

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 14/MP/2017

Coram:

**Shri P.K. Pujari, Chairperson
Shri A.K. Singhal, Member
Dr. M.K. Iyer, Member**

Date of Order: 21st August, 2018

In the matter of

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

In the matter of

NTPC Limited,
NTPC Bhawan
Core-7, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi- 110003

.....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 Limited
Grid Sub-Station Building,
Hudson Lines, Kingsway Camp
New Delhi- 110009
4. New Delhi Municipal Council
Palika Kendra Building,
Opposite Jantar Mantar, Parliament Street
New Delhi- 110001
5. Military Engineering Services
Delhi Cantonment, New Delhi- 110002



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

7. Department of Environment
Government of NCT of Delhi
4th Floor, ISBT Building,
Kashmere Gate
New Delhi- 110006

....Respondents

Parties present:

Shri Sitesh Mukherjee, Advocate, NTPC
Shri Deep Rao, Advocate, NTPC
Shri Manoj Kr. Sharma, NTPC
Shri Nishant Grover, BYPL
Shri Kanishk, BRPL
Shri Sameer Singh, BYPL

ORDER

This Petition has been filed by the Petitioner, NTPC seeking for the following reliefs:

(a) Declare that the directions issued by the DPCC to the Petitioner not to operate Stage-II (2 x 210 MW) units of Badarpur Thermal Power Station (hereinafter referred to as 'the generating station') in light of the severe ambient air conditions in Delhi is a change in law event which entitles the Petitioner to recover capacity charges from respondent Nos. 1 to 5 for the period during which Stage-II is not operated;

(b) Direct Respondent Nos. 1 to 5 to pay the bills raised by the Petitioner for capacity charges from 7.11.2016 until Stage-II of BTPS is permitted to operationalize; and

(c) Pass such other and further order(s) and/ or directions as this Commission deem just, fit and proper in the facts and circumstances of the case and in the interest of justice.

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 the Govt. of India in 1973 and was later transferred to the Petitioner, NTPC 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-I (95 MW): 1.11.1973	Unit-IV (210 MW) : 17.3.1980
Unit-II (95 MW): 1.9.1974	Unit-V (210 MW) : 1.4.1982
Unit-III (95 MW): 1.4.1975	

3. Subsequent to the transfer, Delhi Transco Ltd entered into PPA with the Petitioner 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, the Petitioner 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	PPA dated	Capacity Allocation (in MW)
1	New Delhi Municipal Corporation (NDMC)	6.5.2008	125
2	Tata Power Delhi Distribution Ltd (TPDDL)	8.5.2008	176
3	BSES Rajdhani Power Ltd (BRPL)	5.6.2008	236
4	BSES Yamuna Power Ltd (BYPL)	5.6.2008	118
5	Military Engineering Services (MES)	31.7.2008	50

4. The Petitioner has been operating and selling power to the above said distribution licensees (the 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.

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

(i) The Delhi Pollution Control Committee, Govt. of NCT of Delhi (referred to as 'DPCC') vide its Order dated 2.1.2014 had granted 'Consent To Operate' BTPS under Section 21 of the Air (Prevention & Control of Pollution) Act, 1981 and Section 25 & 26 of the Water (Prevention & Control of Pollution) Act, 1974 valid till 31.1.2018. This Consent was modified by DPCC based on the decision of the Consent Management Committee of DPCC by letter dated 11.2.2016. Stage-II was compliant with the emission norms and all other environmental standards prescribed by DPCC in the Consent to Operate.



(ii) DPCC vide its letter dated 6.11.2016 directed the Petitioner to shut down all units of BTPS upto 16.11.2016 in the light of severe ambient air pollution levels in Delhi. This letter was issued as a statutory direction to the Petitioner by DPCC in exercise of its powers under Section 31A of the Air (Prevention & Control of Pollution) Act, 1981 read with Rule 20 A (6) of the Air (Prevention & Control of Pollution) (Union Territories) Rules, 1983. Therefore, the Petitioner was bound to shut down both its operational Stage-II units which are compliant with the revised emission norms prescribed by DPCC.

(iii) DPCC vide its e-mail and letter dated 16.11.2016 extended its earlier directions dated 6.11.2016 for closure of all units of BTPS up to 31.1.2107. In the said e-mail, the DPCC stated that the aforesaid directions were based on a meeting held with the Lt. Governor of Delhi dated 15.11.2016. Consequently, all units of BTPS have been directed by DPCC to remain shut down from 7.11.2016 till 31.1.2017. Thereafter, DPCC vide letter dated 31.1.2017 issued addendum and extended the closure of all units of BTPS till further orders.

(iv) By issuing directions dated 6.11.2016, 16.11.2016 and 31.1.2017, DPCC has in effect over ridden the Consent to Operate from 7.11.2016 to 14.3.2017 thereby preventing Stage-II of BTPS from operating. The suspension of the statutory Consent to Operate issued to BTPS amounts to a 'Change in law'.

(v) The Delhi SLDC on 28.11.2016 had agreed that the DC of Stage-II units of BTPS ought to be accepted, which was opposed by the beneficiaries. In fact, Delhi SLDC accepted the BTPS DC for November, 2016 and December, 2016. Further, the Petitioner vide letter dated 2.12.2016 requested Delhi SLDC to consider the DC of Stage II units as communicated by BTPS while certifying the monthly Energy accounts.

(vi) The Delhi SLDC vide e-mail addressed to the Petitioner on 6.1.2017 stated that BTPS is not in a position to demonstrate its capability of generation and therefore the DC of BTPS will be 'zero' from 7.11.2016 onwards (in accordance with correction mail dated 7.1.2017).



(vii) Regulation 3(9)(d) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 ('the 2014 Tariff Regulations') provides that a change in any of the conditions of statutory consent amounts to Change in law. The definition of Change in law includes the suspension or over-riding of such consent by the same statutory authority which issued it.

(viii) In terms of Clause 5.3.3 of the PPAs, the distribution licensees have unequivocally agreed to bear the risk of any Change in law through tariff payments, once approved by this Commission. Stage-II units have not been ordered to be decommissioned by any authority and therefore the Petitioner is required to keep the same in a state of readiness incurring a variety of charges, including preservation charges.

(ix) Stage-II units of BTPS are ready and capable of generating power when required by the consumers of Delhi. From the definition of 'Declared Capacity' (DC), the key qualifying criteria for a generating station to issue its DC is its 'capability' to deliver electricity. Stage-II units of BTPS are ready to generate power and has been communicating DC. Hence, the Delhi SLDC is bound to accept and record the same in its periodical Energy Accounts. Accordingly, Delhi SLDC be directed to accept DC from Stage-II units of BTPS.

(x) The suspension of Consent to Operate by a statutory body like DPCC in consultation with the Central and State government amounts to a Change in law event over which the Petitioner has no control. Accordingly, the Petitioner has claimed capacity charges for the said period in terms 2014 Tariff Regulations.

(xi) In terms of Clause 5.3.3 of the PPA and Regulation 3(9)(d) of the 2014 Tariff Regulations, the discoms are liable to bear the risk of any Change in law through tariff payments once approved by the Commission.

6. In the above background, NTPC has submitted that Stage-II units of BTPS is fully compliant with the emission norms prescribed by DPCC and is therefore capable of generating power, except for the DPCC's unforeseeable statutory



directions dated 6.11.2016 & 16.11.2016 over which NTPC has no control. It has also submitted that the non-acceptance of DC of Stage-II by SLDC would render the Petitioner's change in law claim infructuous. Accordingly, NTPC has prayed for payment of capacity charges by the Respondents for the period 7.11.2016 to 14.3.2017 during which Stage-II of BTPS was not in operation. The Petitioner has also filed IA No. 5/2017 seeking interim directions on SLDC to accept the DC issued by BTPS from 6.11.2016 onwards and record the same in its periodical energy accounts pending the Petition. The prayer of the Petitioner in the IA has been taken up for consideration along with the main Petition.

7. The Petition was admitted and notice was issued to Respondents in the Petition and the IA with directions to complete pleadings in the matter. The Commission also directed the Petitioner to submit documentary evidence of the DC of Stage-II units furnished to SLDC during the period of shutdown starting from 7.11.2016. In compliance with the above directions, the Petitioner vide affidavit dated 18.5.2017 has submitted the relevant documents. Replies to the Petition & IA have been filed by the Respondent, TPDDL (vide affidavit dated 17.7.2017) and Respondents, BRPL & BYPL (vide separate affidavits dated 8.8.2017). Rejoinder to the said replies has been filed by the Petitioner vide its affidavits dated 4.9.2017 and 29.8.2017 respectively.

Submissions of the Respondents

BRPL & BYPL

8. The Respondents, BRPL & BYPL have objected to the maintainability of the Petition and have submitted the following:

- (a) The present Petition is barred by the principle of Res-judicata and/ or constructive Res-judicata to the extent that the Petitioner in this Petition has



sought payment of capacity charges for Stage-II of BTPS, which has already been prayed by the Petitioner in Petition No. 33/MP/2016 for four units of BTPS till they are permitted to be operationalized.

(b) There is no change in any condition or covenant of the Consent to Operate dated 2.1.2014 by virtue of the DPCC's directions in letters dated 6.11.2016 & 16.11.2016. Moreover, any directions issued by the DPCC under Section 31-A of the Air (Prevention and Control of Pollution) Act, 1981 cannot be construed as Change in law as DPCC, under the said section, is empowered to direct the closure, prohibition or regulation of any industry, operation or process. The DPCC is also empowered to direct stoppage or regulate supply of electricity.

(c) There is no provision either under the Electricity Act, 2003, the Regulations specified by the Commission, the Contract Act or the PPA entered between the parties which permit the Petitioner to levy Capacity charges when it is prohibited by law from generating power. Hence, there cannot be any payment of capacity charges to the Petitioner if the generating unit is required to be shut down by direction of a statutory authority.

(d) The Petitioner should have preferred appeal to the Appellate Authority viz National Green Tribunal against the DPCC's directions dated 6.11.2016 & 16.11.2016.

(e) Regulation 30 of the 2014 Tariff Regulations does not contemplate any payment of capacity charges on account of any change in law. The payment of Capacity Charges is on the basis of DC certified by SLDC and if the plant is shut, the declared availability is nil and there can be no question of any capacity charges.

TPDDL

9. The Respondent No. 3, TPDDL has submitted the following:

(a) The suspension of Consent to Operate is an interim direction by the DPCC to control pollution in Delhi NCR region. The definition of Change in law under the 2014 Tariff Regulations does not include suspension of such consent



and hence DPCC's order dated 6.11.2016 & 16.11.2016 will not be construed as Change in law.

(b) Clause 5.3.3 of the PPA dated 8.5.2008 limits the effect of Change in law to recovery of any 'expenses' on account of Change in law. However, the claim of the Petitioner for payment of fixed charges is not an expense and thus cannot be allowed in terms of the PPA.

(c) The DPCC's directions for shut down of Stage-II of BTPS may be considered as Force Majeure event in terms of clause 12 of the PPA as none of the parties had control over such event. Hence, the beneficiaries are not liable to pay any amount which is borne out of any force majeure event.

Rejoinder of NTPC

10. The Petitioner has filed its rejoinder to the replies filed by the above Respondents. The gist of the submissions in the rejoinder is as under:

(a) The present Petition does not pertain to the revision of norms by the DPCC and relates to the *in toto* suspension of the Consent to Operate vide DPCC directions dated 6.11.2016 and 16.11.2016. As per the terms of the Consent to Operate, the petitioner was empowered to operate the power plant in an uninterrupted fashion so long as its terms were complied with. By completely suspending the operation of Stage-II of the power plant from 7.11.2016 to 14.3.2017, DPCC has altered a fundamental condition that goes to the heart of the Consent to Operate, in as much as it affects its uninterrupted applicability for the prescribed period.

(b) Even though BTPS has to be shut down in terms of the directions of the DPCC, Stage-II of BTPS were not ordered to be decommissioned by any authority. As such, BTPS is required to be kept in state of readiness incurring various charges like O & M expenses, depreciation etc. which are to be reimbursed to the Petitioner. Pursuant to the meeting of the EPCA on 27.2.2017, DPCC vide letter dated 14.3.2017 lifted its order of suspension and permitted Stage-II of BTPS to operate from 15.3.2017 to 15.10.2017.



(c) Clause 5.3.3 of the PPA empowers the generator to recover the cost on account of change in law from distribution companies. Further, Regulation 8(7) of the 2014 Tariff Regulations provides that the losses attributable to an uncontrollable parameter have to be passed on to the beneficiaries of the generating station. Since Change in law event is an uncontrollable parameter, it squarely falls with the ambit of the said regulation, thereby entitling Petitioner to get compensation for the losses caused due to Change in law event.

(d) Stage II of BTPS was fully compliant with the applicable environmental norms and was capable of generating electricity on the date when Consent to Operate was suspended by DPCC on 6.11.2016. The petitioner is therefore entitled for losses incurred during the period of suspension i.e. from 7.11.2016 to 14.3.2017.

(e) BTPS has been communicating DC to SLDC which is bound to accept and record the same in its periodical energy accounts. SLDC accepted the DC for the months of November & December, 2016 but subsequently informed that BTPS is not in a position to demonstrate capability of generation and therefore DC of BTPS shall be 'zero' from 7.11.2016 onwards. Therefore, Delhi SLDC may be directed to accept and record the DC from Stage-II of BTPS failing which the change in law claim of the Petitioner would be rendered infructuous.

(f) The suspension of Consent to Operate was not due to any fault whatsoever on the part of the Petitioner, but due to wholly external factors amounting to change in law.

(g) Regulation 3(9)(d) of the 2014 Tariff Regulations provides that change in any of the conditions of a statutory consent amounts to Change in law. Thus, the Regulations and the PPA envisage Force majeure and Change in law events as distinct concepts and change to Consent to operate dated 2.1.2014 issued by the DPCC squarely falls within the scope and ambit of Change in law.



Submissions during the hearing

11. Learned counsel for the Petitioner, during the hearing of the Petition on 15.5.2018 reiterated the submissions made in Petition/rejoinder. The learned counsel however added that the provisions of the 2014 Tariff Regulations, viz., Regulation 3(9)(d) and Regulation 8(7) read with clause 5.3.3 of the PPA provides that the distribution licensees are liable to bear the risk, once the Commission arrives at the finding that a change in law has occurred in respect of Stage-II of BTPS. The learned counsel further submitted that since the change in law event has adversely affected the petitioner's ability to recover the costs incurred by it during the period from 7.11.2016 to 14.3.2017, it would be appropriate for the Respondents 1 to 5 to pay capacity charges as relief from change in law. Referring to the judgments of the Hon'ble Supreme Court in K. Balakrishna Rao & Ors vs Hazi Abdulla Sait & Ors, Printers (Mysore) Ltd V Asstt. Commercial Tax Officer and Tata Power Company Ltd V Reliance Energy Limited & Ors, the learned counsel pointed out that the directions of DPCC, an instrumentality of the Govt. of NCTD, not to operate Stage-II units of BTPS is in the nature of directions under Section 11 of the Electricity Act, 2003. He also submitted that Section 11(2) of the said Act empowers the Appropriate Commission to offset the adverse financial impact of such direction suffered by the generating company, this Commission, may offset the financial impact by way of tariff recovery from the respondents for the period it was shut down due to directions of DPCC.

12. Learned counsel for the Respondents, BRPL & BYPL made the following submissions:

- (i) The Petitioner's reliance on Regulation 8 of the 2014 Tariff Regulations (truing-up) is not maintainable as the said regulation contemplates truing up of the capital expenditure and cannot be equated to the recovery of full



capacity charges. It does not also speak of recovery/payment of capacity charges on 'deemed generation' concept.

(ii) BTPS had not complied with the PM emission norm of 150mg/Nm³ in terms of the Consent to operate granted on 2.1.2014. Thus, there can be no payment/recovery of capacity charges in case of shut down ordered by the DPCC for non-compliance of the environmental norms. Regulation 30 of the 2014 Tariff Regulations which provides for capacity charges, does not contemplate payment of full capacity charges on account of Change in law.

(iii) In case of a shut-down ordered by a lawful constitutional authority, the only option before the Petitioner would be to claim 'frustration' of the contract (Sec 56 of the Contract Act) in order to avoid any claim for damages by the respondents, for failure on the part of the petitioner to perform its obligations under the contract/PPA. However, in the present case, the generating company, despite not performing due to supervening conditions, has sought the beneficiaries to perform its obligations.

(iv) Even otherwise, the claim of the Petitioner for 'change in law' is not maintainable since the petitioner had knowledge as early as in 2008 that BTPS is required to comply with the PM emission norm of 50 mg/Nm³.

(v) DC can be declared only when the generating station is legally permitted to operate. The term 'capable to deliver' would mean 'lawfully permitted to deliver'. Since BTPS was not permitted to operate by direction of a legal authority, it was not capable of delivering ex-bus power. Hence, the prayer for declaration of DC by BTPS and acceptance of the same by Delhi SLDC is not acceptable.

(vi) DPCC is a State Board under the Air Act, 1981 and is not an 'Appropriate Government' under the Electricity Act, 2003. The DPCC directions dated 6.11.2016 and 16.11.2016 has been issued under Section 31 A of the Air Act, 1981 and cannot be construed as directions under Section 11. Hence, the question of offset of adverse financial impact does not arise.

(vii) There is no provision in the Act or Regulations that permits the petitioner to levy capacity charges when it is has been prohibited from



generating power. The payment of capacity charges is on the basis of declared availability as certified by SLDC. Since the plant is shut down and DC is nil, there can be no question of recovery of capacity charges from the beneficiaries.

13. The learned counsel for the Respondent, TPDDL adopted the above submissions of the Respondents BYPL & BRPL. He however referred to the Provisional Energy Accounts issued for the months of November, 2016 & December, 2016 by Delhi SLDC and pointed out that no amicable decision could be arrived at in the Delhi OCC meeting dated 28.11.2016 with regard to the DC of Stage-II units.

14. The Commission after hearing the parties on 15.5.2018 reserved its order in the Petition after directing as under:

“6. Accordingly, the Commission directed the Delhi SLDC to file on affidavit, on or before 31.5.2018, all the correspondences/documents addressed by SLDC to GoNCTD as regards the Monthly Energy Accounts/DC of Stage-II units of BTPS along with the directions of GoNCTD for revision of Monthly Energy Accounts/DC in respect of Stage-II units of BTPS. The Commission also directed the Petitioner and the Respondents to file their written submissions with copy to the other, on or before 4.6.2018.”

15. Pursuant to the above directions, the Respondents, BRPL & BYPL by common affidavit dated 4.6.2018 and the Respondent, TPDDL vide affidavit dated 4.6.2018 have filed their written submissions. The written submissions of these Respondents are mainly on the lines argued during the hearing. Delhi SLDC has placed on record a copy of the noting which shows that the Delhi SLDC was directed by GoNCTD not to accept DC of BTPS during the period of shut down and accordingly Delhi SLDC has not accepted the DC from 7.11.2016 till 14.3.2017 when the Notification of DPCC was withdrawn.

16. Since order in the Petition could not be passed prior to one Member of the Commission demitting office, the Petition was listed for hearing on 7.8.2018.



During the hearing, the learned counsel for the Petitioner and the representatives of the Respondents submitted that since the Commission had already heard the matter and issued detailed ROP, no further arguments were required in the matter. Accordingly, the Commission reserved its order in the Petition. Based on the submissions of the parties and the documents available on record, we proceed to examine the prayer of the Petitioner in the Petition.

Analysis and Decision

17. 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-II units of BTPS is a Change in law event;

Issue No.2: Whether the directions of DPCC shall be considered as directions of GoNCTD under section 11 of the Electricity Act, 2003;

Issue No.3: Whether the non-acceptance of DC by the Delhi SLDC is justified; and

Issue No.4: 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-II units of BTPS is a Change in law event

18. 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.

19. DPCC vide order dated 2.1.2014 had granted Consent to Operate BTPS valid till 31.1.2018, inter alia prescribing the environmental norms to be adhered by BTPS including the Particulate Matter (PM) emission norm not exceeding 150mg/Nm³. This Consent was later modified by DPCC vide letter dated 11.2.2016, wherein BTPS was directed to meet the PM emission norm of 50mg/Nm³. The Petitioner has submitted that Stage-II units of BTPS are compliant with the emission norms and all other environmental standards prescribed by the DPCC.

20. While so, DPCC, in exercise of its powers under Section 31 (A) of the Air (Pollution and Control of Pollution) Act, 1981 read with Rule 20A of the Air (Pollution and Control of Pollution) (Union Territories) Act, 1983, by letter dated 6.11.2016 issued directions to BTPS, including the closing down of all units of BTPS with immediate effect, for the next ten days i.e from 7.11.2016 to 16.11.2016, in order to curb air pollution levels in Delhi. The relevant portion of the directions is extracted as under:

“Now therefore, in order to curb air pollution levels in Delhi, it has been directed under Section 31 (A) of the Air (Pollution and Control of Pollution) Act as follows:

- 1. The Badarpur Thermal Power Station (BTPS) shall close down all its units with immediate effect for next ten days (7.11.2016 to 16.11.2016)*
- 2. That BTPS shall immediately stop the lifting of the fly ash from the fly ash storage area for any purpose with immediate effect for next ten days (7.1.2016 to 16.11.2016)*
- 3. xxxx*

21. The above said directions continued to remain in force upto 31.1.2017 in terms of the DPCC addendum dated 16.11.2016 and all units of BTPS remained



closed till 14.3.2017. It is however noticed that pursuant to the meeting of the EPCA on 27.2.2017, DPCC vide letter dated 14.3.2017 lifted its order of suspension and permitted Stage-II units of BTPS to operate from 15.3.2017 to 15.10.2017.

22. The Petitioner has submitted that DPCC by issuing directions dated 6.11.2016 and 16.11.2016 has in effect overridden the Consent to Operate for the period from 7.11.2016 till 14.3.2017, thereby preventing the Stage-II units from operating. According to the Petitioner, the change in any of the statutory consent amounts to Change in law and the definition of change in law includes the suspension or overriding of such consent by the statutory body which issues it. As the Stage-II units were compliant with all applicable environmental norms, the closure of these units based on the directions of DPCC is a Change in law event, being outside the control of the Petitioner. It has argued that since Stage-II units of BTPS have not been ordered to be de-commissioned by any authority, it is required to keep the same in state of readiness, incurring a variety of charges including preservation charges. The Respondents, BRPL & BYPL have submitted that the directions issued by DPCC under Section 31A of the Air Act cannot be a Change in law event since the DPCC is empowered to direct the stoppage or regulation of supply of electricity. They have also submitted that if an event leads to a complete stoppage of operations, it would not qualify as Change in law under any of the clause of Regulation 3(9) of the 2014 Tariff Regulations. These Respondents have pointed out that even if it is assumed that the stoppage of operations is a Change in law event, the same would be considered only at the time of truing up and for uncontrollable parameters for the purpose of additional capitalization. The Respondent, TPDDL has submitted that the DPCC directions dated 6.11.2016 & 16.11.2016 do not amend, vary or alter or modify any of the



conditions of the Consent to Operate granted to the Petitioner. Accordingly, TPDDL has submitted that the onus is on the Petitioner to prove that due to directions of DPCC, there has been change in the conditions contained in the Consent to Operate granted to BTPS.

23. The submissions have been examined. Regulation 3(9)(d) of the 2014 Tariff Regulations defines 'Change in law' as under:

“(9) “Change In Law” means occurrence of any of the following events:

- (a) enactment, bringing into effect or promulgation of any new Indian law; or*
- (b) adoption, amendment, modification, repeal or re-enactment of any existing Indian law; or*
- (c) change in interpretation or application of any Indian law by a competent court, Tribunal or Indian Governmental Instrumentality which is the final authority under law for such interpretation or application; or*
- (d) change by any competent statutory authority in any condition or covenant of any consent or clearances or approval or license available or obtained for the project; or*
- (e) xxxxx”*

24. The above regulations also provide that a change in any of the conditions of a statutory consent amounts to change in law. We are not convinced with the submissions of the Respondents that the directions of DPCC do not constitute a change in law event. As stated, Consent to Operate granted by DPCC to BTPS on 2.1.2014 was valid till 31.1.2018, subject to the Petitioner complying with the terms therein. The grant of Consent to Operate by DPCC empowered the Petitioner to operate BTPS uninterruptedly, subject to compliance with all environmental norms. In the present case, the Stage-II units of BTPS were compliant with all environmental norms. However, the DPCC, by issuing directions dated 6.11.2016 and 16.11.2016 temporary closure of the stage-II units has in effect overridden the Consent to Operate from 7.11.2016 to 14.3.2017, though the said units were



compliant with all environmental norms. The suspension of Consent to Operate and the closure of the Stage-II units of BTPS during the period from 7.11.2016 to 14.3.2017 based on DPCC directions has resulted in the fundamental condition of uninterrupted applicability of Consent to Operate being altered. It is further noticed that the directions of DPCC dated 6.11.2016 and 16.11.2016 for temporary closure of the units of BTPS from 7.11.2016 to 14.3.2017 was revoked by DPCC and the said units were permitted to operate during the period from 15.3.2017 to 15.10.2017. The suspension of operation and the revocation thereof 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 stage-II units from 7.11.2016 to 14.3.2017 during which period the DPCCs directions were in operation, falls within the scope of change in law under the 2014 Tariff Regulations and the Petitioner would be entitled for relief for the said period. We order accordingly.

Issue No.2: Whether the directions of DPCC shall be considered as directions of GoNCTD under section 11 of the Electricity Act, 2003

25. The Petitioner has submitted that the directions of DPCC not to operate Stage-II units of BTPS are in the nature of directions under section 11 of the 2003 Act. It has further submitted that the directions were issued in extraordinary circumstance that the ambient air condition in Delhi has reached severe level necessitating extreme measures. It had added that DPCC, an instrumentality of GoNCTD, had, subsequent to a meeting chaired by the Hon'ble Lieutenant Governor of NCT of Delhi issued the said directions to the Petitioner. Accordingly, the Petitioner has submitted that in terms of section 11(2) of the 2003 Act, this



Commission may offset the adverse financial impact of such direction suffered by the Petitioner in respect of BTPS. The Respondents have submitted that since DPCC is not the 'Appropriate Government' under section 11 of the 2003 Act and is only an agency of the Government under the Air Act, the submissions of the Petitioner are not tenable.

26. The matter has been considered. As stated, 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.

27. The matter has been considered. The submissions of the Petitioner that the directions of DPCC to BTPS is pursuant to a meeting chaired by the LG of NCTD and hence in the nature of directions under section 11 of the 2003 Act cannot be accepted. It is noticed that the directions of DPCC vide letter dated 6.11.2016 to shut down the Stage-II units till 16.11.2016 are in exercise of its powers under section 31-A of the Air Act, 1981. There is no such reference in the said letter with regard to the same being made under the directions / approval of the LG of NCT of Delhi. It is noticed from the e-mail dated 16.11.2016 enclosed by the Petitioner in



Annexure P-2 (colly) of the Petition, that a decision was taken in the meeting with the LG to further extend the closure of units of BTPS till 31.1.2017. However, the addendum dated 16.11.2016 issued by DPCC contains no such reference of any directions or approval of LG of NCT of Delhi for closure of units of BTPS till 31.1.2017. In this background, we are of the considered view that DPCC, though an instrumentality of the State, has issued directions dated 6.11.2016 & 16.11.2016 under the provisions of the Air Act, 1981. The directions of DPCC cannot therefore be construed as directions of State Government in order to attract the provisions of section 11 of the 2003 Act. In view of this, the submissions of the Petitioner are rejected.

Issue No.3: Whether the non-acceptance of DC by the Delhi SLDC is justified

28. The Petitioner has submitted that the stage-II units of BTPS had not been ordered to be decommissioned by any authority and hence it is required to keep the same in the state of readiness. Accordingly, it has submitted that the stage-II units is ready to generate power and has been communicating 'DC' and the Delhi SLDC is bound to accept and record the same in its periodical Energy Accounts, though the units are under shut down based on DPCCs directions. It has submitted that though the Delhi SLDC accepted the DC for November, 2016 and December, 2016 based on the Delhi OCC meeting on 28.11.2016, it has by email dated 6.1.2017 stated that BTPS was not in a position to demonstrate its capability of generation and DC has been revised as 'zero' in its Energy Accounts dated 12.1.2017 from 7.11.2016 onwards. This stand of Delhi SLDC according to the Petitioner is contrary to its stand in the Delhi OCC meeting wherein it was agreed that the DC of Stage-II units ought to be accepted. The Respondents have contended that the declaration of capacity by a generator can only be lawfully



made if the generator is lawfully able to generate power. If the plant is shut, the deemed availability is 'nil' and hence there can be no claim for payment of capacity charges. According to the Respondents, the definition of DC in Regulation 3(15) refers to the 'capability to deliver ex-bus electricity' and it must necessarily mean 'physical capability' and also 'legal capability'. Though BTPS may be physically capable of operating, it would not have the legal capability to generate electricity. Accordingly, these Respondents have contended that since BTPS was legally prohibited from demonstrating its capacity, the declaration of capacity by Stage-II units of BTPS is fraudulent and there can be no claim for capacity charges.

29. The Commission vide ROP of the hearing dated 15.5.2018 had directed the Delhi SLDC to file all the correspondences/documents addressed by SLDC to GoNCTD as regards the Monthly Energy Accounts/DC of Stage-II units of BTPS along with the directions of GoNCTD for revision of Monthly Energy Accounts/DC in respect of Stage-II units of BTPS. In response, the Delhi SLDC vide affidavit dated 31.5.2018 has submitted that the issue of DC in respect of BTPS was deliberated in the meeting of the OCC on 28.11.2016 and since no amicable solution could be worked out, the OCC requested Delhi SLDC to take up the matter with the Govt. of NCT of Delhi. It has also submitted that pursuant to the OCC meeting dated 28.11.2016 and in response to the letter of the GONCTD dated 8.12.2016, Delhi SLDC had submitted status report to GoNCTD and also requested the GoNCTD to give advice in respect of the DC for Stage-II units of BTPS. In response, GoNCTD advised not to provide DC for non-operational units of BTPS after the DPCC orders. Accordingly, the Energy Accounts for November, 2016 and December, 2016 were revised with DC as 'zero' of BTPS with effect from 7.11.2016.



30. The matter has been examined. Regulation 3(15) of the 2014 Tariff Regulations defines the term 'Declared Capacity' as under:

“Declared Capacity or DC in relation to a generating station means, the capability to deliver ex-bus electricity in MW declared by such generating station in relation to any time block of the day as defined in the Grid Code or whole of the day, duly taking into account the availability of fuel or water and subject to further qualification in the relevant regulation.”

31. According to the above regulation, the criteria for a generating station to issue its DC is its 'capability to deliver ex-bus electricity in MW in any time block of the day or whole of the day'. The Stage-II units of BTPS, though under shut down in terms of the directions of DPCC, were ready and capable of generating power and BTPS has accordingly been communicating DC to the Delhi SLDC. The contentions of the Respondents BRPL & BYPL that the term 'capability to deliver ex-bus electricity' must necessarily mean 'physical capability' and also 'legal capability' cannot be accepted. In our view, though the Stage-II units of BTPS were prevented from generating and supplying power in terms of the DPCCs directions, yet these units were physically capable of generating power during the said period of shut down, considering the fact that the Petitioner was required to keep the same in a state of readiness and resume generation as per DPCCs directions, as and when required by the consumers of Delhi.

32. It is noticed that during the period from 7.11.2016 to 14.3.2017 when the Stage-II units were under shut down, the Petitioner had communicated the DC of the said units to Delhi SLDC in accordance with the IEGC, 2010. The documentary evidence of the DC communicated to the Delhi SLDC has been enclosed as Annexure-P1 (colly) by the Petitioner vide affidavit dated 18.5.2017. Based on the DC communicated by the Petitioner, the Delhi SLDC had certified the DC of Stage-II units of BTPS for the months of November, 2016 and December, 2016 vide its



monthly Energy Accounts published on 6.12.2016 and 6.1.2017 respectively, subject to the decision of GoNCTD. The relevant portion of the provisional energy accounts for the said months issued by Delhi SLDC in respect of the Stage-II units are extracted hereunder:

Period	PAFM	PAFN
November, 2016	58.91	56.45
December, 2016	42.76	54.91

33. It is noticed that the DC of Stage-II units which were accepted by Delhi SLDC and Energy Accounts issued as above, were however revised to 'zero' by the Delhi SLDC vide its correction e-mail dated 7.1.2017. The Delhi SLDC in its affidavit dated 31.5.2018, has clarified that due to the conflicting stands taken by the distribution companies and the Petitioner in their representations to Delhi SLDC as regards acceptance of DC of BTPS, the matter was deliberated on 28.11.2016 in the Delhi OCC meeting and since no amicable solution could be worked out in the said meeting, the OC requested the Delhi SLDC to take up the matter with the Govt. of NCT of Delhi. The relevant portion from the minutes of the meeting dated 28.1.2016 is extracted hereunder:

“Since no consensus could be arrived though BTPS objected, OCC advised SLDC to seek advice from the Govt. of NCT of Delhi as was done in case of certification of DC of BTPS station last winter”

34. It is further noticed that in line with the above and in response to the letter of the Department of Power, GoNCTD, Delhi SLDC had submitted the status report along with a request to the GoNCTD to advise in respect of the DC of the Stage-I units of BTPS. As GoNCTD advised the Delhi SLDC not to provide DC for non - operational units of BTPS after the DPCC orders, the Energy Accounts for the period November, 2016 and December, 2016 were revised to 'zero' by the Delhi



SLDC. In this regard, the relevant noting of the Department of Power, GoNCTD containing the approval of the Secretary (Power), GoNCTD is extracted as under:

“May kindly refer the noting on pre-page NP-8 as NTPC is not able to demonstrate Declared Capacity in view of the DPCC order for closure of all units till 31.1.2017, NTPC is already contesting the case for Stage-I of NTPC BTPS in CERC and may take up the matter for Stage-II (2 x 210 MW) also in CERC, if desired so.

In view of the above, DC may not be considered till 31.1.2017 or till such time DPCC allow to remain close the same.”

35. In our view, the reference made by Delhi SLDC to GoNCTD and the revision of Energy Accounts of Stage-II units of BTPS by Delhi SLDC based on the advice of the GoNCTD is contrary to the provisions of the Electricity Act. SLDCs have been constituted under Section 31(1) of the Electricity Act, 2003, as an independent body which is responsible for carrying out optimal scheduling and despatch of electricity within the State. SLDC in discharge of its statutory functions is covered by the provisions under Section 33 (1) of the said Act. Section 33 of the Electricity Act, 2003 is reproduced here under:

“33. (1) The State Load Despatch Centre in a State may give such directions and exercise such supervision and control as may be required for ensuring the integrated grid operations and for achieving the maximum economy and efficiency in the operation of power system in that State.

(2) Every licensee, generating company, generating station, substation and any other person connected with the operation of the power system shall comply with the direction issued by the State Load Despatch Centre under subsection (1).

(3) The State Load Despatch Centre shall comply with the directions of the Regional Load Despatch Centre.

(4) If any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the State grid or in relation to any direction given under subsection (1), it shall be referred to the State Commission for decision:

Provided that pending the decision of the State Commission, the direction of the State Load Despatch Centre shall be complied with by the licensee or generating company.

(5) If any licensee, generating company or any other person fails to comply with the directions issued under sub-section(1), he shall be liable to penalty not exceeding rupees five lac.”



36. Section 33 deals with the power of the SLDC in giving directions, exercising such provision and control as would be necessary for smooth management of grid operations and for achieving maximum economy and efficiency. Thus, the directions and supervisions of SLDC are in relation to the management of the grid system. Section 33 does not provide that the directions referred to in section 33 (1) are subject to any direction to be made by the State Government. The directions as may be made by the SLDC under section 33 (1) are statutory directions in relation to maintenance of the grid system and nothing more. The issue of SLDC being subordinate to the State Government was examined by the Appellate Tribunal for Electricity in Appeal No. 32/2011 (TPCL V MERC & ors) and the Tribunal after examining the provisions of Section 33 held the following:

“60. The very thesis of the MSLDC which has been subscribed to by the Commission that the MSLDC is subordinate to Government or that it is an organ of the Government and it is obliged to act as a subordinate authority is unknown to the law. The scheme of the Act does nowhere provide that the Legislature intended that the SLDC or RLDC would be acting not independently, not as an autonomous statutory body but as being a subordinate department of the Government.

XXX

62.....The MSLDC, it cannot be questioned, is an independent statutory authority constituted under Section 31 of the Act and is responsible for carrying out optimal scheduling and despatch of electricity within the State. It is a State Load Dispatch Centre whose function is to ensure integrated operation of the power system in the State. The functions of the State Load Dispatch Centre is to optimize scheduling and despatching of electrical energy in accordance with the contracts entered into with the licensees or generating companies operating in the State and to monitor Grid system. It is true that Section 33 gives power to the State Load Dispatch Centre to give such directions and exercise such supervision and control which would be necessary for ensuring the integrated grid operations and for achieving the maximum economy and efficiency in the operation of the power system. Under sub-section (4), if any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the state grid or in relation to any direction given under sub-section (1), it shall be referred to the State Commission for decision. Section 32 or Section 33 does not restrict and control or take away the power of MSLDC to schedule generation capacity of a generator through open access. The decision of the MSLDC to defer scheduling the appellant's generation capacity allegedly in the public interest is clearly contrary to the provision of Section 33 of the Act.”



37. In line with the above discussion, we hold that the revision of the Energy Accounts of BTPS for the said months by Delhi SLDC based on the advice of GoNCTD is contrary to the provisions of the Electricity Act, 2003 and is therefore arbitrary and unjustified. We accordingly direct the Delhi SLDC to accept the DC issued by BTPS for the months of November, 2016 and December, 2016 and publish the same in the periodical Energy Accounts for the purpose of billing the Respondents.

Issue No.4: Whether the Petitioner is entitled for capacity charges during the period of closure of Stage-II units of BTPS

38. The Petitioner has submitted that the suspension of the statutory Consent to Operate which prevented the stage-II units from operation during the period from 7.11.2016 to 14.3.2017, despite being compliant with all environmental norms, is a Change in law event in terms of Regulation 3(9) of the 2014 Tariff Regulations. It has contended that in terms of Clause 5.3.3 of the PPA read with Regulation 8(7) of the 2014 Tariff Regulations, the Petitioner is entitled to receive compensation for the financial losses caused by the aforesaid Change in law event. The Petitioner has argued that the Stage-II units have not been ordered to be de-commissioned and therefore required to be kept in the state of readiness, various expenses like O & M expenses, Interest on loan, depreciation and interest on working capital, including preservation charges are incurred for which it is entitled to claim reimbursement as envisaged under Change in law. Accordingly, it has prayed for recovery of capacity charges from the Respondents for the period from 7.11.2016 till Stage- II units of BTPS were permitted to be operationalized. The Respondents have objected to the said prayer and have argued that if BTPS has been prohibited from running its plant in terms of the directions of a statutory authority, the deemed availability is 'nil' and there cannot, in law or otherwise,



be a declaration of capacity much less any payment of capacity charges. The Respondents have contended that clause 5.3.3 of the PPA limits the effects of change in law to the recovery of any ‘expenses’ and since the Petitioner has sought recovery of capacity charges, the prayer is not maintainable. These Respondents have further contended that even if it were assumed to be a Change in law, the same would be considered at the time of truing- up, for uncontrollable parameters and only for additional capitalization in terms of Regulation 8(2)(5) of the 2014 Tariff Regulations and not for payment of any capacity charges. Accordingly, these Respondents have sought for the rejection of prayer of the Petitioner on this ground.

39. We have examined the matter. Clause 5.3.3 of the PPA provides as under:

“5. Tariff

.....

5.3 Terms and Conditions

5.3.3 Any expenses on account of change in law as approved by CERC would be recovered through tariff.”

40. Regulation 8(3) of the 2014 Tariff Regulations provides as under:

“8(3) The Commission shall carry out truing up of tariff of generating station based on the performance of following Uncontrollable parameters:

i) Force Majeure;

ii) Change in Law; and

iii) Primary Fuel Cost.

41. Regulation 8(5) of the 2014 Tariff Regulations provides as under:

“8(5) The Commission shall carry out truing up of tariff of transmission licensee based on the performance of following Uncontrollable parameters:

(i) Force Majeure; and

(ii) Change in Law.”

42. Regulation 8(7) of the 2014 Tariff Regulations is extracted as hereunder:

“8(7) The financial gains and losses by a generating company or the transmission licensee, as the case may be, on account of uncontrollable parameters shall be



passed on to beneficiaries of the generating company or to the long term transmission customers/DICs of transmission system, as the case may be.

43. Regulation 12 of the 2014 Tariff Regulations provides as under:

“12. Controllable and Uncontrollable factors: The following shall be considered as controllable and uncontrollable factors leading to cost escalation impacting Contract Prices, IDC and IEDC of the project :

(1) xxxxx

(2) The “uncontrollable factors” shall include but shall not be limited to the following:

i. Force Majeure events; and

ii. Change in law.

xxxxxx”

44. Clauses (3), (5) and (7) of Regulation 8 pertain to truing-up of tariff after considering the impact of uncontrollable factors in the nature of Change in law and Force Majeure. Therefore, Change in law has been provided in these regulations in the context of additional capitalization of the expenditures and not for payment of any capacity charges. Hence, relief of capacity charges cannot be granted under these provisions.

45. We have in this order decided that the suspension of Consent to Operate Stage-II units from 7.11.2016 to 14.3.2017 constitutes Change in law event, as the directions to close down the plant was issued by DPCC on account of the ambient conditions in Delhi, despite the Petitioner fulfilling the environmental norms as per the Consent to Operate issued by DPCC earlier. Therefore, the Stage-II units which were in compliance with all environmental norms, were capable of generating power but were prevented from doing so in terms of the directions of DPCC dated 6.11.2016 and 16.11.2016.



46. Proviso to Regulation 30 (2) of the 2014 Tariff Regulations provide 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.”

47. 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-II units 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 capacity 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. Therefore, in relaxation of the above provision, we direct that the Petitioner shall be entitled part annual fixed charges in the form of O & M expenses and interest on loan for the period from 7.11.2016 to 14.3.2017.

48. Petition No. 14/MP/2017 along with IA No. 5/2017 is disposed of in terms of above.

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

Sd/-
(A. K. Singhal)
Member

Sd/-
(P. K. Pujari)
Chairperson

