CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Review Petition No. 9/RP/2021 in
Petition No. 210/MP/2019

And

Review Petition No. 10/RP/2021 in
Petition No. 209/MP/2019

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

Date of Order: 08th September, 2021

In the matter of

Review Petition No. 9/RP/2021 in Petition No. 210/MP/2019

Petition under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, seeking review of Commission's order dated 18.5.2020 in Petition No. 210/MP/2019.

And

In the matter of

1. Southern Power Distribution Company of Telangana Limited,
Mint Compound, Hyderabad-500063, Telangana

2. Northern Power Distribution Company of Telangana Limited,
Vidyuth Bhavan, Nakkalagutta, Hanamkonda,
Warangal-506001 ….**Review Petitioners**

Vs

Sembcorp Energy India Limited,
6-3-1090, A Block, 5th Floor, T.S.R. Towers,
Rajbhawan Road, Somajiguda, Hyderabad-500082 …. **Respondent**

And

In the matter of

Review Petition No. 10/RP/2021 in Petition No. 209/MP/2019

Petition under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, seeking review of Commission's order dated 18.5.2020 in Petition No. 209/MP/2019.

And

In the matter of

1. Southern Power Distribution Company of Telangana Limited,
Mint Compound, Hyderabad-500063, Telangana

2. Northern Power Distribution Company of Telangana Limited,
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Vs

1. Sembcorp Energy India Limited,
6-3-1090, A Block, 5th Floor, T.S.R. Towers,
Rajbhawan Road, Somajiguda, Hyderabad-500082

2. Southern Power Distribution Company of Andhra Pradesh Limited,
D.No. 19-13-65/A, Kesavayanagunta,
Tiruchanoor Road, Tirupati …. **Respondents**

Parties Present:

Ms. Swapna Seshadri, Advocate, TSSPDCL
Shri Damodar Solanki, Advocate, TSSPDCL
Shri D. N. Sharma, TSSPDCL
Shri S Vallinayagam, Advocate, AP Discoms

ORDER

Petition No. 210/MP/2019 was filed by the Respondent, Sembcorp Energy India Ltd (in short 'SEIL') for relief due to change in law event i.e. the introduction of new environmental norms by way of the Environment (Protection) Amendment Rules, 2015 notified on 7.12.2015 (in short' the 2015 Notification') by the Ministry of Environment, Forest and Climate Change (hereinafter referred to as 'MOEF&CC') impacting the revenues and costs of the Respondent during the operating period and the same was disposed of vide order dated 18.5.2020.

2. Petition No. 209/MP/2019 was filed by the Respondent SEIL for relief due to

change in law event i.e. the introduction of new environmental norms by way of the Environment (Protection) Amendment Rules, 2015 notified on 7.12.2015 by MOEF&CC impacting the revenues and costs of the Respondent during the operating period and the same was disposed of vide order dated 6.5.2020.

3. Aggrieved by the impugned orders dated 6.5.2020 and 18.5.2020 as stated above, the Review Petitioners, Southern Power Distribution Company of Telangana Limited and Northern Power Distribution Company of Telangana Limited have filed the Review Petitions, seeking review of the impugned orders on the following issues:

> *"(a) Liberty given to SIEL to approach CEA and a principle decision taken to allow the cost of Nox control system and operating expenses after prudence check;*
>
> *(b) Condition of installation of FGD in the Environmental Clearance;*
>
> *(c) Change in law letter dated 6.6.2019 held to be satisfying the tenets of Article 34.1 of the PSA; (in Review Petition No. 9/RP/2020) and Change in law letters dated 17.7.2017 and 3.6.2019 held to be satisfying the tenets of Article 10.4 of the PPA; (in Review Petition No. 10/RP/2020)*
>
> *(d) Non-consideration of saleability component of Gypsum - the byproduct of FGD system."*

4. As the issues raised in the two Review Petitions were common, both the Review Petitions were heard together on 'admission' through virtual hearing on 18.6.2021. The Commission, after hearing the learned counsel for the Review Petitioners, reserved its order on 'admissibility' of the Review Petitions. Based on the submissions of the Review Petitioners and the documents available on record, we proceed to dispose of the issues raised in the Review Petitions, by a common order, as stated in the subsequent paragraphs.

(a) Liberty given to SIEL to approach CEA and a principle decision taken to allow the cost of NOx control system and operating expenses after prudence check

5. The Review Petitioners, in the Review Petitions, have submitted that the

impugned orders dated 18.5.2020 and 6.5.2020 granting liberty to the Respondent SEIL to approach the Central Electricity Authority (in short 'CEA') for (i) firming up the requirement of Selective Non-Catalytic Reduction (SNCR) for its plant for complying with the NOx effluent norms and its indicative cost and (ii) the cost of such NOx control system and its operating expenses may be allowed based on the CEA guidelines/ recommendations, on prudence check after installing the equipment, is an error apparent on the face of record, as the Commission had not considered the order dated 5.8.2019 passed by the Hon'ble Supreme Court in W. P.(c) No. 13029/1985 (M.C.Mehta Vs Union of India & ors), which was placed on record by the Review Petitioners vide additional affidavit dated 27.2.2020. The Review Petitioners have also submitted that the Hon'ble Supreme Court in its order dated 5.8.2019 had noted the affidavit of MOEF&CC stating that a consensus had been reached between the Environmental Pollution (Prevention and Control) Authority for National Capital Region, Ministry of Power (MOP, GOI), the Central Pollution Control Board (CPCB), Central Electricity Authority (CEA), NTPC Limited for revision of NO_x norms from 300 mg/Nm^3 to 450 mg/Nm^3 for Thermal Power Plants installed between 1.1.2004 to 31.12.2016 and the same will be presented for a final decision to the Secretary, MOEF&CC and the Secretary, MOP. The Review Petitioners have submitted that since the project of the Respondent SEIL would be adhering to the revised NO_x effluent norms, no liberty could have been granted to the Respondent for installation of NOx control system, till a decision is taken by MOEF&CC and MOP, GOI and is approved by the Hon'ble Supreme Court. Accordingly, the Review Petitioners have stated that the impugned orders dated 6.5.2020 and 18.5.2020 in Petition No. 209/MP/2019 and Petition No.210/MP/2020 respectively may be rectified

on this ground.

6. During the hearing on 18.6.2021, the learned counsel for the Review Petitioners reiterated the above submissions and prayed that the impugned orders dated 6.5.2020 and 18.5.2020 may be rectified on this count. She, however, suggested that since the consensus recorded in the order dated 5.8.2019 of the Hon'ble Supreme Court may be finalized by MOEF&CC, the Commission, at this stage, may direct the CEA to take into consideration the Hon'ble Supreme Court's order dated 5.8.2019 in W.P(C) No. 13029/1985, while dealing with the application of the Respondent SEIL, for firming up the requirement of SNCR system and its indicative cost for its plant. The learned counsel for the Review Petitioners prayed that the impugned orders dated orders dated 6.5.2020 and 18.5.2020 may be modified to this extent.

7. We have examined the submissions and the documents available on record. With regard to NOx control system, the Commission in the impugned orders dated 6.5.2020 in Petition No. 209/MP/2019 and dated 18.5.2020 in Petition No. 210/MP/2019 had observed the following:

> *"Further, the Petitioner in its rejoinder has submitted that the CEA has not approved any indicative cost with regard to NOx control system as the same is subjective i.e. certain projects can achieve the new norms by modifying the combustion control system and some other plants may have to go for SNCR. As such, in absence of such indicative cost, the cost of NOx control system (combustion control/ SNCR) is not being allowed on provisional basis at this stage. In this regard the petitioner is directed to approach CEA for firming up the requirement of SNCR system and its indicative cost for the Petitioner's plant. In either case, Petitioner should not initiate installation of SNCR system or modification of combustion control system without the specific recommendations of CEA. The cost of such control system and its operating expenses may be allowed based on CEA guidelines and recommendations, if any, and based on prudence check of the details furnished by the Petitioner after installing the equipment on basis of competitive bidding and on incurring the expenditure based on such bidding."*

8. The grievance of the Review Petitioners is that the Commission, while granting

liberty to the Respondent SEIL, in the impugned orders dated 6.5.2020 and 18.5.2020, had not considered the submissions made in the additional affidavit dated 27.2.2020 filed by the Review Petitioners. We notice that the Review Petitioners, during the hearing of the Review Petitions on 27.2.2020, had filed separate additional affidavits affirmed on 22.2.2020. In these additional affidavits, the Review Petitioners had enclosed the Hon'ble Supreme Court's order dated 5.8.2019 in WP (c) No.13029/1985 and pointed out that, based on the affidavit filed by MOEF&CC, the Hon'ble Court had noted the consensus reached between the Environmental Pollution (Prevention and Control) Authority for National Capital Region, Ministry of Power (MOP, GOI), Central Pollution Control Board (CPCB), Central Electricity Authority (CEA), NTPC Limited and MOEF&CC for revision of NO_x norms from 300 mg/Nm^3 to 450 mg/Nm^3 for Thermal Power Plants installed between 1.1.2004 to 31.12.2016, and that the same will be presented for a final decision to the Secretary, MOEF&CC and the Secretary, MOP. The Review Petitioners had also submitted that the project of Respondent SEIL would already be adhering to the revised NOx effluent norms.

9. There is force in the submission of the Review Petitioners. We notice that the additional affidavit enclosing therewith the Hon'ble Supreme Court's order dated 5.8.2019 in WP(c) No.13029/1985, has apparently escaped the attention of the Commission, while passing the impugned orders dated 6.5.2020 and 18.5.2020. This, according to us, is an error apparent on the face of record and review on this ground is accepted. However, as suggested by the learned counsel for the Review Petitioners during the hearing on 18.6.2021, we direct CEA to take into consideration the order dated 5.8.2019 of the Hon'ble Supreme Court in in WP(C) No.13029/1985

(M.C. Mehta V Union of India & ors) while dealing with the application of the Respondent SEIL for firming up the requirement of SNCR system and its indicative cost of its plant. In line with this, paragraph 43 of the impugned order dated 6.5.2020 and paragraph 54 of the impugned order dated 18.5.2020 stand partially modified as under (the portion in bold is being added):

> *"Further, the Petitioner in its rejoinder has submitted that the CEA has not approved any indicative cost with regard to NOx control system as the same is subjective i.e. certain projects can achieve the new norms by modifying the combustion control system and some other plants may have to go for SNCR. As such, in absence of such indicative cost, the cost of NOx control system (combustion control/ SNCR) is not being allowed on provisional basis at this stage. In this regard the petitioner is directed to approach CEA for firming up the requirement of SNCR system and its indicative cost for the Petitioner's plant. However,* ***CEA, while considering the proposal/application of the Petitioner, shall take into consideration the order dated 5.8.2019 passed by the Hon'ble Supreme Court in WP (C) No.13029/1985 (M.C.Mehta V Union of India & ors).*** *In either case, Petitioner should not initiate installation of SNCR system or modification of combustion control system without the specific recommendations of CEA. The cost of such control system and its operating expenses may be allowed based on CEA guidelines and recommendations, if any, and based on prudence check of the details furnished by the Petitioner after installing the equipment on basis of competitive bidding and on incurring the expenditure based on such bidding"*

10. Issue (a) is decided accordingly.

(b) Condition of installation of Flue Gas Desulphurization in Environmental Clearance

11. The Review Petitioners have submitted that the Commission in its impugned orders dated 6.5.2020 and 18.5.2020 had held that the case of Respondent SEIL is not covered under any of the exceptions provided under the MOP, GOI Notification dated 30.5.2018 issued under Section 107 of the Electricity Act, 2003 (in short 'the Act'), since the Environmental Clearance (hereinafter referred to as 'EC') of the Respondent's project did not envisage installation of FGD. It has submitted that the Respondent had not placed on record all its Environmental Clearances. The Review Petitioners have pointed out that a letter dated 2.3.2015 issued by MOEF&CC, extending the EC dated 4.11.2009, provided for a condition for future installation of

Flue Gas Desulphurization (in short 'FGD') to be added in the EC dated 4.11.2009, indicate that the order dated 6.5.2020 in Petition No.209/MP/2019 and order dated 18.5.2020 in Petition No.210/MP/2019 are patently wrong. The Review Petitioners have pointed out that the same specific condition for future installation of FGD was included in the EC of M/s JSW Energy Ltd, where the APTEL vide its judgment dated 21.1.2013 in Appeal No. 105/2011 had decided that there is no change in law. The Review Petitioners have further submitted that they had specifically averred that the Respondent's case is covered by the exceptions in Section 107 directive dated 30.5.2018 issued by the MOP, GOI, but no finding has been rendered by the Commission in the impugned orders dated 6.5.2020 and 18.5.2020, except to state that the Respondent SEIL case is not covered by the second exception, as the EC of the Respondent SEIL project did not contain any clause for installation of FGD, which is factually incorrect.

12. During the hearing of the Review Petition on 18.6.2021, the learned counsel for the Review Petitioners reiterated the above submissions and contended that in terms of the judgment of APTEL dated 21.1.2013 in Appeal No. 105/2011 (JSWEL v MSEDCL & anr), the impugned orders dated 6.5.2020 and 18.5.2020 may be reviewed.

13. The matter has been examined. In the impugned orders dated 6.5.2020 and 18.5.2020 in Petition No. 209/MP/2019 and Petition No. 210/MP/2019 respectively, the Commission had rejected the submissions of the Review Petitioners that the Respondent was required to comply with the revised norms as part of its EC, and held as under:

Order dated 6.5.2020

"31. In view of the above, we are of the opinion that the Project is impacted by the 2015 Notification and has to undertake activities to comply with the Revised Norms of SO2 and NOx through installation of FGD system and SNCR system respectively. There was no requirement of installation of these systems in the Environmental Clearance granted to the Project. We note that the bid deadline date in the instant case 1.10.2010 and cut-off date (7 days prior to the bid deadline) is 24.9.2010. Since the 2015 Notification has been issued on 7.12.2015, i.e. after the cut-off date, the Revised Norms qualify as events under change in law in terms of the PPA dated 1.4.2013. The Unit-2 of the project has achieved commercial operation on 15.9.2015 which is prior to the 2015 Notification. Therefore, the change in law events brought Order in Petition No. 209/MP/2019 Page 17 of 28 about through the 2015 Notification shall qualify as change in law during the operating period in terms of the PPA dated 1.4.2013

Order dated 18.5.2020

"39. Based on the submissions of the Petitioner, the documents placed on record and the perusal of the Environment Clearance, we are of the view that the Project of the Petitioner was not required to comply with the Revised Norms as per the Environment Clearance. This became mandatory only after the 2015 Notification came into force. We, thus, do not agree to the submission of the Respondents that the Petitioner's Project was required to be compliant with the Revised Norms as part of the Environment Clearance accorded to it. Also, therefore, the Petitioner's case is not covered under the second exception referred to in the letter of Ministry of Power dated 30.5.2018

xxx

41. In view of the above, we observe that the 2015 Notification has been issued by an Government Instrumentality (MoEF&CC); the 2015 Notification was issued (7.12.2015) after the Bid Date (10.9.2015) and qualifies as a Change in Law event in terms of Article 39 of the PSA; the Project is not covered under any of the exceptions of the letter dated 30.5.2018 of the Ministry of Power; both units of the Project have achieved COD before the 2015 Notification; FGD was not envisaged to be installed as per the Investment Approval of the Project; and the Project was not required to install equipment for abatement of SO_2 or NOx to levels envisaged under the 2015 Notification as part of the Environment Clearance. Therefore, the Change in Law events brought about through the 2015 Notification qualify as Change in Law during the operating period in terms of the PSA dated 18.2.2016."

14. In terms of MOP, GOI letter dated 30.5.2018, the 2015 Notification requiring compliance of Environment (Protection) Amendment Rules, 2015, is of the nature of Change in law event, except in cases, where:

(a) Power Purchase Agreements of such thermal power plants have been determined under Section 63 of the Act having bid deadline on or after 7.12.2015; or

(b) Thermal power plants where such requirement of pollutions control system was mandated under the environment clearance of the plant or envisaged otherwise before the notification of amendment rules.

15. MOEF&CC by letter dated 2.3.2015, while extending the validity of EC dated 4.11.2009 of the Respondent's project, had provided for a condition for future installation of FGD, as extracted below:

> *"3. Further, under Para no.4 of the said EC dated 04.11.2009, after the condition no. (xxxvi), the following conditions shall be added:*
>
> *Xxxx*
>
> *(xl) Space for FGD shall be provided for future installation as may be required."*

16. The Review Petitioners have now relied upon the EC extension letter dated 2.3.2015, to contend that the Respondent's project is covered under the exceptions contained in the MOP, GOI letter dated 30.5.2018. It is pertinent to mention that the EC dated 4.11.2009 of the Respondent's project does not mandate installation of FGD system. Also, the extension of EC by MOEF&CC vide its letter dated 2.3.2015, only require the Respondent SIEL to make space provision for installation of FGD, in future, as may be required. In the case of the Respondent SEIL, the bid date was 10.9.2015 (prior to the 2015 Notification) and, therefore, is not covered under the first exception contained in MOP, GOI letter dated 30.5.2018. The decision of the Commission in the impugned order is not based only on letter of MOP, GOI and rather other documents placed on record have been considered viz. cut-off date as per bid, the 2015 Notification of MoEF&CC and conditions in EC granted to the Petitioner's project. Even otherwise, subsequent to passing of impugned order, the issue as regards provision of space for FGD system in ECs has been set at rest by judgement of APTEL. The condition in EC to provide space for future installation of FGD, if required, had already been examined and decided by APTEL vide its common judgment dated 8.8.2020 in Appeal No.21 of 2019 (*Talwandi Sabo Power Limited vs PSERC & anr)* and Appeal No.73 of 2019 (*Nabha Power Limited vs*

PSERC and anr). The relevant portions of the judgment are extracted below:

> *"87. We have to now examine whether the Respondent-Commission was justified in opining that the notification in question does not qualify as a change in law event, since it opines that the EC conditions did envisage installation of FGD system and the present revised norms of 2015 and allied directions are only confirmation of the conditions already envisaged in the EC issued to the Appellants.*
>
> *xxx*
>
> *97. It is also seen that the environmental clearance granted by MoEF & CC for thermal power projects prior to revised norms of 2015 with reference to installation of FGD system broadly categorized into two types. One category covers the projects which were given environmental clearances similar to that of the Appellants envisaging a condition that a space provision is to be kept for the installation of the FGD equipment if required at a later stage in terms of environmental Regulations. The other category of environmental clearance is where MoEF & CC specifically mandated installation of FGD equipment as a statutory requirement*
>
> *Xxxx*
>
> *99. …Therefore, in all those thermal power projects where there was requirement of only space provision, it is difficult to accept the contention of the Respondents that in spite of absence of specification and design for FGD, the Appellants were still required to estimate the cost and earmark funds anticipating revised norms after six years or so from the cut-off date…….. As already stated, anticipating such change, substantial cost cannot be included as capital cost of the project at the time of bidding itself. If such requirement of FGD did not occur during the entire term of the Project, the consumer would be burdened with higher tariff. As a matter of fact, such substantial and significant cost as part of capital cost of the project would not have been approved at all.*
>
> *xxx*
>
> *128. Then coming to the letter of Ministry of Power dated 30.05.2018, the contents of this letter were relied upon by both the parties. However, both Appellants and Respondent interpret same clauses differently. The relevant portions of the said letter are as under:*
> *xxxx*
>
> *129. According to the Respondents, this letter refers to two situations (a) where the pollution control system is mandated and (b) where it is envisaged. Respondents contend that the word 'mandate or otherwise envisaged' would mean one and the same. Therefore, according to them, the condition in the EC to provide space for installing FGD at a later stage would mean it is mandated and therefore it does not amount to Change in Law event.*
>
> *130. It is needless to say that the opinion expressed in this letter is not having any binding effect on any judicial/quasi-judicial authority meant to adjudicate the dispute pertaining to Change in Law claim arising out of MoEF & CC Notification. No one can deny the fact that it was within the domain of Respondent-Commission to adjudicate the same initially when dispute was raised before it. In view of hierarchy of authorities, this Tribunal as Appellate Authority has the jurisdiction to interpret whether Commissions' interpretation was right or wrong and further express opinion whether the revised norms amounts to Change in Law event or not.*
>
> *132. One of the above contents of MoP letter dated 30.05.2018 reads as follows:*
>
> > *"TPPs where such requirement of pollution control system was mandated under the environment clearance of the plant or envisaged otherwise before the notification of amended rules"*

133. This letter refers to two situations. First one is where thermal power projects have requirement of pollution control system like FGD as a mandate under the environmental clearance of the plant. It would mean that it must be a requirement which has to be mandatorily complied with in terms of environmental clearance of the plant. That means it should be one of the conditions in the EC. The second situation refers to requirement of pollution control system envisaged otherwise before the Notification of amended rules. The expression used is "or envisaged otherwise" before the Notification in question. There has to be a literal interpretation of the word 'or envisaged otherwise'. The expression "or envisaged otherwise" in para 5.1 (b) is to be interpreted to mean "envisaged in any document but the Environment Clearances". Hon'ble Supreme Court had occasion to opine on the rule of disjunctive interpretation in cases of the use of the word "or" in LIC vs. D.J. Bahadur, (1981) 1 SCC 315. The relevant extract is mentioned herein below:

xxxx

134. The context, under which the expression 'or envisaged otherwise' before the Notification in question, if compared with the first situation, certainly would mean that such condition of pollution control system was indicated in any other document other than the environmental clearance that must have come into existence before the Notification in question. Therefore, we entirely agree with the arguments of Appellants that the scope of condition at para 5.1(b) of the aforesaid letter would actually mean that a party is not entitled to seek Change in Law claim in respect of any control system, which is already installed in terms of environmental clearance or otherwise required by any other document other than EC

136. In short, from the above analysis, what is noticed is a presentation was made before issuance of ECs and said presentation could be only on the basis of prevailing environmental norms. The mechanism required for the control of emissions in terms of the procedure and norms are quite different from what is required so far as the project of the Appellants is concerned in terms of Notification of the MoEF & CC in 2015. Therefore, in the absence of circumstances requiring FGD installation for these plants at the time of issuing ECs, one cannot opine that such installation was mandatory or envisaged as a statutory requirement in other documents before the notification in question. C Condition (vi) in the ECs definitely and certainly refers to installation of FGD if required in future as a mandate, therefore, the general/standard condition at (vi) would mean provision of 212 space for FGD system alone was the requirement. This would mean the necessity may arise or may not arise in future since it depends upon environmental protection measures from time to time which may be statutorily mandated by MoEF & CC and other concerned authorities."

17. In view of the judgment dated 8.8.2020 in Appeal No.21 of 2019 in Talwandi Sabo and Nabha Power case, as aforesaid, no reliance can be placed on the judgment dated 21.1.2013 of APTEL in JSW case by the Review Petitioners. The submissions of the Review Petitioners deserve no merit for consideration and review on this count is rejected.

18. Issue (b) is decided accordingly.

(c) Change in law letters held to be satisfying the tenets of Article 34.1 of the PSA and Article 10.4 of the PPA

19. The Review Petitioners have submitted that the observations of the Commission in the impugned orders dated 6.5.2020 and 18.5.2020 that the change in law letters dated 17.7.2017 and 3.6.2019 (in Petition No. 209/MP/2019) and letter dated 6.6.2019 (in Petition No. 210/MP/2019) issued by Respondent SEIL to the Review Petitioners had complied with the requirements of notice under Articles 10.4 of the PPA and Article 34.1 of the PSA, is without any finding as to whether the said change in law notice was issued within a reasonable period of time from the date of publication of the 2015 Notification dated 7.12.2015. The Review Petitioners have also submitted that Article 10.4 of the PPA and Article 34.1 of the PSA is a substantial provision casting an obligation on the Respondent SEIL to serve notice of a change in law event on the Review Petitioners, which should be issued within a reasonable period of time. They have further submitted that the failure on the part of the Respondent SEIL to comply with the requirement of notice, does not entitle it to claim any relief under the terms of the PSA/PPA. The Review Petitioners have also pointed out that the question of change in law notice being issued within a reasonable period is of paramount importance, and in no case, the time period of 4 years can be said to be reasonable time. Referring to the Commission's order dated 8.10.2018 in Petition No. 179/MP/2016 (KSKMPCL v TANGEDCO) observing that the delay of 3 years cannot be considered reasonable, the Review Petitioners have prayed that the impugned orders dated 6.5.2020 and 18.5.2020 may be reviewed on this ground. During the hearing of the Review Petition on 18.6.2021, the learned counsel for the Review Petitioners reiterated the above submissions and prayed that the review may be allowed on this count.

20. The matter has been considered. The Commission in the impugned order dated 6.5.2020 in Petition No.209/MP/2019 and order dated 18.5.2020 in Petition No. 210/MP/2019 had examined the issue as to whether the requirement of notice in terms of Article 34 of the PSA has been complied by the Respondent SIEL and decided as under:

Order dated 6.5.2020

"33. As per the above provisions, if the Seller is affected by Change in Law under Article 10.1, in order to claim change in law under the said Article, it is required to give a notice to the Procurers about occurrence of Change in Law as soon as reasonably practicable after becoming aware of the same. The 2015 Notification was issued on dated 7.12.2015 and the Petitioner has submitted that by way of communication dated 17.7.2017 and 3.6.2019, the Petitioner duly informed the Respondents and apprised them of the Notification and the consequent measures it will have to undertake to comply with the Revised Norms. In our view, the Petitioner has complied with the requirement of notice under Article 10.4 of the PPA."

Order dated 18.5.2020

"42.There is no specific provision for notification of Change in Law in the PSA dated 18.2.2016. However, in Article 34.1 (quoted in paragraph 28 of this Order) which provides for the "Increase in Cost", there is a reference for notice to be given by the supplier to the procurers. It states that "If as a result of Change in Law, -------, the Supplier may so notify the Utility and -------. Upon notice by the Supplier, the Parties shall meet, as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, -------. Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Supplier may by notice require the Utility to pay an amount ----- and within 15 (fifteen) days of receipt of such notice ------". There is similar reference in Article 34.2 of the PSA that deals with the case when Change in Law leads to reduction in costs. In the latter case, the procurers have to serve notice upon the supplier. The Articles 34.1 and 34.2 of the PSA provide for timelines once the initial notice is served upon the other Party. However, there is no mention of the period when the initial notice for Change in Law is to be served upon the other Party.

43. As per the provision in Article 34.1 of the PSA, if as a result of Change in Law, the Supplier suffers an increase in costs or reduction in net after-tax return or other financial burden, it is required to give a notice to the Procurers about occurrence of Change in Law. The Petitioner has submitted that by way of communication dated 6.6.2019, the Petitioner informed the Respondents of the 2015 Notification. The Respondents have submitted that in no case a time period of 4 years can be said to be reasonable time in terms of PSA. The Petitioner in its rejoinder has submitted that there was no clarity as to how the 2015 Notification is to be implemented and, therefore, it could not have notified the Respondents of the said Change in Law event. It has submitted that the requirement for sending a notice of occurrence of Change in Law under the provisions of the PSA is a procedural requirement and non-fulfillment of the said procedural requirement cannot take away the substantive rights of the Petitioner.

44. We have already held above that the 2015 Notification is a Change in Law. Moreover, the Petitioner as well as the Respondents were aware of the 2015 Notification prior to signing of the PSA dated 18.2.2016. Also, there is no specific requirement in the PSA for notifying the Respondents in a given time frame. In our view, the Petitioner has complied with the requirement of notice envisaged in the PSA."

21. The Review Petitioners have contended that the Commission in the impugned orders dated 6.5.2020 and 18.5.2020 had not given any finding as to whether the change in law notice was issued within a reasonable period of time from the date of the 2015 Notification. This issue was raised by the Review Petitioners in the original petitions as well and have been duly captured in the impugned orders as under:

"13. The Respondents have submitted that the Petitioner has issued notice of Change in Law on 6.6.2019, and in no case a time period of 4 years can be said to be reasonable time in terms of PSA. Even if considering the COD of 15.9.2015 and power supply date of 30.3.2016, the notice is delayed by more than three years and no reasons have been furnished by the Petitioner for this delay.

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18. The Petitioner has filed its rejoinder vide affidavit dated 26.12.2019. With regard to delay in issuing of the notice of 'Change in Law' to the Respondents, the Petitioner has submitted that the COD of the generating station is 15.9.2015, and cutoff date for triggering the Change in Law event is 10.9.2015. After coming into force of the 2015 Notification, there was no clarity as to how the whole scheme is to be implemented. Without the said clarity, the Petitioner could not possibly have notified the Respondents of the said 'Change in Law' event. The requirement for sending a notice of Change in Law under the provisions of the PSA is a procedural requirement which the Petitioner has complied with. The alleged non-fulfillment of the said procedural requirement cannot take away the substantive rights of the Petitioner and it cannot be read in isolation without looking at the corresponding circumstances that were present at various points of time.

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42. There is no specific provision for notification of Change in Law in the PSA dated 18.2.2016. However, in Article 34.1 (quoted in paragraph 28 of this Order) which provides for the "Increase in Cost", there is a reference for notice to be given by the supplier to the procurers. It states that "If as a result of Change in Law, -------, the Supplier may so notify the Utility and ------- . Upon notice by the Supplier, the Parties shall meet, as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, ------- . Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Supplier may by notice require the Utility to pay an amount ----- and within 15 (fifteen) days of receipt of such notice ------". There is similar reference in Article 34.2 of the PSA that deals with the case when Change in Law leads to reduction in costs. In the latter case, the procurers have to serve notice upon the supplier. The Articles 34.1 and 34.2 of the PSA provide for timelines once the initial notice is served upon the other Party. However, there is no mention of the period when the initial notice for Change in Law is to be served upon the other Party.

43. As per the provision in Article 34.1 of the PSA, if as a result of Change in Law, the Supplier suffers an increase in costs or reduction in net after-tax return or other financial burden, it is required to give a notice to the Procurers about occurrence of Change in Law. The Petitioner has submitted that by way of communication dated 6.6.2019, the Petitioner informed the Respondents of the 2015 Notification. The Respondents have submitted that in no case a time period of 4 years can be said to be reasonable time in terms of PSA. The Petitioner in its rejoinder has submitted that there was no clarity as to how the 2015 Notification is to be implemented and, therefore, it could not have notified the Respondents of the said Change in Law event. It has submitted that the requirement for sending a notice of occurrence of Change in Law under the provisions of the PSA is a procedural requirement and non-fulfillment of the said procedural requirement cannot take away the substantive rights of the Petitioner.

44. We have already held above that the 2015 Notification is a Change in Law. Moreover, the Petitioner as well as the Respondents were aware of the 2015 Notification prior to signing of the PSA dated 18.2.2016. Also, there is no specific requirement in the PSA for notifying the Respondents in a given time frame. In our view, the Petitioner has complied with the requirement of notice envisaged in the PSA."

22. We find no error apparent on the face of the order as the Commission by a conscious decision, had decided that the Respondent SEIL had complied with the requirement of notice as envisaged. The Review Petitioners cannot, therefore, be permitted to reopen the case on merits and seek review of the order on this count. The review cannot be treated as an appeal in disguise. Also, the reliance placed by the Review Petitioners on the finding in the Commission's order dated 8.10.2018 in Petition No.179/MP/2016 that the delay of 3 years in giving notice is not considered reasonable, is misconceived and cannot be applied in the present case, as the decision in the said case, was based on the facts and circumstances and interpretation of the provisions of the PPA entered into by the parties therein. Accordingly, the prayer of the Review Petitioners for review of the orders dated 6.5.2020 and 18.5.2020 on this count is rejected.

23. Issue (c) is decided accordingly.

(d) Non-consideration of saleability component of Gypsum - the by product of FGD system

24. The Review Petitioners have submitted that in the additional affidavits filed on 27.2.2020 in the original petitions, they had brought to the notice of the Commission that the wet limestone based FGD system, to be installed by the Respondent SEIL to meet its SO_2 emission norms produces Gypsum as a by-product. They have also submitted that Gypsum has a commercial value and is saleable in market and, therefore, the revenue which the Respondent earns from the sale of Gypsum should be necessarily subtracted from the operating cost claimed by it. The Review Petitioners have submitted that since the Commission had, in the impugned orders dated 6.5.2020 and 18.5.2020 rendered no finding on this issue while granting relief, the same is an error apparent on the face of the order and review on this count may be allowed. The learned counsel for the Review Petitioners reiterated the above submissions during the hearing on 18.6.2021.

25. The matter has been considered. It is noticed that the Review Petitioners vide affidavit dated 22.2.2020 had submitted that the revenue earned from sale of Gypsum should be subtracted from the operating cost claimed by the Respondent SIEL. They had also requested that the Respondent be directed to prepare and furnish a report in consultation with CEA and give the indicative cost of the revenue that it would earn from the sale of Gypsum. As stated earlier, the additional affidavit dated 22.2.2020 had escaped the attention of the Commission while passing the impugned orders dated 6.5.2020 and 18.5.2020 in Petition No. 209/MP/2020 and Petition No.210/MP/2020 respectively. This, according to us, is an error apparent on the face of the order. We, however, notice that the Commission in the impugned order dated 18.5.2020 in Petition No.210/MP/2019 had directed the staff of the

Commission to float a staff paper on the issue of compensation mechanism and tariff implications on account of the 2015 Notification in case of thermal generating stations covered under Section 63 of the Act, where the PPA does not have explicit provision for compensation mechanism during the operation period and the PPA requires the Commission to devise such a mechanism. Accordingly, after considering the comments of all stakeholders, Commission on 13.8.2021 issued the final order on the subject matter in Suo-motu Petition No. 06/SM/2021. In the said order, the Additional Operation and Maintenance Expenses allowable on account of installation of Emission Control Systems, is as under:

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

26. We note that while the issues raised by stakeholders regarding expenses for handling of the various by-products like gypsum due to installation of Emission Control Systems have been addressed in order dated 13.8.2021 in Suo-motu Petition No. 06/SM/2021, the issue of treatment of the revenue earned from the disposal of such by-products has not been addressed. Accordingly, it is decided that the revenue earned from the sale of various by-products including Gypsum due to installation of Emission Control Systems, shall be deducted from the additional O&M expenses allowed to Respondent SEIL.

27. Issue (d) is decided accordingly.

28. Review Petition No.9/RP/2021 and Review Petition No.10/RP/2021 are disposed of in terms of the above at the admission stage.

Sd/-	*Sd/-*
(I.S.Jha)	**(P.K. Pujari)**
Member	**Chairperson**