

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 154/MP/2021

**Coram:
Shri Jishnu Barua, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member**

Date of Order: 20th September, 2023

In the matter of

Petition under Section 79(1)(a) of the Electricity Act, 2003 read with 76 and 77 of the CERC (Terms and Conditions of Tariff) Regulations, 2019 praying for declaration of Deemed Availability for the period from 1.4.2020 to 30.4.2020 in respect of Ramagundam Super Thermal Power Station Stage-III (1X500 MW).

And

In the matter of

NTPC Limited,
NTPC Bhawan, Scope Complex,
7, Institutional Area, Lodhi Road, New Delhi – 110003.

...Petitioner

Vs

1. AP Eastern Distribution Company Limited,
Corporate Office, P&T Colony, Seethammadhara,
Vishakhapatnam, Andhra Pradesh – 530013.
2. AP Southern Distribution Company Limited,
Corporate Office, Back Side Srinivasa Kalyana Mandapam,
Tiruchhanur Road, Keasavayana Gunta, Tirupati,
Andhra Pradesh - 517503.
3. Telangana State Northern Power Distribution Company Limited,
H. No. 2-5-31/2, Vidyut Bhawan, Nakkalgutta, Hanamkonda,
Warangal, Telangana – 506001.



4. Telangana State Southern Power Distribution Company Limited,
Mint Compound, Corporate Office, Hyderabad,
Telangana – 506063.
5. Tamil Nadu Generation & Distribution Corporation Limited,
144, Anna Salai, Chennai, Tamil Nadu – 600002
6. Bangalore Electricity Supply Company Limited,
Krishna Rajendra Circle, Bengaluru,
Karnataka – 560009.
7. Mangalore Electricity Supply Company,
MESCOM Bhawana, Corporate Office, Bejai,
Kavvoor Cross Road, Mangaluru, Karnataka – 575004.
8. Chamundeshwari Electricity Supply Corporation Limited,
Corporate Office, No. 29, Vijaynagar, 2nd Stage, Hinkal,
Mysore, Karnataka – 570017.
9. Gulbarga Electricity Supply Company Limited,
Main Road, Gulbarga, Karnataka -585102.
10. Hubli Electricity Supply Company Limited,
Corporate Office, P.B. Road, Navanagar,
Hubli, Karnataka – 580025.
11. Kerala State Electricity Board Limited,
Vaidyuthi Bhavnam, Pattom,
Thiruvananthapuram, Kerala – 695004.
12. Electricity department
Govt. of Puducherry,
137, Netaji Subhash Chandra Bose Salai,
Puducherry- 605001

...Respondents

Parties Present :

- Shri Venkatesh, Advocate, NTPC
Shri Ashutosh Srivastava, Advocate, NTPC
Shri Nihal Bhardwaj, Advocate, NTPC
Shri Kartikey Trivedi, Advocate, NTPC
Shri Shivam Kumar, Advocate, NTPC
Shri A.S. Pandey, NTPC



Shri Shahrab Zaheer, NTPC
Shri S. Vallinayagam, Advocate, TANGEDCO
Shri N. Sai Kaushal, Advocate, BESCO
Ms. Bhabna Das, Advocate, BESCO

Order

The present Petition has been filed by the Petitioner NTPC Limited praying for a declaration of Deemed Availability for the period from 1.4.2020 to 30.4.2020 in respect of Ramagundam Super Thermal Power Station Stage-III (1X500 MW) ("RSTPS-III"). Since the Petitioner was not able to declare availability in the said period it is seeking appropriate relief through the present Petition under Regulations 76 and 77 of the Tariff Regulations, 2019 by invoking power to relax and the power to remove difficulties. The Petitioner has prayed as under:

- (a) Grant deemed availability for the period from 1.4.2020 to 30.4.2020 for the instant station;
 - (b) Pass such orders as deemed fit and necessary in the facts and circumstances of the present case.
2. The Petitioner is praying for the deemed availability of the generating station on the basis that due to steam leakage from the HP turbine seal ring the generating station was shut down on 11.3.2020. The work of repair and Maintenance work was awarded to M/s Power Mech on 16.3.2020, but due to the prevailing COVID-19 situation and subsequent lockdown w.e.f. 22.3.2020, the service providers did not wish to provide their services out of fear of Covid-19 spike amongst workers.
3. The Petitioner has sought relief on account of 'Force Majeure' as per Regulation 3(25) of the Tariff Regulations, 2019 and hence the Petitioner has prayed the Commission to invoke Regulations 76 and 77 of the Tariff Regulations, 2019 and prayed to grant deemed availability of the generating station for the period from 1.4.2020 to 30.4.2020.

Submission of the Petitioner: -

4. The Petitioner in its petition has mainly submitted as under: -
- (a) On 7.3.2019, the Commission notified the Tariff Regulations, 2019 w.e.f. 1.4.2019 which shall remain in force for a period of five years i.e., from 1.4.2019 to 31.3.2024. It is to be noted that Regulation 42 of the Tariff Regulations, 2019 introduced a new mechanism for calculation of Availability for computing Annual Fixed Charges ("AFC"):



- (b) On 30.9.2019, Southern Regional Load Despatch Centre (“SRLDC”) declared High Demand Season for the Year 2020-21 as April 2020, February 2021 and March 2021 and the remaining 09 months i.e., from May 2020 to Jan 2021 as Low Demand Season for the Southern Region stakeholders in terms of Regulation 42 (7) of the Tariff Regulations, 2019.
- (c) However, on 11.3.2020, there was sudden steam leakage from the High Pressure (“HP”) Turbine Seal Ring Area in the RSPTS-III. Accordingly, on 16.3.2020 the repair work of the Turbine was immediately awarded to M/s Power Mech. and planned that the unit would be brought back on bar by 31.3.2020 to declare Availability during the High Demand Season.
- (d) However, due to reasons beyond the control of the Petitioner, the repair work could not be initiated due to the onset of the corona virus (“Covid-19”) in India. Covid-19 was declared a global pandemic by the World Health Organization (“WHO”) on 11.3.2020. Subsequently, on 22.3.2020, the Government of Telangana, in order to contain the spread of Covid-19 imposed a complete lockdown in the entire State of Telangana from 22.3.2020 till 31.3.2020.
- (e) Due to the onset of Covid-19 and the consequent lockdown, the planned repair work of the Petitioner was delayed. In this regard on 23.3.2020, M/s Power Mech., vide its email informed that due to the Covid-19 pandemic, the resources were being demobilized from the work site. In response, the Petitioner stated that the power sector comes under essential services and all work related to the power sector needs to be continued. Therefore, M/s Power Mech. was requested to carry out the work by following all the advised precautions. In response, M/s Power Mech. vide its email, stated that the workers were hesitant to enter the work site and wished to be isolated to avoid the risk of infection. Further, even the service providers did not wish to provide their services on account of Covid-19. Despite the request of the Petitioner, the repair and maintenance work could not be resumed.
- (f) On 24.3.2020, the lockdown was imposed across the country. The said restriction, inter alia, included restrictions to transport and travel on international and domestic routes.
- (g) On 24.3.2020, the Petitioner vide its letter to SRPC intimated that delay was apprehended due to non-commencement of repair work at the instant station on account of Covid-19. Accordingly,



it was stated that RSTPS-III may not be able to declare a cumulative Availability of 85%. Since no response was received by the Petitioner, the Petitioner is constrained to file the present Petition.

- (h) For the purpose of full recovery of Annual Fixed Charges of a thermal generating station the Normative Annual Plant Availability Factor was tightened over the control periods 2001-2004 to 2009-14 from 62.8% to 85%. Thereafter, for the period 2014-19, the Target Availability for full recovery of AFC of a generating station was specified at 85% except for the period from 2014 to 2017 wherein NAPAF was lowered slightly to 83% in view of the coal shortage scenario in the country.
- (i) The generating station was under shutdown from 11.3.2020 and could not be synchronized back till 8.6.2020. The revival of the unit was possible only after the complete lockdown order was withdrawn by the Govt. of India. The Petitioner has submitted that the delay caused is akin to 'Force Majeure' as per Regulation 3 (25) of the Tariff Regulations, 2019 and hence has invoked Regulations 76 and 77 of the Tariff Regulations, 2019.

Reply by Respondent TANGEDCO

5. The Respondent TANGEDCO vide affidavit dated 12.11.2021 has submitted that the prayer of the Petitioner is not tenable, as there is no provision in the Tariff Regulation 2019-24 under any section to claim Deemed availability of a thermal generating station under Force Majeure and more so under 'Deemed availability due to situations akin to Force Majeure'. The Respondent has mainly submitted as under:

- (a) The High and Low Demand seasons were decided in the 170th OCC meeting held by SRPC on 11.9.2020. Due consultation process with all Stakeholders was held in declaring the High and Low demand seasons based on the previous five years' consumption and other considerations. The impact of COVID has been worldwide and not restricted to the Petitioner's one particular station.
- (b) From the submission made by the Petitioner, it is seen that the steam leak from High Pressure Turbine was observed on 11.3.2020; the work was awarded on 16.3.2020 with the idea of



bringing back the Unit by 31.3.2020 so as to declare availability during the High Demand Season of April 2020.

- (c) The Petitioner has not disclosed any reason for taking 5 working days to award a contract for the rectification. No explanation has also been given as to when the contractor M/s. Power Mech started mobilizing men and materials after receipt of the order on 16.3.2020 and it has simply been stated that the contractor informed about demobilizing on 23.3.2020, that too when Govt. of Telangana had clarified that the power sector was essential service and lock down was not applicable for power sector. Power Sector being an activity permitted under the G.O, there is clearly no embargo on the Petitioner or their contractor in plying men and materials to the site.
- (d) There is no merit in the claim of the Petitioner that the COVID lockdowns were the reasons for the Station being not available during April 2020. The whole claim seems to be an afterthought, as the Petition was uploaded on 28.6.2021, more than a year after the said problem occurred.

6. The case was heard on 23.11.2021 and 15.7.2022, accordingly order was reserved on admissibility of the Petition. The Commission vide order dated 30.12.2022 had admitted the petition with the following observations:

.....we are of view that the Petition requires detailed hearing on merit of the case. Accordingly, we 'admit' the same and direct issuance of notice to the Respondents. The Respondents are directed to file their replies on 'merits' on or before 16.1.2023, after serving copy on the Petitioner, who may file its rejoinder, if any, by 30.1.2023. Parties are directed to complete their pleadings in the matter, within the due dates mentioned and no extension of time shall be granted for any reason.

Reply filed by the Respondent TANGEDCO

7. The Respondent TANGEDCO in its reply vide affidavit dated 10.1.2023 has mainly submitted as under:

- (a) The prayer for seeking Deemed Availability for the period from 1.4.2020 to 30.4.2020 is not tenable, as there is no provision in the Tariff Regulation 2019-24 under any section to claim Deemed availability of a thermal generating station under Force Majeure and more so under 'Deemed availability due to situations akin to Force Majeure'.



- (b) Due consultation process with all Stakeholders was held in declaring the High and Low demand seasons based on the previous five years' consumption and other considerations. The year 2020 was a Covid year, appropriate weightage will be considered in future years. Hence the claim of the Petitioner is not tenable, as it has already been decided that appropriate weightage will be given in future. Furthermore, the impact of Covid has been worldwide and not restricted to the Petitioner's one particular station.
- (c) The contractual obligation between M/s. NTPC and their Vendor cannot be considered as Force Majeure. Parties ought to be compelled to adhere to contractual terms and conditions. Further, the Hon'ble High Court of Delhi at New Delhi has also stated that it is not in the domain of Courts to absolve Parties from performing their part of the contract. Under such circumstances, Covid-19 cannot be projected as a reason for a Force Majeure event.
- (d) The Petitioner has further stated that the works resumed on 4.5.2020 and the Unit was synchronized on 8.6.2020. From their own submission, it can be confirmed that there is no way the Petitioner, having entrusted the work on 16.3.2020, would have brought back the Unit on bars on 31.3.2020, to declare availability from 1.4.2020, even if lock down was not imposed.
- (e) Regarding Regulations 76 and 77, 'Power to Relax' and 'Power to Remove Difficulty', it is humbly submitted that under the veil for exercise of such power, the Petitioner is challenging the Regulations itself.
- (f) The above claim will lead to unjust enrichment for the generator and injustice to beneficiaries, as the beneficiaries have to suffer a double impact, by not availing power from the station during high demand season, as well as paying the capacity charges when the station was completely unavailable. This will set a bad precedent where loss of Capacity Charges due to lack of efficiency and diligence in completing breakdown works can be passed on to beneficiaries making them suffer double damage.

Reply filed by the Respondent BESCO

8. The Respondent BESCO in its reply vide affidavit dated 16.1.2023 has mainly submitted as under:



- (a) Though the steam leakage in the turbine occurred on 11.3.2020, the Petitioner admittedly awarded the repair work to the contractor only on 16.3.2020 i.e. after a delay of 5 days, during which the unit was shut down. This delay in the demand Season, when time was of the essence, has not been explained by the Petitioner.
- (b) WHO declared Covid-19 to be a global pandemic on 11.3.2020. On 16.3.2020, the Petitioner awarded the work to the contractor. Therefore, the work was accepted by the Contractor with full knowledge of the Covid-19 pandemic and the risks thereof.
- (c) GO No. 45 was issued by the Government of Telangana on 22.3.2020. However, the Petitioner has not given any details of when the site was mobilized by the contractor or how much work was done in the interregnum. GO No. 45 permitted the plying of private vehicles for essential commodities and activities.
- (d) Electricity supply/ power sector fell in the category of essential service under the GO. Therefore, the lockdown imposed in the State had no bearing whatsoever on the repair work to be carried on in the Station.
- (e) The national lockdown was imposed by the Government of India 2 days later on 24.3.2020. Even thereunder, essential services were exempted. The work was resumed on 4.5.2020. Pertinently, during this period the nation-wide lockdown in the country was continuing. It is incomprehensible as to how a lockdown and Covid-19 can be held responsible for delay in repair work prior to 4.5.2020, but not thereafter, even though the same continued.
- (f) Work was awarded to the contractor on 16.3.2020 with the plan that the repair work would be completed in the month of March and the unit would be brought back on bar by 31.3.2020. Therefore, the work was supposed to have been completed in 15 days. Even assuming that work started on 16.3.2020, ceased on 23.3.2020, resumed again on 4.5.2020 and completed by 8.6.2020, it eventually took about 1.5 months for the repair work to be completed.
- (g) In view of the above, it is submitted that the reasons for the Petitioner not being able to declare target availability in the month of April 2020, were not akin to 'force majeure' under Rule 3(25) of the 2019 Regulations. The delay was not beyond the control of the Petitioner and it failed to



act expeditiously and with due diligence and also did not take remedial and mitigating measures which could have reduced the delay.

Rejoinder to the Reply filed by the Respondent TANGEDCO and BESCO

9. The Petitioner in its rejoinder to TANGEDCO and BESCO vide affidavit dated 30.1.2023 has submitted that it is solely because of said Force Majeure event, the Petitioner was not able to declare availability for the said period leading to under-recovery of Annual Fixed Charge. The Petitioner has mainly submitted as under:

- (a) The delay in the resumption of the Unit has caused a consequent loss of availability of RSTPS-III during the peak month of April 2020 which, in effect, has affected the full recovery of AFC by the Petitioner.
- (b) Petitioner is not before this Commission seeking a blanket relaxation of Regulation 42 of Tariff Regulations 2019 which, inter alia, provides a Target Availability of 85% for the High Demand Season, and on the other hand has only sought to consider the deemed availability for the affected period. Accordingly, the Petitioner is entitled to recover the AFC for deemed availability during the shutdown period
- (c) Since the repair was to be conducted in the HP turbine, which requires cooling down of the Turbine in about 4 days of time, after which the rectification work could have commenced. It is pertinent to state that the said time frame was part of the technical process which cannot be escaped from .
- (d) The fixed cost of a thermal generating station was to be computed on an annual basis, and the Petitioner was in a position to assess the net availability of the plant, for computing AFC, only at the end of financial year i.e., 31.3.2021.
- (e) The Petitioner has further submitted that the submissions made by Respondents are denied and the contentions of Respondents in the context of the present issue ought to be rejected and dismissed and the claims of the Petitioner in the present Petitioner may be considered and allowed.



Analysis and Decision

10. We have perused and considered all the documents replies, and rejoinders available on record. The claim of the Petitioner is for the deemed availability of the generating station on the basis that the generating station was shut down due to steam leakage and subsequent repair work at the instant station was delayed due to COVID-19 lockdown.

11. As per the 2019 Tariff Regulations, to recover full AFC, the Petitioner must achieve Target Availability separately for two seasons namely High Demand Season and Low Demand Season.

12. Regulation 42 of Tariff Regulations 2019 provides as under:

“42. Computation and Payment of Capacity Charge for Thermal Generating Stations:

(1) The fixed cost of a thermal generating station shall be computed on annual basis based on the norms specified under these regulations and recovered on monthly basis under capacity charge. The total capacity charge payable for a generating station shall be shared by its beneficiaries as per their respective percentage share or allocation in the capacity of the generating station. The capacity charge shall be recovered under two segments of the year, i.e. High Demand Season (period of three months) and Low Demand Season (period of remaining nine months), and within each season in two parts viz., Capacity Charge for Peak Hours of the month and Capacity Charge for Off- Peak Hours of the month as follows:

...

(3) Normative Plant Availability Factor for “Peak” and “Off-Peak” Hours in a month shall be equivalent to the NAPAF specified in Clause (A) of Regulation 49 of these regulations. The number of hours of “Peak” and “Off-Peak” periods during a day shall be four and twenty respectively. The hours of Peak and Off-Peak periods during a day shall be declared by the concerned RLDC at least a week in advance. The High Demand Season (period of three months, consecutive or otherwise) and Low Demand Season (period of remaining nine months, consecutive or otherwise) in a region, shall be declared by the concerned RLDC, at least six months in advance:

Provided that RLDC, after duly considering the comments of the concerned stakeholders, shall declare Peak Hours and High Demand Season in such a way as to coincide with the majority of the Peak Hours and High Demand Season of the region to the maximum extent possible:

Provided further that in respect of a generating station having beneficiaries across different regions, the High Demand Season and the Peak Hours shall correspond to the High Demand



Season and Peak Hours of the region in which majority of its beneficiaries, in terms of percentage of allocation of share, are located.

4) Any under-recovery or over-recovery of Capacity Charges as a result of under-achievement or over-achievement, vis-à-vis the NAPAF in Peak and Off-Peak Hours of a Season (High Demand Season or Low Demand Season, as the case may be) shall not be adjusted with under-achievement or over-achievement, vis-à-vis the NAPAF in Peak and Off-Peak Hours of the other Season... ”

13. The problem started due to steam leakage in the high-pressure turbine seal ring on 11.3.2020, because of which the unit was shut down. The work order for repair and maintenance was awarded on 16.3.2020. Subsequently, the Lockdown was imposed on 22.3.2020. With the introduction of recovery of AFC based on the seasonal Target Availability w.e.f. 1.4.2020, the operation flexibility to achieve the NAPAF season-wise is further reduced especially in stations with a single unit.

14. The matter was taken up by the Commission for hearing on 23.11.2021, 15.7.2022, 7.2.2023 and 24.4.2023. The Petition was heard on ‘admission’ via virtual hearing, on 23.11.2021. The Commission after hearing the parties, reserved its order on the ‘admissibility’ of the petition. However, the order in the Petition could not be passed prior to the Chairperson Shri P. K. Pujari demitting office, the matter was re-listed for hearing on 15.7.2022 and the order in the Petition was reserved on ‘admissibility’. Considering the fact that the Petition required a detailed hearing on the merit of the case, the Commission vide order dated 30.12.2022 admitted the petition. Matter was heard on 24.4.2023.

15. During the hearing, the learned counsel for the Petitioner made detailed submissions in support of the prayer for declaration of deemed availability in respect of Ramagundam STPS, Stage-III. In response, the learned counsel for the Respondent, TANGEDCO submitted that the default by the contractor due to non-performance of the work, cannot be a ground to declare ‘deemed availability’ and burden the beneficiaries on this count. Further, the Respondent have also submitted that there is no provision for seeking deemed availability under the 2019 Tariff Regulations.

16. The learned counsel for the Respondent BESCO adopted the submissions of the Respondent TANGEDCO and mainly reiterated its contention and submitted that WHO had declared Covid-19 to be a global pandemic and it is not clear as to how Covid-19 can be held responsible for the delay in repair work prior to 4.5.2020, but not thereafter, even though the same state of affairs continued. Further,



there is no provision for claiming 'deemed availability' under the 2019 Tariff Regulations, and hence only the actual declared availability can be considered.

17. The Commission after hearing the parties, directed the Petitioner to furnish the specific dates w.r.t. schedule start and schedule completion of the work along with the date of the actual start and actual work completion, the scope of work along with a copy of work order issued. Subject to the above, order in the petition was reserved.

18. The Petitioner in compliance vide affidavit dated 24.4.2023 has submitted that the Unit of Ramagundam Stage-III was stopped on 11.3.2020 as there was sudden steam leakage from the High-Pressure Turbine Seal Ring Area. Due to the urgent nature of the work, NTPC took the initiative to award the work on an urgent basis. The repair work was awarded to M/s Power Mech on 16.3.2020 for the arresting of the HP turbine inner casing U seal ring leakage of the unit. Accordingly, the agency was communicated to immediately start the work and mobilize of workforce & tools/tackles. However, due to the onset of covid-19, the work could not be carried out in full swing. In order to contain the spread of Covid-19, the Govt. of Telangana on 22.3.2020 issued G.O. Ms. No. 45 and imposed a complete lockdown in the entire State of Telangana from 22.3.2020 till 31.3.2020. Meanwhile, on 24.3.2020, the Ministry of Home Affairs, Government of India imposed lockdown across the country.

19. The Petitioner has further submitted that the barring gear stopping to barring gear starting was supposed to be completed within eighteen days. Accordingly, the specific dates were submitted by the Petitioner. The main grievance of the Petitioner, is that the delay in the commencement of work of the HP Turbine seal ring area by the contractors was only on account of the onset of Covid- 19 and the restrictions imposed by the MHA, GOI and the State Government of Telangana, from time to time and the consequent loss of availability during the month of April 2020 was on account of an event akin to force majeure, which was beyond its reasonable control. Accordingly, the Petitioner has prayed that the provision for achieving target availability season-wise separately, in respect of this generating station, for the year 2020-21, may be relaxed in the exercise of the power under Regulation 76 of the 2019 Tariff Regulations. The moot question to be answered by us is, whether it is a fit case for invoking our



powers under the removal of difficulties and power to relax, as stipulated under regulation 76 and 77 of these regulations?

20. We have examined the matter with regard to the Covid-19 lockdown, it would be pertinent to note that the order of the Ministry of Home Affairs dated 24.3.2020, whereby the guidelines providing for the measures to be taken for containment of Covid-19 were issued, clearly exempted the units and services relating to generation, transmission and distribution from the lockdown. The relevant extract of above guidelines reads as under:

“1. Office of the Government of India, its Autonomous/ Subordinate Offices and Public Corporations shall remain close.

Exceptions:

Defence, central armed police forces, treasury, public utilities (including petroleum, CNG, LPG, PNG) (disaster management, power generation and transmission units, post offices, National Informatics Centre, Early Warning Agencies

4. Commercial and private establishment shall be closed down.

Exceptions:

....

g. Power generation, transmission and distribution units and services...”

21. Further, the Ministry of Power vide letter dated 25.3.2020 had also recognized that power generation is an essential service for securing smooth and uninterrupted power flow across and within the States and operations of inter-State generating stations are critical for maintaining the power supply. Accordingly, in order to provide the uninterrupted operation of such generators, the Ministry had also asked the concerned authorities to provide various permissions to such generating stations. The relevant extract of the said letter reads as under:

“Subject: Essential operation of power generation utilities and permission for material movement needed by them during the nation-wide lockdown for Covid-19 outbreak.

..2. Power Generation is an essential service for securing smooth and uninterrupted power flow across and within the states. In the current scenario of Covid-19 outbreak and nationwide lockdown announced by Hon’ble Prime Minister, there will be need to ensure uninterrupted power generation.

3. The power generation utilities under Ministry of Power, Ultra Mega Power Projects (UMPPs) and Independent Power Plants (IPPs), hereafter referred to as "interstate power generating



stations", supply inter-state electricity to the grid. Hence, their operation are critical for maintaining power supply across the country.

4. In order to provide uninterrupted operation of "interstate power generating stations", the following support is requested from your office.

....c. Waiver from section 144, Nationwide Lockdown, Curfew or any other limitation on number of people to gather in locations like ash pond, raw water intake, Power Generating Stations and other related locations where it may be required for operation and maintenance activities of generation and associated equipment...."

22. The activities pertaining to generation, transmission and distribution were exempted from the nationwide lockdown imposed to restrict spreading of the Covid-19. The imposition of lockdown was a nationwide phenomenon and, in some way, or the other, the whole nation and each and every individual suffered from the imposition of lockdown. The operation of a generating station is totally in the purview of the Generator and also the steam leakage in the HP turbine could be a Mechanical or Operational failure. Moreover, the problem faced by the generator and its financial impact cannot be loaded to the beneficiaries who are also affected parties.

23. Further, the Commission has specified the normative parameter of 85% for full recovery of the fixed charges and provided operational flexibility of 15% to neutralize the difference arising out of fuel shortage and forced outage due to operational failure. The Forced outage at the Generator's end due to operational failure or equipment failure can be met by the 15% margin of availability specified to the generating station.

24. The Petitioner has sought relief on account that the delay caused is akin to 'Force Majeure' as per Regulation 3(25) of the 2019 Tariff Regulations which is extracted as under:

3. Definitions. - In these regulations, unless the context otherwise requires: -

25. 'Force Majeure' for the purpose of these regulations means the events or circumstances or combination of events or circumstances including those stated below which partly or fully prevents the generating company or transmission licensee to complete the project within the time specified in the Investment Approval, and only if such events or circumstances are not within the control of the generating company or transmission licensee and could not have been avoided, had the generating company or transmission licensee taken reasonable care or complied with prudent utility practices:

(a) Act of God including lightning, drought, fire and explosion, earthquake, volcanic eruption,



landslide, flood, cyclone, typhoon, tornado, geological surprises, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred years; or

(b) Any act of war, invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

(c) Industry wide strikes and labour disturbances having a nationwide impact in India; or

(d) Delay in obtaining statutory approval for the project except where the delay is attributable to project developer;

25. The Regulation 3(25) of the 2019 Tariff Regulation provides for the Force Majeure event, which prevents the generating station from completion of the project within the timeline specified in the Investment approval. However, in the present case, the generating station has already achieved COD and is operational.

26. The Hon'ble Bombay High Court in the matter of Standard Retail Pvt. Ltd. v. G. S Global Corp. Ltd. has refused to grant relief under the force majeure clause on account of imposition to lockdown to a set of steel importers on one of the grounds that distribution of steel had been declared as an essential service and no restrictions were imposed on its movements.

27. Further, a petition bearing No. 594/MP/2020 was filed in this Commission by the Petitioner GMR Warora Energy Private Limited seeking payment of capacity charges for the period from 26.3.2020 to June 2020, which had not been paid by the Respondent claiming that reduction in supply of power on account of industry shutdown in the Union Territory of Dadra and Nagar Haveli pursuant to the direction of the Government of India due to the lockdown on account of Covid-19, constitutes an event of Force Majeure under the DNH PPA. The Commission vide order dated 20.1.2022 in Petition No. 594/MP/2020 had not considered the COVID-19 as a Force Majeure event in terms of the order of the Ministry of Home Affairs dated 24.3.2020, whereby the units and services relating to generation, transmission and distribution were exempted from the restrictions imposed on account of the Covid lockdown. The relevant extracts of the said order dated 20.1.2022 is as follows;

35. Thus, in terms of the above, the activities relating to generation, transmission and distribution were exempted from the nationwide lockdown imposed for restricting spreading of the Covid-19. Therefore, it cannot be argued that such lockdown per se has in any way affected



the Respondent, being the distribution licensee in the Union Territory of Dadra and Nagar Haveli, in performing its functions and obligations under the agreement.

36. The Respondent has sought to argue that the reliance on above notification providing for exemption from lockdown is misconceived as the exemption was for the purpose that power supply should not be disconnected. However, the said argument, in our view, is misconceived. On one hand, the Respondent has sought to rely upon the Notifications issued by Ministry of Finance, MNRE and MoP in contending that Covid-19 and nationwide lockdown have been considered as force majeure therein, whereas on the other hand, it has sought to contest the applicability of the Ministry of Home Affairs Order dated 24.3.2020 clearly exempting services relating to generation, transmission and distribution from the lockdown. Such approbation and reprobation on the part of the Respondent cannot be permitted. In view of the categorical exemption from the Covid-19 led nationwide lockdown to all the activities and services relating to generation, transmission and distribution in terms of MoHA Order dated 24.3.2021, in our view, such lockdown cannot be considered as force majeure event that prevents, hinders or delays the Respondent/ distribution licensee in performing its obligations as specified in the DNH PPA.

.....

58. In view of the above discussions, the submission of the Respondent that Covid-19 pandemic led lockdown and consequent reduction in demand constitute force majeure event absolving the Respondent from making payment of capacity charges under the PPA deserves to be rejected and accordingly, the Respondent is directed to make payment of the capacity charges to the Petitioner for the period from April 2020 to June 2020 within 60 days from the date of this order.

28. Thus, the Commission in the above order dated 20.1.2022 in Petition No. 594/MP/2020 has not agreed to the contention that the Covid-19 pandemic led lockdown and consequent reduction in demand constituted a force majeure event in view of the MHA order dated 24.3.2020, whereby the units and services relating to generation, transmission and distribution were exempted from the restrictions imposed on account of the Covid lockdown.

29. Further, the Petitioner has prayed to grant deemed availability under Regulation 76 and Regulation 77 of the 2019 Tariff Regulations.

30. Regulation, 76 of the 2019 Tariff Regulations provides as under: -



“76. Power to Relax: *The Commission, for reasons to be recorded in writing, 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. The Power to Relax under the 2019 Tariff Regulations is in general terms and its exercise is discretionary. As regards the exercise of power to relax, the APTEL vide its judgment dated 25.3.2011 in appeal No. 130/2009 (RGPPL v. CERC & anr.) has observed the following: -

“18.1 The Regulations of the Central Commission and the decision of the Tribunal and the Supreme Court confer the judicial discretion to the Central Commission to exercise power to relax in exceptional case. However, while exercising the power to relax there should be sufficient reason to justify the relaxation and non-exercise of discretion would cause hardship and injustice to a party or lead to unjust result. It has also to be established by the party that the circumstances are not created due to act of omission or commission attributable to the party claiming relaxation. Further, the reasons justifying relaxation have to be recorded in writing.”

32. It is clear from the above observation of the APTEL, that the Central Commission has discretionary power to relax norms based on the facts and circumstances. However, there has to be a sufficient and reasonable justification and such a case has to be one of those exceptions to the general rule. There must be sufficient reason to justify Power to relax. However, the order of the Ministry of Home Affairs dated 24.3.2020, clearly exempted the units and services relating to generation, transmission and distribution from the lockdown. In view of the above, we are of the considered view that such relaxation cannot be allowed to the generating station burdening the extra cost to be borne by the beneficiaries. Accordingly, Regulation 76 of the 2019 Tariff Regulation cannot be invoked.

33. Regulation, 77 of the 2019 Tariff Regulations provides as under: -

“77. Power to Remove Difficulty: *If any difficulty arises in giving effect to the provisions of these regulations, the Commission may, by order, make such provision not inconsistent with the provisions of the Act or provisions of other regulations specified by the Commission, as may appear to be necessary for removing the difficulty in giving effect to the objectives of these regulations.*



34. In our considered view, the regulation of power to remove difficulty is to be exercised only when there is difficulty in effecting the Regulations and not when difficulty is caused by the application of the Regulations. Thus, the exercising of power to remove difficulties does not arise in the present case.

35. In the light of the above deliberations and discussions, balancing the interests of the generator and the beneficiaries, the Commission is of the considered view that it is not a fit case for the Commission to invoke Regulation 76 and Regulation 77 of the 2019 Tariff Regulations. Accordingly, we are not inclined to allow the claim of the Petitioner for declaration of Deemed Availability for the period from 1.4.2020 to 30.4.2020 in respect of Ramagundam Super Thermal Power Station Stage-III (1X500 MW) ("RSTPS-III") due to steam leakage from HP turbine seal ring.

36. Petition No. 154/MP/2021 is disposed of in terms of above discussions and findings.

sd/-
(Pravas Kumar Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I. S. Jha)
Member

sd/-
(Shri Jishnu Barua)
Chairperson

