

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: - In the matter of Petition under Section 86 of the Electricity Act 2003 read with Regulation 8 and Regulation 31 of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020 seeking in-principle approval of the Additional Capital Expenditure to be incurred by MB Power (Madhya Pradesh) Limited for implementation of Flue-Gas Desulphurization System in compliance of the Revised Emission Standards prescribed by MoEFCC Notification dated 07.12.2015 under 'Change in Law' event in terms of Article 12 of the PPA dated 05.01.2011 and Regulation 3.1 (11) of Regulations, 2020.

ORDER

(Date of Order: 27th October' 2022)

M/s MB Power (Madhya Pradesh) Ltd.

239, Okhla Industrial estate, Phase-III, Okhla
New Delhi - 110020

- Petitioner

Versus

1. M.P. Power Management Company Ltd.

Block No. – 15, Shakti Bhawan,
Rampur, Jabalpur- 482008

2. M. P. Poorv Kshetra Vidyut Vitaran Co. Ltd.

Shakti Bhawan, Rampur, Jabalpur
Madhya Pradesh – 482008.

3. M. P. Madhya Kshetra Vidyut Vitaran Co. Ltd.

Bijli Nagar Colony, Nishtha Parisar,
Govindpura, Bhopal, M.P. – 462023

4. M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd.

G.P.H. Compound, Pologround,
Indore Madhya Pradesh.

- Respondents

Shri Amit Kapur, Advocate and Shri Abhishek Gupta appeared on behalf of the Petitioner.

Shri Alok Shankar, Advocate and Shri Nitin Khatri appeared on behalf of Respondent No. 1.

M/s MB Power (Madhya Pradesh) Limited has filed the subject Petition under Section 86 of the Electricity Act 2003 read with Regulation 8 and Regulation 31 of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020 (Tariff Regulations, 2020) seeking in-principle approval of the Additional Capital Expenditure to be incurred for

implementation of Flue-Gas Desulphurization System as a part of Emission Control Systems in compliance of the Revised Emission Standards prescribed by Ministry of Environment, Forest and Climate Change (MoEFCC) Notification dated 07.12.2015 on account of change in Law event in terms of Article 12 of the Power Purchase Agreement (PPA) dated 05.01.2011 and Regulation 3.1 (11) of Tariff Regulations, 2020. The said notification brought modifications in the existing norms related to air emission including oxides of Nitrogen (NO_x), Sulphur Dioxide (SO₂), Particulate Matters, Mercury and quantum of water use in thermal power stations.

2. The petitioner is a generating company under Section 2(28) of the Electricity Act, 2003 which has developed and operates a 1200 MW (2 x 600 MW) coal-based Thermal Power Project in District Anuppur in Madhya Pradesh. Unit No.1 and 2 of the Project achieved Commercial Operation (CoD) on 20.05.2015 and 07.04.2016, respectively.
3. Respondent No. 1 M.P. Power Management Company Limited (MPPMCL) is a Holding Company of three Distribution Licensees (Discoms) being Respondent Nos. 2 to 4 within the State of Madhya Pradesh. It has been authorized by the Discoms to undertake transaction of bulk sale and purchase of electricity on their behalf.
4. The petitioner entered into long term Power Purchase Agreement dated 05.01.2011 with MP Power Trading Company Limited [subsequently renamed as M.P. Power Management Company Limited] for supply of power 30% of the installed capacity of the Project for a period of 20 years at regulated tariff to be determined by this Commission. The petitioner entered another long-term Power Purchase Agreement dated 04.05.2011 with the Government of Madhya Pradesh for the supply of 5% of the net power generated from the Project at a price equivalent to Variable Charges/Cost only.
5. The petitioner submitted that it has also entered into a PPA for supply of power from its Project to Uttar Pradesh Discoms under Section-63 of the Electricity Act, 2003 ("UP PPA"). Supply of power from MB Power's Project under the said UP PPA is governed and regulated by CERC in terms of Section 79(1)(b) of the Electricity Act, 2003.
6. The Commission issued MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2020 on 20.02.2020, which were notified on 28.02.2020 in Madhya Pradesh Gazette. The subject petition is filed under Regulation 8 of the aforesaid Regulations, 2020 which provides in-principle approval in specific circumstances as under:

“The generating company undertaking any additional capitalization on account of change in law events or force majeure conditions may file petition for in-principle approval for incurring such expenditure after prior notice to the beneficiaries or the long term customers, as the case may be, along with underlying assumptions, estimates and justification for such expenditure if the estimated expenditure exceeds 10% of the admitted capital cost of the project or Rs.100 Crore, whichever is lower.”

7. In the subject petition, the petitioner broadly submitted following:
- i. *MB Power has filed the present Petition under Regulation 8 read with Regulation 31 of MPERC Generation Tariff Regulations, 2020 seeking in-principle approval of the Additional Capital Expenditure to be incurred by MB Power for implementation of Flue-Gas Desulphurization (FGD) System as a part of Emission Control Systems in compliance of the Revised Emission Standards related to Sulphur Dioxide as prescribed by Ministry of Environment, Forest and Climate Change Notification dated 07.12.2015 which is a Change in Law event in terms of Article 12 of the Power Purchase Agreement dated 05.01.2011 and Regulation 3.1(11) of MPERC Tariff Regulations 2020. Further, the Petitioner is seeking liberty to approach this Commission at an appropriate stage with respect to approval of Additional Capital Expenditure on account of compliance of the Revised Emission Standards related to other parameters viz. Particular Matter, Oxides of Nitrogen, Mercury etc.*
 - ii. *For compliance with the MoEFCC Notification, MB Power is mandated to install/retrofit various Emission Control Systems including FGD System for control of Sulphur Dioxide (“SO₂”) emissions, Combustion Modification Systems for control of Oxides of Nitrogen (“NO_x”) emissions and other Emission Control Systems in its Project. Accordingly, Central Pollution Control Board (“CPCB”) by its letter dated 11.12.2017 and Central Electricity Authority (“CEA”) by its recommendations dated 05.03.2020 has directed MB Power to mandatorily install Wet Limestone based FGD System in the Project to meet the Revised Emission Standards related to SO₂ emissions as prescribed by MoEFCC Notification. The said CPCB letter specifically notes that MoEFCC Notification prescribed new emission limits for SO₂.*
 - iii. *MoEFCC Notification qualifies as a Change in Law event for MB Power under Article 12 of the PPA and Regulation 3.1(11) of MPERC Tariff Regulations 2020 in terms of the following: -*
 - a. *MoEFCC Notification dated 07.12.2015 has been issued by Ministry of Environment Forest and Climate Change, Government of India in exercise of*

powers conferred by Section 6 and 25 of the Environment (Protection) Act, 1986, which comes within the ambit of 'Law' under the PPA.

- b. The said Notification was issued by Ministry of Environment Forest and Climate Change, Government of India, which is an 'Indian Governmental Instrumentality'. Accordingly, the said Notification has the force of law
 - c. MoEFCC Notification is an enactment of a Law and amendment of an existing law under Article 12 of the PPA and Regulation 3.1(11) of MPERC Tariff Regulations 2020.
 - d. The aforesaid change was effective after 29.12.2010 i.e., seven (7) days prior to the execution of the PPA on 05.01.2011
 - e. Compliance with the MoEFCC Notification will have substantial impact on the Capital and Operational Costs of the Project resulting in additional recurring expenditure to MB Power during the operating period i.e., the tenure of the PPA.
 - f. The Revised Emission Standards by way of the MoEFCC Notification have also brought about a change in consents and approvals required for obtaining Environmental Clearance for the Thermal Power Projects ("TPPs") thereby qualifying as a Change in Law event as per Article 12.1.1(iii)&(iv) of the PPA.
- iv. It is submitted that Ld. CERC by Order dated 03.06.2019 passed in Petition No. 156/MP/2018 (filed by MB Power) has already held that MoEFCC Notification is a Change in Law event for MB Power (this has been dealt in detail under Para 35 of the present Petition). Further the issue whether MoEFCC Notification is Change in Law is no longer res integra as the same has been held to be an event of Change in Law by the Hon'ble Appellate Tribunal for Electricity ("APTEL"), Ministry of Power, Ld. CERC and this Commission.
- v. It is submitted that pursuant to the International Competitive Bidding carried out by MB Power in terms of Tender Notice dated 18.02.2021 the Base Cost of Wet Limestone based FGD System has been discovered as approximately Rs. 648.20 Crores as per the following break-up:-

Details	Base Cost (Excluding GST)	GST
Purchase Order for Supply of Goods	Rs. 346,60,00,000/-	Rs. 62,38,80,000/-
Purchase Order for Supply of Services	Rs. 301,60,00,000/-	Rs. 54,28,80,000/-
Total	Rs. 648,20,00,000/-	Rs. 116,67,60,000/-

- vi. *It is submitted that in compliance of the MPERC Tariff Regulations 2020, MB Power from time to time, by its letters dated 05.09.2019, 18.09.2020 and 17.09.2021, has already shared with MPPMCL various details related to implementation of FGD System in its Project viz. Detailed Project Report containing proposed technology, scope of work, phasing of expenditure, completion schedule, estimated completion cost, indicative impact on tariff etc., CEA's approval, details of International Competitive Bidding and Base Cost of FGD System of Rs. 648.20 Crores as discovered through International Competitive Bidding.*
- vii. *That the Base Cost of Rs. 648.20 Crores (as discovered through competitive bidding) required for implementation of FGD System in the Project is substantial and requires additional funding from lenders/banks. Thus, given the implications of implementing these changes to meet the Revised Emission Standards prescribed by MoEFCC, it is important that there is a certainty of regulatory treatment and recovery of these costs and charges. Therefore, in-principle regulatory approval of the cost is critical for arranging funds for implementation of the FGD System.*
- viii. *In the present case MB Power has already completed the competitive bidding process wherein M/s Apollo International Ltd emerged as the L1 bidder with discovered Base Cost of Rs. 648.20 Crores for implementation of FGD System in the Project. Pursuant thereto, MB Power has: -*
- (a) Issued Lol to Apollo International on 28.05.2021 which was accepted by Apollo International through its e-mail dated 07.06.2021.*
 - (b) Issued Purchase Order for supply of Goods and Work Order for supply of Services to Apollo International on 14.06.2021 towards execution of FGD System.*
 - (c) Released advance payments to Apollo International; and*
 - (d) Achieved the Effective Date under the contract with Apollo International for execution of FGD System. The engineering works have already commenced for implementation of FGD System within the permissible timelines allowed to MB Power.*
- ix. *It is submitted that MB Power has also entered into a PPA for supply of power from its Project to Uttar Pradesh Discoms under Section-63 of the Electricity Act, 2003 ("UP PPA"). Supply of power from MB Power's Project under the said UP PPA is governed and regulated by Ld. CERC in terms of Section 79(1)(b) of the Electricity Act, 2003. Accordingly, MB Power had earlier filed a Petition No. 156/MP/2018 before Ld. CERC seeking declaration of various Change in Law events and relief thereof in*

terms of UP PPA. Ld. CERC in Order dated 03.06.2019 passed in this Petition held that MoEFCC Notification and Additional Capital Expenditure on account of implementation of Revised Emission Standards and its associated operational cost is a Change in Law event for MB Power (this has been dealt in detail under Para 35 of the present Petition). Accordingly, MB Power was directed to proceed with implementation of the Revised Emission Standards and approach the Ld. CERC at an appropriate stage.

- x. Subsequently, MB Power filed Petition No. 450/MP/2019 before Ld. CERC in the UP PPA in compliance of directions issued by Ld. CERC in its aforesaid Order dated 03.06.2019. This Petition No. 450/MP/2019 was filed before CERC seeking in-principal approval of the Base Cost of Rs. 648.20 Crores (as discovered pursuant to competitive bidding process carried out by MB Power) towards implementation of FGD System in the Project. Accordingly, Ld. CERC after carrying out prudence check of the bidding process conducted by MB Power, passed Order dated 21.03.2022 in Petition No. 450/MP/2019 with a finding that the Base Cost of Rs. 648.20 Crores of FGD System is competitive and prudent and accordingly granted in-principle approval of this Base Cost of Rs. 648.20 Crores of FGD System to MB Power.

Details pertaining to MoEFCC Notification and other directions re implementation of FGD System in MB Power's Project:

- xi. On 07.12.2015, Ministry of Environment Forest and Climate Change ('MoEFCC') notified the Environment (Protection) Amendment Rules, 2015 ("MoEFCC Notification") that mandates all TPPs installed till December 2016, like MB Power's Project, to comply with the Revised Emission Standards and other terms and conditions stipulated under the MoEFCC Notification on or before 06.12.2017 (i.e., within a period of 2 years from the date of MoEFCC Notification). In terms of the MoEFCC Notification, MB Power's Project falls under the category of TPPs (units) installed after 01.01.2004 and up to 31.12.2016. Listed below is a brief description of the applicable Revised Emission Standards and terms and conditions stipulated in the MoEFCC Notification: -
- (a) All TPPs with Once Through Cooling must install Cooling Tower and achieve specific water consumption up to maximum of 3.5m³/MW/hr.
 - (b) Emission limit for Particulate Matter is 50 mg/Nm³ for TPPs commissioned between 01.01.2004 to 31.12.2016 and 100 mg/ Nm³ for TPPs commissioned before 31.12.2003.
 - (c) Oxides of Nitrogen emission limited to 300 mg/Nm³ for TPPs commissioned between 01.01.2004 to 31.12.2016 and 600 mg/ Nm³ for TPPs commissioned before

31.12.2003.

- (d) Sulphur Dioxide emission limited to 600 mg/Nm³ for units smaller than 500 MW and 200 mg/Nm³ for units bigger than 500 MW.
- (e) Mercury emission limited to 0.03 mg/Nm³.
- xii. *That it is to be noted that if the Company is affected by a Change in Law in accordance with this Article 12 and the Company wishes to claim relief for such a Change in Law under this Article 12, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.”*
- xiii. *To meet the Revised Emission Standards with respect to Sulphur Dioxide (SO₂) emissions MB Power is required to install/retrofit its Project with FGD System which will result in: -*
 - (a) *One-time Additional Capital Expenditure;*
 - (b) *Recurring Variable Charges in terms of cost of limestone and reagent, cost of disposal of Gypsum (Bi-product)*
 - (c) *Recurring Operational Expenditure during the term of PPA i.e., increase in operation and maintenance expenses of the Project;*
 - (d) *Impact on operational parameters of the Project like Auxiliary Consumption, GSHR etc;*
 - (e) *Disruption in power generation during the installation phase; and*
 - (f) *Loss of Fixed cost recovery during the shutdown period.*
- xiv. *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-1 by 31.03.2022 and in Unit-2 by 30.06.2022, specifically noting the new emission limits for SO₂ and NO_x prescribed by MoEFCC Notification.*
- xv. *On 30.05.2018, Ministry of Power (“MoP”) in exercise of power conferred under Section 107 of the Electricity Act issued directions to Ld. CERC for smooth implementation of the Revised Emission Standards under the MoEFCC Notification. The following directions were issued by MoP: -*
 - a. *MoEFCC Notification dated 07.12.2015 requiring compliance of Environment (Protection) Amendment Rules, 2015, is a Change in Law event.*

- b. *The additional cost implication due to installation/up-gradation of various Emission Control Systems and its operational cost to meet the Revised Environment Standards shall be considered for being made pass through in tariff by Ld. CERC in accordance with law.*
 - c. *The respective TPPs may approach the Appropriate Commission for approval of Additional Capital Expenditure and compensation for additional cost on account of this Change in Law event in respect of PPA(s) entered under Section 62 or Section 63 of the Electricity Act, 2003.*
 - d. *Ld. CERC shall develop appropriate regulatory mechanism to address the impact on tariff, and certainty in cost recovery on account of additional capital and operational cost.*
- xvi. *On 03.06.2019 Ld. CERC passed Order in Petition No. 156/MP/2018 filed by MB Power and, inter-alia, held that MoEFCC Notification and Additional Capital Expenditure on account of implementation of Revised Emission Standards and its associated operational cost is a Change in Law event for MB Power. Accordingly, MB Power was directed to proceed with implementation of the Revised Emission Standards in consultation with CEA. On 21.06.2019, MB Power approached CEA seeking approval of the technology and associated indicative cost with regards to implementation of Emission Control Systems, as proposed in the Feasibility Report dated 12.06.2019.*
- xvii. *On 31.03.2021, MoEFCC issued a Notification extending the timeline for compliance of Revised Emission Standards including implementation of FGD System by TPPs. In terms of said Notification the timeline for implementation of FGD System in MB Power's Project stands extended till 31.12.2024 as on date.*
- xviii. *On 07.12.2018, MB Power had published a Tender Notice initiating International Competitive Bidding for procurement and installation of FGD System in its Project. Pursuant to the competitive bidding, M/s Zhejiang Feida Environmental Science & Technology Co 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, Finance Charges etc).*
- xix. *It is submitted that time is of essence since MB Power is mandated to install the FGD System in its Project in accordance with the strict timelines accorded by Central Pollution Control Board. Failure to install FGD System as per the phased-wise accelerated timeline accorded by CPCB would entail levy of penalty and may affect*

seamless Project operations. Therefore, considering the non-responsiveness, delay and uncertainty on part of Zhejiang Feida and Feida India with respect to acceptance/execution of the Work Order/Purchase Order for FGD System, MB Power decided to:-

- a. Revoke the Purchase Order and Work Order dated 02.09.2020 issued to Zhejiang Feida and Feida India respectively.
- b. Terminate the Lol dated 22.07.2020 issued to Zhejiang Feida and Feida India;
- c. Carry out re-tendering for procurement and installation of FGD System through international competitive bidding process.

xx. After assessment and review of the techno-commercial offers received from the bidders and various rounds of discussions and negotiations, M/s Apollo International Ltd (“Apollo International”) emerged as the L1 bidder. Accordingly, on 28.05.2021, MB Power issued a Lol to Apollo International, which was accepted by Apollo International through its E-mail dated 07.06.2021.

xxi. It is submitted that the Base Cost of the FGD System, as discovered pursuant to International Competitive Bidding is Rs. 648.20 Crores as per the following break-up:

Details	Base Cost (Excluding GST)	GST
Purchase Order for Supply of Goods	Rs. 346,60,00,000/-	Rs. 62,38,80,000/-
Purchase Order for Supply of Services	Rs. 301,60,00,000/-	Rs. 54,28,80,000/-
Total	Rs. 648,20,00,000/-	Rs. 116,67,60,000/-

The Base Cost of Rs. 648.20 Crores includes the following: -

- a. Design, Engineering, Manufacturing, Supply, Packing, Forwarding, Transportation/ Logistics, Erection, Testing and Commissioning etc. of the FGD System;
- b. Civil Works;
- c. Chimney & Duct lining cost; and
- d. Piling works etc.

xxii. On 05.09.2019, MB Power wrote to MPPMCL with respect to compliance with the Revised Emission Standards stipulated by the MoEFCC Notification and inter-alia stated that:-

- a. MoEFCC Notification (as subsequently amended on 08.06.2016 and 01.09.2017) has amended the Environment (Protection) Rule 1986 and mandates all TPPs installed till December 2016 to comply with the Revised Emission Standards relating to Particulate Matter, SO₂ and NO_x by installing various Emission Control

Systems/equipment like Flue Gas De-sulfurization ("FGD") System, Combustion Modification System etc. on or before 31.12.2022.

- b. MoEFCC Notification has been notified after the date which is seven days prior to the execution of the PPAs dated 05.01.2011 and 04.05.2011 (i.e., 29.12.2010) and Statutory compliance with the revised norms stipulated therein will result in additional recurring expenditure to MB Power.*
- c. MoEFCC Notification has the force of Law, as the same has been notified by the Ministry of Government of India. Therefore, MoEFCC Notification qualifies as an event of Change in Law for MB Power in terms of Article 12.1.1 of the PPA dated 05.01.2011.*
- d. As such any additional recurring and/or non-recurring expenditure incurred by MB Power towards the same falls within the ambit of Change in Law. Therefore, the consequent increase in power supply cost on account of the said Change in Law event is required to be compensated by MPPMCL by way of Tariff adjustment.*

Accordingly, vide the aforesaid letter dated 05.09.2019, MB Power duly informed MPPMCL qua the Change in Law event and provided all the necessary details including the impact of such Change in Law event on MB Power. Hence, the said letter constitutes a Change in Law Notice to MPPMCL under the PPA with respect to MoEFCC Notification.

xxiii. On 18.09.2020, MB Power in terms of the mandate of Regulation 31 of the MPERC Tariff Regulations 2020 wrote to MPPMCL providing the status report and details pertaining to steps taken by MB Power for compliance with the Revised Emission Standards stipulated under the MoEFCC Notification dated 07.12.2015. By way of the said letter MB Power informed MPPMCL qua:-

- a. CEA letter dated 05.03.2020 providing its recommendation and approval on the technology and cost with regards to implementation of Emission Control Systems in MB Power Project;*
- b. Competitive bidding carried out by MB Power for implementation of FGD System and the final Base Cost of FGD System discovered during the bidding process.*

xxiv. It is submitted that Regulation 3.1(48) of MPERC Tariff Regulations 2020 defines Revised Emission Standards as the revised norms notified by the Environment (Protection) Amendment Rules, 2015 i.e., the MoEFCC Notification dated 07.12.2015:-

(48) *'Revised Emission Standards' in respect of the thermal generating station means the revised norms notified as per Environment (Protection) Amendment Rules, 2015 or any other rules as may be notified from time to time;'*

8. With the above submission, the petitioner prayed the following:
- a. *Declare that MoEFCC Notification is an event of Change in Law for MB Power in terms of Article 12 of PPA dated 05.01.2011 and MPERC Tariff Regulations 2020;*
 - b. *Grant in-principal approval of Base Cost of Rs. 648.20 Crores as discovered pursuant to competitive bidding carried out by MB Power for implementation of FGD System in the Project as a part of Emission Control Systems;*
 - c. *Grant liberty to Petitioner to approach this Commission for determination of provisional / final additional tariff/ compensation and other associated costs, impact on Project's operational parameters etc. on account of implementation of FGD System in its Project based on actual capital and operational expenditure incurred.*
 - d. *Grant liberty to Petitioner to approach this Commission for seeking approval of Additional Capital Expenditure on account of implementation of the other Emission Control Systems towards compliance of the Revised Emission Standards related to other parameters viz. Particular Matter, Oxides of Nitrogen (NOx), Mercury (Hg) etc. parameters as prescribed in MoEFCC Notification.*
9. At the motion hearing held on 16th August' 2022, the petition was admitted. Vide daily order dated 18th August' 2022, the petitioner was directed to serve copy of the petition to Respondents within seven days. The Respondents were directed to file their replies to the subject petition within three weeks, thereafter. The petitioner was asked to file a rejoinder within a week, thereafter.
10. At the next hearing held on 27.09.2022, the Commission observed the following:
- a. Vide letter dated 23.09.2022, Respondent No. 1 filed reply to the subject petition.
 - b. No reply was received from Respondent No. 2, 3 and 4. Therefore, opportunity to file reply by the aforesaid Respondents was closed.
 - c. Petitioner and Respondent No. 1 concluded their arguments. As requested, parties were allowed to file their respective written submission on arguments within a week. Case was reserved for order.

11. By affidavit dated 23rd September' 2022, the Respondent No. 1 (MPPMCL) filed reply to the subject petition broadly submitted the following:
- i. *In terms of the scheme of the Electricity Act, 2003 a Generating station can either be an inter-state generating station or intra-state generating station. An Inter-State Generating Company is subject to exclusive jurisdiction of the Central Electricity Regulatory Commission while a State Generating Station is subject to jurisdiction of the appropriate State Electricity Regulatory Commission. In no circumstance, a generating station can be subject to jurisdiction of both CERC and SERC. In the event the petitioner is of the belief that it is subject to jurisdiction of the Central Commission, it cannot be subject to the jurisdiction of this Commission and on that ground itself the present petition should be dismissed.*
 - ii. *Scheme of Electricity Act, 2003 is clearly confirmed by Rule 8 of the Electricity Rules, 2005. In light of the above, the Petitioner needs to confirm whether it is relying on a CERC order or it is seeking an approval in terms of extant Regulations framed by this Commission.*
 - iii. *It is submitted that the scope of MPERC Tariff Regulations make it clear that it is applicable only to those generating stations that fall under Section 86 of the Act, the petitioner must be directed to confirm its status before adjudication on merits. While change in law status of MOEFCC notification is not in dispute, but delay in setting up the FGD is purely due to imprudent operation of the petitioner and such increased cost should not be passed on to the consumers in the State of Madhya Pradesh.*
 - iv. *The MoEFCC notification forming basis for the present petition was issued on 07.12.2015. Even at the time of issue of the said notification it was clear that the same shall apply to the generating station of the Petitioner. The Petitioners rather than being diligent and a prudent operator, chose not to install the FGD system while the plant was under construction as unit No. 2 achieved COD on 07.04.2016 and has after repeated notice from Central Pollution Control Board decided to implement the FGD system.*
 - v. *The cost escalation which is directly attributable to such delay should not be allowed as pass-through and the Petitioner should be liable to bear the consequences of delay in implementation of the mandatory systems. Not only has the cost of construction increased due to the delay in compliance of law, it has also resulted in avoidable pollution being caused in the State of Madhya Pradesh. The Petitioner should not be incentivized by granting in principle approval for the prayed amount and only cost which would have been incurred in the event FGD was promptly installed should be allowed to be capitalized. No explanation has been offered by*

the petitioner to explain the time gap between the MOEFCC notification and the steps being taken for installation of the FGD.

- vi. It is also pertinent to note that the petition mentions about an earlier tender process for installation of FGC wherein bid was awarded to Zhejiang Feida. It is also pointed out that the total cost required for the same was much lower than what is now required after the winning bid from Apollo International. It is however not pointed out what consequences have been imposed or are being imposed on Zhejiang Feida for failure to perform the contract. In the event of failure to perform a contract the non-defaulting party is entitled to claim damages and in the instant case cost increase of over Rs. 50 Crore should have been recovered from Zhejiang Feida. The Petitioner has also not given any details of bid security or performance security that was encashed as a result of failure to perform the contract which is routine in an assignment of the present nature.*
- vii. It is submitted in the event the Petitioner had filed a petition before CERC for capital cost FGD system. Filing a petition before CERC requires proof of supply in more than one state. Therefore, the fact that answering respondent and none of the MP Discoms were made a party to the petition filed before CERC appears to be designed to get an order of approval behind the back of the MP Discoms. The order obtained from CERC is now being cited as basis for seeking approval from this Commission. The entire exercise appears to be vitiated and the Petitioner must be directed to explain its conduct prior to adjudication on merits.*
- viii. It is stated that the compensation on MPPMCL, on account of implementation of FGD system, will be limited to its contracted Capacity as per PPA dtd 05.01.2011 not as per PPA dt 04.05.2011.*
- ix. It is however pertinent to point out that the delay in implementation of FGD system has resulted in increased cost and the same should not be passed on to the consumers. The Petitioner must be made responsible for absorbing the cost increase directly attributable to delay by the delay in implementation of FGD. It is further important to clarify that the PPA dated 04.05.2011 is for supply of power on variable charge and additional capitalisation shall have no impact on variable charge. Therefore, no additional amounts shall be due and payable under the variable charge PPA.*
- x. It is submitted even in case of approval being granted, the Petitioner is not entitled to claim any amount other than the capital cost for installation of the FGD system. The Petitioner can also not be incentivized for delay in compliance with the requirements under the MOEF notification. It is submitted that due to increased cost*

of the generating station the generator may be entitled to higher capacity charge, in no event shall it be entitled to compensation from the answering respondent procurer.

12. By affidavit dated 4th October' 2022, the petitioner filed rejoinder to the reply filed by the Respondent No. 1. In the rejoinder the petitioner broadly submitted the following:
- i. It is submitted that Regulations 8 and 31 of MPERC Tariff Regulations 2020 enable MB Power to file such a petition before this Commission seeking in-principle approval for incurring such Additional Capital Expenditure.*
 - ii. The issue raised in the present Petition is whether the MoEFCC Notification is an event of Change in Law for MB Power in terms of Article 12 of the PPA dated 05.01.2011 and MPERC Tariff Regulations 2020 – on account of which, in-principle approval should be granted to the consequential Additional Capital Expenditure towards implementation of FGD System for the Project in context of its Contracted Capacity of 35% under the PPAs to be supplied to MPPMCL.*
 - iii. The aforesaid issue has already also been dealt with by Ld. Central Electricity Regulatory Commission in its Order dated 03.06.2019 passed in Petition No. 156/MP/2018 (filed by MB Power), wherein the MoEFCC Notification has been held to be a Change in Law event for MB Power. **The issue whether MoEFCC Notification is Change in Law is no longer res integra as the same has been held to be an event of Change in Law by the Hon'ble Appellate Tribunal for Electricity, Ministry of Power, Ld. CERC and this Commission as has been stated.***
 - iv. As admitted by MPPMCL in its Reply dated 23.09.2022, MoEFCC Notification qualifies as a Change in Law event for MB Power under Article 12 of the PPA and Regulation 3.1(11) of MPERC Tariff Regulations 2020 . Compliance with MoEFCC Notification will have substantial impact on the Capital and Operational Costs of the Project resulting in additional recurring expenditure to MB Power during the operating period i.e., the tenure of the PPA.*
 - v. It is submitted that the Base Cost of Rs. 648.20 Crores (as discovered through competitive bidding) required for implementation of FGD System in the Project is substantial and cannot be arranged internally and requires additional funding from lenders/banks. To comply with the Revised Emission Standards, MB Power needs to arrange finances which require a certainty in regulatory treatment qua recovery of these costs and charges. As such, the in-principle regulatory approval of the cost prayed for is critical for implementing the FGD System.*

- vi. *On 07.12.2018, MB Power had published a Tender Notice initiating International Competitive Bidding for procurement and installation of FGD System in its Project. Pursuant to the competitive bidding, M/s Zhejiang Feida Environmental Science & Technology Co Ltd 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, Finance Charges etc).*
- vii. *Approval of the additional tariff/compensation on account of implementation of FGD System will be sought by MB Power based on the actual capital and operational expenditure incurred by MB Power for implementation of the FGD System at the appropriate stage.*
- viii. *The in-principle approval is being sought under this Petition is with respect to MP PPAs, which is required to be adjudicated upon by this Commission. This in-principle approval is being sought in terms of Regulation 8 read with Regulation 31 of MPERC Tariff Regulations 2020 which allows MB Power to file Petition seeking in-principle approval of this Hon'ble Commission towards the Additional Capital Expenditure to be incurred for implementation of FGD System as part of ECS in compliance of the Revised Emission Standards related to SO₂ as prescribed by MoEFCC Notification dated 07.12.2015 which is a Change in Law event for MB Power in terms of Article 12 of PPA dated 05.01.2011 and Regulation 3.1(11) of MPERC Tariff Regulations 2020.*
- ix. *Since time is of essence MB Power is mandated to install the FGD System in its Project in accordance with the strict timelines accorded CPCB. Being mindful that failure to install FGD System as per the phased-wise accelerated timeline accorded by CPCB would entail levy of penalty and may affect seamless Project operations – MB Power initiated the re-tendering process as soon as it received an E-mail from Zhejiang Feida on 21.01.2021 wherein concerns on Feida's intent to honour the Work Order/Purchase Order awarded to it for execution of FGD System were raised. Accordingly, on 18.02.2021 MB Power published a Tender Notice in leading Hindi & English News Papers qua International Competitive Bidding for procurement and installation of FGD System in its Project.*
- x. *The data was provided to M/s Save Urja for preparing Feasibility Report with an objective to recommend design parameters, tolerance, operational range and responsiveness of the Emission Control Systems (both FGD System and De Nox System) based on different working conditions which inter-alia included, a range of loading pattern of the Project, various kinds of coal having different GCV and Sulphur*

& Nitrogen content which varies over a fairly wide range etc., which has been duly acknowledged and approved by CEA.

- xii. *It is submitted that such contentions of MPPMCL are perverse and deserves no consideration of this Hon'ble Commission as MB Power has followed the due process and at every milestone of the FGD System implementation process kept MPPMCL duly updated, i.e., regarding the process of complying with the MoEFCC Notification, bidding process and all other events regarding implementation of FGD. Moreover, MPPMCL has never replied to any of MB Power's letters dated 05.09.2019, 18.09.2020 and 17.09.2021 or raised any concerns regarding the same. Hence, MB Power has always been diligent in apprising MPPMCL about the status of implementation of the FGD System from time to time and any submissions by MPPMCL to the contrary cannot be countenanced at this stage.*

This Commission has the Jurisdiction to adjudicate the present Petition:

- xii. *Respondent No. 1 Objecting to the maintainability of the present Petition and jurisdiction of this Commission to adjudicate the present Petition, MPPMCL has contended that:-*
- (a) An Inter-State Generating Company is subject to exclusive jurisdiction of CERC while a State Generating Station is subject to jurisdiction of the appropriate SERC. In no circumstance, a generating station can be subject to jurisdiction of both CERC and SERC.*
 - (b) If MB Power is subject to the jurisdiction of CERC it cannot be subject to the jurisdiction of this Hon'ble Commission.*
 - (c) This Commission does not have jurisdiction qua inter-state generating stations like MB Power.*
 - (d) MB Power cannot be allowed to seek in-principal approval from this Hon'ble Commission after having sought the same from CERC by Order dated 21.03.2022.*
- xiii. *It is submitted that the contentions raised by MPPMCL in its Reply dated 23.09.2022 are frivolous, devoid of merit and ought to be rejected. It is submitted that the Commission has the jurisdiction to adjudicate the present Petition.*
- xiv. *MB Power's generating station is situated in Madhya Pradesh from which MB Power supplies power to the Distribution Licensees in various States viz. Uttar Pradesh and Madhya Pradesh under Long-Term PPAs. Thus, MB Power has a composite scheme for generation and sale of electricity under Section 79(1)(b) of the Electricity Act,*

2003, which is amenable to the jurisdiction of Ld. CERC as upheld in *Energy Watchdog v. CERC (2017) 14 SCC 80*.

- xv. *Supply of power to UPPCL is governed and regulated by Ld. CERC in terms of Section 79(1)(b) of the Electricity Act while supply to MPPMCL is regulated by Ld. MPERC in terms of Section 86 read with Clause 5.2 of the Tariff Policy 2016.*

Supply to UPPCL:

- xvi. *It is submitted that the supply of power to UP Discoms in terms of PPAs dated 18.01.2014 and 20.01.2014 is regulated and governed by Ld. CERC in terms of Section 79(1)(b) of Electricity Act. Accordingly, MB Power had earlier filed a Petition No. 156/MP/2018 before Ld. CERC seeking declaration of various Change in Law events and relief thereof in terms of UP PPA. Ld. CERC in its Order dated 03.06.2019 held that MoEFCC Notification is a Change in Law event for MB Power and directed MB Power to proceed with implementation of Revised Emission Standards and approach the Ld. CERC at an appropriate stage.*
- xvii. *Subsequently, MB Power filed Petition No. 450/MP/2019 before Ld. CERC in context of the UP PPA in compliance of directions issued by Ld. CERC in its aforesaid Order dated 03.06.2019. This Petition No. 450/MP/2019 was filed before Ld. CERC seeking in-principle approval of the Base Cost of Rs. 648.20 Crores (as discovered pursuant to competitive bidding process carried out by MB Power) towards implementation of FGD System in the Project.*
- xviii. *The CERC after carrying out prudence check of the bidding process conducted by MB Power, passed Order dated 21.03.2022 in Petition No. 450/MP/2019 with a finding that the Base Cost of Rs. 648.20 Crores of FGD System is competitive and prudent and accordingly granted in-principle approval of this Base Cost of Rs. 648.20 Crores of FGD System to MB Power.*

Response to MPPMCL's contention on lack of jurisdiction of this Commission to adjudicate present Petition

- xix. *Clause 5.2 of the Tariff Policy 2016 provides that State Government can notify policy to encourage investment in the State by allowing setting up of generating plants, out of which a maximum of 35% of the installed capacity can be procured by the Distribution Licensees of that State for which the tariff shall be determined under Section 62 of the Electricity Act by the SERC of that State:-*

"5.2. All future requirement of power should continue to be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a company owned or controlled by the State Government as an identified

developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 100% of the existing capacity.

Provided further that the Appropriate Commission, as defined in the Electricity Act, 2003, shall ensure that in case of expansion of such projects, the benefit of sharing of infrastructure of existing project and efficiency of new technology is passed on to consumers through tariff.

Provided also that the State Government can notify a policy to encourage investment in the State by allowing setting up of generating plants, including from renewable energy sources **out of which a maximum of 35% of the installed capacity can be procured by the Distribution Licensees of that State for which the tariff may be determined under Section 62 of the Electricity Act, 2003.**

Provided that notwithstanding the provision contained in para 5.11(j) of the policy, **the tariff for such 35% of the installed capacity shall be determined by SERC.** However, the 15% of power outside long term PPAs allowed under para 5.7.1 of National Electricity Policy shall not be included in 35% allowed to be procured by Distribution Licensees of the State.”

- xx. MB Power's generating station is set-up in the State of Madhya Pradesh from which MB Power supplies 35% of the installed capacity to the Distribution Licensees of Madhya Pradesh (MPPMCL) under long-term PPAs dated 05.01.2011 and 04.05.2011. Hence, in terms of Clause 5.2 of the Tariff Policy, the tariff for such supply of power to MPPMCL under PPAs dated 05.01.2011 and 04.05.2011 is determined by this Hon'ble Commission under Section 62 of the Electricity Act. Accordingly, MPERC Tariff Regulations are applicable to MB Power.
- xxi. It is pertinent to mention here that MB Power supplies power from its Project situated in Madhya Pradesh to its beneficiaries/Distribution licensees in terms of the following long-term Power Purchase Agreements ("PPA"): -
- (a) A Contracted Capacity of 361 MW power (i.e., 32.175% of the Project Capacity) to the Uttar Pradesh Discoms ("UP Discoms") through PTC India Limited ("PTC") on back to back basis in terms of:-
- (i) PPA dated 18.01.2014 executed between PTC (on behalf of MB Power) and UP Discoms for supplying of 361 MW power from MB Power's Project.
- (ii) PPA dated 20.01.2014 executed between PTC and MB Power for procurement of 361 MW power from MB Power's Project for onward supply to UP Discoms on back-to-back basis.

(b) 35% of the installed capacity of the Project to MPPMCL in terms of PPAs dated 05.01.2011 and 04.05.2011.

xxii. In view of the above contractual set-up, MB Power has a composite scheme for generation and supply of power, qua 32.175% of Contracted Capacity to the UP Discoms under the UP PPAs. At the same time, MB Power supplies 35% of its installed project capacity to MPPMCL. Since inception this Hon'ble Commission has been determining the tariff for supply of power to MPPMCL in terms of the MPERC Tariff Regulations. MPPMCL has never objected to the same. In such regard, MB Power is amenable to the jurisdiction of Ld. CERC and this Hon'ble Commission as under:

(a) Issues arising out of the MP PPAs: Falls under the jurisdiction of this Commission

(b) Issues arising out of the UP PPAs – Falls under the jurisdiction of the Ld. CERC.

13. Vide submission dated 04.10.2022, Respondent No. 1 filed final written submission retreated the contentions as filed in its earlier reply to the subject petition. Further, by additional affidavit dated 12.10.2022, Respondent No. 1 submitted that Respondent No. 2, 3 and 4 have authorized MPPMCL to represent them in the instant matter and therefore, the reply filed on behalf of MPPMCL should be read as reply on behalf of all the Respondent No. 1 to 4.

Analysis of petition:

Legal and Regulatory Provisions:

14. The subject petition has been filed for in-principle approval of additional capitalization to be incurred to comply with the environmental norms notified by MoEFCC for thermal power stations. Therefore, let us see the provisions of MoEFCC notifications issued in this regard:

i. In exercise of the powers conferred by Sections 6 and 25 of the Environment (Protection) Act, 1986, MoEFCC vide its Notification dated 7.12.2015 has amended the Environment (Protection) Rules, 1986, introducing revised standards for emission of environmental pollutants to be followed by all existing and under construction thermal power plants (TPPs). As per the MoEFCC Notification dated 7.12.2015, all TPPs were mandatorily required to comply with the revised emission control norms within a period of two years from the date of the MoEFCC Notification. Subsequently, vide notification dated 1.4.2021, the thermal power stations have been categorized in A, B and C categories and the deadline for compliance of the revised emission control norms for different categories has been revised from December' 2022 to December' 2025.

- ii. By way of the aforesaid notification dated 07.12.2015, the MoEFCC has specified certain standards to be met by thermal power plants on various parameters such as Water Consumption, Particulate Matter, Sulphur Dioxide (SO₂), Oxides of Nitrogen (NO_x) and Mercury (Hg). The norms prescribed by the MoEFCC vide Notification dated 7.12.2015 are as follows:

Sr. No.	Industry	Parameter	Standards
1	2	3	4
5A.	Thermal Power Plant	Water consumption	<p>All plants with once Through Cooling (OTC) shall install Cooling Tower (CT) and achieve specific water consumption up to maximum of 3.5 m³/MWh within a period of two years from the date of publication of this notification.</p> <p>All existing CT-based plants reduce specific water consumption up to maximum of 3.5 m³/MWh within a period of two years from the date of publication of this notification.</p> <p>New plants to be installed after 1st January, 2017 shall have to meet specific water consumption up to maximum of 2.5 m³/MWH and achieve zero waste water discharged.</p>
25	Thermal Power Plant	TPPs (units) installed before 31st December, 2003*	
		Particulate Matter	100mg/Nm ³
		Sulphur Dioxide (SO ₂)	600 mg/Nm ³ (Units Smaller than 500 MW capacity units) 200 mg/Nm ³ (for units having capacity of 500 MW and above)
		Oxides of Nitrogen (NO _x)	600 mg/Nm ³
		Mercury (HG)	0.03 mg/Nm ³ (for units having capacity of 500 MW and above)
		TPPs (units) installed after [1st January, 2004], up to 31st December, 2016*	
		Particulate Matter	50 mg/Nm ³

	<i>Sulphur Dioxide (SO₂)</i>	<i>600 mg/Nm³ (Units Smaller than 500 MW capacity units) 200 mg/Nm³ (for units having capacity of 500 MW and above)</i>
	<i>Oxide of Nitrogen (NO_x)</i>	<i>300 mg/Nm³</i>
	<i>Mercury (Hg)</i>	<i>0.03 mg/Nm³</i>
	<i>TPPs (units) to be installed from 1st January, 2017**</i>	
	<i>Particular Matter</i>	<i>30mg/Nm³</i>
	<i>Sulphur Dioxide (SO₂)</i>	<i>100mg/Nm³</i>
	<i>Oxides of Nitrogen (NO_x)</i>	<i>100mg/Nm³</i>
	<i>Mercury (Hg)</i>	<i>0.03mg/Nm³</i>

- iii. The water consumption norms for Thermal Power Plants (TPPs) with Once Through Cooling (OTC), existing CT-based TPPs and new TPPs commissioned after 1.1.2017 were specified in the MoEFCC Notification. Further, norms for Particulate Matter, Sulphur Dioxide (SO₂), Oxides of Nitrogen (NO_x) and Mercury (Hg) for TPPs commissioned before 31.12.2003, TPPs commissioned after 1.1.2004 and up to 31.12.2016, and TPPs commissioned after 1.1.2017 were also specified. Subsequently, vide Notification dated 19.10.2020, the MoEFCC relaxed the norms of NO_x for TPPs commissioned during the period 1.1.2004 and 31.12.2016 from 300 mg/Nm³ to 450 mg/Nm³.
- iv. Vide Notification No. 243(E) dated 1.4.2021, MoEFCC has extended the time line, for implementation of the emission control system to comply with the revised emission control system through the Environment (Protection) Amendment Rules, 2021. The said Notification also provides for constitution of task force and environment compensation for operating TPPs beyond the specified timelines. The relevant portion of the Notification dated 1.4.2021 is reproduced as below:
- i. “A task force shall be constituted by Central Pollution Control Board (CPCB) comprising of representative from Ministry of Environment and Forest and Climate Change, Ministry of Power, Central Electricity Authority (CEA) and CPCB to categories thermal power plants in three categories as specified in the Table-I on the basis of their location to comply with the emission norms within the time limit as specified in column (4) of the Table-I, namely:

Sl. No.	Category	Location/Area	Timelines for Compliance	
			Non retiring units	Retiring units
(1)	(2)	(3)	(4)	(5)

1	Category A	Within 10 km radius of National Capital Region or cities having million plus population ¹ .	Upto 31 st Dec. 2022	Upto 31 st Dec. 2022
2	Category B	Within 10 km radius of Critically Polluted Areas ² or Non-attainment cities ²	Upto 31 st Dec. 2023	Upto 31 st Dec. 2025
3	Category C	Other than those included in category A and B	Upto 31 st Dec. 2024	Upto 31 st Dec. 2025

- ii. The thermal power plant declared to retire before the date as specified in column (5) of Table-I shall not be required to meet the specified norms in case such plants submit an undertaking to CPCB and CEA for exemption on ground of retirement of such plant:

Provide that such plants shall be levied environment compensation at the rate of rupees 0.20 per unit electricity generated in case their operation is continued beyond the date as specified in the Undertaking;

- iii. There shall be levied environment compensation on the non-retiring thermal power plant, after the date as specified in column (4) of Table-I, as per the rates specified in the Table-II, namely:-

Table-II

Non-Compliant operation beyond the Timeline	Environmental Compensation (Rs. per unit electricity generated)		
	Category A	Category B	Category C
0-180 days	0.10	0.07	0.05
181-365 days	0.15	0.10	0.075
366 days and beyond	0.20	0.15	0.10.”

15. Vide MoEFCC Notification dated 05.09.2022, the timeline for installation of FGD system has now extended for A, B, and C category thermal power stations till 31st December’ 2024, 31st December’ 2025 and 31st December’ 2026, respectively. The petitioner’s thermal power station is covered under category-C. In the aforesaid notification, last date for retirement of units from exemption from SO₂ compliance also extended till 31.12.2027. Environment compensation for the non-retiring thermal power plant was also revised which is as follows:

Non-Compliant operation beyond the Timeline	Environmental Compensation (Rs. per unit electricity generated)
0-180 days	0.20
181-365 days	0.30
366 days and beyond	0.40

16. The subject petition is filed under Regulations 8 and 31 of the Generation Tariff Regulations, 2020 invoking 'Change in Law' event. Therefore, relevant provisions under MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020 applicable for the control period FY 2019-20 to FY 2023-24 are as under:

i. 'Change in Law' is defined under Regulation 3.1(11) of the MPERC Generation Tariff Regulations, 2020 is as follows:

'Change In Law' means occurrence of any of the following events:

- (i) enactment, bringing into effect or promulgation of any new Indian law, or
- (ii) adoption, amendment, modification, repeal or re-enactment of any existing Indian law, or**
- (iii) change in interpretation or application of any Indian law by a competent court, Tribunal or Indian Governmental Instrumentality which is the final authority under law for such interpretation or application, or
- (iv) change by any competent statutory authority in any condition or covenant of any consent or clearances or approval or licence available or obtained for the project, or
- (v) coming into force or change in any bilateral or multilateral agreement/treaty between the Government of India and any other Sovereign Government having implication for the generating station regulated under these Regulations;

ii. Regarding the in-principal approval of the additional capitalization under 'Change in Law' events or force majeure conditions, Regulation 8 of the aforesaid MPERC Generation Tariff Regulations, 2020 provides as under:

"8. In-principal Approval in Specific circumstances:

8.1 The generating company undertaking any additional capitalization on account of 'change in law' events or 'force majeure' conditions may file petition for in-principle approval for incurring such expenditure after prior notice to the beneficiaries or the long term customers, as the case may be, along with underlying assumptions,

estimates and justification for such expenditure if the estimated expenditure exceeds 10% of the admitted capital cost of the project or Rs.100 Crore, whichever is lower.”

- iii. With regard to Additional Capitalization on account of Revised Emission Standards, Regulation 31 of the aforesaid MPERC Generation Tariff Regulations, 2020 provides as under:

31. Additional Capitalization on account of Revised *Emission Standards*:

31.1 *A generating company requiring to incur additional capital expenditure in the existing generating station for compliance of the revised emission standards shall share its proposal with the beneficiaries and file a petition before Commission for undertaking such additional capitalization.*

31.2 *The proposal under clause above shall contain details of proposed technology as specified by the Central Electricity Authority, scope of the work, phasing of expenditure, schedule of completion, estimated completion cost including foreign exchange component, if any, detailed computation of indicative impact on tariff to the beneficiaries, and any other information considered to be relevant by the generating company.*

31.3 *Where the generating company makes an application for approval of additional capital expenditure on account of implementation of revised emission standards, the Commission may grant approval after due consideration of the reasonableness of the cost estimates, financing plan, schedule of completion, interest during construction, use of efficient technology, and such other factors as may be considered relevant by the Commission.*

31.4 *After completion of the implementation of revised emission standards, the generating company shall file a petition for determination of tariff. Any expenditure incurred or projected to be incurred and admitted by the Commission after prudence check based on reasonableness of the cost and impact on operational parameters shall form the basis of determination of tariff.*

17. The petitioner has sought in-principle approval for additional capitalization to be incurred for installation of flue gas de-sulphuration (FGD) system in compliance to applicability of new environmental norms notified by the MoEFCC in accordance with 'Change in Law' provisions under the Power Purchase Agreements (PPAs) dated 05.01.2011 and

04.05.2011, respectively. Therefore, let us look into the relevant provisions related to 'Change in Law' in the PPA. The provisions under Article 12 of PPA are as under:

- i. As per Article 12.1.1 of the PPA dated 05.01.2011, the definition of Change in Law is as follows:

12.1.1. 'Change in Law' means

The occurrence of any of the following events after the date, which is seven (7) days prior to the execution of this PPA, resulting into any additional recurring/non-recurring expenditure by the Company or any income to the Company:

- i) The enactment, coming into the effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations and framed pursuant to such Law; or*
- ii) A change in the interpretation of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law or any Competent Court of Law; or*
- iii) The imposition of a requirement for obtaining any Consents, Clearances and permits which was not required earlier; or*
- iv) A change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; or*
- v) Any change in tax or introduction of any tax made applicable for supply of power by the Company as per the terms of this Agreement*

But shall not include

- i) Any change in any withholding tax on income or dividends distributed to the shareholders of the Company. Or*
- ii) Change in respect of UI Charges or frequency intervals by an Appropriate Commissions; or*
- iii) Any change on account of regulatory measures by the Appropriate Commissions including calculation of availability*
- iv) The direction / direction and orders of the Appropriate commission including the orders passed on the petition seeking approval to this Agreement.*

- ii. Articles 12.2 and 12.4.1 of the PPA dated 05.01.2011 deal the relief for impact of any Change in Law event is to be sought through Tariff Payment to be decided by the commission. The relevant provisions are as under:

12.2 Application and Principles for computing impact of Change in Law:

While determining the consequence of Change in Law under this Article 12, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payment, to the extent contemplated in this Article 12, the affected Party to the same economic position as if such Change in Law has not occurred and such impact shall be as decided by the Appropriate Commission.

...
Tariff Adjustment Payment on account of Change in Law

12.4.1. Subject to provisions mentioned above, the adjustment in Monthly Tariff Payment shall be effective from:

- i) The date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or*
- ii) The date of order/judgement of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.*

iii. Regarding the Notification of Change in Law, 12.3.1 of the PPA provides as under:

“If the Company is affected by a Change in Law in accordance with this Article 12 and the Company wishes to claim relief for such a Change in Law under this Article 12, it shall give notice to the procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have know of the Change in Law.”

iv. Indian Governmental Instrumentality is defined in PPA as follows:

"Indian Governmental Instrumentality" shall mean the Government of India, Government of Madhya Pradesh and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or Government of Madhya Pradesh or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India but excluding the Company and the Procurer;

18. Vide letter dated 30.05.2018, Ministry of Power (MoP) in exercise of power conferred under Section 107 of the Electricity Act issued directions to CERC to consider the additional cost due to installation of environmental control system as a pass through in tariff and has decided that the said MoEFCC notification dated 07.12.2015 is “Change in Law” event.

The MoP also directed that CERC shall develop appropriate regulatory mechanism to address the impact on tariff, and certainty in cost recovery on account of additional capital and operational cost.

Commission's Observations and Findings:

19. The Ministry of Environment Forest and Climate Change vide notifications dated 7th December 2015 and 28th June 2018, issued new environment norms for thermal power stations. The said notifications revised the existing norms related to air emissions including Oxides of Nitrogen (NO_x), Sulphur Dioxide (SO₂), Particulate Matter, Mercury, quantum of water use and stack height in Thermal Power Plants. In the aforesaid notifications, separate norms have been provided for TPPs (units) installed before 31st December, 2003, TPPs (units) installed between 1st January, 2004 and 31st December, 2016 and TPPs (units) installed after 1st January' 2017.
20. The petitioner has sought in-principle approval of the Commission for additional capital expenditure to be incurred for thermal power stations on applicability of "Change in Law" provisions under PPA for compliance of the new environmental norms (for installation of FGD systems) notified by MoEFCC. The petitioner submitted that in compliance to the new environmental norms as notified by the MoEFCC, its Power Station requires installation of FGD and which in turn would lead to additional capital expenditure in the plant.
21. The petitioner has submitted the following:
 - i. In order to comply new environmental norms issued by MoEFCC for TTPs, the petitioner engaged M/s Save Urja for availing their consultancy service for detailed feasibility study of its Project, identifying the technology and cost estimate for complying with the Revised Emission Standards prescribed under the MoEFCC Notification.
 - ii. Consultant M/s Save Urja submitted the Feasibility Report of the Project on 12.06.2019. In the aforesaid report, the consultant provided various details like proposed technology, scope of work, phasing of expenditure, schedule of completion, estimated completion cost, indicative impact on tariff etc. The proposed technology, estimated associated cost and other ancillary details recommended in the Feasibility Report are in line with the operational norms and guidelines issued by CEA on 20.02.2019 and 15.04.2019 for implementation of FGD System towards compliance of the Revised Emission Standards.

- iii. Vide letter dated 21.06.2019, the petitioner approached CEA seeking approval of the technology and associated indicative cost with regards to implementation of Emission Control Systems, as proposed in the Feasibility Report dated 12.06.2019. Subsequently, vide letter dated 06.02.2020, the petitioner further requested CEA to provide recommendations on the suitable technology and operational parameters for implementation of Emission Control Systems including FGD System in the Project.
- iv. Vide letter dated 05.03.2020, CEA recommended Wet Limestone based FGD System at MB Powers Project with indicative base cost estimation of Rs. 0.37 Cr./MW. 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, CEA's indicative Base Cost does not include taxes, duties, opportunity cost, miscellaneous financial cost and cost for additional work specific to MB Power's Project.
- v. Meanwhile, vide letter dated 05.09.2019, the petitioner had informed the Respondent No. 1 (MPPMCL) with respect to compliance of Revised Emission Standards stipulated by the MoEFCC Notification and stated that MoEFCC Notification has the force of Law, as the same has been notified by the Ministry of Government of India. Therefore, MoEFCC Notification qualifies as an event of Change in Law for MB Power in terms of Article 12.1.1 of the PPA dated 05.01.2011.
- vi. Vide letter dated 18.09.2020, MB Power in terms of the mandate of Regulation 31 of the MPERC Tariff Regulations 2020 provided the status report to MPPMCL and details pertaining to steps taken for compliance with the Revised Emission Standards stipulated under the MoEFCC Notification dated 07.12.2015.
- vii. On 18.02.2021, MB Power issued a tender to initiate International Competitive Bidding for procurement and installation of FGD System in its Project. Pursuant to issuance of the tender documents, four bidders submitted their techno-commercial offer to MB Power. After assessment and review of the techno-commercial offers received from the bidders and various rounds of discussions and negotiations, M/s Apollo International Ltd ("Apollo International") emerged as the L1 bidder. Accordingly, on 28.05.2021, MB Power issued a Lol to Apollo International, which was accepted by Apollo International on 07.06.2021. The Base Cost of the FGD System, as discovered pursuant to International Competitive Bidding is Rs. 648.20 Crore.
- viii. Earlier, the petitioner filed Petition No. 156/MP/2018 before Central Commission for in-principle approval for Additional Capital Expenditure on account of implementation of Revised Emission Standards and its associated operational cost as a Change in

Law event in respect of UP PPAs. Vide Order dated 03.06.2019 the CERC directed the petitioner to proceed with implementation of the Revised Emission Standards in consultation with CEA.

- ix. Further, the petitioner filed Petition No. 450/MP/2019 before the CERC under the UP PPAs seeking in-principle approval of the Base Cost of the FGD System to be implemented in its Project in compliance to the Revised Emission Standards. This Petition was in compliance of directions issued by the CERC in its aforesaid Order dated 03.06.2019.
- x. Vide order dated 21.03.2022, the CERC granted in-principle approval of this Base Cost of Rs. 648.20 Crore of FGD System to the petitioner project. It may be noted that MPPMCL was not a party to such proceedings before the CERC.

22. The units of MB Power TPP were commissioned in May' 2015 and April' 2016, respectively. Therefore, the applicable air emission norms for this plant are as follows:

Particulate Matter	Sulphur Dioxide (SO₂)	Mercury (Hg)
50 mg/Nm ³	200 mg/Nm ³ for Units having capacity of 500 MW and above	0.03 mg/Nm ³

- 23. The base cost recommended 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 does not include opportunity cost related to interconnection of FGD, Taxes & Duties and IDC & IEDC.
- 24. Vide letter dated 30.5.2018, the Ministry of Power issued directions to the Central Commission under Section 107 of the Electricity Act, 2003 to consider the additional cost for installation of environmental control system as a pass through in tariff and has recognised that the said MoEFCC notification dated 07.12.2015 is "Change in Law".
- 25. The Respondent No. 1 in its response to the subject petition has submitted that In terms of the Electricity Act, 2003, a Generating station can either be an inter-state generating station or intra-state generating station. An Inter-State Generating Company is subject to exclusive jurisdiction of the Central Electricity Regulatory Commission while a State Generating Station is subject to jurisdiction of the appropriate State Electricity Regulatory Commission. In no circumstance, a generating station can be subject to jurisdiction of both CERC and SERC.

26. In response to the above, the petitioner submitted that MB Power's generating station is situated in Madhya Pradesh from which MB Power supplies power to the Distribution Licensees in various States viz. Uttar Pradesh and Madhya Pradesh under Long-Term PPAs. Thus, MB Power has a composite scheme for generation and sale of electricity under Section 79(1)(b) of the Electricity Act, 2003, which is amenable to the jurisdiction of the CERC as upheld in *Energy Watchdog v. CERC* (2017) 14 SCC 80. Supply of power to UPPCL is governed and regulated by the CERC in terms of Section 79(1)(b) of the Electricity Act while supply to MPPMCL is regulated by the MPERC in terms of Section 86 read with Clause 5.2 of the Tariff Policy 2016.
27. The Respondent No. 1 further contended that the cost escalation which is directly attributable to such delay should not be allowed as pass-through and the Petitioner should be liable to bear the consequences of delay in implementation of the mandatory systems. As per the Respondent No. 1 due to the delay in installation of FGD not only has the cost of construction increased, it has also resulted in avoidable pollution being caused in the State. Therefore, the Petitioner should not be incentivized by granting in principle approval for the prayed amount and only cost which would have been incurred in the event FGD was promptly installed should be allowed to be capitalized.
28. In response to the above, the petitioner submitted that the aforesaid contention of MPPMCL is wrong and denied since there has been no delay by MB Power in installation of FGD System. The timeline for installation of FGD System extended to 31.12.2026 for MB Power in terms of MoEFCC Notification dated 05.09.2022. As per the petitioner, at the time of construction/commissioning of Unit II of the Project, there was no certainty qua the timeline for installation of FGD System, technology to be adopted and regulatory treatment with respect to tariff implications etc. These clarities were provided by Central Electricity Authority (CEA) only on 05.03.2020. However, MB Power could not have installed FGD System at its Project without the approval from CEA on the technology and operational parameters for FGD.
29. In view of the above observations and on perusal of the submissions by both the parties, the Commission has noted the following:
- i. In accordance with Article 12.1.1 of the PPA dated 05.01.2011, the petitioner wrote a letter to the Respondent No. 1 after notification for new environment norms issued by the MoEFCC, for additional capital expenditure to be incurred for compliance the same. On perusal of the definition of "Change in Law" event, it is observed that the MoEFCC Notification dated 07.12.2015 is a Change in Law event within the terms of the PPA

between the parties. Further, the Ministry of Power, Government of India in exercise of the powers conferred under Section 107 of the Electricity Act, 2003, issued directions to the Central Commission vide letter dated 30.05.2018 providing that issuance of MoEFCC Notification dated 07.12.2015 is a 'Change in Law' event. Therefore, compliance to the new environmental norms and capital expenditure to be incurred in this regard shall fall under Change in Law.

- ii. Estimated capital expenditure (Rs. 648.20 Crore) indicated by the petitioner in compliance to the new environment norms is more than Rs. 100 Crore, which requires in-principle approval of the additional capital expenditure under the Regulation 8 of the MPERC Generation Tariff Regulations, 2020, Further, the petitioner filed the feasibility report prepared by the consultant in which most of the details required under Regulation 31 were incorporated.
 - iii. However, the project is at initial stage and competitive bidding for installation of FGD has been carried out, therefore, the petitioner mentioned that the details of actual expenditure shall be filed on completion of installation and commissioning of works. Therefore, the contention of the Respondent No. 1 that the subject petition is neither maintainable under Regulation 8 nor under Regulation 31 has no merit.
 - iv. The capital cost estimate for installation of FGD as submitted by the petitioner is based on the bidding process carried out by the petitioner. Further, the CEA had estimated the cost of FGD three years back when there was no compulsion of installation of FGD. Looking to the current situation, the CEA is in the process of reviewing its Guidelines/Advice on FGD cost and Technology.
 - v. The petitioner has identified and proposed wet limestone based FGD system for reduction in SO₂ emissions taking into consideration the effectiveness, availability and cost of the Wet Limestone based FGD system based on the CEA recommendations. Therefore, in-principle approval shall be limited only for installation of FGD to meet the SO₂ emission within the prescribed limit.
30. In view of aforesaid facts and circumstances, the Commission is presently only dealing the prayer for in-principle approval and has not dealt with the capital cost scrutiny as well as other issues like O&M expenses, Auxiliary Consumption, shut down time etc. at this stage. It would be appropriate to deal with these issues while processing the petition for determination of supplementary tariff after installation and commissioning of FGD in light of provisions under MPERC Generation Tariff Regulations 2020.

31. The petitioner is required to file all details and documents related to actual expenditure in terms of the Regulation 31 of the MPERC Generation Tariff Regulations, 2020 with the petition to be filed for determination of supplementary tariff after commissioning of FGD system. All relevant details like copy of work order to different vendors, loan agreement along with terms and conditions of loan, detailed calculation for actual IDC, Auditor's certificate for actual expenditure, FGD Commissioning certificate, details of actual SO₂ emission after commissioning of FGD and updated Asset-cum-Depreciation register incorporating FGD components shall be filed by the petitioner alongwith the aforesaid petition.

32. In view of the observations and findings, the Commission hereby accords "in-principle approval" for installation of FGD system at 2 x 600 MW coal based thermal power project under provisions of MPERC Generation Tariff Regulations, 2020. The actual hard cost and soft cost including IDC, IEDC, indirect cost, taxes and duties etc. shall be dealt with and examined by the Commission in petition to be filed by the petitioner for determination of supplementary tariff after commissioning of FGD on capitalization of aforesaid cost in Annual Audited Accounts, in accordance with the Generation Tariff Regulations, 2020 and its amendments.

The subject petition is disposed of accordingly.

(Gopal Srivastava)
Member (Law)

(Mukul Dhariwal)
Member

(S. P. S. Parihar)
Chairman