

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 225/MP/2017**

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

**Date of Order: 29<sup>th</sup> April 2023**

**In the matter of**

Petition seeking compensation for loss of capacity charge on account of inadequate availability of fuel gas under provisions of Regulation 54 (Power to Relax) of the Central Electricity Regulatory Commission (Terms and Condition of Tariff) Regulations, 2014 in respect of the Assam Gas Based Power Plant (received by way of remand from APTEL).

**And**

**In the matter of**

North Eastern Electric Power Corporation Limited,  
Brookland Compound, Lower New Colony,  
Shillong -793003, Meghalaya.

**...Petitioners**

Vs

1. Assam Power Distribution Company Limited,  
Bijulee Bhawan, Paltan Bazar,  
Guwahati – 781001
2. Meghalaya Power Distribution Corporation Limited,  
Short Round Road, Lumjingshai, Shillong – 793001
3. Tripura State Electricity Corporation Limited,  
“Bidyut Bhawan”, Banamalipur, Agartala – 799001
4. Power & Electricity Department,  
Govt. of Mizoram, Power House Complex,  
Electric Veng, Aizawl – 796001.
5. Manipur Power Distribution Company Ltd.,  
Government of Manipur



6. Department of Power,  
Government of Arunachal Pradesh,  
Bidyut Bhawan, Itanagar – 791111.

7. Department of Power,  
Government of Nagaland,  
Kohima – 797001.

8. North Eastern Regional Power Committee,  
NERPC Complex, Dong Parmaw,  
Lapalang, Shillong – 793006.

9. North Eastern Regional Load Despatch Centre,  
Dongtiah, Lower Nongrah, Lapalang,  
Shillong – 793006.

**...Respondents**

**Parties Present :**

Ms. Poorva Saigal, Advocate, NEEPCO  
Shri Shubham Arya, Advocate, NEEPCO  
Ms. Reeha Singh, Advocate, NEEPCO  
Shri Ravi Nair, Advocate, NEEPCO  
Shri Susanta Deka, NEEPCO  
Shri Ripunjoy Bhuyan, NEEPCO  
Ms. Elizabeth Pyrbot, NEEPCO

**Order**

The Assam Gas Based Power Plant of North Eastern Electric Power Corporation Ltd. is a Combined Cycle Gas Based Power plant having an installed capacity of 291 MW located at “Bokuloni Village in Dibrugarh District of the State of Assam”. The Power Plant uses Natural Gas as its fuel. The Natural Gas from the oil fields of Assam is received at a pressure of about 5.5 Kg/cm<sup>2</sup> and is fed to a Gas Booster Station to increase the pressure to about 21 Kg/cm<sup>2</sup> before being fed to the Gas Turbines. The Power Station consists of six Gas Turbines each of 33.5 MW capacities and three Steam Turbines each of 30 MW Capacity. The exhaust of each Gas Turbine is fed into a Waste Heat Recovery Boiler. The steam from two such boilers is used to run one Steam Turbine Generator set. Thus, there are three Combined Cycle Modules.



2. The Petitioner could not achieve Normative Target Availability of the station of 72% during the period from July, 2016 to March, 2017 due to inadequate gas supply by the Oil India Limited (OIL). Accordingly, the Petition No. 225/MP/2017 was filed by the Petitioner, North Eastern Electric Power Corporation Ltd. (hereinafter referred to as "NEEPCO") before the Commission, seeking compensation for loss of Capacity Charge on account of inadequate availability of fuel gas under provisions of Regulation 54 (Power to Relax) of the Central Electricity Regulatory Commission (Terms and Condition of Tariff) Regulations, 2014 in respect of the Assam Gas Based Power Plant (AGBP).

3. The Commission vide its order dated 5.11.2018 disposed of the petition, rejecting the claim of the Petitioner and did not relaxed the Target Availability under provisions of Regulation 54 (Power to Relax) of 2014, Tariff Regulations.

4. Aggrieved by the decision of the Commission, the said order dated 5.11.2018 was challenged before the Appellate Tribunal for Electricity by the Petitioner. Appellate Tribunal of Electricity vide order dated 4.8.2022, had remanded the matter back to the Commission.

5. In compliance to the directions of the Tribunal and based on the findings of the Tribunal in the said judgment dated 4.8.2022, the Petition was heard by the Commission on 25.8.2022, 20.9.2022, 3.11.2022 and 12.12.2022. The Petition was last heard on 12.12.2022 and despite notices, none appeared on behalf of the Respondents. The Commission after hearing the matter on 12.12.2022, reserved the order and directed the Petitioner to submit the limited information regarding the reasons for agreeing to the compensation clause in the bilateral fuel supply agreement, for short supply of gas @80% of the contracted quantum.

#### **Reply by APDCL**

6. The Respondent APDCL vide its affidavit dated 31.1.2023 submitted that it has received written submissions on behalf of the Petitioner on 12.01.2023. The Respondents has mainly submitted as under:

- (a) Nowhere in the order of the Hon'ble Appellate Tribunal, it has been stated that the beneficiaries should bear the economic burden of any such agreement between the Petitioner and the Central Government.



(b) The Petitioner shall, at any point of time, can take up the matter with the Central Government and claim any such dues which arise due to such discretion of the Central Government.

(c) The PPA entered into between the Petitioner and the Respondent Beneficiary States has no back to back link with the FPA agreement signed between the Petitioner and the Fuel Supplier (M/s OIL).

(d) The FPA appears to be a lopsided agreement in favor of OIL.

(e) As per FPA, the Buyer desires to purchase and receive a quantity of 1.40 Million Standard Cubic Meter per Day (MMSCMD) fuel gas on long term basis and accordingly the Seller also agrees to supply and sale a quantity of 1.40 MMSCMD of fuel to be delivered at Kathalguri as per Article 10.1 of FPA. Therefore, in case of any deviations of the contracted fuel gas and corresponding reduction in generation at the project of the Petitioner, the same has to be settled between the Seller (OIL) and the Petitioner as per terms and conditions of the FPA.

(f) 'Force Majeure' clause is to be justified/decided by a committee called 'Gas Supply Co-ordination Committee (GSCC) to be constituted with two (2) members each from both sides of FPA. Under such conditions, without agreement from the Petitioner's side, the Fuel Supplier cannot demand any short supply of fuel attributable to 'Force Majeure' clause.

7. The Respondent accordingly, prayed as under:

(a) Not to admit and entertain the prayers of the Petitioner under Regulation 54 of the CERC Regulations' 2014 which would amount giving undue advantage to the Petitioner for reasons not attributable to the Respondents/ Ultimate Consumers.

(b) To advise the Petitioner to take up the matter with OIL for necessary compensation for short supply of gas by the Supplier for the reasons attributable to the Supplier even by adopting proper procedure including the legal route.

(c) Else, to advise the Petitioner to approach the Central Government for necessary compensation.



- (d) To reduce the installed capacity of the AGBPP machines from its installed capacity of 291 MW to the effective capacity of actual generation with the available gas and proportionately reduce the AFC on pro-rata basis till the time the adequate gas for full capacity generation is not available.
- (e) To Pass any such other orders(s) which the Commission thinks fit and just in the circumstances of the case and in the interest of justice.
8. In response to the above reply, the Petitioner had not filed any rejoinder.
9. Considering the proceedings and also considering the fact that the matter has been remanded back by the APTEL with a direction to decide the issue expeditiously and pass fresh order in accordance with law at an early date, we now examine the case again.

### **Analysis and Decision**

10. The instant petition has been filed by the Petitioner NEEPCO for its AGBP generating station. The Petitioner could not achieve the Normative Target Availability of 72% during July, 2016 to March, 2017. Accordingly, the petition was filed by the Petitioner, seeking compensation for loss of Capacity Charge on account of inadequate availability of fuel gas under provisions of Regulation 54 (Power to Relax).
11. The Commission vide order dated 5.11.2018 in Petition No. 225/MP/2017 had rejected the claim of the Petitioner to consider the actual PAF achieved by AGBP during the period 1.7.2016 to 31.3.2017 as the NAPAF for affected period, to allow recovery of loss of Capacity Charge due to inadequate availability of fuel gas under provisions of Regulation 54 (Power to Relax) of the Central Electricity Regulatory Commission (Terms and Condition of Tariff) Regulations, 2014.
12. Aggrieved by the said order dated 5.11.2018, the matter was challenged by the Petitioner before the Appellate Tribunal for Electricity by the Petitioner.
13. **Appellate Tribunal of Electricity vide order dated 4.8.2022, had remanded the matter back to the Commission with the following observations:**

xxxxxxx

*"7. It does appear from the facts presented before us that the reliefs that the appellant herein could have claimed under the GSPA could have been directed against OIL, the distribution*



licensees which are respondents before us being not party to that contract. At the same time, we cannot shut out eyes to the fact that the directions of the Central Government vis-à-vis the obligations of OIL to supply gas have created a situation which is beyond the control of the appellant, it having been resultantly rendered impossible for it to meet the requisite standards under the Tariff Regulations and the targets under its other contractual arrangements, particularly with the beneficiaries of the electricity thereby generated.

8. We note that the Central Commission has not examined the prayer for relaxation from the above perspective. The impugned order is virtually silent on the reasons for disinclination to examine prayer to that effect.

9. On the forgoing facts, and in the circumstances, we find it just and proper to remit the matter back to the Central Commission for revisit on the prayer for relaxation under Regulation 54 referred to earlier.

10. Needless to add, before granting any such relief, should the Central Commission feel persuaded to do so, it will be obliged to hear all parties that are affected including and particularly the distribution licensees.

11. The observations recorded by us above are for the purposes of dealing with the contentions urged before us and will not be treated as final expression by this Tribunal on merits. All issues are kept open.

12. The impugned order is thus set aside. The matter is remanded to the Central Commission in light of above directions. The Central Commission is directed to take up the matter on 25.8.2022.

13. Needless to add, we would expect the Central Commission to decide the issue expeditiously and pass fresh order in accordance with law at an early date.

14. The matter was taken up by the Commission on 25.8.2022, 20.9.2022, 3.11.2022 and 12.12.2022. The details of the hearings on the respective dates are summarized as under:

#### **Hearing on 25.8.2022**

15. Due to paucity of time, the petition could not be taken up for hearing. Accordingly, the Commission adjourned the matter.

#### **Hearing on 20.09.2022**

16. The Commission, after hearing the learned counsel for the Petitioner, directed to issue notice to the Respondents. The Petitioner was permitted to file the additional information, by 4.10.2022 after serving a copy to the Respondents, who shall file their replies, on or before 14.10.2022. Rejoinder, if



any, by the Petitioner by 21.10.2022. However, no reply, rejoinder or additional information was filed by the Petitioner and Respondents.

### **Hearing on 3.11.2022**

17. The case was heard, learned counsel for the Petitioner submitted that in terms of the judgment of the APTEL dated 4.8.2022, the Commission may consider the prayer of the Petitioner for relaxation of NAPAF for the period from 1.7.2016 to 31.3.2017, keeping in view that there has been inadequate supply of gas by Oil India Limited (OIL) to the generating station of the Petitioner. She further submitted that there has been diversion of gas by OIL to Brahmaputra Valley Fertilizer Corporation Limited, on priority basis, in terms of the directions of Ministry of Petroleum & Natural Gas, on 31.10.2016, and the same had resulted in the non-availability of gas to the Petitioner's generating station. The learned counsel also submitted that the contractual provisions between OIL and the Petitioner, under the FPA, get superseded by the above directions of the Central Government issued for diversion of gas. She further added that unlike other gas-based stations, owing to the terrain and the difficulties in transporting gas, and also in the absence of a gas grid, the alternative sources of gas such as spot gas, RLNG etc. is not available to the Petitioner and it was also not possible for the Petitioner to arrange for alternative source of gas. This fact has been recognized by this Commission in the Statement of Reasons to the 2009 Tariff Regulations. Accordingly, the learned counsel submitted that the present case is a fit case for this Commission to relax the provisions of Regulation 36(A)(d) of the 2014 Tariff Regulations, and allow the full recovery of capacity charges at the actual declared availability, for the said period.

18. None appeared on behalf of the Respondents, despite notice. However, the Commission, as a last opportunity, directed issuance of notice afresh to the Respondents.

### **Hearing on 12.12.2022**

19. The Petition was last heard on 12.12.2022. Despite notices, none appeared on behalf of the Respondents. The Commission vide ROP of the hearing dated 12.12.2022 directed the Petitioner to submit the reason for agreeing to the compensation clause in the bilateral fuel supply agreement for the short supply of gas @80%of the contracted quantum. Subject to above, the order was reserved.



20. The Petitioner in compliance vide its affidavit dated 12.1.2023 has given the background as under:

- (a) On 24.09.1995, NEEPCO had entered into a Fuel Purchase Agreement with Oil India Limited (hereinafter 'OIL') to supply the gas required by the Generating Station. The first Agreement was entered into on 24.9.1995 for the off-take of 1 MMSCMD for a period of 10 years.
- (b) On 13.1.2005 i.e., after a period of 10 years of entering into the first Agreement with OIL (for 1 MMSCMD), NEEPCO entered into Fuel Purchase Agreement with OIL for the supply of 1.4 MMSCMD of Gas.
- (c) On 29.8.2008, this Commission issued the Draft Regulations for the control period 2009-2014 and proposed to reduce the normative availability for the Generating Station to 70%:
- (d) However, in terms of Regulation 26(i)(e) of the Tariff Regulations, 2009, the Target Availability for the Generating Station was fixed at 72%.
- (e) On 21.2.2014, this Commission notified the Central Electricity Regulatory Commission (Terms and Conditions for determination of tariff) Regulations, 2014, wherein the Normative Availability of the Generating Station was fixed at 72% for the period 1.4.2014-31.3.2019.
- (f) On 24.6.2015, NEEPCO entered into a Fuel Purchase Agreement with OIL for the procurement of 1.4 MMSCUMD quantum of Gas.
- (g) In spite of the Fuel Purchase Agreement dated 24.6.2015 stipulating that OIL shall be obliged to supply the agreed quantum of 1.4 MMSCMD, w.e.f. July, 2016, OIL was unable to supply this quantum on a regular basis. The details of the loss in generation on account of fuel unavailability are as under:

Month	Generation required to achieve NAPAF (72% (MU))	Actual gen. (MU)	Total Loss of generation due to all factors (MU)	Loss of generation for gas compressor tripping/shutdown (MU)	Loss of generation for other Forced Outages (MU)	Loss of generation due to shortage of gas (MU)	Percentage Loss of Generation due to gas shortage (G/D%)
A	B	C	D	E	F	G	H
Jul-16	155.88288	141.09	14.79	1.53	2.43	10.8306	73.2117
Aug-16	155.88288	122.71	33.18	0.23	0.53	32.4083	97.6869





Sep-16	150.8544	92.18	58.68	0.50	0.00	58.1790	99.1547
Oct-16	155.88288	146.38	9.51	1.32	3.43	4.7599	50.0762
Nov-16	150.8544	120.81	30.05	0.00	0.33	29.7183	98.8987
Dec-16	155.88288	118.56	37.33	1.22	0.02	36.0873	96.6787
Jan-17	150.8544	132.21	18.65	0.00	0.29	18.3566	98.4417
Feb-17	140.79744	116.90	23.90	0.21	0.28	23.4035	97.9371
Mar-17	155.88288	130.64	25.25	0.00	0.16	25.0860	99.3654
<b>TOTAL</b>	<b>1372.78</b>	<b>1121.46</b>	<b>251.32</b>	<b>5.02</b>	<b>7.47</b>	<b>238.8295</b>	<b>95.0317</b>

(h) The primary reason for the inability of OIL to supply the contracted quantum was on account of the directions of the Ministry of Petroleum and Natural Gas (MoPNG) on 17.8.2016. The same has also been reiterated in the MoPNG letter dated 31.10.2016, diverting the gas from the NEEPCO's Plant to Brahmaputra Valley Fertilizer Corporation Limited, on a priority basis.

(i) NEEPCO had made adequate efforts to mitigate the loss on account of non-availability of Gas was regularly following up with OIL and/or the Ministry of Petroleum and Natural Gas to augment the shortage in supply to the Generating Station.

21. Further, the Petitioner has submitted that the Commission in the Tariff Regulation, 2014, had determined the Normative Annual Plant Availability Factor ('NAPAF') for the Generating Station as 72%, based on the reasoning laid down in the Explanatory Memorandum/Statement of Reasons to the Tariff Regulations, 2009, as notified by this Hon'ble Commission itself, which specifically recognized the following:

- (a) The Generating Station was conceived for a performance level of 68.5% with an allocation of 1 MMSCMD of Gas;
- (b) Even with the additional allocation of 0.4 MMSCMD, only the generation level at 70% is possible;
- (c) Arrangement of spot gas was not possible in such a remote area and the only source is OIL; and
- (d) There was no possibility of arranging additional gas even when this Commission itself took up the matter with the MoPNG.



22. On Commission's specific query vide ROP of the hearing dated 12.12.2022, regarding compensation clause in the bilateral fuel supply agreement, the Petitioner vide an affidavit dated 12.1.2023 has submitted that:-

- (a) The Agreements are entered into with the provision of getting the requisite quantum of supply of fuel and not by providing for compensation for force majeure or supervening sovereign Actions.
- (b) The question of adequacy of the Compensation Formula under the FPA (80% or more) is not relevant to the present case where the insufficiency in supply of gas is owing to the sovereign directions of the MoPNG.
- (c) OIL was the sole supplier in the region and NEEPCO has no option but to agree to the terms and conditions stipulated by OIL. Even otherwise, the terms of the FPA entered into between NEEPCO and OIL (including the compensation formula) is standard terms offered by OIL to its other consumers as well.
- (d) It has not been the case of NEEPCO that the arrangement of gas is not the responsibility of the generator. However, if the gas is not available for reasons not attributable to NEEPCO, such as on account of the directions issued by the MoPNG and/or Force Majeure conditions being faced by the Supplier, then the Generator cannot be penalized for the same.

23. Considering the fact that OIL was the lone supplier and the Petitioner has no provisions either for arrangement of gas from any other source or the arrangement for storage of gas, it had to agree to the terms and conditions stipulated by OIL.

24. The scope of the order in the current matter is limited to the directions of the APTEL in its judgment dated 4.8.2022. As per the direction of APTEL, the case was reheard and the Commission has given opportunity to the Respondents as well as the Petitioner to submit the relevant submissions. None appeared on behalf of the Respondents in any of the hearings.

25. The Petitioner, in the impugned order vide affidavit dated 21.9.2017, had already submitted that the month-wise average plant availability based on declared capacity due to inadequate fuel availability for the period from July, 2016 to March, 2017 is only 58.74%. The Target Availability of



72% could not be achieved by the Petitioner from July, 2016 to March, 2017, mainly because the station was not getting adequate quantum of gas for availability declaration of 72% and the primary reason for the inability of OIL to supply the contracted quantum was on account of the directions of the MoPNG dated 17.8.2016, which directed to divert the gas from the NEEPCO's Plant to Brahmaputra Valley Fertilizer Corporation Limited, on a priority basis. Moreover, the fuel purchase agreement between the Petitioner and supplier also obligates OIL to supply the agreed quantum of 1.4, MMSCMD. However, OIL on account of direction dated 17.8.2016 by MoPNG, could not supply the agreed quantum of gas on regular basis.

26. The direction dated 17.8.2016 by MoPNG, reads as under:

***“Subject: Shutdown of Namrup-II plant of Brahmaputra Valley Fertiliser Corporation Limited(BVFCL) due to Non-Supply of Natural gas by Oil India Limited***

*I am directed to refer to your letter no OIL:01:05-198 dated 29<sup>th</sup> July 2016 from Shri A.M. Mamen, General Manager(Production) on above subject. The matter has been examined in the Ministry with OIL officials and keeping in view that BVFCL is a Urea manufacturing Unit, any short supply of domestic gas will adversely affect Urea production in the region. It has been decided that natural gas supply to BVFCL should be ensured at the level of 1.65 MMSCMD by applying pro-rata cut on technically feasible non-Priority customers in that region, till the production of gas normalizes. You are requested to take further necessary action accordingly under intimation to all concerned including this ministry.”*

27. From the above letter of the Ministry it is evident that despite having contracted quantum with the Petitioner, OIL was bound to comply with the direction of the Ministry and accordingly had to divert the gas from the NEEPCO's Plant to Brahmaputra Valley Fertilizer Corporation Limited, on priority basis. Further, perusal of the submissions made by the Petitioner during current proceedings and the submissions made in the original petition, it could be seen that a number of correspondences took place between the Petitioner & the gas supplier and also with MOP & MoPNG. The Petitioner has not only made correspondence with the OIL but also with the Ministry.

28. The correspondences between the Petitioner and the gas supplier OIL mainly focusses on the inadequacy in the supply of gas as per contracted quantum. The reasons for inadequate supply of gas to the Petitioner are mainly due to two reasons.



(a) MoP&NG Letter No. L-12023/5/2016-GP-II dated 17.8.2016, instructing OIL to divert the gas to M/S BVFCL on priority basis.

(b) Technical problems in few of the gas wells, upset in the system pressure and disruption in the gas supply.

29. The irregularity on behalf of the fuel supplier M/s OIL is on account of the direction dated 17.8.2016 of the MoPNG diverting the gas from NEEPCO's plant to the Brahmaputra Valley fertilizer Corporation Limited on priority basis. On account of the said diversion, the monthly average quantum of supply during the relevant period ranged from 0.9 to 1.18 MMSCMD, which was not adequate to achieve NAPA of 72%. The Technical problem is also an admitted fact, which can be confirmed by the e-mail dated 16.8.2016 from OIL to NEEPCO. Further, from the letter dated 27.4.2017 of OIL to NEEPCO, it can be seen that the OIL admitted the fact that the supply during the previous periods were affected due to the committed quantum to some other consumers as per the directive received from time to time from MoPNG and also because of technical downhole problems in a number of wells coupled with closure of gas wells due to miscreant activities and frequent bandhs/strikes.

30. It is pertinent to mention here that arranging of spot gas or any other alternate fuel in the remote North-Eastern Region is not a feasible option. The location of the Gas Based Station in the North East does not permit the fuel supplier to make alternate arrangement for supply of gas from other areas of the country. Further, there is no mechanism for gas storage. It is noted that there were certain technical problems in the wells of the supplier but the directions of the MoPNG had a superseding effect over the obligation of OIL to supply 1.4 MMSCMD of gas to NEEPCO. In light of the above, the Commission is of the view that there is a case for relaxation as claimed by the Assam GPS station.

31. The Petitioner vide its affidavit dated 21.9.2017 has placed on record the month-wise break-up of plant availability based on declared capacity due to inadequate fuel availability for the period from July, 2016 to March, 2017.

<b>Month</b>	<b>PAFM(%) based on Declared Capacity</b>
July-16	68.68
August-16	58.69
Sept.-16	43.72
Oct.-16	67.49
Nov.-16	56.73



Dec.-16	54.13
Jan.-17	60.27
Feb.-17	59.15
March-17	59.79

32. Perusal of above detail reveals that low NAPAF during the months of July 2016 to March 2017 was not attributable to the any operational problems at the Petitioner's gas plant. Low NAPAF was mainly because of the low supply of gas by M/s OIL to the Petitioner's Gas plant .

33. In view of the above discussions, we are of the view that, it is a fit case for relaxation by invoking of the power vested under Regulation 54 of the Central Electricity Regulatory Commission (Terms and Condition of Tariff) Regulations, 2014.

34. Regulation 54 of the 2014 Tariff Regulations dealing with power to relax in appropriate cases, provides as under:

*"The Commission may, 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.*

35. It is an established principle of law that the power to relax has to be strictly construed and is to be exercised judiciously and with caution. When and only when undue hardship is caused by the application of the rules or regulations, the power to relax is to be exercised. In the present case, low NAPAF during the months of July 2016 to March 2017 was mainly due to shortage of gas supply by OIL. Therefore, the Commission in exercise of power under Regulation 54 allows loss of PAF due to gas shortage as deemed availability during the period 1.7.2016 to 31.3.2017. Further, loss of PAF beyond 28% due to reasons other than gas shortage is not allowed. However, the annual PAF would be restricted to 72%..

36. In view of the above, the directions of the APTEL, in its judgment dated 4.8.2022 in Appeal No 121 of 2019 stands implemented.

**Sd/-**  
**(Pravas Kumar Singh)**  
**Member**

**Sd/-**  
**(Arun Goyal)**  
**Member**

**Sd/-**  
**(I. S. Jha)**  
**Member**

