CC Notification dated 7.12.2015 as a change in law event, However, the additional capital expenditure was not allowed on account of retrofitting of existing FGD. JPL has wrongly claimed that by virtue of the said order, it is automatically entitled to consequential relief(s) as claimed in the present petition. The 283/MP order further noted that the Procurers have not agreed/ consented to the additional expenditure proposed by JPL. In the absence of any consent from the Procurers/beneficiaries, JPL cannot unilaterally demand compensation.

(b) Para 35 of the 283/MP order merely records the submissions made by JPL and does not render any finding/observation. Therefore, in the absence of any specific finding/allowance of the said claims in the order, JPL has no basis to seek the implementation of the said order. The only direction in the 283/MP order pertains to the settlement of claims between JPL and the Respondents (including TPDDL). Moreover, such settlement is not an entitlement of JPL; rather, it is to be carried out on the basis of the merits of JPL's claims. When this Commission itself had rejected JPL's claims for any additional capital expenditure incurred by it on account of retrofitting of FGD, then no reason arises for JPL to seek any compensation from its Procurers.

(c) The 283/MP order only referred to the Suo Motu order and stated that the compensation mechanism for FGD has been laid down therein. The said reference will come into play if and when there is a computation for any compensation at the time of settlement of claims between the parties.

(d) JPL has sought refuge on the observations in Para 36 of the 283/MP order to purportedly state that its claims for compensation have been allowed as per the Suo Motu order and has relied on the APTEL order dated 5.4.2022 to state that the CIL Rules are not applicable in the present matter. The observations/findings in paras 37 to 39 of the 283/MP order pertaining to the settlement as per the CIL Rules are the qualifying factor for the observations made in para 36 of the said order. JPL cannot seek to selectively rely on observations/findings at its whims. Moreover, the Suo Motu order only applies to the generators who had to newly establish FGD pursuant to the issuance of the MOEFCC's Notification dated 7.12.2015. Therefore, there is no occasion for JPL to make any claims. In so far as the CIL Rules are concerned, it is not denied that the same are inapplicable in the present case in light of the APTEL order dated 5.4.2022 and the clarification issued by the MOP. JPL cannot cherry-pick observations from the main order to seek a

favourable outcome.

(e) At the time of construction of the Project, JPL had sought specific permission from the MOEF&CC vide its letter dated 16.3.2010 for the installation of FGD to ensure the integrity of the main plant design. The approval in this regard was granted to JPL on 11.8.2010, where after, JPL completed the construction of its Plant and commissioned Unit 1 on 29.3.2012 and Unit 2 on 19.7.2012. Notably, the additional claims, which are consequential to the installation of FGD, ought to have been factored in at the time of bidding and are unwarranted at this stage. TPDDL has placed its detailed submissions in Petition No. 283/MP/2019 as well with respect to JPL's claims for compensation and reiterates the same herein.

Rejoinder of JPL to the reply of the Haryana Discoms

7. The Petitioner, in its rejoinder affidavit dated 21.11.2022, has reiterated its submissions in the petition. In addition to this, the Petitioner has submitted the following:

(a) At the time of setting up of the Project, it was envisaged that the same would be run primarily on domestic coal, and imported coal would be used sporadically, and hence the requirement to run the FGD unit, would be on need basis. However, the MOEFCC Notification dated 7.12.2015, changed the parameters, as the FGD Unit was now required to be run on a continuous basis. In view of the substantial costs that JPL would now incur in running and maintaining the FGD Unit, Petition No. 283/MP/2019 was filed by JPL with the detailed reasons and costs that it would now have to incur to run the FGD system on a continuous basis. JPL did not seek the reimbursement of the initial capital expenditure of Rs. 299.02 crores spent on setting up the FGD Unit.

(b) After the filing of the present petition, on 8.7.2022, the Haryana Discoms *inter-alia* wrote to JPL, wherein they pointed out towards reduction in the contracted capacity in the months of April 2022 and May 2022, terming this as a unilateral action violating para 110 of the Suo Motu order. JPL replied that the said reduction in the contracted capacity from 1237.22 MW to 1224.02 MW is due to the 1% increase in the auxiliary consumption, in terms of the 283/MP Order read with the Suo-Motu Order, and no mutual agreement between the parties is required in this regard. It was further informed by JPL that para 110 of the Suo-Motu Order relates to provisional tariff for power plants, wherein the FGD system was yet to be set up and is not applicable to the present case since JPL had already set up the FGD

system in its Power Plant.

(c) The 283/MP Order has essential elements of a 'decree' in terms of Section 2(2) of the Code of Civil Procedure (CPC) as laid down by the Hon'ble Supreme Court in *S. Satnam Singh v. Surender Kaur, (2009) 2 SCC 562*.

(d) The Suo Motu order recognized the need for a compensation mechanism for additional expenditure to be incurred on account of the impact of the MoEF&CC Notification dated 7.12.2015 for the PPAs executed in terms of Section 63 of the Act. The Haryana PPA and the TPTCL PPA were executed in furtherance of the competitive bidding guidelines issued by MOP, GOI under Section 63 of the Act. Accordingly, the compensation mechanism put in place by way of the Suo Motu order, including the compensation for additional expenditure payable for operating the FGD system, is squarely applicable in the present case.

(e) The 283/MP order had conclusively adjudicated/determined JPL's claim for additional expenditure. However, it was only for the procedure to be followed by JPL for claiming the additional expenditure, JPL was directed to take recourse to the CIL Rules. This cannot be read to mean that JPL's claim for additional expenditure itself has not been adjudicated.

(f) The contentions raised by the Respondent Haryana Discoms, that all costs for operating the FGD System were considered by JPL at the time of bidding and, as such, JPL is not entitled to any additional costs towards the same, was already raised and decided in the 283/MP order. The Haryana Discoms cannot be permitted to re-agitate the same issues which already stand decided by the said order.

(g) Once a normative approach has been adopted by the Commission in accordance with the Suo Motu order, there cannot be any further adjustments on the basis of the actual expenses, on account of it being less or more. This position of law has been upheld by the APTEL in *HPGCL v. HERC [2009] APTEL 111*. Therefore, the Haryana Discoms' contentions that JPL cannot claim a blanket increase of 1% in the auxiliary consumption and that the difference of actuals and normative parameters to be considered, subject to prudence check, are incorrect.

(h) JPL claims have been raised strictly in accordance with the mechanism/ dispensation provided under the Suo Motu order and have been shared with the Haryana Discoms.

(i) This Commission has devised a mechanism for compensation on a

normative basis for additional expenditure incurred for installing and operating the FGD systems, such that the affected parties are restituted to the same economic position as if a change in law did not take place. The Commission records in Para 43 of the Suo Motu order that the data of the O&M expenses incurred for operating the FGD Systems was not available at that time since there were no operational FGD systems and therefore, a mechanism has been devised for compensation taking into account various heads of expense required to operate the FGD systems. In any event, there are no components/elements in the compensation mechanism which is premised on return on equity or assure any returns to the generators.

Rejoinder of JPL to the reply of TPTCL

8. The Petitioner, in its rejoinder dated 21.11.2022, has reiterated its submissions in the Petitioner. In addition to this, the Petitioner has submitted the following:

(a) TPTCL has failed to provide any response on the merits of the present petition. However, TPTCL has admitted that in the 283/MP order, JPL was granted compensation towards additional expenditures in operating the FGD system in accordance with the Suo Motu order.

(b) After filing the present petition, on 8.6.2022, the TPDDL *inter-alia* wrote to TPTCL, wherein they pointed out the reduction in the contracted capacity in the month of April 2022, from 123.72 MW to 122.40 MW on account of a 1% increase in auxiliary consumption of JPL (w.e.f. 1.4.2022) in terms of the Suo-Motu Order, terming this as unilateral, not acceptable and legally untenable. TPTCL was requested by TPDDL to take up the matter with JPL to provide the full contracted capacity as scheduled by TPDDL. JPL replied on 24.6.2022, stating that the said reduction in the contracted capacity is in terms of the 283/MP order, being binding upon the parties.

(c) On 23.9.2022, TPDDL *inter-alia* wrote to TPTCL pointing out that MOEFCC Notification dated 5.9.2022 and Para 110 of the Suo Motu order, stating that timelines for implementing FGD system, etc. have been extended and therefore, JPL claims are not admissible, till such extended date. JPL replied on 11.10.2022, stating that there is no bar on the generating station to install the FGD system prior to the revised timelines, and the Respondents ought not to raise the issues already decided vide 283/MP order. Further, the Central Pollution Control Board (CPCB) had specifically directed JPL to install the FGD System Project by 31.1.2019, which has been complied with.

(d) TPTCL PPA clearly states that TPTCL expressed its interest in purchasing from JPL for the remaining 10% of the available capacity. TPTCL PPA further stipulates that TPTCL has agreed to purchase power from JPL, and JPL shall sell power to TPTCL. Since the contractual understanding/ arrangement is between TPTCL and JPL, TPTCL is bound by the provisions of the TPTCL PPA to compensate JPL for the additional expenditure allowed by the 283/MP order. TPTCL PPA expressly provides for the contractual obligations between TPTCL and JPL. Further, in terms of Article 13.4, read with Article 11.8 of the TPTCL PPA, TPTCL is obligated to compensate JPL for any change in law event.

(e) The Commission, in its order dated 9.8.2019 in Petition No. 393/MP/2018 titled *"JSW Hydro Energy Limited v. PTC India Limited & Ors."* held that when the provisions of the PPA are clear and imposes a liability on the trader (i.e., PTC India Limited, in the said case) to establish a payment settlement mechanism, the said liability cannot be made contingent upon similar action being taken by the beneficiaries.

(f) The Commission, in its order dated 15.8.2020 in Petition No. 158/MP/2019 titled *"APNRL v. TANGEDCO & ors.",* had imposed the liability for payment of late payment surcharge on the trader (i.e., PTCIL) in terms of its PPA with the generator.

Rejoinder of JPL to the reply of TPDDL

9. The Petitioner, vide its rejoinder affidavit dated 28.11.2022, has reiterated its submissions made in the Petition and the rejoinders to the submissions of other Respondents.

Hearing dated 7.2.2023

10. During the hearing on 7.2.2023, the learned counsel for the Petitioner made preliminary oral submissions in support of the prayers in the petition. The learned senior counsel for the Respondent HPPC and the learned counsel for the Respondent TPTCL objected to the preliminary submissions of the learned counsel for Petitioner and argued that the reliefs prayed for by the Petitioner cannot be granted in the present case. However, due to paucity of time, the hearing of the matter could not be completed.

The Petitioner JPL and the Respondent TPTCL filed their note of submissions on 9.4.2023 and 10.4.2023, respectively.

Hearing dated 25.4.2023

11. During the hearing on 25.4.2023, the learned Senior counsel for JPL made detailed oral submissions and sought directions on the Respondents to comply with the Commission's order dated 7.1.2022 read with order dated 13.8.2021 and compensate JPL for the additional expenditure incurred. The learned Senior counsel for the Respondent HPPC, made detailed oral submissions in the matter, objecting to the claims of JPL. The learned counsels for TPTCL and TPDDL adopted the submissions of the Respondent HPPC. In response, the learned Senior counsel for JPL pointed out that JPL has a right to be restored to the same economic position as if a change in law had not taken place. The Commission, after hearing the parties, reserved its order in the Petition after directing the Petitioner to furnish certain additional information after serving a copy to the other parties.

12. In compliance with the above directions, JPL has filed the additional information on 6.7.2023. as under:

> **Details of the additional expenditure claimed by JPL**
>
> 1. The detailed computation of the additional expenditure claimed by JPL from the Respondent Haryana Discoms and the Respondent TPTCL from February 2019 to April 2023 (year-wise) in accordance with the formula for compensation under the Suo-Motu Order is annexed herewith and marked as **Annexure A-1.** Further, the month-wise calculation under the following heads as tabulated by JPL in terms of the Suo-Motu Order (as directed by the Commission in 283/MP Order) is annexed herewith and marked as **Annexure A-2**:
>
> **A. *Supplementary Capacity Charge (SFC)***
>
> (i) Servicing of Additional Capital Expenditure: The capital expenditure incurred by JPL amounting to Rs. 299.02 crores towards installation of the FGD System has not been claimed by JPL in line with the 283/MP Order.

(ii) Additional O&M expenses (O&Me): The capital cost of the FGD system for the purpose of computing additional O&M expenses has been considered Rs. 299.02 crores in terms of the 283/MP Order. Based on the formula provided in the Suo-Motu Order, the detailed computation of the additional O&M expenses on account of continuous operation of the FGD system from February 2019 to April 2023 (on a monthly basis) is annexed in Annexure **A-2.**

(iii) Additional Interest on Working Capital (IWCe)

(iv) Additional Capacity Charges due to Additional Auxiliary Energy Consumption (ACCe)

B. Supplementary Energy Charge (SEC):

(i) Expenses towards consumption of reagent (CORe);

(ii) Additional Energy Charges due to Additional Auxiliary Energy Consumption (AECe).

The aforementioned information with detailed computation has been shared by JPL with the Respondents along with the monthly bills raised for the supply of power.

II. <u>Details of the actual O&M expenses pertaining to FGD incurred prior to and after issuance of MoEF&CC Notification dated 7.12.2015</u>

(a) Details of the actual O&M expenses pertaining to FGD incurred prior to MoEF&CC Notification dated 07.12.2015

1. Since its installation at the Plant, the FGD system has been operated by JPL on an as-required basis, totalling up to 198 hours (*excluding trial period of FY 2018-2019*) of usage. Since the FGD system was operated sparingly prior to the MoEF&CC Notification and there was no legal requirement for operating the FGD System, all expenses incurred for the FGD system were considered and tabulated as part of the Plant's O&M expenses. It is submitted that no separate record of O&M costs for the FGD System was maintained for the said period, as this was part of the overall O&M expenses for the Plant. Therefore, it is not possible to furnish actual O&M expenses specifically for the FGD system prior to the MoEF&CC Notification.

2. However, in view of the directions issued by the Commission, to the best of its abilities, JPL is providing segregated details of certain costs, i.e., limestone consumption costs and FGD APC costs incurred for operating the FGD system. The details of the afore-mentioned expenses incurred prior to the issuance of the MoEF&CC Notification are annexed herewith and marked as **Annexure A-3.** The data provided herein is only considering the data that can be segregated for the FGD system, since the majority of the expenses incurred for O&M for the FGD system were absorbed in the Plant's operations and cannot be segregated.

3. JPL has not claimed/recovered any amounts towards the additional expenditure incurred due to operations of the FGD system prior to 7.12.2015 as under:

(i) Operations of the FGD system from 2014-15 to 2017-18,

(ii) Trial operations of the FGD system from April 2019 to January 2019.

(b) Details of the actual O&M expenses pertaining to FGD incurred after MoEF&CC Notification dated 07.12.2015

4. Post MoEF&CC Notification dated 7.12.2015, JPL has been running the FGD system since February 2019 on a continuous basis, as mandated by the MoEF&CC. While the normative formula provides for certain categories of O&M expenses for which Thermal Power Producers are to be compensated, such as the cost of limestone and operational costs, JPL has incurred additional expenditure for running the FGD system under the below-mentioned heads. JPL has not claimed any of the below-mentioned expenses from the Procurers in the said proceedings, and the said data is being provided only in view of the directions of the Commission.

(i) **Additional Capital Expenditure for retrofitting the FGD system post MoEF&CC Notification** – At the time of issuance of the MoEF&CC Notification, which required that the FGD be run on a continuous basis, JPL had incurred an additional capital expenditure of Rs.15.84 crores approximately for retrofitting and modifying the FGD system so that it is technically capable of running as per the specifications of the said Notification. It is to be mentioned that JPL had incurred these expenses *suo motu* and sought to recover the same in Petition No. 283/ MP/ 2019 filed before the Commission. In the 283/MP Order, the Commission had disallowed the additional capital costs. However, JPL has incurred such expenses towards the FGD system to ensure compliance with the MoEF&CC Notification.

(ii) **Water Charges** – For the purposes of forming the limestone slurry used in the FGD system, a substantial amount of raw water is used at the Plant. This gets further enhanced due to the treatment charges of the raw water. From 2018-19 to 2022-23, JPL has incurred an approximate expenditure of Rs.2.39 crores. The Haryana Irrigation Department has increased the water charges substantially, and it is likely that the water charges will continue to increase in the future.

(iii) **Additional manpower costs**- After the MoEF&CC Notification dated 7.12.2015, JPL has employed a specific team for regular operations and maintenance of the FGD system. However, the amounts shared as manpower costs incurred for running the FGD system do not include the indirect manpower costs and hours, i.e., manhours spent by personnel from procurement, production, commercial, finance, and environment departments of JPL, towards the efficient running of the FGD system. Accordingly, the manpower costs, as provided, are the closest data that can be produced by JPL towards the O&M expenses for the FGD system, but the same is not a complete representation of the expenses in this regard.

The actual O&M expenses incurred by JPL for FGD operations post issuance of the MoEF&CC Notification are annexed hereto and marked as **Annexure A-4**.

5. The details provided for Auxiliary Power Consumption are actually an estimate, as there is no separate meter installed for some of the FGD's auxiliaries, which are being operated in tandem with the main Plant Auxiliary Consumption, i.e. operation of Air Compressors, Water pumps, lighting, Gypsum dyke area, Limestone storage area, Chemical storage area and laboratories are not metered separately. Further, there is additional auxiliary consumption due to the fact that some of the FGD auxiliaries, such

as the chemical dosing system and limestone slurry pumps, continue to operate even during the Plant shutdown due to the continuous mixing of limestone slurry in the FGD system. Further, the Auxiliary Power Consumption of the FGD equipment also increases with the ageing of the equipment.

6. From the data shared, the actual expenses incurred for running of the FGD system, have not been uniform each month. Therefore, the expenses are not fixed or consistent and vary due to Plant load factors and other technical parameters, and therefore, cannot be considered a benchmark.

7. Since these are the initial years of the FGD system, the equipment was mostly unused, and therefore, there have been minimal repairs required for the system. Since the slurry is highly acidic and abrasive, it aggravates wear and tear with the ageing of the equipment, resulting in an exponential increase in the maintenance costs during the major outages of the units. Accordingly, the expenses towards O&M will only increase with the passage of time, along with an anticipated higher percentage of auxiliary power consumption. This trend can be observed from the upward revision in expenses shared by JPL from the years 2019-20 to 2022-23.

8. Due to these cost variations on account of the FGD system and inevitable inaccuracies in computing a 100% accurate amount spent on O&M for the FGD system, compensating the generators' based on their actual expenses, as computed, shall inevitably cause injustice to the generators, including JPL, as they cannot be restituted to the same economic position, as if, change in law event has never occurred. This was a difficulty that was being faced by the thermal power generators, that were required to comply with the MoEF&CC Notification, as a result of which, the Commission issued the Suo Motu order, which currently holds the field. Accordingly, JPL ought to be granted reliefs, as set out by the Commission, in terms of the Suo-Motu Order, as has been made applicable to all the thermal power plants operating the FGD systems.

13. In response to the above additional information, the Respondents have also filed their replies as stated below:

Respondent Haryana Discoms

14. The Respondent Haryana Discoms, vide affidavit dated 26.7.2023, have submitted the following:

(a) The claim towards auxiliary power, if any, to be considered by the Commission cannot be more than what had already been envisaged by the Petitioner at the time of the installation of the FGD and prior to the Notification dated 7.12.2015.

(b) The claim made by the Petitioner towards additional O&M expenses, Water charges etc., are not admissible in the present case and cannot be considered in terms of the Suo-Motu Order dated 13.08.2021 as the Petitioner had envisaged all costs/inputs associated with the installation of existing FGD system in the

technical description of FGD submitted by the Petitioner while seeking approval of MoEF&CC, GOI on 16.3.2010;

(c) All the factors for the operation of the FGD system., like limestone consumption, water consumption, power, Gypsum generation, Gypsum storage, wastewater generation, capital and recurring cost of operation, were clearly envisaged by the Petitioner. Therefore, the Petitioner is not entitled to any additional costs for the operation of the FGD system, on account of the MoEF&CC Notification, 2015, as these costs were duly taken into account by the Petitioner prior to the installation of the FGD;

(d) As regards the gypsum generation, the Petitioner has failed to specify the quantum of gypsum that it has generated as a by-product of the operation of FGD and the profit derived by the Petitioner from the sale of the said gypsum;

(e) For the period prior to 2015, the O&M expenses were considered as a part of the overall O&M expenses of the plant. Similarly, the O&M expenses, after the MoEF Notification dated 7.12.2015, should not be separately considered and granted to the Petitioner. In addition, it appears that there is a discrepancy in the data submitted by the Petitioner along with the affidavit. A perusal of Annexure-3 of the affidavit on Page 11 shows that for 2015-16, FGD was operated for 108 hours, and the total cost incurred has been claimed as Rs. 90,40,934/-. However, in 2016-17, FGD was operated for only 2 hours, and the claim made by the Petitioner for the said period is Rs. 87,75,214/-. The above is excessive when compared to 2014-15 when FGD was operated for 2 hours, and the claim made by the Petitioner for the period was Rs. 12,19,004/-. As regards the claim for the period 2019 onwards, no break-up of the O&M expenses has been provided by the Petitioner

15. The Respondent, TPDDL, vide affidavit dated 26.7.2023, has submitted the following:

(a) JPL's claim in the present petition and the main petition is with respect to the payments towards the additional expenditure incurred due to the operation of the FGD system, which has allegedly led to the increase in auxiliary power consumption, O&M expenses, increase in the consumption of raw material and waste / contaminated water disposal cost, and the additional working capital costs.

(b) As per the specific findings in the Suo Motu order, the provisional tariff for FGD ought to have been mutually agreed upon between JPL and TPDDL. However, JPL has commenced the billing of FGD, without any such mutual agreement with TPDDL, and such conduct of JPL ought to be disallowed. The Suo Motu order only applies to generators who had to newly establish FGD pursuant to the MOEF&CC Notification dated 7.12.2015, and therefore, there is no occasion for JPL to make any claims on the basis of the same.

(c) This Commission has not provided for any such reduction in the contracted capacity in the Suo Motu order. However, JPL has reduced the contracted capacity of TPDDL by 1% from 1.4.2022 on account of ECS without any mutual agreement with TPDDL. Such conduct of JPL is *de hors* the categorical findings of this Commission and JPL ought to be reprimanded for the same.

(d) The data on account of additional expenses/water charges and additional manpower cost has been provided by JPL only in light of the specific directions of this Commission in the ROP dated 25.4.2023. However, this Commission, in the 283/MP order, had not allowed/granted any additional expenditure towards FGD for JPLs Plant. In fact, it has been stated in the 283/MP order that the additional expenditure towards retrofitting the FGD system may be undertaken with the consent of beneficiaries. It is reiterated that TPDDL never provided any consent for the same. Therefore, no additional expenditure, as claimed by JPL for FGD, is payable by TPDDL.

(e) The FGD system was envisaged by JPL in the initial plan of the Project and was installed by JPL in October 2013; thus, the installation of the FGD system by JPL was before the promulgation of the MoEFCC Notification. Since the FGD system was already considered as part of the Plant at the initial stage, thus, the related capacity charges O&M charges and other charges claimed by JPL are part of the fixed costs, already factored in by JPL, while quoting tariff during the bidding process. JPL has no basis to contend otherwise. Further, any other cost on account of FGD shall be allowed/disallowed, as per the MOEFC guidelines.

(f) Notably, this Commission, in the 283/MP order, has held that JPLs Plant already meets the revised emission norms, as notified by the MOEF&CC. At this point, it is also pertinent to note that the notification revised the emission norms and limited the emission of Sulphur Dioxide (SO_2) to 200 mg/NM^3. In the 283/MP order, this Commission has specifically observed that JPL's Plant is already in compliance with the revised emission norms, i.e., even prior to the promulgation and issuance of the Notification. Reliance in this regard is also placed on the CEA's letter dated 20.6.2020.

Hearing dated 31.1.2024

16. Since the order in the Petition (which was reserved on 25.4.2023) could not be issued prior to one Member, who formed part of the Coram, demitting office, the matter has been re-listed for hearing. At the outset, the learned counsels for the Petitioner and the Respondents submitted that since pleadings and arguments have already been completed, the Commission may reserve its order in the petition. Based on the consent of the parties, the order in the petition was reserved.

Analysis and Decision

17. As stated, Petition No.283/MP/2019 was filed by the Petitioner seeking compensation for the decrease in revenues and increase in the cost as a result of the change in law events in terms of Sections 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 read with Clause 4.7 of the Competitive Bidding Guidelines and Article 13 of the

PPAs dated 7.8.2008 and 20.1.2009 entered into by the Petitioner with the Respondent Haryana Discoms (viz., UHBVNL and DHBVNL) and the Respondent TPTCL respectively. During the pendency of this Petition, the Commission, vide its order dated 13.8.2021 in Petition No. 6/SM/2021, had devised a mechanism to determine the compensation on account of the installation of Emission Control System by the generating companies in compliance with the Revised Emission Standards issued by the MoEF&CC, vide the Environment (Protection) Amendment Rules, 2015 dated 7.12.2015, in respect of the thermal generating stations whose tariff is determined through competitive bidding under Section 63 of the Electricity Act, 2003.

18. Thereafter, vide order dated 7.1.2022, Petition No. 283/MP/2019 was disposed of by the Commission, holding as under:

> *(i) MoEFCC Notification dated 7.12.2015 is held as Change in law;*
>
> *(ii) Additional capital expenditure incurred / to be incurred on installation of FGD System is disallowed, as JPL itself submitted that it is not claiming capital cost amounting to Rs. 299.02 crores towards the installation of the existing FGD System.*
>
> *(iii) We are not inclined to allow the additional capital expenditure incurred or to be incurred by the Petitioner towards retrofitting the existing FGD or towards trial run undertaken w.e.f. 01.04.2018;*
>
> *(iii) We note that the Petitioner had installed the FGD system on its own volition, though not mandated. However, after the MOEFCC Notification dated 07.12.2015, in order to comply with the Revised Emission Norms for SO_2, the Petitioner is mandated to run the FGD system on continuous basis;*
>
> *(iv) Compensation to the Petitioner for compliance with the MOEFCC Notification dated 07.12.2015 shall be governed in accordance with that order (order dated 6.8.2021 in Petition No.6/SM/2021). For the purpose of O&M expenses, the capital cost of FGD system shall be treated as Rs. 299.02 crore;*
>
> *(v) We note that the Ministry of Power, Government of India has notified the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (hereinafter referred to as "the Change in Law Rules") and the Petitioner, therefore, is required to follow the process specified thereunder;*
>
> *(vi) Accordingly, the Petitioner may approach the Respondents for settlement of Change in Law claims among themselves in terms of the Change in Law Rules and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules;*
>
> *(vii) We also note that CEA has opined that additional expenditure towards retrofitting FGD system may be undertaken with the consent of beneficiaries. Therefore, the Petitioner is granted liberty to approach the Commission if there is*

consent of beneficiaries and the same will be dealt with in terms of provisions of the PPAs and in accordance with law.

19. Subsequently, the order dated 13.8.2021 in Petition No.6/SM/2021 was corrected/ modified, vide corrigendum orders dated 11.11.2021 and 12.9.2023, respectively. Meanwhile, the Petitioner has filed the present Petition seeking the implementation of the 283/MP/2019 order (dated 7.1.2022) and for directions to the Respondents to make payments towards the additional capital expenditure incurred /to be incurred on account of the increased auxiliary consumption, O&M expenditure, consumption of raw material & waste /contaminated water disposal and additional working capital costs.

20. The Respondent Haryana Discoms have submitted that the implementation of the 283/MP order as sought by JPL is not maintainable since no 'decree' was passed in favour of JPL and there has been no adjudication of the claims of the Petitioner and the parties were merely directed to settle the change in law claims in terms of the CIL Rules, 2021. Similarly, the Respondent TPDDL has submitted that in the absence of any specific finding /allowance of the claims in the order, the Petitioner has no basis to seek the implementation of the said order dated 7.1.2022. *Per contra*, the Petitioner has submitted that the 283/MP order had conclusively adjudicated/determined the Petitioner's claim for additional expenditure, and it was only for the procedure to be flowed for claiming such expenditure; the Petitioner was directed to take recourse to the CIL Rules.

21. We have examined the matter. A `decree' is defined in Section 2(2) of the Code of Civil Procedure to mean the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It may either be preliminary

or final. It may partly be preliminary and partly be final. The court, with a view to determining whether an order passed by it is a decree or not, must take into consideration the pleadings of the parties and the proceedings leading up to the passing of an order. The circumstances under which an order had been made would also be relevant. As laid down by the Hon'ble Supreme Court in S. Satnam Singh v Surendar Kaur (2009) 2 SC 562, for determining the question as to whether an order passed by a court is a decree or not, it must satisfy the following tests:

(a) There must be an adjudication;
(b) Such adjudication must have been given in a suit;
(c) It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;
(d) Such determination must be of a conclusive nature; and
(e) There must be a formal expression of such adjudication."

22. The observations of the Commission in the 283/MP/2019 order, as noted in paragraph 3 of this order above, reveal that the decision of the Commission has the essentials of a decree and satisfies the tests above. In fact, the Commission in the said order, while taking note of the claims of the Petitioner towards the increase in auxiliary consumption on account of the installation of the FGD system, incurring additional expenditure for procuring raw materials for operating the existing FGD, etc., had referred to the Suo Motu order (dated 13.8.2021) and observed that the compensation claims of the Petitioner for compliance with the MOEF&CC notification dated 7.12.2015 shall be governed by the said order. The relevant portion of the Suo Motu order is extracted below:

"35. The Petitioner has claimed (a) increase in auxiliary power consumption on account of installation of FGD system, and (b) revision of the contracted capacity due to claimed increase in auxiliary power consumption after the installation of the FGD system. Further, the Petitioner has submitted that on account of the MOEFCC Notification dated 7.12.2015, the Petitioner is also affected on the following counts:(c) incurring of additional expenditure for procuring raw materials for operating the existing FGD and increased waste and contaminated water disposal costs on a continuous basis; (d) incurring of O & M expenses

on a continuous basis; and (e) incurring of additional working capital costs on a continuous basis.

36. The Commission has already issued order dated 13.08.2021 in Petition No. 06/SM/ 2021 wherein a mechanism has been provided (in consultation with stakeholders) to determine compensation on account of installation of Emission Control System by the generating companies in compliance with the Revised Emission Standards issued by MOEF&CC vide the 2015 Amendment Rules in respect of the Thermal Generating stations whose tariff is determined through competitive bidding under Section 63 of the Electricity Act, 2003. Compensation to the Petitioner for compliance with the MOEFCC Notification dated 07.12.2015 shall be governed in accordance with that order…"

23. Having adjudicated the matter, the Commission had, in terms of the CIL Rules, 2021, directed the Petitioner to approach the Respondents for settlement of the change in law claims among themselves and approach the Commission only in terms of Rule 3(8) of the said Rules to verify the calculation and adjust the amount of the impact in the monthly tariff or charges. Further, the implementation of the 283/MP order, sought by the Petitioner is in the backdrop of the APTEL judgment dated 5.4.2022 in O.P. Nos. 1 & 2/2022, setting aside the Commission's order. APTEL held in the said judgement that the CIL Rules apply prospectively to matters and that the change in law claims initiated after 22.10.2021 cannot be retrospectively applied to proceedings pending for adjudication before the Central Commission. The relevant portion of the said judgment is extracted below:

"60. We hold that the CIL Rules apply prospectively to matters and change in law claims initiated after 22.10.2021 and cannot be retrospectively applied to proceedings pending for adjudication before the Central Commission particularly where the cause of action had already arisen before the Rules were brought into existence for the reason the law, existing as on date of filing of proceedings, will only govern the dispute [see Narendra Kishore Marwah vs. Samundri Devi, (1987) 4 SCC 382 and Ramesh Chandra v. Additional District judge & Ors, (1992) 1 SCC 751].

61. We may add here that even if we were to adopt the view of CERC that the CIL Rules represent procedural law, we are not persuaded to accept that these Rules can stop the pending adjudicatory process in its tracks divesting the statutory authority of its jurisdiction to adjudicate in matters awaiting its decision. In Ramesh Kumar Soni v. State of Madhya Pradesh, (2013) 14 SCC 696, it was held that even procedural law does not always have retrospective effect particularly where cause of action and claims proceedings pre-date the new law

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63. As mentioned earlier, pertinent to note that the Central government which has

framed and notified the CIL Rules itself has clarified, albeit subsequently, by a communication issued by MoP on 21.02.2022 that CIL Rules will apply to Change in Law events which occur on or after 22.10.2021, such events as had occurred prior to the notification of these Rules to be dealt with in accordance with the prevalent dispensation or rule at the time of occurrence of the event."

In light of the above discussions, the submissions of the Respondents as referred to in paragraph 20 above, are rejected.

24. One more contention of the Respondent Haryana Discoms and TPDDL is that the Suo Motu order cannot be ipso facto applied to the facts of the present case, as the said order was passed while dealing with the mechanism for compensation for the generating companies, which installed the FGD system in terms of the MOEF &CC notification dated 7.12.2015. In other words, they have contended that the Suo Motu order only applies to generators who had newly established FGD pursuant to the MOEF&CC Notification dated 7.12.2015. Per contra, the Petitioner has submitted that the Suo Motu order, which recognised the need for a compensation mechanism for additional expenditure to be incurred on account of the impact of the MOEF&CC Notification dated 7.12.2015 for the PPAs executed in terms of Section 63 of the Act, is squarely applicable to the present case.

25. The matter has been examined. As stated, the Petitioner, in Petition No. 283/MP/ 2019, had sought the incremental capital expenditure, impact of increased auxiliary consumption and raw material consumption, increased operational and maintenance expenses, and increased interest on working capital to be incurred for complying with the revised emission norms to be compensated under change in law, in terms of Article 13 of both the PPAs. The Commission, while considering the change in law claims of the Petitioner (as referred to under para 7 above), had, by a conscious decision, held in para 36 of the 283/MP order that the compensation to the Petitioner for compliance

with the MOEFCC Notification dated 7.12.2015 shall be governed in accordance with the Suo Motu order dated 13.8.2021. It is noticed that the Commission, in the Suo Motu order dated 13.8.2021, taking note of the fact that the implementation of ECS to meet the revised emission standards results in an increase in cost, inter alia, on account of additional capital expenditure, additional O&M expenses, Interest on working capital and consumption of reagent and also resulting in the decrease in revenue on account of additional auxiliary energy consumption as the net saleable energy available for selling to the procurers decreases, and keeping with the principle laid down in PPAs of restitution for restoring the affected party to the same economic position as if no change in the law had occurred, has finalised the compensation mechanism vide the Suo Motu order, and the same is applicable for the generating station of the Petitioner. Some of the observations of the Commission in the Suo Motu order are extracted for reference:

"4…The generating companies are invoking the provisions of change in law of respective power purchase agreements to recover such additional impact of cost arising on account of installation or up-gradation and operation of the emission control system/s. Along with invocation of change in law, the generating companies are also seeking approval of provisional capital cost on ex-ante basis, based on the chosen technology.

5. While acknowledging the 2015 Rules as Change in Law event under PPAs and approving provisional cost for installation of flue-gas desulfurization (FGD) system in few cases, the Commission has taken cognizance of the concerns of the parties regarding the compensation mechanism. The Commission, vide order dated 23.4.2020 in Petition No. 446/MP/2019 and order dated 18.5.2020 in Petition No. 210/MP/2019, directed the staff of the Commission to float a staff paper on the issue of compensation mechanism and tariff implications on account of the 2015 Notification in case of thermal generating stations covered under Section 63 of the Act, where the PPA does not have explicit provision for compensation mechanism during the operation period and the PPA requires the Commission to devise such a mechanism.

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13. Implementation of ECS to meet the revised emission standards results in increase in cost, inter alia, on account of additional capital expenditure, additional Operation and Maintenance Expenses, Interest on Working Capital and consumption of reagent. Also, it results in decrease in revenue on account of additional auxiliary energy consumption as the net saleable energy available for selling to the procurers decreases. In keeping with the principle laid down in PPAs of restitution of restoring the Affected Party (in this case, the thermal generating stations) to the same economic position as if no Change in Law had occurred, a compensation mechanism has been finalized through this order.

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15. The standard bidding documents issued by the Central Government under Section 63 of the Act do not provide any specific formulation for computation of compensation during the operating period but contain the principle of restitution to restore the affected party to the same economic position as if the change in Law event has not occurred. The Commission has finalized the compensation mechanism to compensate the affected party (in present case, the thermal generating stations) during the operation period by invoking the principle of restitution contained in the PPAs.

26. Thus, the submissions of the Respondents that the Suo Motu order is not applicable to the present case of the Petitioner is only an afterthought and is therefore not acceptable.

27. Another contention of the Respondent Haryana Discoms is that all factors for the operation of the FGD system, like limestone consumption, water consumption, wastewater generation, etc., including the capital and recurring cost of operation, were clearly envisaged by the Petitioner prior to the installation of the FGD system, and therefore, it is not entitled to any additional costs, for the operation of the FGD system on account of the MOEF&CC Notification dated 7.12.2015. Similarly, the Respondent TPDDL has submitted that in the absence of any consent from the Procurers/beneficiaries to the additional capital expenditure proposed, the Petitioner cannot unilaterally demand compensation. *Per contra*, the Petitioner has submitted that since the issues raised by the Respondents were already decided by the Commission in the 283/MP order, they cannot be permitted to re-agitate the same issues.

28. We have examined the matter. It is noticed that the Respondents Haryana Discoms and TPDDL had raised these issues during the proceedings in Petition No. 283/MP/2019 before the Commission, and the Commission vide its order dated 7.1.2022 disposed of the same, as under:

"21. The Haryana Discoms have submitted that the Existing FGD is an integral part of the Plant and the capacity charges and all factors related to operation and maintenance are deemed to have been accounted for in the tariff being paid by the Haryana Utilities. We

note that the Petitioner has itself submitted that it is not claiming capital cost amounting to Rs.299.02 crore towards installation of the Existing FGD. Therefore, no additional expenditure by the Petitioner on installation of FGD system is considered and allowed.

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24. We also note that the Respondents (the Haryana Discoms and TPDDL) are against any additional expenditure towards retrofitting the existing FGD. Thus, we are not inclined to allow retrofitting of the existing FGD since the Plant already meets the Revised Emission Norms of SO2 and the beneficiaries have not consented to the additional expenditure"

29. In the above background, the Respondents cannot be permitted to re-agitate the issues which had already been decided in the 283/MP order and 6/SM/2021 order, as the same has attained finality. The Petitioner is only seeking compensation for the additional expenditure incurred for operating the FGD system in compliance with the MOEF&CC Notification dated 7.12.2015, and not for installation or for retrofitting the FGD system. For these reasons, the submissions of the Respondents stand rejected.

30. As stated, the Commission, vide the 283/MP order dated 7.1.2022, had disallowed the additional capital expenditure of Rs 299.02 crore incurred on the installation of the FGD System and the retrofitting of the existing FGD system or trial run undertaken with effect from 1.4.2018. However, the compensation claims of the Petitioner towards the (a) increase in auxiliary power consumption on account of installation of FGD system, (b) revision of the contracted capacity due to increase in auxiliary power consumption claimed after the installation of the FGD system (c) incurring of additional expenditure for procuring raw materials for operating the existing FGD and increased waste and contaminated water disposal costs on a continuous basis; (d) incurring of O & M expenses on a continuous basis; and (e) incurring of additional working capital costs on a continuous basis, were directed to be governed by the compensation mechanism laid in terms of the Suo Motu order dated 13.8.2021, as under:

"44. Accordingly, the Commission is of the view that operation and maintenance expenses shall be allowed @2.5% (instead of 2% proposed in the draft Suo-Motu order) of the additional capital expenditure (ACEe) for installation of ECS (excluding IDC and FERV) as admitted by the Commission and to be escalated at the rate of 3.5% per annum for the period up to 31.03.2024 and, thereafter, the norms shall be reviewed based on available data. Till 31.03.2024, the additional O&M expenses (O&Me) shall be worked out as follows:

First Year: 2.5% of ACEe excluding IDC and FERV (to be allowed proportionately if operation of ECS is for part of the year)

Second Year onwards: 2.5% of ACEe escalated annually at the rate of 3.5% Additional Interest on Working Capital (IWCe) component of SFC

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51. Therefore, Working Capital (WCe) allowed shall include following components:

a) Cost of limestone or reagent for stock of 20 days corresponding to the normative annual plant availability factor;

b) Advance payment for 30 days towards cost of limestone or reagent for generation corresponding to the normative annual plant availability factor;

c) Operation and maintenance expenses in respect of emission control system for one month;

d) Maintenance spares @20% of operation and maintenance expenses in respect of emission control system; and

e) Receivables equivalent to 45 days of supplementary capacity charge and supplementary energy charge for sale of electricity calculated on the normative annual plant availability factor.

52. Accordingly, the Additional Interest on Working Capital (IWCe) shall be worked out as under:

IWCe(n) = WCe(n) x WCIR(n)/100.

Where,

WCe(n) is the Working Capital of the year for which compensation is to be determined (refer paragraph 51)

WCIR(n) is Working Capital Interest rate (in %) which is Marginal Cost of Lending Rate of State Bank of India (for one-year tenor) plus 350 basis points as on 1st April of the year for which compensation is to be determined."

31. The Suo Motu order thus recognised the need for a compensation mechanism for additional expenditure to be incurred on account of the impact of the MOEF&CC Notification dated 7.12.2015 for the PPAs executed in terms of Section 63 of the Act. However, for settlement of the compensation claims, the Petitioner was directed by the Commission, in the said order, to adopt the procedure as laid down under the CIL

Rules, 2021 and then approach the Commission under Rules 3(8) of the said rules. With the Commission's order on the retrospective application of the CIL Rules being set aside by APTEL (as stated in para 23 above), the change in law claims, which had arisen prior to the Rules being brought into existence, are to be decided by the Commission, in the present case.

32. The Petitioner was directed vide ROP of the proceedings dated 25.4.2023 to submit certain additional information, and in response, the Petitioner has filed the additional information on 6.7.2023 (as per Annexures-A-1 & A-2) and as detailed in paragraph 12 above. While the Respondent Haryana Discoms have submitted that the compensation payable in terms of Article 13 of the PPA is subject to the requirement, prudency check as deemed appropriate by the Commission, the Respondent TPDDL has stated that the settlement of claims is to be carried out on the basis of the merits of the claims of the Petitioner.

33. As stated, the Petitioner has executed PPA dated 7.8.2008 (amended on 17.9.2008) with the Haryana Discoms and PPA dated 20.1.2009 (amended on 21.10.2010) with TPTCL, which has a back to back agreement with TPDDL. The Respondent TPTCL has submitted that the prayers sought by the Petitioner in the present Petition (as well as in Petition No.283/MP/2019) are essentially qua the Haryana Discoms and TPDDL, who are the end Procurers/Beneficiaries, and any liability in respect of the additional expenditure incurred by the Petitioner, qua the change in law event, cannot be foisted upon TPTCL, being an intermediary procurer. It has stated that the relief sought by the Petitioner is ultimately borne by the beneficiary, TPDDL under the PSA, owing to the back-to-back arrangement between the parties. Both the PPAs entered into by the Petitioner provide for relief in case of a "change in

law". Article 13 of the PPAs provides that a party impacted by a 'change in law' event should be restored to the same economic position as if such 'change in law' had not occurred. As per Article 13.2 of both the PPAs, determination of the consequence of a change in law event ought to have due regard to the principle that the fundamental purpose of compensating the party affected by such change in law event is to restore through monthly tariff payments, the affected Party to the same economic position as if such change in law event has not occurred. Article 13.2(b) of both PPAs provides for the determination of the impact of a change in law event occurring during the "operation period" period between COD (as defined under the relevant PPA) and the date of expiry or earlier termination of the PPAs in accordance with their respective terms). Under both PPAs, compensation for change in law during the operation period is payable subject to the condition that the increase/ decrease in revenues or cost to the Petitioner is in excess of an amount equivalent to one per cent (1%) of the Letter of Credit (as defined in the relevant PPA) in aggregate for a contract year. The increase/ decrease in revenues and costs to the Petitioner on account of the issuance of the introduction of the Revised Emission norms is in excess of the said threshold for the contract years commencing from the contract year 2018-19.

34. As noted in the 283/MP order, the Petitioner has issued a notice dated 27.7.2016 to the Respondents, wherein it had apprised them that the Plant had been operating as per the prevailing norms, and that it was not adequately equipped to comply with the Revised Emission norms. It had also stated that owing to the fact that the Revised Emission Norms constituted a 'change in law' event under the PPAs, the said additional expenses ought to be compensated to the Petitioner. In addition to the above, the Petitioner issued a notice dated 13.12.2018 to HPPC, wherein the Petitioner yet again

apprised the Respondents about the 'change in law' event that had occurred. It had also informed the Respondents that it was in the process of filing a petition before this Commission in accordance with the provisions of the PPAs. It has also been noted that the Respondents, vide letters dated 31.1.2019 and 5.2.2019, had neither denied nor refuted any of the claims made by the Petitioner, including that the Revised Emission norms amounts to a 'change in law' under the PPAs and have expressly taken the view that this Commission ought to decide the costs/compensation payable to the Petitioner. Pursuant to the 283/MP order dated 7.1.2022, the Petitioner had addressed letters to the Haryana Discoms stating that it would share the relevant calculations for reliefs in terms of the 283/MP order and the expenditure incurred/to be incurred for continuous operation of the FGD system for both units of the Project from 1.2.2019. Similarly, the Petitioner, on 17.3.2022, had issued notices to both the Haryana Discoms and TPTCL in terms of the 283/MP/order, the Suo Motu order, and the CIL Rules read with Article 13 of the respective PPAs. In response, the Respondents, by letters dated 11.2.2022, 14.2.2022 and 13.4.2022, have contended that the Petitioner is not entitled to any compensation in terms of the said order.

35. We note that the Respondent Haryana Discoms and TPDDL have submitted that the Commission has not provided for any such reduction in the contracted capacity in the Suo Motu order and that the Petitioner has reduced the contracted capacity of the Respondent by 1% from 1.4.2022 on account of ECS, without any mutual agreement with the Respondent. The Petitioner has, however, clarified that the reduction in the contracted capacity is due to the 1% increase in the auxiliary consumption in terms of the 283/MP order read with the Suo Motu Order. As regards the auxiliary consumption norms for ECS, the Commission in the Suo Motu order decided as under:

59. We have considered all the suggestions and comments of the stakeholders. We are of the view that auxiliary energy consumption norms for ECS specified by the Central Electricity Authority are based on some study, available data and discussions with technology providers. Therefore, the Commission at this stage, when sufficient operational data regarding auxiliary energy consumption of ECS is not available, considers it appropriate to be guided by the norms suggested by Central Electricity Authority (CEA). Further, it is observed that CEA has not specified any part load compensation with regard to auxiliary energy consumption of ECS. We also do not find any provision in the PPAs which provides for any relief to the seller for lower PLF. Accordingly, the suggestion for linking the auxiliary energy consumption of ECS with plant load factor is not considered for the purpose of devising the compensation mechanism.

60. In view of the above deliberations, additional capacity charges due to additional auxiliary energy consumption (ACCe) shall be arrived at based on the formula (quoted at paragraph 54 above) as proposed in the draft Suo-Motu order and norms of auxiliary energy consumptions for ECS specified by CEA (Annexure–I)

36. As per Annexure-I, the additional auxiliary energy consumption for a wet limestone based FGD system (without gas to the gas heater), based on the CEA recommendations, is 1%, and the same has been accepted by the Commission. As observed by the Commission in the above order, the additional capacity charges due to additional auxiliary energy consumption are to be worked out in terms of the formula provided in para 54 of the said order. In view of this, the submissions of the Petitioner that the reduction in the contracted capacity of the Respondent by 1% from 1.4.2022 on account of ECS, due to a 1% increase in the auxiliary consumption, in terms of the 283/MP order read with the Suo Motu Order is accepted. Further, the Commission, in para 43 of the Suo Motu order, has taken note of the concerns of the stakeholders on the difficulty in the availability of data relating to O&M expenses (due to lack of ECS in operation) and has accordingly adopted the normative approach, by permitting the O&M expenses @2.5% of the additional capital expenditure for installation of ECS as stated in paragraph 44 of the said order. It is pertinent to mention that the capital expenditure incurred by the Petitioner for Rs 299.02 crores towards the installation of the FGD system has not been claimed by the Petitioner.

37. Admittedly, the 283/MP order has enabled the Petitioner to seek additional expenditure on account of the change in law events in accordance with the compensation mechanism laid down under the Suo Motu order. Further, the direction to the Petitioner, in the said 283/MP order to approach the Respondents, in terms of the CIL Rules, does not survive any more, in the present case, pursuant to the judgment of APTEL dated 5.4.2022 in OP Nos.1 & 2/2022, as stated above. Thus, the Respondents were obligated to compensate the Petitioner in accordance with the Suo Motu order read with the 283/MP order. In this background, the stand of the Respondents refusing the payment of compensation to the Petitioner in terms of the 283/MP order read with the Suo Motu order is, in our view, erroneous. The detailed computation of the additional operational expenditure encompasses various components. This includes the additional O&M cost, calculated as 2.5% of the admitted capital expenditure of 299 crore, additional interest on working capital, expenses related to the consumption of reagents, and 1% of additional auxiliary consumption. Furthermore, this computation elucidates the subsequent impact on the capacity charges and energy charges, claimed by the Petitioner from the Respondents from February, 2019 till April 2023, both year-wise and month-wise. On prudence check of the same, it is noticed that the claim of the Petitioner is in accordance with the formula for compensation in terms of the Suo Motu order read with the 283/MP order. It is pertinent to mention that the Petitioner had raised bills on the Respondents, pursuant to the 283/MP order relating to the period from February 2019 onwards. Accordingly, we hold that the Respondents are liable to make payment of such compensation claims to the Petitioner with effect from February 2019, after reconciliation, within a period of 30 days from the date of this order, based on the bills raised by the Petitioner. Needless to say, the payment of LPS for such amounts claimed by the Petitioner shall be guided

by clause 11.3.4 of the PPAs executed by the parties. We direct accordingly. In case of any disagreement/ differences between the parties, they are at liberty to approach this Commission with an appropriate petition, and the same will be considered in accordance with law.

38. Petition No. 131/MP/2022 is disposed of in terms of the above.

Sd/-	***Sd/-***	***Sd/-***
(Pravas Kumar Singh)	**(Arun Goyal)**	**(Jishnu Barua)**
Member	**Member**	**Chairperson**