

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No.119/MP/2019**

**Coram:**  
**Shri P.K. Pujari, Chairperson**  
**Shri I.S. Jha, Member**  
**Shri Arun Goyal, Member**

**Date of Order: 19<sup>th</sup> July, 2020**

**In the matter of**

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

**And**

**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 - 110010

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

...Respondents

**Parties present:**

Shri Sitiesh Mukherjee, Advocate, NTPC  
Shri Aryaman Saxena, Advocate, NTPC  
Shri E.P.Rao, NTPC  
Shri Rohit Ladha, NTPC  
Shri Hasan Murtaza, Advocate, BRPL & BYPL

**ORDER**

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

- a) *Declare that the direction dated 03.10.2017 issued by the DPCC to the Petitioner to not operate Stage II (2 x 210 MW) Units of Badarpur Thermal Power Station in light of the severe ambient air conditions in New Delhi is a Change in Law event;*
- b) *Hold that the Petitioner is entitled to recover appropriate Capacity Charges in accordance with law from Respondent Nos. 1 to 5 for the period between 17.10.2017 and 28.02.2018; and*
- c) *Pass such other and further order(s) and/or directions as this Hon'ble Commission may deem just, fit and proper in the facts and circumstances of the case and in the interest of justice.*

**Background**

2. Badarpur Thermal Power Station (hereinafter called 'BTPS') with a total capacity of 705 MW (3 x 95 MW + 2 x 210 MW) was originally set up the Govt. of India in 1973 and was later transferred to the Petitioner, NTPC Limited, 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 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.

### **Submission of the Petitioner**

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

#### ***Shutdown during 2016-17***

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



(ii) Subsequently, 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 31.1.2017. In the said e-mail, the DPCC stated that the aforesaid directions were based on a meeting held with the Lieutenant Governor of Delhi dated 15.11.2016. Consequently, all units of BTPS were directed by DPCC to remain under shut-down from 7.11.2016 up to 31.1.2017.

(iii) Thereafter, DPCC vide its letter dated 31.1.2017 issued addendum in continuation of its earlier directions dated 6.11.2016 and 16.11.2016 and extended the closure of all units of BTPS till further orders. In the said addendum, the DPCC noted that a Graded Response Action Plan was discussed at a meeting of the Environment Pollution (Prevention & Control) Authority dated 20.1.2017 where it was recorded that the air pollution levels have been very poor or severe and, therefore, closure of BTPS was directed.

(iv) Pursuant to the meeting of the Environment Pollution (Prevention & Control) Authority on 27.2.2017, the DPCC vide its letter dated 14.3.2017 lifted its order of suspension and permitted the Stage-II units of BTPS to operate from 15.3.2017 to 15.10.2017.

(v) The DPCC had earlier issued Consent to Operate dated 2.1.2014 to the Petitioner, which was valid up to 31.1.2018 *inter alia* prescribing the emission norms of 150 mg/Nm<sup>3</sup> which were to be adhered to by Stage-II units of BTPS. The Consent to Operate dated 2.1.2014 was modified by DPCC vide its letter dated 11.2.2016 wherein the emission norm were revised from 150 mg/Nm<sup>3</sup> to 50 mg/Nm<sup>3</sup>. The Stage-II units of BTPS was compliant with all prevalent environmental standards including emission norms prescribed by DPCC vide its Consent to Operate dated 2.1.2014 and its revised norms vide letter dated 11.02.2016. By issuing directions dated 6.11.2016, 16.11.2016 and 31.1.2017, DPCC has in effect overridden 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'.

(vi) The Delhi SLDC on 28.11.2016 had agreed that the DC (Declared Capacity) of Stage-II units of BTPS ought to be accepted, which was opposed by the beneficiaries. In fact, Delhi SLDC accepted the DC of BTPS 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.



(vii) 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, DC of BTPS will be 'zero' from 7.11.2016 (in accordance with correction mail dated 7.1.2017). Further, the Delhi SLDC revised the declared capacity of BTPS to '0' vide its Energy Account dated 12.1.2017.

(viii) Stage-II units of BTPS were fully compliant with the emission norms prescribed by the DPCC vide its Consent to Operate and were capable of generating power, but for the DPCC's unforeseeable statutory direction, over which the Petitioner had no control. In such circumstances, the Petitioner was foreclosed from raising bills on its beneficiaries even though it was ready to generate and had been shut-down for reasons entirely outside its control.

(ix) Aggrieved by such conduct, the Petitioner filed Petition No. 14/MP/2017 before this Commission, seeking a declaration that the directions issued by DPCC not to operate Stage-II units of BTPS constituted a 'Change in Law' event. The Commission vide its Order dated 21.8.2018, read with Corrigendum to said Order dated 6.9.2018 declared that the DPCC's directions constituted a 'Change in Law' event and passed consequential directions to the Delhi SLDC and Respondents 1 to 5 (Delhi Discoms).

### ***Shutdown during 2017-18***

(x) DPCC vide letter dated 14.3.2017 had lifted its order of suspension and permitted Stage-II units of BTPS to operate from 15.3.2017 to 15.10.2017. Subsequently, DPCC vide its letter dated 3.10.2017 directed the Petitioner not to operate BTPS for the period from 17.10.2017 to 15.3.2018 on account of anticipated severe ambient air pollution level in Delhi during winter season.

(xi) Since BTPS was in compliance with all the conditions specified in its Consent to Operate, DPCC's letter dated 3.10.2017 amounted to a 'Change in Law' event. On 1.3.2018, DPCC intimated the Petitioner that BTPS Stage-II units were allowed to operate with immediate effect, pursuant to the meeting of the Environment Pollution (Prevention & Control) Authority held on 28.2.2018.

(xii) Meanwhile, the Consent to Operate dated 2.1.2014 modified by DPCC vide its letter dated 11.2.2016, was set to expire on 31.1.2018. Accordingly, the Petitioner applied for renewal thereof vide letter dated 1.2.2018. Later, the Consent to Operate was renewed and issued to BTPS on 25.6.2018 by DPCC which was extended till 15.10.2018 vide its communication dated 25.7.2018.



(xiii) With effect from 15.10.2018, the operations of BTPS have permanently been discontinued. This was discussed and finalized in the meeting held on 4.9.2018, under the aegis of the Minister of State (Independent Charge), Power and New and Renewable Energy, which was attended by the representatives from Ministry of Power, Central Electricity Authority and the Petitioner.

(xiv) The Petitioner is seeking relief for the period from 17.10.2017 to 28.2.2018 during which the Stage-II units were compliant with the emission norms, but was prevented from generation because of the statutory direction of DPCC.

(xv) 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.

(xvi) 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.

(xvii) During the period when Stage-II units of BTPS were under shut down due to DPCC's Order (17.10.2017 to 28.2.2018), Delhi SLDC did not certify Declared Capacity of BTPS in its monthly energy accounts even though BTPS was capable of generating power and was declaring the Declared Capacity. The said units of BTPS were ready to generate power and BTPS had accordingly been communicating its DC and the Delhi SLDC was, therefore, bound to accept and record the same in its periodical energy accounts, though the units were under shut down for complying with the directions of DPCC.

(xviii) The Stage-II units of BTPS were ready and capable of generating power during the period from 17.10.2017 to 28.2.2018 based on requirement of consumers of Delhi. The Petitioner vide its letters dated 5.10.2018 and 21.11.2018 had requested the Delhi SLDC to certify DC of BTPS for the period from 17.10.2017 to 28.02.2018 in terms of the Commission's Order dated 21.8.2018 in Petition No. 14/MP/2017, but the revision of energy accounts in this regard is still awaited.

6. In the above background, the Petitioner has submitted that in terms of the Commission's Order dated 21.8.2018 in Petition No.14/MP/2017, the DPCC direction dated 3.10.2017 constitutes a 'Change in Law' event and accordingly the Petitioner



be permitted to recover annual fixed charges from the Respondents during the period from 17.10.2017 to 28.2.2018 when the Stage-II units were not permitted to be in operation.

7. Thereafter, the Petitioner vide its affidavit dated 20.5.2020 placed reliance on the Commission's order dated 5.11.2018 in Petition No. 172/MP/2016 (NTPC v UPPCL & ors) and enclosed the same to form part of the record in this petition.

8. During the hearing on 21.5.2020, the learned counsel for the Petitioner mainly argued on the lines of its submissions made in the petition. He also pointed out that the Commission in some of its orders pertaining to the claim for additional expenditure towards 'installation of FGD' and 'transportation of Fly ash' had granted reliefs in exercise of its 'regulatory powers'. Accordingly, the learned counsel for the Petitioner submitted that since the directions of DPCC relating to Stage-II units of BTPS had already been considered as a 'Change in law' event, the Commission may, in exercise its 'regulatory powers', allow the capacity charges as prayed for in the present case. In response, the learned counsel for the Respondents, BRPL and BYPL submitted that the claim of the Petitioner for the period from 1.2.2018 to 28.2.2018 cannot be considered, since the Consent to Operate BTPS, which was valid till 31.1.2018, was renewed only on 25.6.2018. In reply to this, the learned counsel for the Petitioner clarified that the Consent to Operate granted to BTPS on 25.6.2018 would be retrospectively applicable, considering the time taken by DPCC for processing the application of the Petitioner. The Commission, at the request of the parties, granted time to file written submissions and reserved its order in the petition.



9. Pursuant to the directions of the Commission, the Respondents BRPL and BYPL vide affidavit dated 31.5.2020 have filed written submissions and the Petitioner has filed its response to the same vide affidavit dated 8.6.2020.

#### **Written Submissions of the Respondents, BRPL and BYPL**

10. The Respondents BRPL and BYPL, vide affidavit dated 31.5.2020, while pointing out that the Consent to Operate BTPS expired on 31.1.2018, have submitted that the Petitioner had applied for renewal of the Consent to operate on 1.2.2018 and the same was renewed by DPCC only on 25.6.2018. Accordingly, these Respondents have submitted that since there was no Consent to operate BTPS for the period from 1.2.2018 to 28.2.2018, the question of granting any relief to the Petitioner on account of 'Change in law' for this period does not arise. The Respondents have also submitted that the prayer in the present petition is only for recovery of capacity charges or a part thereof and since there is no prayer nor pleading for recovery of any additional revenue expenditure incurred by the Petitioner, the Commission's order dated 5.11.2018 in Petition No. 172/MP/2016 is not applicable in the present case. Accordingly, the Respondents have submitted that the relief prayed for by the Petitioner on this count may not be allowed.

#### **Reply of the Petitioner to Written Submissions of BRPL and BYPL**

11. The Petitioner vide its affidavit dated 8.6.2020 has furnished its reply to the aforesaid written submissions of the Respondents BRPL and BYPL and has clarified that the renewal of consents, licenses or lease etc., which are granted by public offices and government departments, have retrospective application i.e. they relate





back to the date of application/ date of expiry. Referring to the observations of the Hon'ble Supreme Court in Ishwar Chandra & Ors Vs The Oriental Insurance Co. Ltd [2007 AIR (SC) 1445], the Petitioner has pointed out that the renewal of Consent to Operate of BTPS has to be done in accordance with the provisions of the Air (Prevention and Control of Pollution) Act, 1981 read with the applicable provisions of the Air (Prevention and Control of Pollution) (Union Territories) Rules, 1983 and in terms of the provisions of the Water Prevention and Control of Pollution Act, 1974. It has further submitted that the statutes and rules framed under these Acts/ Rules do not provide any timeline for consent holder to apply for renewal of Consent to Operate. The Petitioner submitted that it had applied for 'renewal of the Consent to Operate' on 31.1.2018 and complied with the norms specified by the renewal order of DPCC and was, therefore, allowed to resume the power supply with effect from 1.3.2018 (immediately after recalling the closure orders by DPCC). The Petitioner has also submitted that DPCC at the time of recalling the closure orders with effect from 1.3.2018 was aware of the pending application for renewal of the Consent to Operate granted by DPCC and that the same would relate back to the date of application. The Petitioner has, therefore, submitted that the Consent to Operate is effective from the date of its expiry and the objection of the Respondents BRPL and BYPL may be rejected.

### **Analysis and Decision**

12. Based on the submissions of the parties, the issues which emerge for consideration of the Commission are as under:

***Issue No. 1: Whether the directions of DPCC dated 3.10.2017 for closure of Stage-II units of BTPS is a 'Change in law' event;***



**Issue No.2: Period for which relief under Change in law is applicable - for the period from 17.10.2017 to 28.2.2018 or from 17.10.2017 to 31.1.2018;**

**Issue No.3: Whether the Petitioner is entitled for capacity charges for the period of closure of Stage-II units.**

We proceed to examine the issues below.

**Issue No. 1: Whether the directions of DPCC dated 3.10.2017 for closure of Stage-II units of BTPS is a 'Change in law' event**

13. The Petitioner has submitted that DPCC by issuing directions dated 3.10.2017 to close the Stage-II units of BTPS from 17.10.2017 due to severe ambient air pollution levels has in effect overridden the Consent to Operate (CTO) granted by DPCC on 2.1.2014. It has further submitted that the direction of DPCC dated 3.10.2017 to shut down the Stage-II units of BTPS had prevented the Stage-II units of BTPS from operating for the period from 17.10.2017 to 28.2.2018. According to the Petitioner, the closure of the Stage-II units for the said period based on the directions of DPCC is a 'Change in law' event, being beyond the control of the Petitioner and that relief may be granted to the Petitioner.

14. We have examined the matter. DPCC vide its order dated 2.1.2014 had granted Consent to Operate BTPS *inter alia* prescribing the environmental norms to be adhered by BTPS including the Particulate Matter (PM) emission norm not exceeding 150 mg/Nm<sup>3</sup>. This Consent to Operate (CTO) was later modified by DPCC vide letter dated 11.2.2016, wherein BTPS was directed to meet the PM emission norm of 50 mg/Nm<sup>3</sup>. The Petitioner has submitted that Stage-II units of BTPS were compliant with the emission norms and all other environmental standards prescribed by DPCC. 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, had issued directions to BTPS vide letter dated 6.11.2016 for closure of all units of BTPS with effect from 7.11.2016 to 16.11.2016, in order to curb air pollution levels in Delhi. Subsequently, 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 31.1.2017. Thereafter, DPCC vide its letter dated 31.1.2017 issued addendum in continuation of its earlier directions dated 6.11.2016 and 16.11.2016 and extended the closure of all units of BTPS till further orders. Pursuant to the meeting of the Environmental Pollution Control Authority (EPCA) on 27.2.2017, DPCC vide its letter dated 14.3.2017 had lifted its order of suspension and permitted Stage-II units of BTPS to operate from 15.3.2017 to 15.10.2017. During the period of shut down, the Delhi SLDC reduced DC of units of BTPS to zero though the Petitioner was ready to operate the units of BTPS, was compliant with environmental norms and regularly declared DC. Aggrieved thereby, the Petitioner filed Petition No. 14/MP/2017 before this Commission and submitted that the directions of DPCC dated 6.11.2016, 16.11.20016 and 31.1.2017 for closure of Stage-II units of BTPS for the period from 7.11.2016 to 14.3.2017 had overridden the Consent to Operate issued on 2.1.2014 (and modified by order dated 11.2.2016) for the said period, though the units were compliant with all environmental norms and that the closure of the units based on the directions of DPCC was a Change in law event, being beyond the control of the Petitioner. The Commission vide its order dated 21.8.2018 in Petition No. 14/MP/2017 held that the suspension of CTO 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



constituted a Change in law event. The relevant portion of the order dated 21.8.2018 is extracted hereunder:

*“24.....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.”*

15. In the present case, DPCC vide its letter dated 3.10.2017 had directed the closure of Stage-II units of BTPS with effect from 17.10.2017 to 28.2.2018. The relevant portion of the said letter is extracted hereunder:

*“And whereas, whole of union territory of Delhi has been declared as air pollution control area vide Notification No. GSR 106(E) dated 20.02.1987 under sub-section (1) of section 19 of the said Air Act, 1981.*

*And whereas, Delhi faces severe ambient air pollution levels in winters wherein the levels of pollutants like particulate (PM 2.5, PM 10) go up manifold.*

*And whereas, in the meeting of EPCA on 26/09/2019 on implementation of Graded Response Action Plan it was decided that Badarpur Thermal Power Plant will remain shut down from October 17, 2017.*

*Now therefore, in order to implement the Graded Action Plan and the decisions taken in the EPCA meeting, the Competent Authority in DPCC under section 31 (A) of Air (Pollution and Prevention) Act directs as follows:*

- 1. The Badarpur Thermal Power Station (BTPS) shall close down all its units from October 17, 2017 to March 15, 2018*

*xxxx”*



16. Subsequently, DPCC vide letter dated 1.3.2018 revoked its direction dated 3.10.2017 and allowed the operation of Stage-II units of BTPS with effect from 1.3.2018. The relevant portion of the said letter is extracted under:

*“And whereas, in the above mentioned meeting of EPCA on 28/02/2018, it was decided that Badarpur Thermal Power Plant would be allowed to operate from immediate effect.*

*Now, therefore, in compliance of the abovementioned decision taken in the EPCA meeting dated 28/02/2018, the Competent Authority in DPCC is pleased to revoke the closure directions issued on 30/01/2017 and directs as follows:*

*a) that Badarpur Thermal Power Plant (BTPS) would be allowed to operate from March 1, 2018.”*

17. 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”*

18. The above Regulation provides that change in any of the conditions of a statutory consent amounts to change in law. According to us, the CTO granted by DPCC on 2.1.2014 empowered the Petitioner to operate BTPS uninterruptedly, subject to compliance with all environmental norms. It is observed that though Stage-II units of BTPS were compliant with the environmental norms notified by the statutory authority, DPCC vide its letter dated 3.10.2017 directed closure of the said units from 17.10.2017 on account of ambient air pollution levels in Delhi during winters. The



suspension of CTO and the closure of the Stage-II units of BTPS based on DPCC directions has resulted in the fundamental condition of uninterrupted applicability of CTO being altered. Similar direction of DPCC for closure of Stage-II units of BTPS for the period from 7.11.2016 to 14.3.2017 had been declared as a change in law event vide Commission's order dated 28.10.2018 in Petition No.14/MP/2017. In this background, we hold that the closure of Stage-II units from 17.10.2017 by DPCC vide its letter dated 3.10.2017 is a change in the consent granted to BTPS and would, therefore, constitute a Change in law event under the 2014 Tariff Regulations.

**Issue No.2: Period for which relief under Change in law is applicable - for the period from 17.10.2017 to 28.2.2018 or from 17.10.2017 to 31.1.2018 ;**

19. Having held that the direction of DPCC vide letter dated 3.10.2017 for closure of Stage-II units from 17.10.2017 is a 'Change in law' event, the Petitioner is entitled for consequential relief. The question which arises for consideration next is whether the relief under change in law allowed would cover the entire period of closure of Stage-II units from 17.10.2017 to 28.2.2018, including the period after the expiry of CTO i.e. from 1.2.2018 to 28.2.2018 as claimed by the Petitioner.

20. The Petitioner has submitted that closure of Stage-II units from 17.10.2017 to 28.2.2018 based on the DPCC direction dated 3.10.2017 is a change in law event and it is entitled to capacity charges for the said period. Per contra, the Respondents, BRPL and BYPL, have submitted that since there was no CTO for the period from 1.2.2018 to 28.2.2018, the question of granting any relief on account of 'Change in law' to the Petitioner for the said period does not arise. The Respondents have pointed out that the CTO expired on 31.1.2018 and that the Petitioner applied for



renewal of CTO only on 1.2.2018. They have submitted that since DPCC had renewed the CTO only on 25.6.2018, the Petitioner will not be entitled for any relief on account of change in law for the period from 1.2.2018 to 28.2.2018.

21. In response, the Petitioner has placed reliance on the observations of the Hon'ble Supreme Court in *Ishwar Chandra & Ors Vs The Oriental Insurance Co. Ltd* [2007 AIR SC1445] and submitted that renewal of the Consent to Operate had to be done in accordance with the provisions of Air (Prevention and Control of Pollution) Act, 1981 read with the applicable provisions of the Air (Prevention and Control of Pollution) (Union Territories) Rules, 1983 and Water Prevention and Control of Pollution Act, 1974 and these Acts and Rules do not provide any timeline for the consent holder to apply for renewal of Consent to Operate. It has contended that DPCC, while revoking the order of closure and allowing the operation of Stage-II units of BTPS from 1.3.2018 was aware of the pending application of the Petitioner for renewal of CTO and, therefore, the renewal of CTO granted by DPCC on 25.6.2018 would have retrospective application from the date of expiry of the CTO (31.1.2018).

22. The submissions have been considered. As stated, the CTO granted by DPCC to BTPS on 2.1.2014 was valid till 31.1.2018 and the same was subject to the terms and conditions mentioned therein for compliance by the Petitioner. One such condition in the CTO granted to BTPS is that the application for renewal of CTO is required to be submitted by Petitioner two months in advance of the expiry date of the CTO. It is, however, observed that the Petitioner had submitted its complete application for renewal on 1.2.2018 (by payment of fees) i.e. after expiry of the CTO and DPCC had renewed the CTO on 25.6.2018. In our view, by not submitting the application for



renewal two months in advance of expiry date of CTO as required in the CTO itself, the Petitioner has, by its conduct, violated the condition with regard to renewal of CTO. That being so, it is incorrect on part of the Petitioner to say that the renewal of consents, licenses etc., granted by public offices and Government departments have retrospective application. It is also incorrect to plead that the Acts/Rules do not provide any timeline for consent holder to apply for renewal of CTO. According to us, the Petitioner was under an obligation to take adequate care to see that the CTO granted to BTPS is renewed before its expiry on 31.1.2018. Since the application for renewal of CTO has been submitted by the Petitioner after its validity date of 31.1.2018 and the same having been renewed on 25.6.2018, we agree with the Respondents, BRPL and BYPL, that there was no valid CTO for the period from 1.2.2018 to 28.2.2018. Accordingly, we hold that the relief of change in law would not be available to the Petitioner for the period from 1.2.2018 to 28.2.2018. We have, in paragraph 18 above, decided that the closure of Stage-II units from 17.10.2017 based on directions of DPCC dated 3.10.2017 is a change in law event. Based on aforesaid discussions, we decide that the relief under 'Change in law' for closure of Stage-II units based on the directions of DPCC dated 3.10.2017 is applicable for the period from 17.10.2017 to 31.1.2018.

**Issue No.3: Whether the Petitioner is entitled for capacity charges for the period of closure of Stage-II units**

23. The Petitioner has submitted that the suspension of the statutory Consent to Operate which prevented the stage-II units of BTPS from operation during the period from 17.10.2017 to 28.2.2018, 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 decommissioned and, therefore, are required to be kept in the state of readiness incurring various expenses including preservation charges. The Petitioner has stated that the purpose of compensating the Petitioner affected by Change in Law, is to restore through tariff payment, the Petitioner to the same economic position as if such Change in Law had not occurred. It has added that on a combined reading of the PPAs and the provisions of the 2014 Tariff Regulations, it follows that once this Commission arrives at a finding that a Change in Law event has occurred in respect of the Petitioner's generating station, the distribution licensees are liable to bear the cost thereof. Accordingly, the Petitioner has prayed that the Petitioner be permitted to recover annual fixed charges during the period from 17.10.2017 to 28.2.2018 and that the Respondent beneficiaries may be directed to pay the same. The Petitioner vide its affidavit dated 20.5.2020 has referred to the Commission's order dated 5.11.2018 in Petition No. 172/MP/2016 and submitted that the relief sought by the Petitioner under Regulation 8 of the 2014 Tariff Regulations may be granted by the Commission in exercise of its 'regulatory powers'. The Respondents, BRPL and BYPL, have objected to the above prayer of the Petitioner.

24. The matter has been considered. Clause 5.3.3 of the PPA provides as under:

*"5. Tariff  
Xxx*



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.”

25. 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.*

26. 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.”*

27. 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.”*

28. 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, the relief of capacity charges cannot be granted under these provisions.

29. We have in this order already decided that the suspension of Consent to Operate Stage-II units based on the DPCC letter dated 3.10.2017 constitutes Change in law event and that the Petitioner is entitled for relief under change in law for the period from 17.10.2017 to 31.1.2018. We observe that the Petitioner in Petition No. 14/MP/2017, had prayed for grant of capacity charges for the period of closure from



7.11.2016 to 14.3.2017 and the Commission vide its order dated 28.10.2018 had relaxed the proviso to Regulation 30(2) of the 2014 Tariff Regulations and allowed 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. The relevant portion of the order is extracted hereunder:

*“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.”*

30. In line with above decision, we direct that the Petitioner shall be entitled for part annual fixed charges in the form of O & M expenses and interest on loan for the period from 17.10.2017 to 31.1.2018.

31. The Petitioner has submitted that Stage-II units of BTPS were ready to generate power and BTPS had accordingly been communicating its DC and the Delhi SLDC is, therefore, bound to accept and record the same in its periodical energy accounts, though the units are under shut down for complying with the directions of DPCC. It has submitted that Delhi SLDC did not certify DC of BTPS in its monthly energy accounts even though BTPS was capable of generating power and was declaring the



DC. The Petitioner has further submitted that it cannot raise bills on its beneficiaries unless the Delhi SLDC accepts DC of BTPS and publishes the same in its periodic energy accounts. Accordingly, the Petitioner has prayed that the Delhi SLDC may be directed to accept and record the DC corresponding to Stage-II units of BTPS for the period from 17.10.2017 to 28.2.2018. For the relief granted to the Petitioner by this order, we direct the Delhi SLDC to certify the DC as declared by BTPS for the period from 17.10.2017 to 31.1.2018 and publish the same in the periodical energy accounts for the purpose of billing the Respondents as decided in paragraph 30 above.

32. Petition No. 119/MP/2019 is disposed of in terms of above.

**Sd/-**  
**(Arun Goyal)**  
**Member**

**Sd/-**  
**(I.S.Jha)**  
**Member**

**Sd/-**  
**(P. K. Pujari)**  
**Chairperson**

