

APTEL AFFIRMS MOEF&CC'S NOTIFICATION MANDATING INSTALLATION OF FLUE GAS DESULFURIZATION (FGD) SYSTEMS IS A CHANGE IN LAW EVENT



The Appellate Tribunal for Electricity (“APTEL”) has affirmed the Notification issued by the Ministry of Environment, Forest and Climate Change (“MoEF&CC”) on 07.12.2015 (“FGD Notification”) is a “change in law” event.

The FGD Notification introduced specific emission norms for Sulphur Dioxide (SO₂), Nitrogen Dioxide (NO₂), and Particulate Matter (PM) for thermal power plants and required the installation of a Flue Gas Desulfurization (“FGD”) System. This meant that an additional investment would be required for the Thermal Plants in installing a Flue Gas Desulfurization system.

To cover the costs involved in the implementation of the FGD system, The Prayagraj Power Generation Corporation Limited (“PPGCL”) issued a change in law notice on 01.05.2019 to Uttar Pradesh Power Corporation (“UPPCL”) along with the Uttar Pradesh DISCOMs under the Power Purchase Agreements (“PPAs”) signed between the parties. PPGCL then approached the Uttar Pradesh Electricity Regulatory Commission (“UPERC”) by way of a petition under Sections 86(1)(b) and 86(1)(f) of the Electricity Act, 2003, read with relevant provisions of the PPA in 2019. In an Order issued on 8.08.2021, the UPERC held that the FGD Notification issued by the MoEF&CC is a change in law event.

Consequently, An Appeal was filed by Uttar Pradesh Power Corporation Limited (“UPPCL”) in APTEL alleging that the FGD Notification are not “new”, and that the Request for Proposal and other documents including the Environmental Clearances envisaged incorporation of FGD System in future. UPPCL also contested that the change in law notice issued by Prayagraj Power Corporation Limited (“PPGCL”) on 01.05.2019 was not in accordance with the provisions of the PPA as the same was issued unreasonably after a delay of around four years.

PPGCL asserted that the new environmental norms mandated by the MoEF&CC notifications necessitated the installation of the FGD system, constituting a new “Change in Law” event that imposed significant financial burdens.

Further, PPGCL also plead that the delay in issuing the notice was due to acute financial constraints, leading to the company being declared a Non-Performing Asset (NPA) until new ownership by Resurgent Ventures Pte Limited (“RVPL”) in 2019 enabled the company to address the issue.

On 29.07.2024, APTEL reasoned that the space needs to be provisioned for installation of FGD system at a future date, if required. This indicated that only adequate space for installation of FGD system was required to be kept for such installation. In the absence of standard emission norms for SO₂ and NO₂ at the time of RFP stage, it was not possible for any bidder to factor in the cost of installation of FGD system in the bids. Therefore, the new environmental norms for installation FGD System were not foreseeable at the time of the RfP and signing of the PPA. Further, considering the financial distress and change in ownership, APTEL deemed the timing of the notice as reasonable.

APTEL acknowledged that PPGCL had resumed normal operations only after the new financially sound ownership took over and had the technical vetting for FGD completed.

Prayagraj Power Corporation Limited was represented in the APTEL by Mr. Shri Venkatesh, Managing Partner assisted by Mr. Suhael Buttan, Counsel, Mr. Vineet Kumar, Senior Associate and Mr. Nikunj Bhatnagar, Associate of the SKV Team.

For more details, and to read the Hon’ble APTEL’s Order, click [here](#).