

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 130/MP/2017

Coram:

**Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member**

Date of Order: 13th March, 2018

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with Part 7, Clause 4 of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 in regard to difficulties faced in implementation of the Mechanism for compensation for degradation of Heat rate, Auxiliary Power Consumption and Secondary Fuel Consumption due to Part Load Operation and Multiple Start/ Stop of Units

And

In the matter of

NTPC
NTPC Bhawan
Core-7, Scope Complex
7, Institutional Area, Lodi Road
New Delhi-110003

.....Petitioner

Vs

1. Grid Corporation of Orissa Ltd,
Vidyut Bhawan, Janpath,
Bhubaneshwar-751022, Odisha
2. Madhya Pradesh Power Management Corporation Limited
Shakti Bhavan,
Vidyut Nagar, Rampur,
Jabalpur- 110003
3. Maharashtra State Electricity Distribution Limited
Prakashgad, Bandra (East)
Mumbai- 400051
4. Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhawan, Race Course,
Vadodara- 390007
5. Chhattisgarh State Power Distribution Company Limited
P.O- Sundernagar, Danganiya,
Raipur- 492013



6. Electricity Department,
Government of Goa, Vidyut Bhavan,
Panaji- 403001, Goa
7. Electricity Department
Administration of Daman and Diu
Daman- 396210
8. Electricity Department
Administration of Dadra & Nagar Haveli
Silvasa- 396230
9. Andhra Pradesh Eastern Power Distribution Company Limited
Corporate Office, P & T Colony, Seethamadhara,
Vishakhapatnam- 530013
10. Andhra Pradesh Southern Power Distribution Company Limited
Corporate office, Back Side Srinivasa Kalyana Mandapam
Tiruchhanur Road, Kesavayana Gunta,
Tirupathi- 517503
11. Telangana Northern Power Distribution Company Limited
H. No. 2-5-31/2, Vidyut Bhavan, Nakkalagutta, Hanamkonda,
Warangal- 506001
12. Telangana Southern Power Distribution Company Limited
Mint Compound, Corporate Office
Hyderabad- 500063
13. Bangalore Electricity Supply Company Limited
Krishna Rajendra Circle,
Bangalore- 560001
14. Mangalore Electricity Supply Company Limited
Paradigm Plaza, A.B. Shetty Circle,
Pandeshwar, Mangalore- 575001
15. Chamundeshwari Electricity Supply Corporation Limited
Corporate Office, No. 29, Ground Floor,
Kaveri Grammeena Bank Road, Vijayanagar 2nd Stage,
Mysore- 570017
16. Gulbarga Electricity Supply Company Limited
Main Road, Gulbarga- 585102
17. Hubli Electricity Supply Company Limited
Corporate Office, P.B. Road, Navanagar,
Hubli- 580025
18. KSEB Ltd
Vaidyuthi Bhavanam, Pattom,
Thiruvananthapuram- 695004



19. Tamil Nadu Generation & Distribution Corporation Limited
144, Anna Salai, Chennai- 600002
20. Electricity Department
Govt. of Puducherry, 137, NSC Bose Salai,
Puducherry- 605001
21. Uttar Pradesh Power Corporation Limited
Shakti Bhavan Extn, 10th Floor, 14, Ashok Marg,
Lucknow- 226001
22. Rajasthan Urja Vikas Nigam Limited
Shed No. 5/5, Vidyut Bhavan, Janpath, Jyoti Nagar,
Jaipur- 302005
23. Tata Power Delhi Distribution Limited
33 kV Substation, Hudson Lines, Kingsway Camp,
Delhi- 110009
24. BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place,
New Delhi- 110019
25. BSES Yamuna Power Limited
Shakti Kiran Building, Karkardooma,
Delhi- 110092
26. Haryana Power Purchase Centre
Shakti Bhavan, Sector- 6,
Panchkula, Haryana- 134109
27. Punjab State Power Corporation Limited
The Mall, Patiala- 147001
28. Himachal Pradesh State Electricity Board
Kumar Housing Complex Building-II,
Vidyut Bhavan, Shimla- 171004
29. Electricity Department (Chandigarh)
Union Territory of Chandigarh, Addl. Office Building,
Sector- 9 D, Chandigarh
30. Uttarakhand Power Corporation Limited
Urja Bhavan, Kanwali Road,
Dehradun- 248001
31. New Delhi Municipal Council
Palika Kendra Building, Opp. Jantar Mantar,
Parliament Street, New Delhi- 110001
32. Military Engineering Services
Delhi Cantonment, New Delhi- 110010



33. Power Development Department
Govt. of J & K, Civil Secretariat,
Jammu
34. Power Department
Govt. of Sikkim, Kazi Road,
Gangtok- 737101, Sikkim
35. Jharkhand Urja Vikas Nigam Limited
Engineering Building, HEC, Dhurwa,
Ranchi- 834004
36. Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata- 700054
37. Bihar State Power (Holding) Company Limited
Vidyut Bhawan, Bailey Road,
Patna-800001
38. North Bihar Power Distribution Company Limited
Vidyut Bhawan, Bailey Road,
Patna- 800001
39. South Bihar Power Distribution Company Limited
Vidyut Bhawan, Bailey Road,
Patna- 800001
40. West Bengal State Electricity Distribution Company Limited
Vidyut Bhawan, Bidhannagar, Block DJ, Sector-II,
Salt Lake City, Kolkata- 700091
41. Assam Power Distribution Company Limited
Bijulee Bhawan, Paltan Bazar,
Guwahati- 781001
42. Meghalaya Energy Corporation Limited
Lum Jingshai, Short Round Road, Shilling- 793001
43. Department Of Power
Government of Arunachal Pradesh, Itanagar-791111
44. Department Of Power
Govt. of Mizoram, Khatla,
Aizawl- 796001
45. Manipur State Power Distribution Company Limited
Keishampat, Imphal- 795001
46. Department of Power
Govt of Nagaland, Kohima- 797001
47. Tripura State Electricity Corporation Limited
Bidyut Bhaban, Banamalipur, Agartala- 799001



48. National Load Despatch Centre
1st Floor, NLDC Office, B-9, Qutab Institutional Area,
Katwaria Sarai, New Delhi-110016

49. Northern Regional Load Despatch Centre
18-A, Shaheed Jeet Singh Sansanwal Marg,
Katwaria Sarai, New Delhi-110016

50. Eastern Regional Load Dispatch Centre
14, Golf Club Road, Tollygunje,
Kolkata- 700033

51. Southern Regional Load Despatch Centre
29, Race Course Cross Road
Bangalore-560009

52. Western Regional Load Despatch Centre
F-3, MIDC Area, Marol,
Andheri (East), Mumbai-400093

53. North Eastern Regional Load Despatch Centre
Dongteih Lower Nongrah, Lapalang
Shillong-793006

54. Northern Regional Power Committee
18-A, Shaheed Jeet Singh Sansanwal Marg,
Katwaria Sarai
New Delhi-110016

55. Southern Regional Power Committee
29, Race Course Cross Road
Bangalore-560009

56. Eastern Regional Power Committee
14, Golf Club Road, Tollygunje,
Kolkata- 700033

57. Western Regional Power Committee
F-3, MIDC Area, Marol,
Andheri (East), Mumbai-400093

58. North Eastern Regional Power Committee
NERPC Complex, Dong Parmaw, Lapalang
Shillong-793006

.....Respondents

Parties Present:

Shri Anand K. Ganeshan, Advocate, NTPC
Ms. Swapna Seshadri, Advocate, NTPC
Shri Ashwin Ramanathan, Advocate, NTPC
Ms. Parichita Chowdhury, Advocate, NTPC
Shri U.S. Mohanty, NTPC



Shri Somes Bandyopadhyaya, NTPC
Shri Vikram Singh, NTPC
Shri R.B. Sharma, Advocate, WBSEDCL & BSP(H)CL
Shri Rajkumar Mehta, Advocate, GRIDCO
Shri S. Vallinayagam, Advocate, TANGEDCO
Shri Ashutosh K. Srivastav, Advocate, TPDDL
Shri Rahul Kinra, Advocate, TPDDL
Shri Pratyush Pandey, TPDDL
Shri Manish Garg, UPPCL
Shri S.S. Barpanda, NRLDC
Shri Ashok Ranjan, NRLDC
Shri H.K. Chawla, POSOCO & NRLDC

ORDER

The Petitioner, NTPC has filed this Petition with the following prayers:

“(a) Allow Compensation for partial loading operation of generating stations w.e.f 06.04.2016 i.e. subsequent to the issuance of CERC (IEGC) (Fourth Amendment) Regulations, 2016 w.e.f 06.04.2016.

(b) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.”

2. The Petitioner in the Petition has mainly submitted as under:

(a) The Petitioner herein is a generating company within the meaning of Section 2 (28) of the Electricity Act, 2003. The Petitioner has generating stations/projects across the country and currently owns approximately 51,000 MW of coal and gas fired thermal generating stations.

(b) On 6.4.2016, the Commission notified the CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016. These Regulations inter-alia lowered the technical minimum scheduling limit to 55% and provided for compensation to the coal based and gas based generating stations on account of partial loading of the units. This compensation is allowed in the form of degradation of the operational norms such as Heat Rate and Auxiliary Power Consumption in various ranges upto 55%.

(c) The CERC (IEGC) (Fourth Amendment) Regulations, 2016 also provides for compensation for start-up fuel cost towards start/ stops exceeding 7 nos/year against Reserve Shutdown. Regulations 6.36 (6) and 6.36 (7) of the CERC (IEGC) (Fourth Amendment) Regulations 2016 provide the following regarding a detailed operating procedure for reserve shutdown to be prepared by NLDC and mechanism for compensation to be worked out by RPCs.



(d) The Commission vide its order dated 5.5.2017 has issued a detailed procedure for taking units{s) under Reserve Shut Down and Mechanism for Compensation for degradation of Heat rate, Auxiliary Power Consumption and Secondary Fuel Consumption due to Part Load Operation and Multiple Start Stops of Units (the Approved Procedure). The Approved Procedure contains the process and methodology for calculation of the compensation amount for a station based on the Average Unit Loading %. The Approved Procedure also provides that the compensation amount so calculated will be billed along with the monthly bills raised by the generators on the distribution utilities.

(e) It is submitted that the CERC (IEGC) (Fourth Amendment) Regulations, 2016 were issued on 6.4.2016. By order dated 5.5.2017, the Commission has prescribed the Detailed Operating Procedure and the Compensation Mechanism specified shall come into force from 15.5.2017. The Commission had recognized and approved the basis & framework to compensate the generators for part load operation due to low scheduling in terms of energy charges on 6.4.2016.

(f) Prior to issuance of the CERC (IEGC) (Fourth Amendment) Regulations 2016 on 6.4.2016, NTPC Stations were scheduled by RLDCs generally considering 70% as the technical minimum unit loading. Subsequent to the issuance of the CERC (IEGC) (Fourth Amendment) Regulations 2016, the provisions of these Regulations with regard to 55% as technical minimum unit loading have been implemented by the Regional load Despatch Centres. Accordingly, NTPC stations in various time-blocks during 2016-17 were required to operate below technical minimum loading of 70% and upto 55%.

(g) The month-wise detail of time-blocks wherein unit loading of different stations remained less than 70% is enclosed at Annexure-1 of the Petition. It can be seen that almost all the stations were given schedule of less than 70% and upto 55% level.

(h) On the basis of CERC (IEGC) (Fourth Amendment) Regulations, 2016 in almost 106585 time blocks, NTPC coal stations were given a schedule of less than 70% in the financial year 2016-17, across all the regions of the country as given below:

Regions	No. of time blocks with unit loading of less than 70% upto 55% in 2016- 17 in all NTPC stations
NR	25059
WR	29896
SR	25073
ER	26557
Total	106585

(i) It can be seen that for substantial time, coal stations of NTPC were running at less than 70% loading in 2016-17. The tariff of NTPC stations is determined by the Commission based on the Terms and Conditions of Tariff Regulations issued by them for different control periods. The current control period being 2014-19, the



CERC (Terms and Conditions of Tariff) Regulations 2014 is the applicable Tariff Regulations for calculation of the Capacity Charge and Energy Charge of different stations. The Energy Charge Rate (ECR) of a station depend on the normative Operational parameters namely Heat Rate and Auxiliary Power Consumption and the Landed cost and Calorific value of fuel i.e. Coal and Oil

(j) In case of low load operation of the units, the Operational parameters viz Heat Rate and Auxiliary Power Consumption deteriorate from the normative values leading to increase in the cost of generation. The objective of the CERC (IEGC) (Fourth Amendment) Regulations, 2016 is to compensate the generator against any increase in cost of generation, which cannot be covered within the Operating norms fixed in the CERC (Terms and Conditions of Tariff) Regulations, 2014.

(k) It is respectfully submitted that Unit loading data above shows that the NTPC units were subjected to partial loading subsequent to the enactment of the CERC (IEGC) (Fourth Amendment) Regulations 2016, thereby leading to an increase in cost of generation of energy, which is not covered under the existing Operational norms of the CERC (Terms and Conditions of Tariff) Regulations 2014. This increase in the cost of generation of NTPC stations needs to be compensated.

(l) RPCs were to only work out mechanism for quantifying and sharing of compensation based on the Regulations. All parameters to be used for determining and sharing compensation are based on various operation parameters and billing parameters which are already being shared by NTPC either with beneficiaries, (CEA or RLDCs)

(m) The methodology for calculation of the compensation as given in the Approved Procedure issued by the Commission vide order dated 5.5.2017 can be used for calculation of the compensation amount in all such cases of low load operation of NTPC units during 2016-17, subsequent to the issuance of the CERC (IEGC) (Fourth Amendment) Regulations 2016.

(n) In summary, the CERC (IEGC) (Fourth Amendment) Regulations, 2016 has lowered the technical minimum scheduling limit to 55% and has provided for compensation in the Heat Rate and Auxiliary Power Consumption at different ranges of loading in the form of a table. This technical minimum scheduling limit has been implemented by different beneficiaries/RLDCs. The deterioration of operational parameters due to reduced loading has already impacted the generators. The Procedure containing the mechanism for calculation of the compensation amount has been subsequently issued on 5th May 2017. The data required for working out compensation is already available with the RLDCs. Therefore, the Compensation may please be worked out based on the Approved Procedure and allowed to the Petitioner for the period after 6.4.2016 i.e. when the CERC (IEGC) (Fourth Amendment) Regulations, 2016 were issued.



3. Accordingly, the Petitioner in the Petition has prayed that compensation for NTPC Stations in respect of part-load operation during the year 2016-17 as per CERC (IEGC) (Fourth Amendment) Regulations, 2016 (hereinafter 'the IEGC Regulations, 2016'), w.e.f 6.4.2016 may be allowed.

4. The matter was heard on 20.7.2017 and the Commission after hearing the Petitioner issued notice to the Respondents on "admissibility" of the Petition, with directions to the parties to complete pleadings in the matter. Replies to the petition have been filed by the Respondents, GRIDCO, TANGEDCO, GUVNL, TPDDL, BRPL, BYPL, WBSEDCL, BSP(H)CL, UPPCL, SRPC and the Load Despatch Centres (NLDC, NRLDC, SRLDC, WRLDC, ERLDC & NERLDC). The Petitioner has filed its Rejoinder to the said replies.

Submissions of the Respondents

GUVNL

5. The Respondent No.4, GUVNL vide affidavit dated 11.8.2017 has submitted as under:

(a) The IEGC Regulations, 2016 was notified on 6.4.2016 and the amendment had dealt with several issues. However, while notifying the amendment in Regulation 1(2), the Commission had clearly stated that Regulation 6.3(B) would come into force on such date as the Commission may appoint by notification in the gazette. Thus, it does not stand logic for NTPC to claim relief in the teeth of the Regulations.

(b) When it was clear to all concerned that the compensation mechanism would come into force subsequently, the said Regulations cannot be set at naught by seeking relaxation. NTPC by way of the instant Petition is not merely seeking relaxation but is seeking an amendment of the Regulations itself which cannot be permitted.

(d) GUVNL had not given any consent to WRLDC / NTPC for operating the NTPC plant / units in accordance with the IEGC, Regulations, 2016.

(c) GUVNL has never agreed to pay any compensation to NTPC towards degradation of Station Heat Rate, Auxiliary Consumption and Secondary Fuel Consumption towards operating the power plant / units at part load / and with multiple start / stops since no mechanism was in place during 2016-17. There is no merit in the petition and the petition needs to be dismissed at the admission stage.



SRPC

6. Southern Regional Power Committee (SRPC) on 20.8.2017 has submitted as under:

(a) NTPC has stated that its coal stations were given a schedule of less than 70 % in the year 2016-17 across all the regions of the country. In Southern Region, number of time blocks with unit loading of less than 70% up to 55% in 2016-17 has been shown as 25073. This is not in line with scheduling procedure adopted in SR where schedule up to 70 % is ensured, except in a couple of instances of contingencies. For instance on 15.9.2016, NLDC issued a message to back down ISGS of SR up to 60%, citing continued under drawal by SR constituents. It is submitted that an ISGS is scheduled lowest up to the technical minimum only, which is 70%. NLDC letter is annexed at ANNEXURE-I, indicating instruction for scheduling up to 60%. However, NTPC has mentioned that ISGS stations were given a schedule of less than 70 % in SR. It is also seen that there are instances when Ancillary Services were triggered in other Regions to maintain the station at minimum schedule. NLDC may be ensuring minimum schedule of 70 % through RRAS up instruction to ISGS in most of the cases.

Load Despatch Centres

7. The Respondent Nos. 48 to 53 (NLDC, NRLDC, ERLDC, SRLDC, WRLDC and NERLDC)

vide common reply affidavit dated 24.8.2017 have submitted the following:

(a) It was provided in Regulation 1(2) of the above Regulations that sub-Regulation 6.3B would come into force on such date as the Commission may appoint by notification in the official Gazette. Accordingly the IEGC Regulations, 2016, except Regulation 6.3B came into effect from 29.4.2016.

(b) Regulation 6.3B as well as the detailed procedure came into effect on 15.5.2017. Hence the provisions of the procedure will also be applicable from the date of its coming into force. In the 4th amendment, it was clearly mentioned that Regulation 6.3B would come into force from a date to be notified by the Commission. Accordingly, RLDCs have implemented Regulation 6.3B from 15.5.2017, after the same was notified. After issuance of IEGC Regulations, 2016 there was no change in the scheduling philosophy at RLDCs although the Petitioner has claimed that Regional Load Despatch Centre has implemented 55% technical minimum unit loading subsequent to the issuance of IEGC Regulations, 2016.

(c) It would be pertinent to mention here that even prior to 6.4.2016, RLDCs were scheduling generating stations below the technical minimum declared by the generators, if the system conditions so warranted.

(c) In all the regions except WR, scheduling was generally done honouring technical minimum declared by the generators. In the Western Region, during the 25th WRPC meeting (held on 4/2/2014), Reserve Shut Down (RSD) procedure was discussed and agreed to be implemented on trial basis. It was also discussed and decided that if



the net schedule of the plant is less than the technical minimum schedule, then WRLDC shall not revise the same on its own to technical minimum level. In such cases, generating plant was to decide whether to operate the unit or bring it under RSD.

(d) RSD methodology was implemented in Western Region. Subsequently, during the 27th WRPC meeting held on 22/11/2014, it was decided that RSD methodology shall be continued in the Western Region (MoM enclosed as Annexure II). In view of the above, it is submitted that it is not appropriate for the Petitioner to state that the RLDCs started giving schedule below the technical minimum declared by the generator after the 4th amendment to IEGC came into force, i.e. after 6.4.2016. In the light of the foregoing submissions, it is prayed that the Commission may take a view on the issue as deemed fit.

UPPCL

8. The Respondent No. 21, UPPCL vide affidavit dated 14.9.2017 has submitted that the detailed operating procedure has been finalized after consultation with all the stakeholders including the Petitioner. It has also submitted that the alleged claim of Compensation for partial loading operation of generating station during the year 2016-17 w.e.f. 6.4.2016 is without any basis as the issue was deliberated at length at the time of preparation of detailed operating procedure. Accordingly, the Respondent has submitted that the Petition is liable to be dismissed and the claim of the Petitioner for Compensation for partial loading operation of generating station during the year 2016-17 w.e.f. 6.4.2016 may be disallowed.

GRIDCO

9. The Respondent No.1 GRIDCO vide affidavit dated 13.9.2017 has submitted the following:

(a) The Petitioner in the guise of seeking relaxation of the provisions of Regulation 6.3B of the IEGC, Regulations, 2016, is seeking amendment of the said Regulations which is not permissible in terms of the Commission's order dated 11.4.2017 in Petition No. 83/MP/2014.

(b) Power to relax can be exercised only in a given fact situation and cannot be invoked for a general relaxation of the Regulations. Thus, in disguise of seeking relaxation of Regulation 6.3B inserted by fourth amendment Regulations, NTPC is in



effect seeking amendment of clause 6.3B of the said Regulation which is not permissible. Reliance is placed on the judgment dated 6.5.2011 of the Appellate Tribunal for Electricity in Appeal 170/2010 (M.P Power Generation Company Vs MPERC)

(c) Difficulties, if genuine, can only be addressed by amendment of the CERC Grid Code Regulations through a Public Hearing after following the prescribed procedure. The Petition filed is therefore not maintainable.

(d) The procedure of feedback by RPCs after consultation with the stakeholders, on the operation of the Compensation Mechanism for assessment of efficacy of the same, NLDC's deliberation of the WRPC procedure in other RPC's and submission of feasibility report and subsequent review of operation of Detailed Operating Procedure on Reserve Shut Down by the Commission are yet to be carried out. Pending the above review process, there cannot be any justification for the Petitioner to file the present Petition and the Petition is liable to be dismissed as premature.

(e) The statement of NLDC and RLDC in its reply further belies the claim of the Petitioner that 55% as Technical Minimum Unit Loading have been implemented by the Regional Load Despatch Centres. Similarly, the statement of SRPC in its reply letter dated 20.8.2017 belies the claim of the Petitioner that 55% as Technical Minimum Unit Loading has been implemented by the Regional Load Despatch Centres for the Southern Region. Hence, the Petition is not maintainable.

TANGEDCO

10. The Respondent No. 19, TANGEDCO vide affidavit dated 18.9.2017 has mainly submitted that the Commission having carved out an exception for Regulation 6.3B under the IEGC Regulations, 2016 itself, the prayer sought by the Petitioner under Power to relax specially to give retrospective effect to the notification dated 5.5.2017 is not maintainable in law. It has stated that the notification dated 5.5.2017 was pursuant to giving opportunity to the Petitioner and other Central Generating Stations, NLDC and RPC. The Respondent has further submitted that the Petitioner did not raise the present issue before this Commission prior to the issuance of notification dated 5.5 .2017. The Respondent has added that the prayer sought by the Petitioner in the present petition is an afterthought and based on factually incorrect data. Hence, the Petition is liable to be dismissed.



TPDDL and BRPL

11. The Respondent No.23, TPDDL and Respondent No.24, BRPL vide their affidavits dated 20.9.2017 and 3.10.2017 have submitted the following:

(a) The Petition as well as the reliefs claimed by the Petitioner are not maintainable and are liable to be dismissed as the Petitioner cannot seek retrospective application of a regulation when the regulation has been made applicable prospectively from 15.5.2017.

(b) In terms of Regulation 6.3B (6) and (7), POSOCO submitted the detailed Operating procedure for Backing down of Coal/Lignite/Gas Unit(s) of the Central Generating Stations, Inter-State Generating Stations and other generating stations and for taking such units under Reserve Shut Down on scheduling below Technical Minimum Schedule. RPCs have also finalised the 'Mechanism for compensation for De-gradation of Heat Rate, Aux Consumption and Secondary Fuel Oil Consumption, due to part load operation and multiple start/stop of units.

(c) The order dated 5.5.2017 clearly specifies that the Detailed Operating procedure and compensation mechanism shall come into force from 15.5.2017. It is evident that Regulation 6.3B cannot be enforced prior to the date of its notification. Any claim for compensation for operating the plant at technical minimum can only be made after the detailed operating procedure and compensation mechanism has come into force. As the compensation sought from 6.4.2016 till 14.5.2017 is prior to the date of notification, the present Petition is not maintainable.

(d) The data submitted by the petitioner is not complete since the Petitioner has provided plant wise scheduling details instead of unit-wise details. The plant wise scheduling can be substantially affected even if one unit is shut down. Moreover, the data does not differentiate as to when the backing down was directed by the RLDCs taking into consideration the grid security; and when the backing down was directed by the RLDCs at the behest of the beneficiaries.

(e) In terms of section 29(1) of the Electricity Act, 2003, RLDCs are empowered to issue directions to generating stations to ensure grid stability. Therefore, irrespective of the IEGC, 2016, RLDCs are empowered to schedule the generating stations below technical minimum. As such scheduling by RLDCs cannot be banked upon by the Petitioner to gain unjust enrichment by claiming retrospective application of Regulation 6.3(B) of IEGC, 2016.

(f) Even assuming that RLDCs were scheduling the plant below technical minimum after 6.4.2016 (date of 4th amendment of IEGC), the Petitioner could have raised dispute before this Commission under Section 29(5) of the Electricity Act, 2003. It is an afterthought on behalf of the Petitioner to claim compensation when admittedly the detailed procedure and compensation mechanism was not in existence for the period under which the relief is sought for i.e 6.4.2016 to 14.5.2017.



(g) From the replies dated 24.8.2017 of the RLDCs and letter of SRPC, it is evident that RLDCs have implemented Regulation 6.3(B) only after 15.5.2017. Also, RLDCs have only been scheduling the plants of the Petitioner below technical minimum if the conditions so warranted. Therefore, the contention of the Petitioner that RLDCs have been scheduling the plants of the Petitioner as per Regulation 6.3B of the IEGC Regulations, 2016 is not tenable.

(h) Regulation 6.3B was not part of the IEGC Regulations, 2016 prior to 15.5.2017. Therefore, the Petitioner is seeking retrospective amendment to the Regulation which is not permissible and amounts to abuse of process of law. Power to relax cannot be stretched to mean that the Commission can apply a regulation which was non-existent on that date.

(i) Removal of difficulties as sought for by the petitioner is also not tenable. The power of removal of difficulties can only be exercised for removal of any difficulty encountered in the enforcement of the statute and cannot be invoked to change or amend the basic structure of the Regulations as held by the Hon'ble Supreme Court in *M.U.Sunai Vs UOI* (1975) 2 SCR 640. Hence, the present Petition is not maintainable as it seeks amendment of the Regulations in the garb of power to relax.

BYPL

12. The Respondent No. 25, BYPL vide affidavit dated 3.10.2017 has mainly submitted the following:

(a) The detailed operating procedure has been finalised after consultation with all stakeholders including the Petitioner. Hence, the claim of the Petitioner for compensation for partial loading operation during the year 2016-17 i.e from 6.4.2016 is without any basis as the issue was deliberated at length at the time of preparation of detailed procedure.

(b) In the guise of seeking relaxation of the provisions of Regulation 6.3B of IEGC, Regulations, 2016, NTPC is in effect seeking amendment of the said Regulations which is not permissible.

13. The Respondent No. 37, BSP (H)CL vide affidavit dated 5.1.2018 has submitted that the IEGC Regulations, 2016 came into force from 6.4.2016, except Regulation 6.3B. Regulation 6.3B and the Detailed Operating Procedure and mechanism for compensation came into operation with effect from 15.5.2017. Accordingly, the Respondent has submitted that the claim of the Petitioner for partial loading of the generating station from 6.4.2016 is without any basis and hence the Petition is liable to be dismissed.



WBSEDCL

14. The Respondent No. 40, WBSEDCL vide affidavit dated 23.1.2018 has mainly submitted the following:

(a) The IEGC, Regulations, 2016 came into force from 6.4.2016, except Regulation 6.3B. Regulation 6.3B and the Detailed Operating Procedure and Mechanism for compensation came into operation with effect from 15.5.2017. Accordingly, the Respondent has submitted that the claim of the Petitioner for partial loading of the generating station from 6.4.2016 is without any basis and hence the Petition is liable to be dismissed.

(b) The Petitioner through this Petition is seeking retrospective operation of Regulation 6.3B. Regulation 6.3B speaks of compensation only in the event if the technical minimum schedule falls below the normal plant availability factor but at or above the technical minimum schedule of 55%.

(c) The Petitioner knew that the operating procedure and the compensation mechanism specified in the order dated 5.5.2017 shall come into force from 15.5.2017. Hence, there is no provision of retrospective operation of these regulations as per IEGC, Regulations, 2016.

(d) The actual operation of the thermal generating stations wherein unit loading of different stations remained below 70% may also be problems in that generating station. Moreover, the problems related to the unit loading less than 70% upto 55% in the particular time blocks are taken care under Regulation 8 of the 2014 Tariff Regulations, wherein the generating station is required to carry out truing up of tariff based on performance of controllable parameters. This issue has been raised by the Petitioner only to sub-serve its commercial interest and is liable to be rejected by the Commission.

Rejoinder of Petitioner

15. As stated, the Petitioner has filed its rejoinder to the above said replies of the Respondents which are summarised as under:

(a) The Petition is maintainable. It is an admitted fact that Regulation 6.3B as envisaged was to come into force from 15.5.2017, as provided in Regulation 1(2) of IEGC Regulations, 2016. However, immediately after 6.4.2016 i.e after issuance of the fourth amendment, RLDCs started implementing the said regulations with regard to 55% as technical minimum unit loading, by issuing directions to NTPC stations. Accordingly, the generating stations of NTPC in various time blocks during 2016-17 were required to operate up to technical minimum loading in the above range.

(b) The Petition is maintainable since it seeks to redress the issue between 6.4.2016 when part of Regulation 6.3B came to be implemented and 15.5.2017 when the



compensation mechanism has been notified by the Commission. The feedback at the RPCs will be for changing the compensation mechanism for future. This will not address the issue of NTPC between the period 6.4.2016 to 15.5.2017 when the generating stations operated at technical minimum but are not getting compensated for the same.

(c) There is no basis for the submissions of SRPC that schedule up to 70% was ensured at all times to the generating station at the Southern Region. SRPC has not submitted any data supporting the same. The example of RRAS UP being triggered to maintain Jhajjar station at minimum schedule is of no relevance to decide the present matter. The fact remains that in several time blocks, the generating units were scheduled below 70% and unit loading was lower.

(d) There is no dispute on the fact that prior to 6.4.2016, generating stations were given schedules below the technical minimum on account of system or grid stability/ security issues. However, these were much fewer and in intermittent cases. The difficulty arose after notification of IEGC Regulations, 2016 on 6.4.2016, wherein RLDC started scheduling NTPC stations below the technical minimum as a matter of routine rather than for system or grid security.

(e) The submission of POSOCO that in all the regions, except WR, scheduling was done honouring technical minimum declared by generators is incorrect. In each of the regions in several time blocks, due to RLDC instructions, the generating stations of NTPC having operated at levels below the technical minimum. That in the year 2016-17, Unchahar-I, Dadri-II, Mouda-I, Vindhyachal-I, Simhadri-II, Farakka-I & II, Farakka-III, Barh and Bongaigaon stations are entitled for compensation whose Average Unit Loading (AUL) were less than 85%.

(f) The data submitted by NTPC is not incomplete. NTPC has in fact benefitted the respondents by averaging out the plant availability month- wise and thereafter computing the periods in which the respective plants had to operate at technical minimum. It is irrelevant to NTPC whether the backing down was directed by RLDCs for grid security or at the behest of the beneficiaries. So far as NTPC is concerned, it has operated at the technical minimum which has caused losses to NTPC and compensation mechanism has been devised to compensate NTPC in cases of such operation.

(g) The claim for compensation is not an afterthought. It was only when compensation mechanism was notified on 15.5.2017, did NTPC realise the dichotomy of the situation and filed the present Petition. There was no dispute to be raised regarding operating at a particular level.

(h) The provisions related to 'power to remove difficulties' and 'power to relax' supplement each other and authorises this Commission to meet any eventuality which comes before it in subsequent or challenged circumstances or predicaments. Furthermore, the nature of jurisdiction exercised by the Commission is regulatory in nature that carries with it the powers to pass such orders as necessary in the interest



of justice. The exercise of such powers has been upheld by the APTEL in its judgment dated 3.12.2013 in Appeal No. 87/2012 (UPPCL vs CERC & anr). The judgment of the Hon'ble SC in M.U.Sinai vs UOI supports the contention of NTPC, as there is clear difficulty in implementation of Regulation 6.3B. It cannot be that while one part of Regulation 6.3B came into effect on 6.4.2016, the other part would be given effect from 15.5.2017. The difficulty has arisen only in relation to the date of implementation.

(i) NTPC is not challenging any of the terms of order dated 5.5.2017. The case of NTPC is simply that while a generating station has been asked to operate at technical minimum from an earlier date i.e. 6.4.2016 onwards, the compensation in lieu of the same has been ordered from a later date. There is a dichotomy in this approach and therefore the power of relaxation needs to be used to rectify the situation.

(j) POSOCO cannot rely on its own report (RRAS), specially when the same does not bear any association with the IEGC Regulations, 2016. When this Commission has already notified the said regulations, which provides for bringing down the technical minimum at 55%, then the only procedure required was to compensate the utilities for generation up to 55% level.

16. During the hearing of the Petition on 30.1.2018, the learned counsel for the Petitioner reiterated the submissions made in the Petition and prayed that the Commission may exercise the Power to Relax and Remove difficulties on the aspect of the mechanism for compensation for degradation of Heat Rate, Auxiliary Power Consumption and Secondary Fuel Consumption due to part load operation and multiple start/stop of units in accordance with Part 7, Regulation 4 of the IEGC Regulations, 2010 read with Regulation 115 of the CERC (Conduct of Business) Regulations, 1999. The learned counsels for the Respondent No. 1, GRIDCO raised issues on 'maintainability' of the Petition and stated that the exercise of 'Power to Relax' would amount to amendment of the regulation and the same is not permissible. The learned counsel for other Respondents, namely TANGEDCO, WBSEDCL and BSP(H)CL adopted the submissions of Respondent No. 1, GRIDCO and submitted that the prayer of the Petitioner may be rejected. The Commission directed the parties to file their written submissions on the issue of 'maintainability' of the Petition and accordingly reserved its order in the matter.



Maintainability

17. As regards maintainability, the Petitioner vide affidavit dated 27.1.2018 and the Respondents, GRIDCO, TPDDL and BRPL have filed written submissions in the matter.

Submissions of the Petitioner

18. The Petitioner has submitted that for the purpose of maintainability, two aspects namely, (i) the court ought to have jurisdiction to entertain the matter, and (ii) the petition should not be barred by any law including law of limitation, are relevant. It has also submitted that the scope of consideration on maintainability at the preliminary stage is confined to basic aspects such as patent lack of jurisdiction or absence of a cause of action. Referring to the judgments of the Hon'ble Supreme Court in Liverpool & London S.P & I Association Ltd. vs MV Sea Success I (2004) 9 SCC 512 and Ramesh D. Desai vs Bipin Vadilal Mehta (2006) 5 SCC 638, the Petitioner has submitted that maintainability should be decided without referring to the averments made in the reply and by accepting the contents of the application as correct. It has further submitted that in so far as Electricity Act is concerned, the Hon'ble SC in its judgment in PTC vs GERC & ors and the Hon'ble High Court of AP in its judgment in AP Gas power Corporation Ltd vs APERC have laid down that all issues, whether preliminary or otherwise, need to be dealt with together in order to provide for expeditious disposal of matter. The Petitioner has pointed out that the difficulty has arisen because of the fact that while one part of the Regulation 6.3B came into effect on 6.4.2016, the other part has been notified only from 15.5.2017. It has stated that there is dichotomy in this approach and therefore the Power of relaxation / Removal of difficulties need to be used to rectify this situation. Accordingly, the Petitioner has argued that the matter needs to be admitted and heard on merits.



Submissions of the Respondents

GRIDCO

19. GRIDCO vide affidavits dated 30.1.2018 & 15.2.2018 has filed its written submissions on maintainability and has argued that the present Petition is not maintainable. It has submitted that the Petitioner in the garb of seeking relaxation, has in effect sought the amendment of Regulation 6.3B which is not permissible in terms of the Commission's order dated 11.4.2017 in Petition No. 83/MP/2014. GRIDCO has also submitted that Power to relax can be exercised only in a given factual situation and cannot be invoked for a general relaxation of the Regulations. Referring to the judgment dated 6.5.2011 of APTEL in Appeal No. 170/2010 (MPPGCL V MPERC & ors), GRIDCO has stated that the Petitioner is in effect seeking amendment of Regulation 6.3B which is not permissible. GRIDCO has further submitted that the reliance of the Petitioner to the judgment in 'Liverpool case' is not applicable to the present case since the said judgment was given in the context of a civil suit wherein Civil Procedure Code (CPC) is applicable and Order 14 of the CPC provides that all issues should normally be tried together. It has further added that the judgments of the Hon'ble SC in PTC vs GERC & ors and the Hon'ble High Court of AP in AP Gas power Corporation Ltd vs APERC are also not applicable since these judgments relate to preliminary /interlocutory objections raised by the parties, whereas in the present case, the Commission had issued notice on 'admissibility' and had reserved orders on the same.

TPDDL & BRPL

20. TPDDL vide affidavit dated 19.2.2018 and BRPL vide affidavit dated 20.2.2018 have filed their written submissions on maintainability and have argued that the Petition is not maintainable. They have placed reliance on the judgments of the Hon'ble Supreme Court in T.K.Lathika v Seth Karsandas Jamnadas (1999) 6 SCC 632 and Union of India V



Ranbir Singh Rathaur & ors (2006) 11 SCC 696 and have submitted that the Hon'ble Court had held that the question of maintainability has to be decided at the preliminary stage of hearing and once the maintainability of the matter is established, only then the merits can be adjudicated upon. TPDDL & BRPL have further submitted that the stand similar to the one taken by the Petitioner herein was considered by APTEL in Appeal No. 279 of 2013 (GUVNL V GERC & ors) and by judgment dated 22.8.2014, the APTEL had decided that the State Commission was well within its rights to decide about the maintainability of the Petition and to reject the Petition at the admission stage itself. Accordingly, they have submitted that the case laws relied upon by the Petitioner have no application in the present matter. TPDDL & BRPL have stated that any relaxation, if allowed by the Commission, would imply retrospective application of the Regulations, which is not permissible and would be inconsistent with the Electricity Act, 2003. They have further stated that the creation of substantive rights, which admittedly was not in existence during the concerned period (2016-17), if allowed, would be contrary to the law that a right or liability which was created for the first time cannot be given retrospective effect. TPDDL & BRPL have pointed out that Regulation 6.3B was not part of the IEGC Regulations, 2016 prior to 15.5.2017 i.e the date on which it was notified by the Commission. They have also submitted that the removal of difficulties as sought for by the Petitioner is untenable since the same can only be exercised for removal of any difficulty encountered in the enforcement of the statute and cannot be invoked for any act inconsistent with the Electricity Act, 2003 and to change/amend the basic structure of the Regulations. TPDDL & BRPL have pointed out that the Commission can only remove a difficulty if it emanates from the regulation or can relax a provision which exists in the regulation, but does not have a role when the provision was not notified during the period for which the Petitioner is seeking relief. Referring to the judgment dated 11.1.2011 of the APTEL in Appeal No. 111/2010 (TN Spinning Mills Assn V TNEB)



they have submitted that in the absence of a statute providing for power for delegated legislation to operate retrospectively, the regulations can only have prospective application. TPDDL & BRPL have further submitted that this Commission, while considering the suggestions of MMPTCL in Petition No. 54/2005, had taken a stand that a regulation has to be given effect to from the date of notification in the official gazette. They have argued that a statute cannot have a retrospective application unless it has been expressly provided by the legislature. TPDDL & BRPL have also submitted that RLDCs are empowered to schedule the generating stations below technical minimum and as such scheduling by RLDCs cannot be relied upon by the Petitioner to gain unjust enrichment by claiming retrospective application of Regulation 6.3B of IEGC Regulations, 2016. Accordingly, TPDDL & BRPL have submitted that the submissions of the Petitioner may be rejected and the Petition may be dismissed as not maintainable.

Analysis and decision

21. Before deciding the issue of maintainability, we take note of the submissions of the Petitioner as regards the scope of consideration of maintainability at the preliminary stage. The Petitioner has placed reliance on the judgment of the Hon'ble Supreme Court in 'Liverpool case' and has argued that the scope of consideration of maintainability at the preliminary stage is confined to basic aspects such as patent lack of jurisdiction or absence of cause of action and that 'maintainability' should be decided without reference to the averments made in the reply and by accepting the contents of the Petition as correct. Also, the Petitioner has referred to the judgment of the Hon'ble Supreme Court in PTC V GERC and judgment of the High Court of Andhra Pradesh in AP Gas Power Corporation V APERC to contend that all issues, whether preliminary or otherwise, need to be dealt with together in order to provide for expeditious disposal of matters.



22. The Respondents, BRPL and TPDDL have placed reliance on the judgments of Hon'ble Supreme Court and have submitted that the question of maintainability has to be decided at the preliminary stage of hearing and merits can be adjudicated only after maintainability is established. Referring to the judgment dated 22.8.2014 of the APTEL in Appeal No. 279/2013, these Respondents have submitted that the Commission is well within its rights to decide about the maintainability of the Petition and to reject the Petition at the admission stage itself. The Respondent, GRIDCO has argued that the said judgments are not applicable to the present case since CPC is not applicable in proceedings before the Commission, whereas, these judgments were passed in the context of a civil suit wherein Civil Procedure Code (CPC) is applicable and Order 14 of the CPC provides that all issues should normally be tried together.

23. The matter has been examined. In our view, the Petitioners' reliance on the judgment of the Hon'ble Supreme Court in 'Liverpool case' to contend that (a) maintainability at the preliminary stage is confined to basic aspects such as patent lack of jurisdiction or absence of a cause of action and (b) maintainability should be decided without referring to the reply and by accepting the contents of the Petition is highly misplaced and would not be of any help to the Petitioner. The judgment in the Liverpool case was rendered in the context of determination of rights of the parties under Order 7, Rule 11 of the CPC etc. It is pointed out that the Electricity Act is an exhaustive code and the provisions of CPC do not strictly apply to the proceedings before the Commission. The Commission is well within its right to decide on its own procedure which satisfies the principles of natural justice and transparency. Accordingly, the Commission in the present case having entertained doubt about the maintainability of the Petition decided to issue notice at the admission stage. The question as to whether the State Commission at the admission stage could decide the issue of maintainability of



the Petition on the basis of contents of the Petition alone or on the basis of reply and defence by other side was examined by the APTEL in Appeal No. 279/2013 and by judgment dated 22.8.2014, it was held that the State Commission having doubt with regard to maintainability, could hear both parties and consider their pleas before deciding the matter. The relevant portion of the judgment is extracted hereunder:

“25. As already indicated, the State Commission would follow its own procedures irrespective of the procedures referred to in the CPC either under Order-7 Rule-11 or Order 14 Rule-2 of the CPC. As long as the procedure adopted by the State Commission satisfies the said two requirements namely principle of natural justice and transparency, such procedures could not be called in question in this Appeal.

26. In view of the above, there is no infirmity in the procedure adopted by the State Commission in issuing notice to the other side before admission. In order to decide the question of maintainability of the Petition, the State Commission when it entertains the doubt with regard to the maintainability, has got the jurisdiction to get a clarification over the position of law by issuing notice to the other side.

27. Once the State Commission decided to issue notice to other side to give opportunity to the other side to make submissions with regard to the question relating to the maintainability of the Petition before admission, it means that the State Commission wants to decide the question of maintainability only after hearing both the parties on the basis of their respective pleas in the Petition filed by the Petitioner as well as the reply filed by the Respondents.

28. Therefore, the procedure adopted by the State Commission in this case by issuing notice to the other side for deciding the question of maintainability of Petition would show that the State Commission followed both principles of natural justice and the transparency to pass the appropriate order on the issue of the maintainability of the Petition before admission.

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40. In view of what is stated above, the first question is decided accordingly in favour of the Respondents holding that the State Commission is well within its rights to decide about the maintainability of the Petition not only on considering the contents of the Petition but also the contents of the objections raised by other side through their reply and to reject the Petition at the admission stage itself.”

24. On a careful reading of the judgment in Liverpool case, it is noticed that the Hon’ble Supreme Court has recorded a finding in its earlier judgment that preliminary objections can be entertained by a Court at an initial stage. The relevant portion is extracted hereunder:

“9. In K. Kamaraja Nadar v. Kunju Thevar (1959 SCR 583 : AIR 1958 SC 687 : 14 ELR 270), the Election Tribunal and the High Court both refused to consider preliminary objections raised by the returned candidate at the initial stage on the ground that the same would be considered at the trial of the election petition. This Court set aside the order and



directed that the preliminary objection should be entertained and a decision reached thereupon before further proceedings were taken in the election petition.

25. The Petitioner has also placed reliance on the judgment dated 18.10.2012 of the Hon'ble Supreme Court in PTC V GERC and the judgment of the Hon'ble High Court of A.P in A.P. Gas Power Corporation Ltd V APERC (2005) 6 SCC 368 and has submitted that all issues whether preliminary or otherwise, need to be dealt with together in order to provide for expeditious disposal of matters. Though we find merit in the submissions of the Petitioner, these judgments, in our view, do not bar the Commission from deciding the question of maintainability, at the outset, and if maintainable, to proceed with the matter and dispose of the same. As pointed out by the Respondent, BRPL, the Supreme Court in Union of India Vs Ranbir Singh Rathaur & ors (2006) 11 SCC 696 had held as under:

“42. ...In any event we feel that the High Court's approach is clearly erroneous. The present appellants in the counter affidavit filed had raised a preliminary objection as regards the maintainability of the writ petitions and had requested the High Court to grant further opportunity if the necessity so arises to file a detailed counter affidavit after the preliminary objections were decided. The High Court in fact in one of the orders clearly indicated that the preliminary objections were to be decided first. But strangely it did not do so. It reserved the judgment and delivered the final judgment after about three years.

Since the High Court has not dealt with the matter in the proper perspective we feel it would be proper for the High Court to re-hear the matter. The High Court shall first decide the preliminary objections raised by the present appellants about the non-maintainability of the writ petitions...”

In the above background, the submissions of the Petitioner to admit the Petition and hear the matter on merits is rejected and accordingly we proceed to decide the maintainability of the Petition in the subsequent paragraphs.

26. The IEGC Regulations, 2016 was issued by the Commission on 6.4.2016. The said Regulations were notified in the Gazette of India on 29.4.2016. Regulation 1(2) of the IEGC Regulations, 2016 provides that sub-Regulation 6.3B would come into force on such date as the Commission may appoint by the notification in the official Gazette. The same is extracted as under:



1. *Short title and commencement:*

(1) xxxx

(2) *These Regulations shall come into force with effect from date of publication in Official Gazette except Sub-Regulation 6.3B which shall come into force on such date as the Commission may appoint by notification in the Official Gazette.*

27. Some of the provisions of Regulation 6.3B of the IEGC Regulations, 2016 which provided for Technical minimum for operation of Central Generating Stations and Inter-State Generating Stations as under:

1. *The technical minimum for operation in respect of a unit or units of a Central Generating Station of inter-State Generating Station shall be 55% of MCR loading or installed capacity of the unit of at generating station.*

2. *The CGS or ISGS may be directed by concerned RLDC to operate its unit(s) at or above the technical minimum but below the normative plant availability factor on account of grid security or due to the fewer schedules given by the beneficiaries.*

3. *Where the CGS or ISGS, whose tariff is either determined or adopted by the Commission, is directed by the concerned RLDC to operate below normative plant availability factor but at or above technical minimum, the CGS or ISGS may be compensated depending on the average unit loading duly taking into account the forced outages, planned outages, PLF, generation at generator terminal, energy sent out ex-bus, number of start-stop, secondary fuel oil consumption and auxiliary energy consumption, in due consideration of actual and normative operating parameters of station heat rate, auxiliary energy consumption and secondary fuel oil consumption etc. on monthly basis duly supported by relevant data verified by RLDC or SLDC, as the case may be.*

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4. *In case of a generating station whose tariff is neither determined nor adopted by the Commission, the concerned generating company shall have to factor the above provisions in the PPAs entered into by it for sale of power in order to claim compensations for operating at the technical minimum schedule.*

5. *The generating company shall keep the record of the emission levels from the plant due to part load operation and submit a report for each year to the Commission by 31st May of the year.*

6. *NLDC shall prepare a Detailed Operating Procedure in consultation with the generators and beneficiaries at RPC forums within 2 months' time and submit to the Commission for approval. The Detailed Operating Procedure shall contain the role of different agencies, data requirements, procedure for taking the units under reserve shut down and the methodology for identifying the generating stations or units thereof to be backed down upto the technical minimum in specific Grid conditions such as low system demand, Regulation of Power Supply and incidence of high renewables etc., based on merit order stacking.*

7. *The RPCs shall work out a mechanism for compensation for station heat rate and auxiliary energy consumption for low unit loading on monthly basis in terms of energy charges and compensation for secondary fuel oil consumption over and above the norm of 0.5 ml/kWh for additional start-ups in excess of 7 start-ups, in consultation with generators and beneficiaries at RPC forum and its sharing by the beneficiaries.*



28. Thereafter, POSOCO by letters dated 12.8.2016 and 4.11.2016 submitted the 'Detailed Operating Procedure for taking units under Reserve Shut Down' (Detailed Operating Procedure). Similarly, the RPCs finalized the 'Mechanism for Compensation for Degradation of Heat Rate, Aux Energy Compensation and Secondary Fuel oil Consumption, due to Part Load Operation and Multiple Start/Stop of Unit' (Compensation Mechanism) after discussions with stakeholders and submitted the same to the Commission. The Commission had examined the Detailed Procedure and the Compensation Mechanism and after consultation and finalization of the same with CEA, NLDC, RLDCs and RPCs approved by order dated 5.5.2017, the Detailed Operating Procedure and the Compensation Mechanism in terms of sub-clause 6 of the Regulation 6.3B (6) of IEGC Regulations, 2016. It was however made clear in the said order the Detailed Operating Procedure and the Compensation Mechanism specified therein would come into force from 15.5.2017. The same was notified by the Commission on 5.5.2017, as under:

“And, now therefore, it is notified for the information of all concerned that Regulation 6.3B of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016 and the Detailed Operating Procedure on reserve shutdown and Mechanism for Compensation shall come into force with effect from 15.5.2017.”

29. The Petitioner in this Petition has prayed for the reliefs under para 1 above and has submitted that difficulty has arisen on account of the fact that while the IEGC Regulations, 2016 came into force from 6.4.2016, the Operating Procedure and Compensation Mechanism under Regulation 6.3B of the said Regulations came into force only from 15.5.2017. According to the Petitioner, Regulation 6.3B ought to have been implemented from 6.4.2016 i.e the date of issuance of the IEGC Regulations, 2016, since RLDC had started implementing the said Regulations by directing the Petitioner to back down to 55% as per the said Regulations. In the alternative, it has submitted that it is a fit case for the Commission to exercise its power to relax and give effect to the



Regulation 6.3B with effect from 6.4.2016 or on the date on which RLDCs directed the Petitioner to operate its generating stations at technical minimum. Most of the Respondents have objected to the prayer of the Petitioner by submitting that the Petitioner is seeking amendment of the said Regulations in the guise of seeking relaxation. Some of the respondents have also submitted that since the Commission had consciously decided to notify the Operating Procedure and Compensation mechanism from 15.5.2017 by order dated 5.5.2017, the same has attained finality. Accordingly, these Respondents have prayed that the relief prayed for by the Petitioner may be rejected and the Petition be dismissed as not maintainable.

30. We have examined the matter. The Petitioner has invoked the provisions of Part 7, clause 4 of the IEGC and Regulation 115 of the CERC (Conduct of Business) Regulations, 1999, as amended from time to time, for relaxation and removal of difficulty in Regulation 6.3B of the IEGC Regulations, 2016. Part 7, clause 4 of the IEGC, 2010 provides as under:

'(4) The Commission may by general or special order, for reasons to be recorded in writing, and after giving opportunity of hearing to the parties likely to be affected by grant of relaxation, may relax any of the provisions of these regulations on its own motion or on an application made before it by an interested person.'

31. Regulation 115 of the CERC (Conduct of Business) Regulations, 1999 provides as under:

'Power to remove difficulties

115. If any difficulty arises in giving effect to any of the provisions of these regulations, the Commission may, by general or special order do anything not being inconsistent with the provisions of the Act, which appears to it to be necessary or expedient for the purpose of removing the difficulties.'

32. The above provisions empower the Commission to relax any of the provisions of the IEGC Regulations. However, the Power to relax cannot be stretched in order to retrospectively enforce a statutory provision which had not been provided in the said



Regulations. In other words, under the garb of exercise of Power to relax, the Regulations cannot be amended with retrospective effect. The power of relaxation is in general terms and its exercise is discretionary. It is settled law that exercise of discretion must not be arbitrary and must be exercised reasonably and with circumspection, consistent with justice, equity and good conscience, always in keeping with the given facts and circumstances of a case. In *R.K. Khandelwal v. State of U.P.*, (1981) 3 SCC 592, the Supreme Court noted that

“6. Dr. Singhvi, who appears on behalf of the appellant, raised a further contention that the ratio 1:1 was relaxed from time to time by the University and that the appellant was discriminated against by the arbitrary refusal of the authorities to relax the ratio in his favour. We are prepared to accept that if there is a power to relax the ratio, that power must be exercised reasonably and fairly. It cannot be exercised arbitrarily to favour some students and to disfavour some others.”

33. It is the settled law that the power to remove difficulties is conferred upon the Commission to remove trivial difficulties and does not include the power to amend the Regulations. In addition to above, the said power to remove difficulty can only be exercised to the extent necessary only for giving effect to a particular Regulation. The Tribunal in its judgment dated 25.3.2011 in Appeal No.130 of 2009 (RGPPL V CERC & ors) had held that the power to remove difficulties is to be exercised when there is difficulty in effecting the Regulations and not when difficulty is caused due to application of the Regulations.

34. The Petitioner has submitted that the difficulty has arisen due to the fact that while one part of Regulation 6.3B came into effect from 6.4.2016, the other part which provide for the compensation mechanism has been notified only from 15.5.2017. It has stated that while the generating stations have been asked to operate at technical minimum from an earlier date i. 6.4.2016, the compensation in lieu of the same has been ordered from a later date i.e 15.5.2017. The Petitioner has pointed out that the existence of the said provision leads to cause of difficulty which had arisen due to



different dates of implementation of the same Regulations. According to the Petitioner, there is dichotomy in the approach of the Commission and therefore the power of relaxation/removal of difficulties needs to be used to rectify the situation.

35. The submissions of the Petitioner are not acceptable. The Commission on 6.4.2016 issued the IEGC Regulations, 2016 and the same was notified on 29.4.2016. It was however made clear under Regulation 1(2) of the said notification that Regulation 6.3B would come into effect from the date as the Commission may appoint by notification in the Official Gazette. The operationalization of Regulation 6.3B was consciously deferred to a later date taking into consideration the fact that the Detailed Procedure and Compensation Mechanism to be prepared by NLDC/ RPC in terms of Regulation 6.3B (6) is required to be approved by the Commission after submission of the same. This is evident from the Statement of Reasons to the IEGC Regulations, 2016 as under:

'12.3.5 Since Sub-Regulation 6.3B can only be operationalized after approval of the Detailed Procedure to be prepared by NLDC, the amendment to the Grid Code except Sub-Regulation 6.3B shall come into effect from the date of notification and Sub-Regulation 6.3B shall come into effect from a date to be notified by the Commission.'

36. The Petitioner was therefore fully aware that the operationalization of Regulation 6.3B of the IEGC Regulations, 2016 would be effective only from a later date i.e after the detailed procedure and compensation mechanism submitted by NLDC /RPC are approved by the Commission. Subsequently, the Commission by order dated 5.5.2017 while approving the Detailed Procedure and Compensation Mechanism under Regulation 6.3B had directed its operationalization from 15.5.2017. Thus, the Petitioner had full knowledge about the implementation of the compensation but had preferred not to raise any issues or objections. The Petitioner in its written submissions has however submitted that it is not challenging any of the terms of the order dated 5.5.2017, but has only pointed out the dichotomy of asking the generating stations to operate at a technical



minimum from an earlier date (6.4.2016) and compensation mechanism being ordered from later date. This submission of the Petitioner is an afterthought and deserves no merit for consideration. It is pertinent to mention that the order dated 5.5.2017 enclosing the Detailed Procedure and Compensation mechanism and the notification dated 5.5.2017 therein, made it abundantly clear that the Detailed Procedure and the Compensation Mechanism are to be effective from 15.5.2017. Hence, if the Petitioner does not have any challenge to the order dated 5.5.2017, it cannot challenge or have any issues with the date of operationalization of the compensation mechanism.

37. As stated, the order of the Commission dated 5.5.2017 directing the implementation of Detailed Procedure and the Compensation Mechanism under Regulation 6.3B from 15.5.2017 was also notified in the official gazette on 5.5.2017. Accordingly, the Detailed Procedure and the Compensation Mechanism under Regulation 6.3B had attained the force of a statute from 15.5.2017. In our considered view, the prayer of the Petitioner to exercise the power of relaxation/removal of difficulty and to relate back the date of implementation of the Detailed Procedure and the Compensation Mechanism under Regulation 6.3B from 15.5.2017 to 6.4.2016 would have the effect of amending the said Regulations, which is not permissible. Under the guise of relaxation or removing the difficulty, the Petitioner cannot seek amendment of the said regulations and /or the retrospective application of the Detailed Procedure and Compensation Mechanism under Regulation 6.3B. In *M.U.Sinai Vs Union of India* (1975) 2 SCR 640, the Hon'ble Supreme Court had held as under:

“The existence or arising of a difficulty is the sine qua non for the exercise of power. If this condition precedent is not satisfied as an objective fact, the power under this clause cannot be invoked at all. Again, the “difficulty” contemplated by the clause must be a difficulty arising in giving effect to the provisions of the Act and not a difficulty arising aliunde, or an extraneous difficulty. Further, the Central Government can exercise the power under the clause only to the extent it is necessary for applying or giving effect to the Act etc., and no further. It may slightly tinker with the Act to round off angularities, and smoothen the joints or remove minor obscurities to make it workable, but it cannot change, disfigure or do



violence to the basic structure and primary features of the Act. In no case, can it, under the guise of removing a difficulty change the scheme and essential provisions of the Act.”

38. The Petitioner has submitted that the Detailed Procedure and the Compensation Mechanism ought to have been implemented from 6.4.2016 instead of 15.5.2017 as the RLDC had started immediately implementing the said Regulations by directing the Petitioner to back down at 55% as per the said regulations. RLDCs have submitted that they were scheduling the generating stations below the technical minimum declared by the generators if the system conditions so warranted. The Petitioner has however pointed out that these were much fewer and in intermittent cases. The Respondents BRPL & TPDDL have submitted that in terms of Section 29(1) of the Electricity Act, 2003, the RLDCs can issue directions to generating companies to ensure grid stability and are also empowered to schedule the generating stations below technical minimum. They have also pointed out that even assuming the RLDCs were scheduling below technical minimum after 6.4.2016, the Petitioner could have raised a dispute before the Commission. Accordingly, the Respondents have submitted that the scheduling of the RLDCs in terms of the Act cannot be relied upon by the Petitioner to seek retrospective application of Regulation 6.3B of the IEGC Regulations, 2016.

39. There is force in the submission of the Respondents. As stated, the IEGC Regulations, 2016 notified on 6.4.2016 made it abundantly clear that Regulation 6.3B of the said Regulations would come into force as on the date the Commission may appoint by notification. By notification dated 5.5.2017, the Commission had directed the implementation of the Detailed Procedure and Compensation Mechanism under Regulation 6.3B from 15.5.2017. When the regulation was not in force, the Petitioner could have approached the Commission for appropriate directions as implementation of technical minimum without Compensatory mechanism adversely affects the interest of



the Petitioner. The Petitioner having not approached the Commission at the relevant time, the present Petition is clearly an afterthought. Therefore, we do not find sufficient ground for exercise of power of relaxation.

40. The Respondent, TPDDL in its reply dated 20.9.2017 has submitted that the data submitted by the Petitioner does not differentiate between the backing down directed by RLDC on grid security and backing done directed by RLDCs at the behest of the respondents. In response, the Petitioner vide rejoinder dated 17.11.2017 has clarified that there is no reason for the Petitioner to differentiate between the two, based on the reason for asking the petitioner to operate at technical minimum. It has also stated that in so far as the Petitioner is concerned, it has operated at technical minimum which has caused losses to the Petitioner. Accordingly, the Petitioner has submitted that it is required to be compensated for such operation as the compensation mechanism had been devised. This submission of the Petitioner is also not acceptable. As stated, the Compensation Mechanism had come into force only from 15.5.2017 and the Petitioner is required to be compensated for the losses for operation under technical minimum in terms of the said mechanism only after the said date. In our considered view, the Compensation Mechanism under Regulation 6.3B was operationalized from 15.5.2017 and hence, it would be unfair for the Petitioner to claim compensation for the period from 6.4.2016 to 14.5.2017 by seeking relaxation of the said regulation. The Petitioner by implementing the technical minimum without the authority of regulation and in the absence of Compensatory mechanism has taken a commercial risk and cannot seek compensation through relaxation of regulation. In this connection, we refer to the judgment of the Hon'ble Supreme Court in *New India Sugar Works v. State of Uttar Pradesh & Ors.* [1981] 3 SCR 29, wherein it was observed:



“It was next strongly contended that in fixation of the price of levy sugar the Government has not taken into consideration that fact that the petitioners would undergo a serious loss because the price would not be sufficient even to cover their manufacturing cost. We are, however, unable to agree with this argument. The policy of price control has for its dominant object equitable distribution and availability of the commodity at fair price so as to benefit the consumers. It is manifest that individual interest, however, precious they may be must yield to the larger interest of the community viz., in the instant case, the large body of the consumers of sugar. In fact, even if the petitioners have to bear some loss there can be no question of the restrictions imposed on the petitioners being unreasonable.”

41. As pointed out by the Respondent, the Commission in its order dated 27.12.2007 in Petition No.54/2005 had rejected the prayer of MPPTCL with regard to the commencement of the CERC (Sharing of revenue derived from utilization of transmission assets for other business) Regulations, 2007 as under:

“6. In the draft it was proposed that the regulations would come into force on 1.1.2008. M.P. Power Trading Company Ltd has suggested that the income earned by the transmission licensee even prior to 1.1.2008 may also be passed on to the beneficiaries.

7. The suggestion made by M.P. Power Trading Company Ltd has been examined. Any direction for adjustment of income earned prior to 1.1.2008 is liable to be construed as giving retrospective effect to the regulations. In our opinion, this is not permissible since the Act, the parent statute, does not permit to make regulations retrospectively. Any such scheme has to be applied prospectively after due notification in the Official Gazette. We have to adopt a practical approach in the matter. What is important at this stage is that the scheme is introduced without further delay. Accordingly, we do not propose any change in the proposal contained in the draft, as regards the date of commencement.

42. In the light of the above discussions, we find no reason to allow the prayer of the Petitioner for compensation in exercise of the Power of relaxation/Removal of difficulty in the present case. Accordingly, the Petition is not maintainable and is hereby dismissed.

43. We also wish to point out that the Respondent, TANGEDCO in its reply affidavit dated 18.9.2017 has, in addition to the submissions in respect of this petition, raised additional issues like financial impact on TANGEDCO due to backing down of the generating stations owned by TANGEDCO, difficulties in payment of compensation to CGS and ISGS, sale of un-requisitioned surplus, penetration of more Renewable Energy



into grid affecting financial planning of TANGEDCO etc. As these submissions of TANGEDCO are irrelevant to decide the issues raised by the Petitioner in the instant Petition, the same has not been considered in this order. TANGEDCO, if so advised, may raise these issues in the appropriate forum for necessary reliefs.

44. Petition No. 130/MP/2017 is disposed of in terms of the above.

Sd/-
(Dr. M.K. Iyer)
Member

Sd/-
(A. S. Bakshi)
Member

Sd/-
(A.K. Singhal)
Member

