

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 450/MP/2019

Coram:

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

Date of Order: 21st March, 2022

In the matter of

Petition invoking Section 79 of the Electricity Act, 2003 read with (i) Article 10 of the Power Purchase Agreement dated 18.01.2014, (ii) Article 10 of Schedule 1 of the PPA dated 20.01.2014, (iii) Clause 4.7 of the Competitive Bidding Guidelines, and (iv) this Commission's Order dated 03.06.2019 passed in Petition No. 156/MP/2018 seeking approval of the additional capital and operational expenditure on account of installation of various Emission Control Systems in compliance with Ministry of Environment, Forest and Climate Change Notification dated 07.12.2015.

And

In the matter of

MB Power (Madhya Pradesh) Limited,
239, Okhla Industrial Estate, Phase-III,
New Delhi-110 020

...Petitioner

Versus

1. Uttar Pradesh Power Corporation Limited,
7th Floor, Shakti Bhawan,
14, Ashok Marg,
Lucknow – 226001
2. Pashchimanchal Vidyut Vitran Nigam Limited,
Urja Bhawan, Victoria Park,
Meerut – 250001.
3. Purvanchal Vidyut Vitran Nigam Limited,
DLW Bhikaripur,
Varanasi – 221004
4. Madhyanchal Vidyut Vitran Nigam Limited,
4A, Gokhale Marg,
Lucknow – 226001.

5. Dakshinanchal Vidyut Vitran Nigam Limited,
Urja Bhawan, NH – 2, (Agra-Delhi Bypass Road), Sikandra,
Agra- 282002.

6. PTC India Limited,
2nd Floor, NBCC Tower
15, Bhikaji Cama Place,
New Delhi-110066.

7. Central Electricity Authority,
Sewa Bhawan, R. K Puram, Sector-1
New Delhi-110066.

...Respondents

The following were present:

Shri Amit Kapur, Advocate, MBPMPL
Shri Akshat Jain, Advocate, MBPMPL
Shri Pratyush Singh, Advocate, MBPMPL
Shri Abhishek Gupta, MBPMPL
Shri Sitiesh Mukherjee, Advocate, UPPCL
Shri Abhishek Kumar, Advocate, UPPCL
Shri Nived Veerapaneni, Advocate, UPPCL
Shri Karan Arora, Advocate, UPPCL
Shri Chandrika Prasad Yadav, UPPCL
Shri Ravi Kishore, Advocate, PTC

ORDER

The Petitioner, MB Power (Madhya Pradesh) Limited (in short 'MB Power') is a generating company as per Section 2(28) of the Electricity Act, 2003 (hereinafter referred to as 'the Act'). MB Power has established and operates a 1200 MW (2 x 600 MW) coal-based thermal power project (in short 'Project') located at district Anuppur in the State of Madhya Pradesh. Unit -1 and Unit -2 of the Project achieved Commercial Operation Date ('COD') on 20.5.2015 and 7.4.2016 respectively.

Background

2. The Petitioner has entered into the following Power Purchase Agreements ('PPAs') for supply of power from the Project:

(a) Supply of 361 MW to Paschimanchal Vidyut Vitran Nigam Limited, Purvanchal Vidyut Vitran Nigam Limited, Madhyanchal Vidyut Vitran Nigam Limited and Dakshinanchal Vidyut Vitran Nigam Limited (hereinafter referred to as 'the UP Discoms') in terms of PPA dated 18.1.2014.

(b) Supply of 30% of the installed capacity of the Project to Madhya Pradesh Power Trading Company Limited, Madhya Pradesh Poorva Kshetra Vidyut Vitran Nigam Limited, Madhya Pradesh Madhya Kshetra Vidyut Vitran Nigam Limited and Madhya Pradesh Kshetra Vidyut Vitran Nigam Limited.

(c) Supply of 5% of the net output of the Project to Madhya Pradesh Power Trading Company Limited.

3. On 18.1.2014, the Procurers, namely, UP Discoms through UPPCL and the Respondent No. 6 i.e. PTC India Limited (hereinafter referred to as 'PTC') entered into a Power Purchase Agreement (hereinafter referred to as 'the Procurer-PPA') for supply of 361 MW (Net) power for a period of twenty-five years from the Scheduled Delivery Date of the Project, for onward sale on long term basis. On 20.1.2014, the Petitioner entered into back-to-back PPA (hereinafter referred to as 'the PTC-PPA') dated 20.1.2014 with PTC. The Procurer-PPA and the PTC-PPA are collectively referred to as the UP Discoms PPAs or simply as PPAs depending upon the context.

4. It is stated that from 22.8.2015, MB Power has been supplying the contracted capacity i.e. 361 MW (net) or 386.1 MW (gross) power (32.175% of the Project capacity) to the UP Discoms through PTC on back-to-back basis.

5. The chronological dates of events with regard to UP Discoms PPAs are as under:

Power Supply to	UPPCL under Long term (361 MW)
Cut-off date	17.9.2012

Date of submission of bid	24.9.2012
Procurers PPA with PTC	18.1.2014
Back to back PPA executed by the Petitioner with PTC	20.1.2014
Start of supply of power	From 22.8.2015

6. The Petitioner had filed Petition No. 156/MP/2018, *inter-alia*, seeking compensation on account of occurrence of Change in Law events under the PTC-PPAs and Procurer-PPAs. After considering the submissions of the parties therein, the Commission disposed of the Petition No. 156/MP/2018 vide order dated 3.6.2019 and held that the additional capital expenditure to be incurred by MB Power on account of implementation of the revised environmental/emission norms prescribed by Ministry of Environment, Forest and Climate Change (MoEF&CC) Notification dated 7.12.2015 is a Change in Law event as per Article 10.1.1 of the Procurers PPAs dated 18.1.2014. Accordingly, the Petitioner was granted liberty to approach the Commission for determination of increase in cost and/or revenue expenditure on account of implementation of the emission norms as per guidelines of the Central Electricity Authority.

7. Pursuant to liberty granted by the Commission vide order 3.6.2019 in Petition No. 156/MP/2018, the Petitioner has filed the present Petition, *inter-alia*, seeking in-principle/provisional approval of capital expenditure and operational expenditure to be incurred by the Petitioner for installation of various Emission Control Systems (ECS) in compliance of the revised environmental norms prescribed in the Ministry of Environment, Forest and Climate Change Notification dated 7.12.2015. The Petitioner has made the following prayers:

“(a) Grant in-principal approval of the total capital expenditure of Rs. 690.75 Crores to be incurred by MBPL due to installation of Wet Lime FGD System, De-NOx System (i.e Combustion Modification System in terms of Low NOx Burner with SOFA) and other Emission Control

System/Equipment for abatement of Oxides of Sulphur and Nitrogen;

(b) Approve the additional O&M expenses of Rs 1.44 Lakh/MW (over and above the normative O&M expenses as per the Regulations 2019-24) for the first year of operation post implementation of Wet Lime FGD System & De-NOx System (i.e Combustion Modification System in terms of Low NOx Burner with SOFA)) (along with appropriate annual escalation factor for subsequent periods) for abatement of Oxides of Sulphur and Nitrogen, as provided in the instant Petition;

(c) Approve the additional Auxiliary power consumption of 2% over and above the normative Auxiliary power consumption for each 600 MW unit as per CERC Regulations 2019-24;

(d) Allow shutdown period required for installation and commissioning of Emission Control System at the Projects as Deemed Availability for payment of Capacity Charges. The revenue losses during the period may be considered as opportunity cost for interconnection and considered as part of capital cost; and

(e) In the alternative, prescribe, devise and apply appropriate norms for computing the adjustment in tariff to offset the additional investment/increase in costs due to MoEFCC Notification for restituting MBPL to the same economic position as if such Change in Law event had not occurred.”

Hearing dated 19.1.2022

8. The Petitioner vide its note of arguments for the hearing filed on 19.1.2022 and in its rejoinder dated 8.2.2022 has submitted that at this juncture the Petitioner is only seeking in-principle approval of the base cost discovered through International Competitive Bidding (ICB) process for procurement and installation of Flue Gas Desulfurization System (in short 'FGD system'). Other prayers pertaining to additional O&M expenses, additional auxiliary power consumption, shutdown period and in-principle approval of cost towards installation and operation of De-NOx system is not being claimed by the Petitioner at this stage and the Petitioner is seeking liberty to approach the Commission at the appropriate stage for further approvals. Accordingly, in the present case, this Commission is only dealing with the prayers of the Petitioner for in-principle approval of the base cost of FGD system and the compensation mechanism. Further, liberty may be granted to MB

Power to approach this Commission for determination of increase in cost and/or revenue expenditure on account of implementation of De-NOx system for compliance towards revised NOx emission norms.

Submissions of the Petitioner

9. The Petitioner has mainly made the following submissions through its Petition and in affidavits dated 4.5.2020, 25.8.2020 and 6.9.2021:

a) In terms of the MoEF&CC Notification, the emission norms and other terms and conditions applicable to Thermal Power Plants (TPPs) installed till December, 2016 (like MB Power), are as under:

Summary of Emission Norms to be complied with for Environment Protection Measures as per Rules applicable on various dates			
Sl. No.	Parameters	Norms as on Cut-off-Date (17.09.2012)	Norms under MOEFCC Notification (TPPs installed between 01.01.2003 to 31.12.2016)
1	Particulate matter (mg/Nm ³)	50	50
2	SO₂ (mg/Nm³)	No limit specified in Applicable Regulation	200 (for Units of 500 MW and above)
3	NO_x (mg/Nm³)		300
4	Mercury (mg/Nm ³)		0.03
5	Specific water consumption (m ³ /MWh)		3.5
(Cumulatively referred to “ Environmental Norms ”/“ Emission Norms ”)			

b) Relevant dates for the purpose of Change in Law are as under:

Particulars	Date
Procurer-PPA	18.01.2014
PTC-PPA	20.01.2014
Bid-Deadline	24.09.2012
Cut-off-Date (i.e., 7 days prior to the Bid deadline)	17.09.2012
Change in Law – MoEFCC Notification	07.12.2015

c) On 11.12.2017, Central Pollution Control Board (CPCB) in exercise of

power conferred by Section 5 of the Environment Act, 1986 directed MB Power to mandatorily install Emission Control Systems including FGD system and other Combustion Modification Systems in Unit-I by 31.3.2022 and in Unit-2 by 30.6.2022, specifically noting the new emission limits for SO₂ and NO_x prescribed by MoEF&CC Notification. This timeline stands extended till 31.12.2024 as on date.

d) On 30.5.2018, Ministry of Power, Government of India (MoP) issued directions to this Commission stating that MoEF&CC Notification dated 7.12.2015 is a “Change in Law” event and additional cost implication due to installation/up-gradation of various Emission Control System and its operational cost to meet emission norms be considered for pass through in tariff.

e) The Commission vide order dated 3.6.2019 in Petition No. 156/MP/2018 *inter-alia* directed MP Power to proceed with implementation of revised emission norms in consultation with CEA.

f) On 21.6.2019, MB Power approached CEA seeking approval of the technology and associated indicative cost with regard to installation of Emission Control Systems, as proposed in the Feasibility Report dated 12.6.2019. CEA by its letter dated 21.6.2019 returned the Feasibility Report directing MB Power to approach the Commission for further necessary action without providing its recommendation on technology and associated costs for the Emission Control Systems (ECS).

g) On 6.11.2019, MB Power filed the present Petition seeking in-principle approval for additional capital expenditure and operational expenditure to be incurred by it for installing various ECS in compliance of MoEF&CC Notification.

h) On 14.1.2020, during the hearing, MB Power informed this Commission that CEA has not provided its recommendation on the technology and cost with regard to installation of FGD system and other ECS for the Project. The Commission vide Record of Proceedings (RoP) for the hearing dated 14.1.2020 directed the Petitioner to again approach CEA for approval of (i) suitable

technology to be used for its generating station; (ii) Operational parameters of its generating station such as auxiliary consumption, O&M expenses and Station Heat Rate, etc., consequent to the implementation of ECS; (iii) Norms of consumption of water, limestone and ammonia, etc., required for operation of its generating station after implementation of ECS; and (iv) Any other detailed technical inputs. Staff of the Commission was directed to refer the matter to MoP to direct CEA to furnish its recommendations to MB Power.

i) On 6.2.2020, MB Power requested CEA to provide its recommendation on the suitable technology and operational parameters qua installation of revised ECS including FGD system, besides approval of its Feasibility Report.

j) On 5.3.2020, CEA provided its recommendation and approved the technology and operational parameters regarding installation of wet limestone based FGD system at MB Power's Project. While recommending the indicative base cost for wet limestone based FGD system, CEA stated that the actual cost of retrofitting/installing FGD system at MB Power's Project needs to be discovered through open competitive bidding. Further, the CEA's indicative base cost does not include taxes, duties, soft costs including IDC, IEDC miscellaneous financial costs, etc., opportunity cost and other costs for additional work specific to MB Power's Project.

k) The Petitioner vide its affidavit dated 22.5.2020 has placed on record the recommendations issued by CEA.

l) Pursuant to the tender notice issued by MB Power on 7.12.2018 initiating ICB for procurement and installation of FGD system, M/s Zhejiang Feida Environmental Science & Technology Company Limited (Zhejiang Feida) had emerged as the successful bidder with discovered base price of approximately Rs. 594 crore (excluding taxes and duties and other incidental expenses like IDC, IEDC and finance charges, etc.). Accordingly, MB Power had issued Lol to Zhejiang Feida on 22.7.2020 and purchase order/work order on 20.8.2020.

m) Due to outbreak of Covid-19 pandemic and its subsequent adverse impact on global supply chain and in light of Government of India directives dated 23.7.2020 and 28.7.2020 with respect to purchase preference in power sector to be given to local content, Zhejiang Feida was neither providing its acceptance to the purchase order/work order nor submitting the Advance Bank Guarantee (ABG).

n) Considering the non-responsiveness from the vendor, MB Power issued a notice on 9.7.2021 revoking the purchase order/work order dated 20.8.2020 and terminating the Lol dated 22.7.2020 issued to Zhejiang Feida. Accordingly, MB Power carried out re-tendering for procurement and installation of FGD system through ICB process.

o) Pursuant to re-tendering carried out by MB Power by publishing a tender notice on 18.2.2021, the technically qualified bidders submitted their financial/price bids on 30.4.2021. Pursuant to evaluation of the financial bids and after negotiation with the bidders, M/s Apollo International Ltd (Apollo International) emerged as L1 bidder. Accordingly, MB Power issued Letter of Intent to Apollo International on 28.5.2021 which was accepted by Apollo International through its e-mail dated 7.6.2021, and purchase order for supply of goods and work order for supply of services to Apollo International on 14.6.2021 towards execution of FGD system.

p) The base cost of wet limestone based FGD, discovered pursuant to competitive bidding is approximately Rs. 648.20 crore which details are as under:

Details	Base Cost (Excluding GST)
Purchase order for Supply of Goods	Rs. 346,60,00,000/-
Purchase order for Supply of Services	Rs. 301,60,00,000/-
Total	Rs. 648,20,00,000/-

q) Base cost of Rs.648.20 crore includes cost for design, engineering, manufacturing, supply, packing, forwarding, transportation/ logistics, erection,

testing and commissioning, etc. of the FGD system, civil works, chimney & duct lining cost and piling works, etc.

r) Base cost of Rs.648.20 crore is only the base cost of procuring and installing FGD system at MB Power's Project and the same does not include the cost/expenses towards the following components:

- (i) Cost of De-NOx system;
- (ii) Taxes and Duties, GST, etc.;
- (iii) Pre-operative expenditure including insurance cost and start-up expenses, etc.;
- (iv) Finance Charges;
- (v) Interest during Construction ("IDC").;
- (vi) Hedging cost and/or impact of Foreign Exchange Rate Variation ("FERV").;
- (vii) Contingency;
- (viii) Project Management Charges;
- (ix) Loss in revenue during the Project shut-down period for installation of ECS in the Project.
- (x) Other overheads.

s) All details pertaining to re-tendering with all relevant documents have been placed on record by MB Power's affidavit filed on 17.9.2021. Pursuant to this, MB Power has released advance payments to Apollo International and has already achieved the effective date under the contract with Apollo International for execution of FGD system. The engineering works have already commenced for execution of FGD system within the permissible timelines allowed to MB Power.

t) In-principle approval of cost of FGD system is necessary to enable MB Power to secure necessary debt finance for procurement and installation of the said FGD system. The issue of whether MoEF&CC Notification is Change in

Law is no longer *res integra*. This Commission has declared MoEF&CC Notification as Change in Law and granted in-principle approval of the associated cost to various generation companies.

u) UPPCL/UP Discoms were party to the proceedings in Petition No. 133/MP/2016, Petition No. 118/MP/2017, Petition No. 98/MP/2017 and Petition No. 446/MP/2019 before this Commission and have not challenged the Orders passed in above these petitions. The interpretation of MoEF&CC Notification as Change in Law and grant of in-principle approval of Capex and Opex (in similar factual background as in the present Petition) have attained finality and UPPCL is barred from raising pleas which have been rejected by this Commission.

v) Approval of in-principle cost of FGD system is critical to the Project since the Banks are unwilling to provide funds required for procurement and installation of the FGD system without such approval. This position has been noted by Appellate Tribunal for Electricity (APTEL), this Commission and Ministry of Power as under:

(i) APTEL judgment dated 28.8.2020 passed in Appeal No. 21 of 2019 titled *TSPL. v. PSERC & Anr.*

(ii) The Commission's order dated 23.4.2020 passed in Petition No. 446/MP/2019 titled *Sasan Power Limited vs MPPLCL & Ors.*

(iii) MoP Office Memorandum dated 20.4.2020.

(iv) Indian Banking Association (IBA) letter dated 8.8.2018 to Association of Power Producers (APP) highlighting their inability to fund Power sector for installation of FGD/Emission Control Systems.

(v) Minutes of 70th Meeting of the Forum of Regulator (FoR) held on 31.1.2020 recording a decision by the Forum that this Commission's orders and benchmark costs and norms recommended by CEA will serve as reference documents to decide matters pertaining to Change in Law and grant of in-principle approval of Capex on account of implementation of Revised Emission Standards by TPPs.

Submission of the Respondent, UPPCL

10. The Respondent, UPPCL, vide its replies dated 16.7.2020 and 29.1.2022, has mainly submitted the following:

a) The Petitioner has approached the Commission without incurring cost i.e., without completing the competitive bidding process for discovering the actual cost for installing FGD system and associated system as per direction of CEA dated 5.3.2020.

b) The Petitioner has provided higher values of oxides of Sulphur and Nitrogen to M/s Save Urja based on which M/s Save Urja has prepared the feasibility report. There are discrepancies in the value/emission levels of SO_x and NO_x provided by the Petitioner to M/s Save Urja on 18.4.2019 and the values indicated in the Environment Compliance reports dated 30.11.2018 and 1.6.2019 submitted to MoEF&CC. Thus, in absence of accurate data, the recommendations of the Save Urja's Feasibility Report ought not to be relied upon even to understand an indicative value.

c) The Petitioner vide its affidavit filed on 22.5.2020 has sought revision in overall cost of installation of FGD system and associated system to Rs.896.74 crore from Rs. 690.75 crore (claimed in the Petition) on account of:

(i) Outbreak of Covid-19 pandemic: This claim is based on anticipation of increase in hard cost and soft cost, without furnishing any evidence indicating the certainty of such increase in price. Claims based on anticipations are not sustainable in law and ought to be rejected.

(ii) Failing to include the incidence of GST in the estimated cost claimed in the Petition: Since the Petitioner has not conducted the competitive bidding process to discover actual cost, the claim for revision on account of GST is premature.

d) The Petitioner has sought to recover entire quantum of additional capital expenditure on account of FGD system from UP Discoms in disregard to the

actual contracted capacity of 361 MW. UP Discoms at best, may be made liable only to the extent of their contracted capacity and not for entire cost of installation of FGD system and associated system.

e) The Commission in its previous orders has taken a view that even if FGD system is to be installed for entire capacity of the generator's project, the power procurers can be made liable only to the extent of their respective contracted capacities.

f) Useful life of the FGD system and associated system may not be same in terms of the Procurers PPA/PTC PPA. Therefore, burden in tariff to the extent of the contracted capacity requires further consideration in terms of the difference between the useful life of FGD system and associated system and the term of Procurers PPA/PTC PPA.

g) The instant Petition has been filed without seeking recommendations of CEA and approval, which is inconsistent with established industry practice.

h) The Petitioner has initiated an ICB for installation of FGD system and De-NOx system by publishing notice for the same. However, details of the same have not been furnished with the instant Petition.

i) Claim of the Petitioner qua installation of FGD system (for abatement of SOx) and Low NOx Burner with Secondary Over fire Air (for abatement of NOx) are entirely based on Feasibility Report of M/s Save Urja, which was issued considering emission level, which do not seem to be accurate. Further, since, CEA in its report has not recommended for low NOx burners, the same ought not to be allowed at present.

j) Issue with respect to the revised emission norms pertaining to permissible limit for levels of Nitrogen Oxide is pending adjudication before the Hon'ble Supreme Court, which may require a revision from the existing limit of 300mg/Nm³ to 450mg/Nm³ and the revised limit i.e., 450mg/Nm³ may be achievable by combustion modification.

k) Obligation to install FGD system always existed on the Petitioner in terms of the environmental clearance dated 28.5.2010 issued well before the effective date under the Procurers PPA. Therefore, MoEF&CC Notification mandating installation of FGD system cannot be considered as a Change in Law event as the Environmental Clearance (EC) always envisaged and mandated the Petitioner to keep space for installation of FGD system and also to earmark funds towards installation of FGD system, which might be required to be installed at a later stage. In this regard, reliance has been placed on the judgment of APTEL in Appeal No. 105 of 2011 in the case of JSW Energy Limited v. Maharashtra State Electricity Distribution Company Limited and Anr. ('JSW case')

l) 2% increase in auxiliary power consumption on account of installation of FGD system is contrary to CEA's recommendation of 1%.

m) The prayers in the Petition for in-principle approval of additional capital expenditure towards installation and operation of ECS i.e., Wet Limestone based FGD system and DeNOx system have been rendered infructuous since:

(i) CEA has already accorded its advice along with cost estimate at Rs. 0.37 crore/MW for installation of FGD system at MB Power's Project.

(ii) In absence of a provisional approval of the costs or in-principle approval, the Petitioner has already proceeded to issue work order and purchase order to Apollo International Limited on 14.6.2021 during the pendency of the present Petition and advance payments have also been made meaning that funds have been arranged.

(iii) Initial premise set up by the Petitioner for want of in-principle approval has been wiped out and evidently sufficient regulatory certainty has been achieved.

(iv) The Commission in its order dated 13.8.2021 read with corrigendum dated 11.11.2021 in 06/SM/2021 (Suo-motu Order) has prescribed mechanism to determine the compensation on account of installation of ECS/FGD system based on principles of economic

restitution. Hence, the Commission has already ensured regulatory certainty of FGD cost by issuing the order dated 13.08.2021.

(v) Suo-motu Order dated 13.8.2021 does not permit for provisional or in-principle approval of approximate base costs.

(vi) Ministry of Power, Government of India has notified the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (hereinafter referred to as 'the Change in Law Rules') prescribing a mechanism for treatment of Change in Law costs and the same does not permit and contemplate in-principle or provisional approval of cost. In case guidelines issued by the Central Government cover the situation, the Commission is bound by the same and cannot exercise its regulatory powers under Section 79(1)(b) of the Act contrary to the Change in Law Rules which covers the situation.

(vii) Prayers of the Petitioner for prescribing norms for computing the adjustment in tariff, additional O&M expenses, additional auxiliary power consumption and shutdown period on account of installation of FGD system have become infructuous in light of suo-motu order dated 13.8.2021 and CEA's letter dated 5.3.2020.

n) The Petitioner is supplying power to the distribution licensees of Madhya Pradesh through Madhya Pradesh Power Management Company Limited (MPPMCL) under long-term Power Purchase Agreements dated 5.1.2011 and 4.5.2011. Hence, MPPMCL/MP Discoms qualifies as necessary party to the present proceedings. However, MPPMCL/MP Discoms have not been impleaded as parties to the present Petition. Thus, there is non-joinder of necessary party.

Rejoinder of the Petitioner

11. The Petitioner has filed its rejoinders dated 1.8.2020 and 7.2.2022 in respect of the replies of the Respondent, UPPCL and has submitted as under:

a) Completion of competitive bidding is not a pre-requisite for grant of in-principle approval of additional capital expenditure to be incurred by the generating company on account of installation of ECS. Further, CEA's directions referred by UPPCL have been issued four months after filing of the present Petition. Notwithstanding, the Petitioner has already concluded the process of ICB for procurement and installation of FGD system in line with the directions of the Commission and CEA and has accordingly discovered the base cost of FGD system as Rs. 648.20 crore. Accordingly, the present Petition has been filed seeking in-principle approval of such additional Capex and Opex to obtain/deploy debt finance for procuring and installing FGD system in the Project. Installation of such FGD system would require substantial Capex investment which requires additional funding from lenders/banks.

b) In the current financial health of the sector, lenders/banks are reluctant to provide funding to generating companies for compliance of MoEF&CC Notification without a Change in Law declaration and in-principle approval of the associated cost of ECS by the Appropriate Commission. In this regard, reliance has been placed on the Commission's order dated 23.4.2020 in Sasan Power Limited v. MPPMCL & Ors.

c) The Commission through the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2019 ('Tariff Regulations 2019') has allowed generating companies to file Petition for in-principle approval of additional Capex to be incurred on account of implementation of Revised Emission Norms.

d) UPPCL's contention that MB Power's Environment Clearance dated 28.5.2010 (EC) (issued well before the cut-of-date i.e., 17.9.2012) envisaged and mandated MB Power to provide provisions for installation of FGD system for future use and earmark funds for FGD have been specifically rejected by APTEL in its order dated 28.8.2020 passed in Appeal No. 21 of 2019 titled TSPL. v. PSERC & Anr (TSPL FGD Judgment). APTEL in its judgment in the case of TSPL after interpreting an identical clause qua provision for FGD and

earmarking of funds in TSPL's Environment Clearance held that a standard clause was introduced in the ECs for many of the thermal power projects which did not contemplate or envisage installation of FGD and earmarking funds for the same.

e) EC merely required MB Power to make provision/space for installing FGD system in future, and for earmarking funds for environmental protection measures specified in the EC. As regards the funds for environmental protection measures, the provision did not refer to installation of FGD system.

f) It was only by virtue of the CPCB letter dated 11.12.2017 issued pursuant to MoEF&CC Notification dated 7.12.2015 that FGD system installation was 'stipulated' as a requirement for the first time. MB Power could not have anticipated in 2010 the mandatory requirement and specifications of FGD system which were notified in December 2015 and December 2017.

g) The Hon'ble Supreme Court in the case of *Energy Watchdog vs. Central Electricity Regulatory Commission and Ors* (2017) 14 SCC 80] (Energy Watchdog Judgment) held that reduction in allocated quantity of coal was imposed after the bid cut-off date culminating in revised Policy. Therefore, the Change in Law modified the 2007 Policy. The present case is a similar one, where only space/provision for installation of FGD system in future was contemplated in the EC granted to MB Power in 2010. The specifications of the FGD linked to the revised emission norms were established in terms of the MoEF&CC Notification issued 5 years later in 2015. Hence, Change in Law took place in 2015 and relief for the same ought to be granted.

h) UPPCL's reliance on judgment of APTEL in the case of JSW case is wholly erroneous since the facts in the present case are distinct from those in JSW case. APTEL in TSPL's Judgment taking note of the factual differences and the conditional nature of JSW's EC has held that the decision in JSW's case is not applicable to other Thermal Power Projects with standard clause in their ECs. APTEL held that the conditions imposed in JSW's EC were imposed for the power projects located in the States of Assam and Chittinad only.

i) MB Power claim qua installation of ECS including FGD system is based on the statutory directions issued by CPCB and CEA and not on the Feasibility Report prepared by M/s Save Urja.

j) The Petitioner is claiming compensation from UPPCL corresponding to its contracted capacity of 361 MW (net) or 386.1 MW (gross), which translates into 32.175% of the Project capacity. The Commission in its order dated 3.6.2019 passed in Petition No. 156/MP/2018 and order dated 18.01.2019 passed in Petition No. 224/MP/2018 (between same parties) has settled the issue to hold that UPPCL/UP Discoms are only liable to compensate MB Power in proportion to their share in the contracted capacity under the PPAs. Hence, the compensation sought from UPPCL qua the Change in Law event is limited to its contracted capacity in accordance with the Clause 5.2.1 of the Procurers PPA.

k) Funds required for procurement and installation of FGD system is substantially high, which cannot be arranged by the Petitioner from its internal resources and hence debt-funding by the banks/lenders is essential for installation of FGD system. In absence of in-principle regulatory approval of the associated cost of FGD system, the banks/lenders have expressed increased reservation for debt-funding towards implementation of the FGD system in the Petitioner's Project.

l) For timely commissioning of FGD system, although advance payments have been released by the Petitioner to Apollo International from its internal resources, however, further implementation of FGD system would necessitate debt funding by the banks/ lenders. Hence, in-principle approval of the cost of FGD system is utmost critical and urgently required for arranging further funds for implementation of FGD system.

m) CEA by its letter dated 5.3.2020 has provided its recommendation on the indicative base cost estimation for installation of FGD system at MB Power's Project. The recommendation provided by CEA is only an estimate and not based on actual parameters. CEA in its letter dated 5.3.2020 has stated that

actual cost of retrofitting FGD system for MB Power needs to be discovered through open competitive bidding.

n) This Commission's Suo-moto order dated 13.8.2021 is a generic order prescribing generic norms for determination of Change in Law compensation amount. The said order comes into play only when MB Power has actually incurred FGD cost and not at present when MB Power has to arrange the requisite debt funds which require a prior in-principle approval of cost of FGD system from the Commission as also noted in the above referred order dated 23.4.2020 in Petition No. 446/MP/2019 in the case of Sasan Power Limited v. MPPMCL & Ors.

o) Suo-moto order dated 13.8.2021 pertains to determination of compensation cannot be equated with grant of in-principle approval of FGD system cost which is plant specific and required prior to incurring the cost.

p) The Petitioner had filed Petition No. 156/MP/2018 before this Commission seeking compensation for various Change in Law events affecting supply of power (during the operation period) from the Project to UPPCL under PPA dated 18.1.2014. MPPMCL was not a party in Petition No.156/MP/2018, while UPPCL was the lead Respondent in the said Petition. In 156/MP/2018, MB Power had also claimed MoEF&CC Notification dated 7.12.2015 mandating compliance of revised emission norms pertaining to SOx and NOx as an event of Change in Law under the said PPA dated 18.1.2014. Petition No. 156/MP/2018 was filed in terms of provisions of UP-PPA only and accordingly, no relief was sought under the long-term PPA dated 05.01.2011 executed under Section 62 of the Act between MB Power and MPPMCL/distribution licensees of Madhya Pradesh.

q) The present Petition has been filed for a Change in Law event specific to a particular PPA i.e., UP-PPA only which in no way affects the performance of another PPA i.e., MP-PPA and/or the beneficiaries under MP-PPA (i.e., MPPMCL). Therefore, MPPMCL does not qualify as a necessary or a proper

party necessitating impleadment at this belated stage, especially when MPPMCL was not even a party in the earlier proceeding viz. Petition No. 156/MP/2018 (where this Commission had decided MoEF&CC Notification as a Change in Law event for MB Power under Article 10 of the UP-PPA).

r) UPPCL being the lead Respondent in Petition No. 156/MP/2018, neither sought impleadment of MPPMCL nor objected to MPPMCL not being made a party in such proceedings.

s) Even in other proceedings initiated by MB Power before this Commission, namely, Petition No. 224/MP/2018 and Petition No. 289/MP/2018, UPPCL has never raised such issues qua impleadment of MPPMCL on grounds that MB Power is also supplying power to MPPMCL under long-term PPAs from the same Project.

Hearing dated 9.2.2022

12. The matter was heard on 9.2.2022 through video conferencing. During the course of hearing, learned counsel for the Respondent, UPPCL made detailed submissions in the matter. Learned counsel, *inter alia*, submitted the following:

(a) The Petitioner through its affidavit filed on 17.9.2021 has submitted that pursuant to re-tendering, the base cost discovered for implementation of FGD system is Rs. 648.20 crore, which amounts to Rs.0.54 crore/MW. The said cost is higher than the cost recommended by CEA (i.e. Rs.0.37 crore/MW) and the cost discovered by the other generators. Reliance was placed on a comparative statement exhibiting the base cost discovered and considered by the Commission in various orders.

(b) The Petitioner has not filed the copy of Notice Inviting Tender (NIT) and other relevant documents to indicate whether such documents provided any benchmark price or floor price.

(c) The basis and justifications for seeking in-principle approval of total capital expenditure towards installation of ECS such as the regulatory certainty qua

treatment of costs/charges, methodology for arriving at compensation to mitigate the impact of Change in Law, etc., have now been rendered infructuous in view of the suo-motu order dated 13.8.2021 read with corrigendum dated 11.11.2021 in Petition No. 6/SM/2021.

(d) In the aforesaid suo-motu order, the Commission has already provided the mechanism/ methodology to determine compensation on account of installation of ECS keeping in mind the principle of economic restitution, which gets triggered only once the capital cost of ECS is determined. Accordingly, in-principle approval or provisional approval of the cost is no longer required.

(e) The Change in Law Rules notified by the Ministry of Power, Government of India on 22.10.2021 prescribe a mechanism for treatment of cost of Change in Law and do not permit or contemplate an in-principle or provisional approval. The Change in Law Rules clearly provide that the actual impact of the Change in Law event is required to be placed before the Commission.

(f) Apart from the Respondents, the Petitioner is supplying power to M. P. Power Management Company Limited, distribution companies of Madhya Pradesh and Government of Madhya Pradesh under long-term PPAs and these are necessary parties in the present petition. Non-joinder of the same is fatal to the present proceedings.

(g) Order 1 Rule 9 of the Code of Civil Procedure, 1908 ('CPC') provides that no suit shall be defeated by the reason of misjoinder or non-joinder of parties. However, proviso clarifies that nothing in Order I Rule 9 of CPC shall apply to a 'necessary party'. Therefore, it should be ensured that necessary party is before the Court otherwise the proceedings will have to fail. Reliance was placed on the decision of Hon'ble Supreme Court in the case of Chief Conservator of Forest v. Collector, [(2003) 3 SCC 472].

(h) Prayer for grant of an in-principle or provisional approval has been sought against the total estimated capital expenditure which corresponds to the entire 1200 MW of the project and not for only 32.175% (i.e. capacity allocated to

Respondents) of total costs. Hence, MPPMCL, MP Discoms and Government of Madhya Pradesh are necessary party to the present proceedings and the prayers sought by the Petitioner cannot be adjudicated in their absence.

(i) Submissions of the Petitioner that the Respondent having not raised similar objections in the earlier proceedings in Petition No. 156/MP/2018 is untenable as prayers sought therein and in the present case are very distinct in nature. Also, the various decisions relied upon by the Petitioner in this regard are distinguishable.

13. *In rebuttal*, learned counsel for the Petitioner made detailed submissions refuting the contentions made by the learned counsel for the Respondent, UPPCL. Learned counsel for the Petitioner, *inter alia*, submitted the following:

(a) The Petitioner's prayer for in-principle approval has not been rendered infructuous. The in-principle approval of the cost to be incurred by the Petitioner on account of procurement and installation of FGD system is critical and necessary to provide required comfort to the bankers/ lenders for debt funding towards installation of capital-intensive FGD system. This position has already been noted and upheld by the APTEL, this Commission and the Ministry of Power. Reliance was placed on the decision of APTEL dated 28.8.2020 in Appeal No. 21 of 2019 (TSPL v. PSERC and Anr.) and the order of the Commission dated 23.4.2020 in Petition No. 446/MP/2019 (Sasan Power Ltd. v. MPPMCL and Ors.).

(b) Funds required for procurement and installation of FGD system is substantially high, which cannot be arranged by the Petitioner from its internal resources and, hence, debt-funding by the banks/ lenders is essential. If debt funds are not sanctioned at the earliest, the entire work pertaining to procurement and installation of FGD system will be halted resulting in violation of the phase-wise accelerated timeline of December 2024 given to the Petitioner for installation of FGD system. Thus, prayer of the Petitioner for grant of in-principle approval of FGD system cost has not been rendered infructuous.

(c) The contentions of UPPCL are self-contradictory. At one hand, UPPCL vide its reply dated 16.7.2020 stated that the prayer for in-principle approval of FGD cost is premature since the Petitioner has approached the Commission without completing the competitive bid process for discovering the actual cost and now that the Petitioner has discovered the actual base cost for installation of FGD system through competitive bid process, UPPCL is contending that such prayer has been rendered infructuous. The Hon'ble Supreme Court in Suzuki Parasrampuriah Suitings (P) Ltd v. Official Liquidator, [(2018) 10 SCC 707] has held that taking inconsistent stand by a party makes its conduct far from satisfactory.

(d) CEA in its letter dated 5.3.2020 has stated that actual cost of retrofitting FGD system for the Petitioner is required to be discovered through competitive bidding process. Pursuant to CEA's directions, the Petitioner has conducted the competitive bidding process and discovered the actual base cost of Rs. 648.20 crore for procurement and installation of FGD system.

(e) Suo-motu order dated 13.8.2021 in Petition No 6/SM/2021 is a generic order prescribing generic norms for determination of Change in Law compensation. The said order comes into play only when the Petitioner has actually incurred FGD cost and not at the present when it has to arrange the requisite debt funds which requires a prior in-principle approval of FGD cost from the Commission.

(f) The Change in Law Rules are not applicable to the present case as they do not deal with the grant of in-principle approval of the cost of FGD system as sought in the present Petition. Further, the Petitioner in its Note for Arguments dated 19.1.2022 has already made detailed legal submissions and reasons justifying that the Change in Law Rules are not applicable. The present Petition is limited to in-principle approval of base cost of the FGD system.

(g) The Commission in various orders has declared MoEF&CC Notification dated 7.12.2015 as Change in Law and has granted in-principle approval of the associated cost to various generating companies therein. In many of such cases, UPPCL was also party to the proceedings and has not challenged such orders. Thus, it is barred from raising pleas which have been rejected by this

Commission. APTEL vide its judgment dated 12.8.2021 in Appeal No. 421 of 2018 (APMuL v. Haryana Utilities) has clearly held that the distribution licensees being a public utility cannot adopt a different approach/ yardstick but should have same approach towards all the parties.

(h) MPPMCL/ MP Discoms are not the necessary party to the present proceedings.

(i) The present Petition has been filed in terms of directions and liberty granted by the Commission vide order dated 3.6.2019 in Petition No. 156/MP/2018, wherein MPPMCL was not a party to the Petition. Also, the purpose of the present Petition is limited only to claim relief from UPPCL corresponding to its contracted capacity of 361 MW (net) (i.e. 32.175% of Project Capacity) in accordance with the applicable Change in Law provisions under Article 10 of UP-PPA. Even in the other proceedings initiated by the Petitioner before this Commission vide Petition No. 224/MP/2018 and Petition No. 289/MP/2018 also, UPPCL did not raise such issues qua impleadment of MPPMCL as party to the Petition.

(j) UP-PPA dated 18.1.2014 has been executed pursuant to competitive bidding process under provisions of Section 63 of the Electricity Act, 2003 ('the Act') whereas, PPAs with MPPMCL/MP Discoms have been executed under Section 62 of the Act where tariff determination is essentially done on cost plus basis in accordance with prevailing Tariff Regulations. The provisions of such PPA are significantly different with regard to aspects like tariff determination, computation of compensation/ supplementary tariff on account of Change in Law, etc. and as such proceedings under PPAs in terms of Section 62 and Section 63 of the Act cannot be at the same footing. In this regard, reliance was placed on the decision of APTEL dated 20.12.2019 in Appeal No. 54 of 2019 (GRIDCO Ltd. v. GMR Kamalanga Energy Ltd. and Ors.) wherein APTEL has categorically held that since proceedings under Section 62 and Section 63 of the Act are entirely different, distribution companies under Section 62 PPAs would not qualify as a necessary party in Change in Law Petitions filed by the generating company under Section 63 PPAs entered with other distribution companies.

Analysis and Decision

14. We have considered the submissions of the Petitioner and the Respondent, UPPCL and perused documents available on record.

15. The Petitioner had approached the Commission through Petition No. 156/MP/2018, *inter alia*, seeking additional capital expenditure on account of amendment in environmental norms. The Petitioner had submitted that MoEF&CC vide its Gazette Notification dated 7.12.2015 has amended the Environment (Protection) Rules, 1986 thereby imposing new condition and/or making the existing environmental norms more stringent related to water consumption and emission standards (Particulate Matter, Sulphur Dioxide, Oxides of Nitrogen and Mercury) by Thermal Power Plants. The Petitioner had submitted that compliance with these newly prescribed environment norms would require substantial additional capital expenditure ("CAPEX") followed by recurring operational expenses ("OPEX") and would also result in deterioration of operating parameters like Gross SHR and Auxiliary Energy Consumption, etc., consequently resulting in a considerable increase in cost of power supplied to UP Discoms under PPA. The Commission, after considering the submissions of the Petitioner and the Respondents, UP Discoms, by order dated 3.6.2019, held that the event of 'additional capital expenditure on account of amendment in Environment Norms' is a Change in Law event as decided by this Commission in CGPL case. Accordingly, the Commission directed the Petitioner to implement the revised emission norms in consultation with CEA and approach this Commission for determination of increase in cost or/and revenue expenditure on account of implementation of revised norms in accordance with the guidelines to be issued by CEA and the mode of recovery of the same

through monthly tariff. Relevant portion of the order dated 3.6.2019 in Petition No. 156/MP/2018 is extracted as under:

“102. We have considered the submissions of the Petitioner. The Commission in its order dated 17.9.2018 in Petition No. 77/MP/2017 has dealt with the issue of ‘Additional capital expenditure on account of amendment in Environment Norms’. The summary of the Commission’s decisions in the above order dated 17.9.2018 is extracted as under:

“49. Summary of our decisions in this order are as under:

(a) MoEFCC Notifications, 2015 prescribing the revised environmental norms in respect of thermal Power plants which has been issued after the cut-off date of Mundra UMPP are in the nature of Change in Law in terms of the PPA dated 22.4.2007 and the MoP directions issued under Section 107 of the Act.

(b) The Petitioner has given notice regarding Change in Law arising out of MoEFCC Notification in terms of the PPA.

(c) The Petitioner is required to take steps to implement revised norms in respect of Sulphur Dioxide, Nitrogen Oxide and water consumption. The Petitioner has taken up the matter with MoEFCC for exemption from implementing the norms for water consumption and therefore, the implementation of the norms of water consumption shall be dependent on the decision of MoEFCC in this regard.

(d) Mundra UMPP meets the norms prescribed in MoEFCC Notification, 2015 with regard to particulate matters and mercury and accordingly, the Petitioner has not claimed the relief under Change in Law.

(e) The Commission has directed CEA vide its order dated 22.7.2018 in Petition No. 98/MP/2017 to prepare guidelines specifying the suitable technology for each plant and operational parameters such as auxiliary consumption, Station Heat Rate, O&M expenses, norms of consumption of water, lime stones etc. for implementation of revised environmental norms. The Petitioner shall implement the revised norms as per the MoEFCC Notification, 2015 in consultation with CEA.

(f) There is no provision for in-principle approval in the PPA. However, the Commission has decided that MoEFCC Notification, 2015 is in the nature of Change in Law. Accordingly, the Petitioner shall approach the Commission for determination of increase in cost or/and revenue expenditure on account of implementation of revised norms in accordance with the Guidelines to be issued by CEA and the mode of recovery of the same through monthly tariff.”

103. The above decision is also applicable in the instant case. The event of ‘Additional capital expenditure on account of amendment in Environment Norms’ is a Change in law event as decided by this Commission in CGPL case. Accordingly, the Petitioner is directed to implement the revised norms in consultation with CEA and approach this Commission for determination of increase in cost or/and revenue expenditure on account of implementation of revised norms in accordance with the guidelines to be issued by CEA and

the mode of recovery of the same through monthly tariff.”

16. In terms of the liberty granted by the Commission in the aforesaid order, the Petitioner has filed the present Petition seeking in-principle approval of capital cost and operational cost to be incurred by the Petitioner for installing various ECS in compliance of the revised environmental norms prescribed in the MoEF&CC Notification dated 7.12.2015.

17. However, as already noted above, the Petitioner vide affidavit dated 7.2.2022 has submitted that at this stage, it is only seeking in-principle approval of the base cost discovered through ICB for procurement and installation of FGD system and therefore, we will restrict the submissions of the parties and our observations/decisions only to the aforesaid prayer. For the rest of the prayers, as requested by the Petitioner, liberty is granted to the Petitioner to raise the same at the appropriate stage, which will be considered by the Commission in accordance with the law.

18. Thus, the only issue that arises for our consideration is as to whether provisional approval of capital expenditure can be granted to the Petitioner for incurring proposed expenditure towards installation of FGD system (i.e. base cost of the FGD system). However, prior to considering the aforesaid prayer of the Petitioner and the details/documents furnished in support thereof, it would be appropriate to deal with certain primary objections raised by the Respondent, UPPCL.

19. The Respondent, UPPCL has raised objections on the maintainability of the instant Petition for non-joinder of necessary party by the Petitioner. UPPCL has submitted that the Petitioner is also supplying power to the distribution licensees of

Madhya Pradesh through Madhya Pradesh Power Management Company Limited (MPPMCL) under long-term Power Purchase Agreements dated 5.1.2011 and 4.5.2011. Hence, MPPMCL/MP Discoms qualifies as necessary party to the present proceedings. However, MPPMCL/MP Discoms have not been impleaded as parties to the present Petition. Thus, there is non-joinder of necessary party. It is submitted that none of the reliefs sought by the Petitioner can be granted in absence of MPPMCL, MP Discoms and Government of MP as reliefs claimed by the Petitioner under the present Petition are with reference to the entire power station. It is also submitted that the similar objection was not raised in the Petition No. 156/MP/2018 as the prayers sought by the Petitioner therein and as sought in the present Petition are distinct. Reliance placed by the Petitioner on the judgment of APTEL dated 20.12.2019 in Appeal No. 54 of 2019 and order of this Commission dated 31.5.2017 in Petition No. 61/GT/2016 is misplaced as they are distinguishable.

20. *Per contra*, the Petitioner has submitted that the present Petition has been filed in terms of the direction and liberty granted by the Commission in order dated 3.6.2019 and in continuation of earlier proceedings i.e. Petition No. 156/MP/2018 wherein MPPMCL was not a party. Further, the present Petition has been filed for Change in Law event specific to a particular PPA i.e. UP-PPA only which is no way affecting the performance of another PPA i.e. MP-PPA and/or the beneficiaries under the MP-PPA i.e. MPPMCL/MP Discoms. Therefore, MPPMCL does not qualify as the necessary or proper party necessitating impleadment. UPPCL being lead Respondent in Petition No. 156/MP/2018 neither sought impleadment nor objected to MPPMCL not being made a party in such proceedings. It has been submitted by the Petitioner that UP-PPA dated 18.1.2014 has been executed pursuant to Section 63 of the Act where the tariff has been discovered through a

competitive bidding process, whereas MP-PPA has been executed pursuant to Section 62 of the Act wherein tariff determination is done on cost plus basis in accordance with the prevailing Tariff Regulations. The provisions of such Section 62 and Section 63 PPAs are significantly different with regard to aspects like tariff determination, computation of compensation/supplementary tariff on account of Change in Law and as such proceedings under Section 62 and Section 63 of the Act cannot be equated. Reliance has been placed on the judgment of APTEL dated 20.12.2019 in Appeal No. 54 of 2019 and order of this Commission dated 31.5.2017 in IA No. 18 of 2017 in Petition No. 61/GT/2016.

21. We have considered the submissions made by the Petitioner and Respondents on the issue of non-joinder of necessary party i.e., MPPMCL to the present Petition. We observe that the Petitioner had filed Petition No. 156/MP/2018 before the Commission seeking compensation for various Change in Law events affecting supply of power (during the operation period) from the Project to UPPCL under PPA dated 18.1.2014. However, MPPMCL was not a party in Petition No. 156/MP/2018, while UPPCL was the lead Respondent in the said Petition. In Petition No. 156/MP/2018, the Petitioner had also claimed MoEF&CC Notification dated 7.12.2015 as an event of Change in Law under the said PPA dated 18.1.2014. It is noticed that the Petition No. 156/MP/2018 was filed in terms of provisions of UP-PPA only and no relief was sought under the MP PPA dated 5.1.2011.

22. We take note that the generating companies who are in the process of implementation of FGD system for a specific thermal project having multiple PPAs with different beneficiaries, have filed separate Petitions before this Commission

seeking in-principle approval of cost to be incurred for implementation of FGD system being installed in the same Project, with each Petition specific to a PPA. Accordingly, this Commission has admitted each such Petition and has issued separate orders under each such Petition.

23. The instant Petition has been filed for seeking in-principle approval of capital cost and operational cost to be incurred by the Petitioner for installing various ECS in compliance of the revised environmental norms prescribed in the Notification dated 7.1.,29015 issued by Ministry of Environment, Forest and Climate Change specific to a particular PPA i.e., UP-PPA only. Therefore, we are of the view that there is no need to implead MPPMCL as a necessary or a proper party to the present Petition, especially when MPPMCL was not even a party in the earlier proceeding viz; Petition No. 156/MP/2018 (where this Commission had decided MoEF&CC's 2015 Notification as a Change in Law event).

24. The purpose of the present Petition is limited only to claim relief from UPPCL corresponding to UPPCL's contracted capacity of 361 MW (net) only (i.e., 32.175% of the Project Capacity) in accordance with the applicable Change in Law provisions under Article 10 of UP-PPA. Hence, UPPCL's objection on the maintainability of the instant Petition is not sustainable. We accordingly, decide that MPPMCL does not qualify as a necessary or a proper party to the present Petition and the instant Petition is maintainable.

25. Further, UPPCL has contended that the MoEF&CC Notification dated 7.12.2015 which has mandated the installation of FGD system for the MB Power's Project cannot be considered as Change in Law event as EC to the Project dated 28.5.2010 always envisaged the Petitioner to keep space for installation of FGD and

also to earmark the funds towards installation of FGD system, which might be required to be installed at the later stage. To buttress the aforesaid submission, UPPCL has placed the reliance on the judgment of APTEL dated 21.5.2013 in Appeal No. 105 of 2013 in the matter of JSW Energy Limited v. Maharashtra State Electricity Distribution Co. Ltd. and Anr.

26. *Per contra*, the Petitioner has submitted that the aforesaid contentions of UPPCL have been specifically rejected by the APTEL in its judgment dated 28.8.2020 in Appeal No. 21 of 2019 (TSPL v. PSERC and Anr.) wherein APTEL after interpreting an identical clause qua provision for FGD system and earmarking of funds in TSPL's EC held that a standard clause was introduced in the ECs for many of the thermal power projects which did not contemplate or envisage installation of FGD system and earmarking funds for the same. The installation of FGD system and earmarking of funds for FGD system was neither mandated nor envisaged in the EC issued to the Petitioner. The EC merely required the Petitioner to make provision/space for installing FGD system in future and for earmarking funds for environment protection measures as specified in the EC. The contentions similar to the contentions raised by UPPCL have already been considered and rejected by the Commission in similar matters and the reliance was placed on the order dated 28.3.2018 in Petition No. 104/MP/2017 (Adani Power Ltd. v. UHBVNL and Anr.) and order dated 17.9.2018 in Petition No. 77/MP/2016 in the case of CGPL v. GUVNL and Ors. (CGPL case). It has been submitted by the Petitioner that UPPCL's reliance on the JSW case is erroneous since the facts in the present case are distinct from those in JSW case. The initial EC issued to JSW was conditional subject to the additional safeguard measures and a detailed study was to be conducted for assessing the impact on alphonso mango and marine fisheries.

Such additional condition does not exist in the EC of the Petitioner.

27. At the outset, we observe that the Commission in its order dated 3.6.2019 in Petition No. 156/MP/2018 (filed by MB Power) has already dealt with the issue of MoEF&CC Notification dated 17.12.2015 as an event of Change in Law for the Petitioner in terms of the Procurers PPA dated 18.1.2014 and has held that the event of additional capital expenditure towards installation of ECS on account of amendment in environment norms is a Change in Law event.

28. Thus, the MoEF&CC Notification dated 7.12.2015 mandating the Petitioner to install FGD system in its thermal project and the consequent additional capital expenditure on account of implementation of the Revised Emission Norms and its associated operational cost constitute a Change in Law event for the Petitioner in terms of the Procurers PPA dated 18.1.2014. Accordingly, the Petitioner is entitled to compensation on account of the same in terms of Article 10 of the PPA.

29. It is noticed that UP Discoms/UPPCL were party to the proceedings in Petition No. 156/MP/2018 before this Commission wherein MoEF&CC Notification dated 07.12.2015 was allowed as an event of Change in Law for the Petitioner. We understand that UPPCL or any other respondents have not challenged the Order dated 3.6.2019 passed by the Commission in Petition No. 156/MP/2018. Hence, the said Order with respect to MoEF&CC Notification dated 7.12.2015 being an event of Change in Law for the Petitioner has attained finality. In any case, UPPCL is barred from raising an issue in this proceeding which has already been decided by this Commission in its previous order.

30. The Commission after passing the order dated 3.6.2019 in Petition No. 156/MP/2018 has become functus officio and cannot revisit the issues already

decided in the said order, which has attained finality. Hence, we are not inclined to deal with the merits of the contentions raised by UP Discoms/UPPCL on the issue of MoEF&CC Notification dated 7.12.2015 qualifying as an event of Change in Law for the Petitioner since the same stands decided in terms of our previous order dated 3.6.2019, which still holds the field.

31. Having dealt with the above primary issues, we now proceed to consider as to whether in-principle approval of capital expenditure can be granted to the Petitioner for incurring proposed expenditure towards installation of FGD system.

32. The Petitioner has submitted that in-principle approval of the cost to be incurred by the Petitioner on account of procurement and installation of the FGD system in the Project is critical and necessary to provide the required comfort to the banks/lenders for the debt-funding towards installation of capital intensive FGD system. The Petitioner has submitted that in absence of a prior in-principle regulatory approval of the associated cost of FGD system would have serious repercussions in achieving the financial closure and subsequent implementation of the FGD system by the Petitioner within the permissible timelines. It is submitted that the aforesaid position has already been noted and upheld by the APTEL in judgment dated 28.8.2020 in Appeal No. 21 of 2019 (TSPL v. PSERC and Ors.), Commission's order dated 23.4.2020 in Petition No. 446/MP/2019 (Sasan Power Limited v. MPPMCL and Ors.) and the Ministry of Power in its office memorandum dated 20.4.2020.

33. We have considered the submissions made by the Petitioner. It is observed that the issue of allowing provisional approval for incurring the capital expenditure towards installation of ECS on the provisional basis to comply with the revised

emission norms specified vide MoEF&CC Notification of 2015 is no longer *res-integra*. The Commission in its various orders has accorded approval to the generating stations for incurring the capital expenditure towards installation of ECS on provisional basis. Moreover, the Commission has also recognized the need of comforting the lenders financing the generating station for undertaking capex for installation of FGD/ ECS.

34. Ministry of Power, Government of India has recognized the problems being faced by generating companies on account of financial institutions seeking assurance of fund flow after installation of FGD system. Ministry of Power, Government of India vide its letter dated 21.1.2020, addressed to Secretary to Forum of Regulators (who is also Secretary to the Commission), stated as under:

"2. A copy of the minutes of the meeting held in Ministry of Power on 21.10.2019 with Banks/Financial Institutions regarding issues related to financing of FGDs is enclosed wherein as per Para 4.2 inter alia mentioned as follows:

"IPPs requested that provisional tariff on account of FGD may be allowed as Banks are not willing to finance unless there is clear cut CERC orders on additional tariff, which could be possible only when FGD is commissioned. It was requested that based on the estimation of cost by CEA, CERC may fix provisional tariff after allowing some discount (say 10%). Chairperson, CEA informed that they had drafted some norms on provisional tariff and it had been sent to CERC for consideration. Hon'ble Minister advised CEA to follow up with CERC and this issue may be taken up in the Forum of Regulators (FOR) meeting which could be convened at the earliest. The matter regarding fixation of provisional tariff on account of FGD installation may be discussed with CERC."

3. In this regard, CEA has informed that:

i. Financing of pollution control equipment is mainly an issue for the projects commissioned under section 63 of the Act.

ii. During discussion, CERC pointed out that a few generating companies, which have set up generating station under section 63 of the Act have filed petition for compensation due to change in law impacting revenue and cost during the operating period.

iii. CERC has already passed some orders in such petitions recommending requirement of installing additional equipment to meet revised environmental norms as change in law and giving liberty to the Petitioner to approach to the commission for determination of revised norms.

iv. CERC was of the opinion that normally such assurance from regulator should be sufficient for the lenders to fund additional capital expenditure required to meet revised environmental norms.

2. In view of the above, it is requested that the issue on 'provisional tariff' on account of installation of FGD, may be included as an Agenda for the next Forum of Regulators (FOR) meeting and the decision taken, therein, may be communicated to Ministry of Power, at the earliest."

35. Further, the Ministry of Power vide its letter dated 20.4.2020 addressed to the Secretary of the Commission, has stated as under:

"I am directed to refer to the meeting taken by Secretary (Power) through Video Conferencing on 09.04.2020 (copy of the meeting are enclosed as Annex-I) and this Ministry's letter of even number dated 21.01.2020 (copy enclosed as Annex-II) with regard to taking up the matter with Forum of Regulators on the above mentioned subject. It was observed that CERC was also contemplating to amend the Tariff Regulations 2019-24 to provide for norms for installation of FGDS for complying with the environmental operating norms as Change in Law.

2. In the above-mentioned meeting held on 09.04.2020, it was recommended that in view of the stipulated timelines decided by the Hon'ble Supreme Court for installation of FGDs, investment approval may be accorded by CERC at the earliest possible on applications of FGDS submitted by Gencos based on the CEA's benchmark cost and indicative technologies so as to facilitate funding of banks/ FIs. It was also felt that upon completion of the installation of FGD or a month before the completion of installation, the applications for fixation/revision of tariff may be filed and CERC would, as far as possible, dispose them in a time frame of 3 months so that the Gencos are not cash strapped and the lenders feel assured. Similar process may also be taken up by CERC with SERCs.

3. Accordingly, CERC is requested to take necessary action and devise a mechanism vide which applications of Gencos for installation of FGD as per norms of CEA, gets decided by the Appropriate Commission within a period of three months for Investment approval. The same is expected to facilitate assurance for lenders on their lending to Gencos for installation of FGD.

4. This issue with the approval of Hon'ble Minister of State (IC) Power and NRE."

36. The Commission vide order dated 23.4.2020 in Petition No. 446/MP/2019 [Sasan Power Limited v. MPPMCL & Ors.] has also taken note of the difficulty expressed by the banks and lenders in funding for installation of FGD system in the absence of a prior regulatory approval of the resultant cost from the Appropriate Commission. Relevant extracts of order dated 23.4.2020 is as under:

“18..... The Petitioner has approached financial institutions for loans where the banks through IBA have expressed difficulty in funding in view of prevailing situation in the power sector. Similar is the case with PFC that has informed the Petitioner that it needs comfort in terms of approval of the Commission so that there are no problems in debt servicing of loans that may be availed by the Petitioner. Commission is also conscious of the fact that the installation of FGD system in thermal power stations is being monitored by the Hon’ble Supreme Court. Any further delay in securing loan from financial institutions is likely to further delay installation of FGD system.

...

40. We have approved provisional capital cost and other costs related to installation of FGD system that is likely to provide enough comfort to financial institutions. However, we recognise that certainty of stream of cash flow in form of tariff is likely to give further comfort to these financial institutions and that it is also equally important for the procurers as well as sellers to know the tariff implications on account of installation of FGD system.”

37. Similar provisional approval of the base cost for installation of ECS has been considered and given by the Commission in a number of subsequent cases.

38. Further, APTEL in its judgment dated 28.8.2020 passed in Appeal No. 21 of 2019 in the matter of TSPL v. PSERC & Anr. has held that debt funds for installation of FGD system will not be sanctioned by lenders in the absence of regulatory certainty by the Appropriate Commission. Relevant portion of said judgment dated 28.8.2020 is extracted as under:

“139. It is also seen additional funds including debt funds, which will not be sanctioned by lenders (as amount involved is significantly high) in the absence of regulatory certainty for the methodology/mechanism of arriving at compensation to mitigate the impact of Change in Law event.”

39. In the above background, the Petitioner has sought in-principle approval of the base cost towards procurement and installation of FGD system in the Project.

40. However, the Respondent, UPPCL has objected to grant of in-principle approval for cost incurred towards FGD system while contending that the Petitioner's prayer for in-principle approval of additional capital expenditure towards installation and operation of ECS i.e., Wet Limestone based FGD system has been rendered infructuous. UPPCL has submitted that one of the grounds for seeking in-principle approval of the cost had been the refusal by CEA to approve the technology or estimated cost. However, admittedly, CEA vide its letter dated 5.3.2020 has given its advice along with the cost estimate at Rs.0.37 crore/MW and thus, the above premise for seeking in-principle approval has been lost its relevance as on date. Moreover, even in the absence of provisional approval of the costs, the Petitioner has proceeded to issue work order and purchase order on 14.6.2021 and has made advance payment to Apollo International Limited, meaning that the Petitioner has already arranged the necessary funds.

41. *Per contra*, the Petitioner has submitted that for timely completion of FGD system, the Petitioner has made advance payment to Apollo International Limited from its internal resources. However, the funds required for procurement and installation of FGD system is substantially high, which cannot be arranged by the Petitioner from its internal resources and hence, debt financing by the banks/lenders is essential for which in-principle approval of the cost of FGD system

is urgent and utmost critical. The Petitioner has submitted that contention of UPPCL is self-contradictory as on one hand it has stated that the prayer of in-principle approval of cost of FGD system has been rendered infructuous in light of CEA's approval dated 5.3.2020 whereas on the other hand, vide its reply dated 16.7.2020, it has stated that the present Petition is pre-mature as the Petitioner approached the Commission without completing the competitive bid process for discovering the actual cost for FGD system as directed by CEA in its letter dated 5.3.2020. It has been further submitted that recommendation provided by CEA is only an estimate and CEA vide its letter dated 5.3.2020 has itself stated that the actual cost of retrofitting of FGD system needs to be discovered through open competitive bidding.

42. We have considered the submissions made by the parties. The Respondent, UPPCL has sought to contend that the prayer for seeking in-principle approval of the cost for FGD system has been rendered infructuous as one of the grounds for the said prayer was that CEA had not approved the technology or estimated cost for the Petitioner's Project, which has not been approved by CEA vide letter dated 5.3.2020. However, the contention is, in our view, not tenable. The underlying reason for consideration of the prayer for in-principle or provisional approval of base cost of FGD system to be incurred by the generating companies such as the Petitioner is to enable them to tie up the requisite funding including debt for implementation of FGD system and to provide comfort to the lenders. Mere indicative base cost estimation for installation of FGD system as conveyed by CEA does not provide any comfort to lenders without the necessary in-principle or provisional approval of the base cost of FGD system by the appropriate regulatory body, such as this Commission. Besides, CEA letter dated 5.3.2020 (as quoted in

the subsequent paragraphs) itself states that the actual cost of retrofitting of FGD for the Petitioner needs to be discovered through a process of open competitive bidding. Pursuant to the same, the Petitioner has carried out the bidding process and has discovered the actual base cost of Rs.648.20 crore for procurement and installation of FGD system, for which the Petitioner is required to arrange the necessary funding. Therefore, the contention of UPPCL that the prayer of the Petitioner seeking in-principle approval of cost for installation of FGD system has been rendered infructuous in view of the CEA's letter dated 5.3.2020 providing recommendation on the indicative base cost for installation of FGD system deserves to be rejected.

43. The Respondent, UPPCL has further submitted that other reasons for seeking in-principle approval of FGD system base cost such as the want of regulatory certainty qua treatment of costs & charge, methodology/mechanism of arriving at compensation to mitigate the impact of Change in Law which is critical for obtaining and deploying fund, to ensure that the project economics and time value of money is secured and the generating company is put into the same economic position, etc. have also been wiped out in view of the Commission's order dated 13.8.2021 in Suo-Motu Petition No. 6/SM/2021. The Commission vide aforesaid order has already provided a mechanism to determine compensation on account of installation of ECS by the generating companies in compliance with revised emission standards in respect of thermal generating station whose tariff is determined through competitive bidding under Section 63 of the Act. The said order already addresses all specific concerns of the Petitioner and as such does not provide for a grant of in-principle approval of base cost of FGD system as sought by the Petitioner. Accordingly, in-principle or provisional approval cannot be granted to

the Petitioner contrary to the mechanism contemplated under the Commission's order dated 13.8.2021 in Suo-Motu Petition No. 6/SM/2021.

44. *Per contra*, the Petitioner has submitted that order dated 13.8.2021 issued by the Commission is a generic order prescribing generic norms for determination of Change in Law compensation. The said order comes into play only when the Petitioner has actually incurred the cost for installation of FGD system and not at present when the Petitioner has to arrange the requisite debt which requires a prior in-principle approval of FGD cost from the Commission as noted by the Commission in its order dated 23.4.2020 in Petition No. 446/MP/2019. The said order does not even provide for provisional tariff/ in-principle approval of the base cost of FGD system.

45. We have considered the submissions made by the parties. Indisputably, the Commission vide its suo-motu order dated 13.8.2021 has specified the mechanism to determine the compensation on account of installation of ECS by the thermal generating stations in compliance of the revised emission standards notified by MoEF&CC vide 2015 Notification read with Notifications dated 19.10.2020 and 1.4.2021 in respect of the thermal generating stations whose tariff has been determined through competitive bidding under Section 63 of the Act. However, as clearly spelled out in the order and as also admitted by the Respondent itself, the compensation mechanism specified therein gets triggered once the capital cost of FGD system has already been incurred by a generating company and not at the stage where the Petitioner currently is which is at the stage of securing the required funding for installation of FGD system. In our view, the Respondent's contentions that the said order does not permit or contemplate in-principle or provisional

approval of costs for installation of ECS is misplaced. The said order does not restrain the generating station for seeking in-principle or provisional approval of base cost to be incurred towards installation of FGD system for the purpose of tying up the necessary funding from the lenders and financial institutions.

46. The Respondent UPPCL has further submitted that the Change in Law Rules as notified by the Ministry of Power, Government of India, prescribe a mechanism for treatment of Change in Law costs and same does not permit and contemplate in-principle approval of the FGD system cost. The formula stipulated under these Change in Law Rules clearly contemplates that the financial impact needs be crystallized for computation of the compensation amount. However, such a financial impact can only get crystallized once the Petitioner completes the installation of FGD system. It is further submitted that when the Change in Law Rules deal with 'Change in Law' in a certain manner and do not permit grant of in-principle approval of the cost of FGD system, the Commission cannot exercise its power to regulate under Section 79(1)(b) of the Act contrary to the said Rules.

47. *Per contra*, the Petitioner has submitted that the Change in Law Rules are not applicable to the present case. The Petitioner has submitted that the said Rules are not exhaustive and they do not deal with grant of in-principle approval of FGD cost as sought in the present Petition. It is submitted that as per the decision of Hon'ble Supreme Court in Energy Watchdog v. CERC, [(2017) 14 SCC 80], the regulatory powers under Section 79(1)(b) of the Act can be exercised even in situation where the Central Government existing rules and guidelines do not deal with a given situation. In the present case, admittedly, the Change in Law Rules do not deal with grant of in-principle approval of cost of FGD system and therefore, the

Commission can exercise its regulatory powers for granting in-principle approval of base cost of FGD system despite the notification of Change in Law Rules. It has been further submitted by the Petitioner that the Commission after having granted in-principle approval of FGD system costs to various generators like Sasan Power Limited v. MPPMCL & Ors and CGPL based on cost discovered through competitive bidding process is functus officio and cannot change its stand on the said issue in the subsequent proceedings like the present case. The reliance has been placed on the judgment of Hon'ble Supreme Court in the case of Dwarka Das v. State of MP, [(1993) 3 SCC 500] and SBI v. S. N Goyal, [(2008) 8 SCC 92].

48. We have considered the submissions made by the parties. As regards the applicability of the Change in Law Rules is concerned, it is pertinent to note that the Commission, in its various recent decisions, has already taken a considered view that the Change in Law Rules only provide for process and mechanism for timely recovery of Change in Law claims and compensation and are procedural law in nature [e.g. Order dated 6.12.2021 in Petition No. 228/MP/2020, order dated 19.1.2022 in Petition No. 700/MP/2020 and order dated 4.2.2022 in Petition Nos. 514/MP/2020 and 49/MP/2021 etc.]. However, pertinently the present Petition has not been filed seeking declaration or in-principle approval of Change in Law event or computation of financial impact or compensation on account of Change in Law event. In fact, the Commission vide order dated 3.6.2019 in Petition No. 156/MP/2018 has already considered the event of 'amendment in Environment Norms' as Change in Law event in respect of the Petitioner and directed the Petitioner to proceed with the implementation of the revised emission standards in consultation with the CEA. Pursuant to liberty granted by the Commission in its order dated 3.6.2019 in Petition No.156/MP/2018, the Petitioner through the present

Petition is only seeking in-principle approval of the additional capital expenditure to be incurred for meeting the revised emission norms notified by MoEF&CC Notification dated 7.12.2015, which would entail arranging substantial funds from the lenders. Such an provisional approval of the additional capital expenditure would facilitate the Petitioner to comply with MoEF&CC Notification and to implement the FGD system in its Project. Further, currently the Petitioner is not seeking any compensation for the impact of Change in Law and is only seeking approval of base cost towards installation of FGD system. Hence, we consider it appropriate to provisionally approve the base cost of FGD system at this juncture. Keeping in view the above observations, we now proceed to consider the prayer of the Petitioner for provisional approval of the base cost towards installation of FGD system.

49. It is noted that CEA vide letter dated 5.3.2020 has provided its recommendation and approved the technology and operational parameters regarding installation of Wet Limestone based FGD system at the Petitioner's Project. While recommending the indicative base cost for Wet Limestone based FGD system, CEA has stated that the actual cost of retrofitting and installing FGD system at the Petitioner's Project needs to be discovered through open competitive bidding. It is observed that CEA's indicative base cost does not include taxes, duties, soft costs including IDC, IEDC, miscellaneous financial costs, etc., opportunity cost and other costs for additional work specific to the Petitioner's Project. Relevant extracts from CEA's report as regards technology and cost aspects, are as under:

“Observation of CEA on installation of FGD to control SO₂ emission in 2X600 MW for Anuppur Thermal Power Plant-MBPL is as under:

1. MBPL may choose lime stone based FGD technology, as opted. However, final selection of feasible technology may be done considering "Techno-economic lifecycle cost analysis" of various SO₂ removal technologies.

2. The criteria for selecting optimum SO₂ removal technology and Cost has been published on CEA's website under UMPP division of Thermal Wing of CEA (<http://cea.nic.in/umpp.html-Norms>) for installation of Lime stone/Ammonia/Sea water base FGD. Accordingly, the indicative base cost estimation for installation of new wet lime stone based FGD at MBPL would be Rs. 0.37 Cr/MW. The actual cost of retrofitting of FGD for MBPL needs to be discovered through open competitive bidding in consultation with lead procurer. The lead procurer (to be invited by MBPL) may be involved in bidding process till final award of FGD contract.

In feasibility report MBPL has proposed some extra plant specific requirement (PILING WORK) for which an additional CAPEX of 0.037 CR/MW is proposed. MBPL may approach regulator, for these additional plant specific requirements and its implication on tariff.

3. As per data provided by MBPL the maximum sulphur content in the coal used in Anuppur TPS is 0.52%. Accordingly Anuppur TPS may limit SO₂ below environment norms with up to 0.52% Sulfur in coal.

4. The indicative Auxiliary power Consumption for all FGD technologies is also available in CEA's website under UMPP division of Thermal Wing of CEA. As MBPL has opted for wet lime stone FGD, the maximum additional auxiliary power Consumption (APC) for complete FGD facilities will be 1.0%.

5. While choosing Chimney options MBPL may see the feasibility and conduct lifecycle cost benefit analysis for constructing new wet Chimney or using the existing chimney.

6. MBPL may study "the cases of failure" of all systems including lining material used for corrosion protection for various sections of FGD system. The life cycle cost analysis for selection of corrosion protection lining may be done considering these failure studies for optimum selection.

7. The reagent source for FGD may be selected based on distance, purity and cost in reference to the life cycle running cost so that the tariff impact on consumers is at minimum."

50. Thus, it is clear that the cost recommended by CEA is "base cost" and only an indicative cost. The generating companies such as the Petitioner are required to discover the price through a transparent competitive bidding process. Therefore, treating the cost recommended by CEA as an indicative cost, the Commission needs to take a view on reasonableness of claimed costs based on whether the cost has been discovered through a transparent competitive bidding process.

51. The Petitioner vide its affidavit dated 17.9.2021 has placed on record the details pertaining to ICB carried out by the Petitioner for selecting the successful bidder for procurement and installation of FGD system in its Project. Along with the affidavit, the Petitioner has made available the copies of relevant documents such as tendering documents, tender notice, LOI and its acceptance by the bidder, purchase order and work order issued to the successful bidder.

52. With regard to bidding process, we observe as under from the submissions of the Petitioner:

a) Initially, the Petitioner published a Tender Notice on 7.12.2018 initiating ICB for procurement and installation of FGD system and pursuant thereto, M/s Zhejiang Feida Environmental Science & Technology Company Limited Ltd ('Zhejiang Feida') had emerged as the successful bidder with discovered base price of approximately Rs. 594 crore (excluding taxes & duties and other incidental expenses like IDC, IEDC and Finance Charges, etc). The Petitioner had issued Lol to Zhejiang Feida on 22.7.2020 and purchase order/work order on 20.8.2020.

b) However, due to outbreak of Covid-19 pandemic and its subsequent adverse impact on global supply chain and in light of Government of India directives dated 23.7.2020 and 28.7.2020 with respect to purchase preference in power sector to be given to local content, Zhejiang Feida was neither providing its acceptance to the purchase/work order nor submitting the advance bank guarantee.

c) Considering the non-responsiveness from this Chinese vendor, the Petitioner issued a Notice on 9.7.2021 revoking the purchase/work order dated 2.9.2020 and terminating the Lol dated 22.7.2020 issued to Zhejiang Feida.

d) Accordingly, the Petitioner carried out re-tendering and on 18.02.2021, the Petitioner published a Tender Notice in leading Hindi and English Newspapers qua ICB for procurement and installation of FGD system in its

Project. Pursuant thereto, technical and financial eligibility and qualification requirements were uploaded on the website of the Petitioner and interested bidders were asked to contact the Petitioner's officers via e-mail for obtaining the tender documents.

e) The Petitioner received request from 9 bidders for issuance of the tender documents. After review of their credentials, tender documents were issued to all 9 bidders.

f) In addition to the above and with a view to increase competition, the Petitioner issued tender documents to two domestic bidders having experience and credentials with respect to implementation of FGD system.

g) Pursuant to issuance of the tender documents, four bidders submitted their techno-commercial offers to the Petitioner by 30.4.2021.

h) After assessment and review of the techno-commercial offers received from the bidders and various rounds of discussions and negotiations, Apollo International Limited emerged as the L1 bidder.

i) On 28.5.2021, the Petitioner issued Lol to Apollo International Limited, which was accepted by it through its e-mail dated 7.6.2021.

j) On 14.6.2021, the Petitioner issued two separate orders i.e., purchase order for supply of goods and work order for supply of services to Apollo International Limited for design, engineering, supply, civil works, erection and testing and commissioning, etc. towards execution of FGD system in its Project. In terms of purchase order, Apollo International Limited will:

(i) engage GE Power India Limited as its technology provider and contractor for supply of main equipment i.e., absorber tower of FGD system; and

(ii) ensure that GE Power provides the necessary design and other engineering inputs for FGD system.

k) The base cost of FGD system discovered pursuant to ICB is as under:

Details	Base Cost (Excluding GST)
Purchase order for supply of goods	Rs. 346,60,00,000/-

Purchase order for supply of services	Rs. 301,60,00,000/-
Total	Rs. 648,20,00,000/-

53. The Respondent, UPPCL has submitted that the base cost discovered through a competitive bidding process (Rs.0.54 crore/MW) is higher than the CEA indicative cost of Rs.0.37 crore/MW. In this regard, the Petitioner has submitted that base cost recommended by CEA is only indicative in nature and CEA has stated that the actual base cost of the FGD system needs to be discovered through competitive bidding process. The Petitioner has further contended that actual base cost of the FGD system discovered through competitive bidding process being specific to the Petitioner's Project factors in the actual project requirements like project specific civil works, chimney & duct lining cost and piling works, etc., which could not have been included in the CEA indicative cost. Further, a significant time has elapsed since CEA has conveyed the indicative base price. In addition, the retendering process also took significant amount of time.

54. We observe that base cost of FGD system as recommended by CEA is only an indicative cost and while indicating the cost, CEA has stated that the actual cost of FGD needs to be discovered through a process of competitive bidding. We agree with submissions of the Petitioner that base cost of FGD system discovered through a competitive bidding process is specific to the Petitioner's Project keeping in view the actual Project requirements. We also note that a significant time has elapsed since CEA indicated the base price and the re-tendering process was beyond the reasonable control of the Petitioner.

55. The Commission has dealt with the issue of cost claimed by Petitioner

discovered through an open tendering process being higher than the CEA's indicative cost in earlier orders, including the combined order dated 20.09.2021 in Petition No. 94/MP/2019, Petition No. 459/MP/2019, Petition No. 460/MP/2019, Petition No. 461/MP/2019, Petition No. 462/MP/2019 and Petition No. 463/MP/2019. The relevant extracts of the order dated 20.9.2021 are as under:

“85. The Commission in order dated 23.4.2020 in Petition No. 446/MP/2019 and order dated 6.5.2020 in Petition No.209/MP/2019 has already observed that the hard cost recommended by CEA is indicative in nature and that it is not possible to indicate the exact cost that can be discovered through a competitive bidding process. In the instant cases, the cost claimed by the Petitioner is discovered through competitive bidding process and the same has been duly approved by the Board of Directors of the Petitioner. Taking into consideration that the per MW hard cost suggested for FGD system by CEA is indicative in nature; that the cost claimed by the Petitioner is discovered through a competitive bidding process; that the cost recommended by CEA is more than two-three years old; and that CEA has already recognised the need for revising the cost recommended by it earlier, we approve the hard cost claimed by the Petitioner as given in paragraph 70 above towards installation of WFGD system....”

56. The above findings are also applicable in the present case. The base cost stated by CEA is only an indicative cost and CEA itself has stated that the actual base cost of FGD system needs to be discovered through a competitive bidding process. In the present case, the base cost of FGD system has been discovered by the Petitioner through a competitive bidding process as Rs.648.20 crore (i.e.Rs.0.54 crore/MW).

57. Considering the fact that the base cost of Rs.648.20 crore for procurement and installation of wet limestone based FGD system has been discovered by the Petitioner based on open competitive bidding, the Commission accords provisional approval to the base/hard cost of Rs.648.20 crore for implementation of FGD system in the Petitioner's Project as per the bid finalized by the Petitioner. The Commission expects the Petitioner to exercise due diligence and utmost economy

in implementing the FGD system.

58. The Petitioner is granted liberty to approach this Commission with final actual costs after commissioning of the FGD system, which may be allowed after prudence check in accordance with law.

59. Petition No. 450/MP/2019 is disposed of in terms of above discussion and findings.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member

sd/-
(P.K. Pujari)
Chairperson