CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 225/MP/2022

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

Date of Order: 20th January, 2024

Petition No. 225/MP/2022

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 10.05.2021 to 22.06.2021 in respect of Rihand Super Thermal Power Station Stage-II (2X500 MW).

And

In the matter of
National Thermal Power Corporation Limited,
NTPC Bhawan,
Core-7, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi-110 003 **…….Petitioner**

Vs

1. Uttar Pradesh Power Corp. Limited,
   Shakti Bhawan, 14, Ashok Marg,
   Lucknow-226 001

2. Rajasthan Urja Vikas Nigam Limited,
   (On Behalf of Rajasthan Discoms),
   Vidyut Bhawan, Janpath,
   Jaipur-302005

3. Tata Power Delhi Distribution Limited,
   Grid Substation, Hudson Road,
   Kingsway Camp,
   New Delhi-110009

4. BSES Rajdhani Power Limited,
   BSES Bhawan, Nehru Place,
   New Delhi-110019

5. BSES Yamuna Power Limited,
   Shakti Kiran Building, Karkardooma,
   Delhi-110092

6. Haryana Power Purchase Centre,
   Shakti Bhawan, Sector-VI,
   Panchkula-134109

7. Punjab State Power Corporation Limited,
   Through its Managing Director,
   The Mall,
   Patiala-147001

8. Himachal Pradesh State Electricity Board Limited,
   Kumar Housing Complex Building-II,
   Vidyut Bhawan, Shimla-171004

9. Power Development Department,
   Government of J&K, Civil Secretariat,
   Srinagar

10. Electricity Department of Chandigarh.
    Union Territory of Chandigarh,
    Additional Office Building, Sector-9 D,
    Chandigarh

11. Uttarakhand Power Corporation Limited,
    Urja Bhavan, Kanwali Road,
    Dehradun-248 001 **…….Respondents**

Parties Present:
Shri Venkatesh, Advocate, NTPC
Shri Shivam Kumar, Advocate, NTPC
Shri Parimal Piyush, NTPC
Shri Siddhant Pradhan, NTPC
Shri Rahul Kinra, Advocate, BRPL and BYPL
Shri Aditya Ajay, Advocate, BRPL and BYPL
Shri Prithu Chawla, Advocate, BRPL and BYPL
Shri Sameer Singh, BYPL

ORDER

The present Petition has been filed by the Petitioner NTPC Limited, praying to relax the provisions of achieving the target availability and grant deemed availability equal to the Normative Annual Plant Availability Factor i.e. 85% as per the Tariff Regulations, 2019, during the High demand Season as well as Low Demand season of FY2021-22 for non-achieving of NAPAF due to the onset of Covid-19 (2nd wave) and the consequent lockdown. The Petitioner has prayed as under:

> *(a) Grant deemed availability equal to Normative Annual Plant Availability Factor i.e., 85% as per the Tariff Regulations, 2019 during the High demand Season as well as Low Demand season of FY2021-22 for the instant station.*
>
> (b) *Pass such orders* as deemed fit and necessary in the facts and *circumstances* of the present case.

Submission of the Petitioner: -

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

a) The Petitioner (NTPC) is a 'Generating Company' as defined under Section 2(28) of the Electricity Act, 2003.

b) The Petitioner has power stations in different regions and places in the country. Rihand Stage-II is one such station located in the State of Uttar Pradesh with an Installed Capacity of 1000 MW (2X500 MW). The power generated from Rihand Stage-II is being supplied to the Respondents herein, who are Distribution Companies.

c) The Commission over the five tariff periods (2001 to 2024) is determining/ regulating the generation tariff of the generating stations installed under Section (62) of the Electricity Act 2003. Commission at the beginning of each tariff period notifies the terms and conditions of the Tariff applicable for the extant tariff period after consultation with all the stake holders. It may be pertinent to mention that over the tariff periods, the Commission has tightened the norms of operating parameters of generating stations. The operating norms specified in the respective Tariff Regulations were equitable to both generators and beneficiaries as the same was based on the past actual operating details of the generating stations and, at the same time encouraged efficiency improvement so that the generators could earn incentive.

d) In this regard, it is submitted that for the purpose of full recovery of Annual Fixed Charges (AFC) of a thermal generating station, the Normative Annual Plant Availability Factor (NAPAF or Target Availability) is tightened over the control periods from the period from 2001-2004 to 2009-14 from 62.8% to 85% respectively. Thereafter, for the period 2014- 24, 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 for the period 2014-17 was lowered slightly to 83% in view of the coal shortage scenario in the country.

e) It is evident from the Statement of Reasons (SoR) of the Tariff Regulations 2009, that NAPAF of 85% was specified for the thermal power stations so as to provide operation flexibility and to mitigate any risk arising out of fuel and operational contingency. The operating margin was allowed so that thermal units operate at high pressure temperatures and pressure and involve high rotating speed equipments, which aremore prone to wear & tear and forced outages in spite of diligently carrying out annual unit overhauls. NTPC, in most of its stations, could achieve the Target Availability specified in the extant tariff regulations by meticulously planning its unit's annual overhauls, renovations and other repair works while meeting the grid demand, etc.

f) Generally, NTPC carries out annual overhauls of 18 days to 45 days of a unit, which correspond to a loss of availability of about 5% to 12% for a single unit. The balance margin of availability provides operation flexibility for loss of availability arising out of fuel or forced outage due to equipment problems. The operational flexibility is also achieved by taking planned shutdown of units one by one in case of multiple unit stations.

g) On 07.03.2019, this Commission notified the Tariff Regulations, 2019 w.e.f. 01.04.2019, which remains in force for a period of five years. Regulation 42 of the Tariff Regulations, 2019 introduced a new mechanism for recovery of

AFC based on the seasonal normative target availability w.e.f. 01.04.2020, which has further reduced the operation flexibility.

h) As per the provisions of Tariff Regulations 2019, a generating station for recovery of full AFC the generator has to achieve target availability separately for two seasons, namely High Demand Season (period of three months, consecutive or otherwise) and Low Demand Season (period of remaining nine months, consecutive or otherwise) w.e.f. 01.04.2020. Further, High Demand Season and Low Demand Season months are different in different Regions and these months are defined based on the Regional seasonal/ demand variations. The same has to be declared by respective RLDCs six months in advance.

i) Northern Regional Power Committee (NRPC) vide its 180th OCC declared High Demand Season for the Year 2021-22 as June 2021, July 2021 and August 2021 and the remaining 09 months of FY 2021-22, i.e. from April 2021 to March 2022 (excluding the above months), to be Low Demand Season for the Northern Region stakeholders.

j) Based on the above, NTPC carried out detailed shutdowns/ overhauls planning/ Additional Capitalization works, etc, keeping enough margin for forced shutdown /Partial Availability arising out of operational exigencies so that each station of Northern Region, including RhSTPS-II, could achieve the seasonal Target Availability of 85% for both High Demand and Low Demand season separately. Accordingly, all the works for RhSTPS-II were planned such that the

operational flexibility for achieving the target availability separately for both the High and Low demand seasons was secured, and it could supply cheaper power to the benefit of beneficiaries as per their demand.

k) However, due to some unforeseen and unfortunate circumstances which were beyond the reasonable control of the petitioner, there was some under-achievement of availability during the High Demand Season (June 21 to Aug 21) and Low Demand Season (April to May 21 and September 21 to March 22) despite all-out efforts by the petitioner to mitigate the effect of those circumstances.

l) The overall availability achieved for the year 2021-22 by Rihand Stage-II is as tabulated below:

PAF Cumm. 2021-22	PAF High Demand Season		PAF Low Demand Season	
	Peak Hour	Off Peak Hour	Peak Hour	Off Peak Hour
80.53%	79.20%	78.91%	81.15%	81.04%

Rihand Stage-II has achieved overall availability of 81.06% and 78.96% in the Low demand and High demand seasons, respectively. Accordingly, there has been an under-achievement of 3.94%, equivalent to approx. 242 MUs during the Low Demand Season and under-achievement of 6.04%, equivalent to approx. 125 MUs during the High Demand Season with respect to normative availability of 85%.

m) The factors which led to the under-achievement of Availability in the High Demand Season are detailed below:

i. Power plant maintenance is regularly performed in power plants which include inspections, preventive maintenance, and repairs for all of the assets throughout a power plant. This maintenance work is crucial for the safety and preservation of the longevity of energy plant assets. The longer a plant can run, the more cost-effective it is over time, and maintenance plays a crucial role in maximizing the longevity of an energy plant.

ii. Power plant maintenance refers not just to the maintenance of assets and equipment but also to routine inspections, installation of equipment, regular reporting, systems integrations and reviews, and scheduled preventive maintenance—all of the work required to help the plant stay active and in good working order from one day to the next. Petitioner in all of its stations carries out its regular maintenance routines for all its units as per schedules.

iii. Petitioner has been carrying out shutdowns/ overhauls / Add-cap works in a planned and phased manner in RhSTPS-II station such that the maximum energy/ power is made available to the beneficiaries and at the same time achieves the required overall availability of the station as specified in the Commission's Regulations.

iv. It is being done in consultation with the beneficiaries at the RPCs and other relevant forums. The station has been able to achieve PLF well

above the normative availability specified in Tariff Regulations in the past years. The availability of RhSTPS-II for the FY2019-20 & FY2020-21 is 88.49% & 97.41% i.e. over the normative availability.

v. During the year 2021-22, with due consent at OCC forums of NRPC. Accordingly, NTPC had planned Overhauling for Unit-II of Rihand Stage-II as under:

Unit	Maintenance	Scheduled Start of Work	Scheduled End Of Work	Duration (days)
Unit 2 (500 MW)	Annual Overhaul	31.03.2021	09.05.2021	40

vi. Accordingly, resources were mobilized, and equipment/ parts were ordered in advance for carrying out the above planned work. On 30.03.2021, Unit-II of the instant station was taken out of Bar for 40 days (i.e. up to 09.05.2021) for capital overhaul along with modification of the Bypass Over Fire Air (BOFA) system as per schedule. All men and material were mobilized.

vii. The overhauling work for Unit# II (500 MW) was going on at full scale and was expected to be completed as planned. The mobilization of men and materials for the purpose was already in full swing.

viii. However, in the month of April, there have been developments which have affected not only industry, but the country as a whole. The COVID-19 pandemic 2nd wave wreaked havoc on the overall social, economic, and healthcare as well as industrial sectors of our country. By early April

2021, a major *second wave* of COVID-19 infections took hold in the country with destructive consequences. By late April, the country surpassed millions of active cases and suffered thousands of unfortunate deaths every day. It is believed to be the second-worst pandemic that has affected the country almost after 100 years. The last menace was witnessed during the 1918 influenza outbreak that claimed 12 million lives.

ix. The second wave placed a major strain on the healthcare system, including a shortage of liquid medical oxygen, logistic issues, and a lack of essential supplies. The need to "provide solutions in a very short time" doubled up efforts, especially towards the availability of medical oxygen, such as increases in production and the use of alternate sources to deliver oxygen supplies. A large number of industrial oxygen plants were employed for this purpose.

x. In this regard, the Government of India (GOI) took several proactive preventive and mitigating measures, starting with progressive tightening of restrictions on travel, issuing of advisories for the members of the public, setting up quarantine facilities, contact tracing of persons infected by the virus and various social distancing measures. Several advisories have been issued to States and Union Territories (UTs) for taking necessary measures to subside the spread of this wave.

xi. Further, it is humbly submitted that ‘all out efforts’ were made by the petitioner to prevent the spread of the pandemic. In order to ensure

social distancing at the workplace and isolation measures in line with the guidelines issued by the Government of India/ State Government, from time to time, a comprehensive SOP (standard operating procedure) was implemented to start the above-mentioned activities while ensuring the safety and security of employees and other stakeholders.

- All the persons entering the plant premises were scanned through the thermal scanner at the entry gate to screen off.
- Gate passes for workers were being issued only after medical examination.
- Workers coming from outside the district were being quarantined as per prevailing government guidelines.
- Washbasin/ arrangements for hand washing provided at different locations of the site.
- Regular sanitization of workplaces.
- Regular Awareness sessions on COVID-19 organized.
- Distribution of masks and gloves to contract workers and other associates done.
- Ensuring round-the-clock availability of Ambulance (Basic & Advance Life Support), oxygen supplies & and first-aid kits.
- Necessary tie-ups with State administration have been done for COVID-19 testing of contract workers/associates as per requirement.

xii. Despite its best efforts, the instant Station could not remain immune to the fallout of the 2nd wave of COVID. The prevalent wave had a

devastating effect on the overall activities at the instant station as well . There was a significant spread of COVID-19 infections at the Rihand station, which also led to some unfortunate deaths among NTPC employees as well as other members of the workforce. Further, the construction works also suffered massively due to the effect of COVID-19 on health and medical infrastructure. The unprecedented Oxygen Crisis due to the COVID-19 2nd wave disrupted the supply of oxygen for use in overhauling activities.

xiii. Due to the complete lockdown during the above-mentioned period, the workers/ labourers left the site, and there was complete demobilization of the workers/ labourers, bringing the overhauling activities to a standstill. Further, the supply of the material/equipments from manufacturers was also completely disrupted due to issues with supplies as well as logistics.

xiv. All men and materials were mobilized. During the commencement of overhauling, there were very few cases of Covid-19, and the capital overhaul was going on as per schedule. However, in mid-April COVID cases started to surge in the instant station on account of the 2nd wave of COVID-19. By the end of May 2021, all the overhauling work had come to a standstill as all the workers of the main agency, i.e. BHEL, were diagnosed as COVID-positive. As per the prevalent Government Protocols, the COVID-positive patients were isolated for further treatment. Several members of the BHEL team, including the Site

Construction Manager, and Mechanical and C&I engineers, got critically ill and, thus, hospitalized.

Amid the prevailing widespread COVID pandemic, BHEL was not able to mobilize any replacement for the ailing officials. Not just the BHEL employees but the site supervisors from the sub-contractors, foremen, and workmen were also diagnosed as COVID-positive. Two of the officials of the Petitioner who were associated with the modification of the BOFA system for NOx control also got critically ill from COVID-19. It was a chaotic situation at the site, and amid such a situation, there was hardly anyone to guide & supervise the execution of the scheduled jobs.

Amidst the threat of rapidly surging COVID, a mass exodus of workmen started from the site. Some of those workers were also leaving the site due to the deaths and illnesses of their family members in their native places. Some of them got severely ill at their native places and were hospitalized. On the one hand, the workmen who had left the site could not be brought back, while on the other hand , the new replacement workmen could not be mobilized amidst the threat of the widespread pandemic and the stringent restrictions on the people's movement despite all the efforts by the Petitioner.

xv. In addition to the above, during the 2nd wave of COVID, there was a serious scarcity in the supply of Industrial Oxygen. To ensure the uninterrupted supply of Medical Oxygen, the Ministry of Home Affairs (MHA) vide order dated 22.04.2021 prohibited the supply of oxygen for

industrial purposes w.e.f. 22.04.2021. Further, as per the MHA directions dated 25.04.2021, the use of liquid oxygen was disallowed for any non-medical purpose.

Due to the diversion of oxygen towards medical purposes only and the prohibition of the supply for industrial purposes, the overhauling activities and the BOFA R&M works came to a standstill. The agency Techno Hitech Pvt Ltd also expressed the inability to arrange the oxygen gas for the aforesaid works.

xvi. The delay in completing the overhauling activities of Unit #2 is as follows:

Work Start Date	Scheduled Completion Date	Actual Completion Date	Scheduled Duration (days)	Actual Duration (days)	Delay (days)
31.03.21	09.05.21	23.06.21	40	84	44

xvii. Accordingly, with respect to Rihand St-II, there has been an under-achievement of 12.55%, equivalent to 259.875 MUs, during High Demand Season and 4.23%, equivalent to 259.875 MUs, during Low Demand Season with respect to the norm of 85%.

xviii. Based on the above, NTPC carried out detailed shutdowns/ overhauls planning/ Additional Capitalization works etc, keeping enough margin for forced shutdown /Partial Availability arising out of operational exigencies so that each station of Northern Region, including Rihand Stage-II, could achieve the seasonal Target Availability of 85% for both High Demand and Low Demand season separately. Accordingly, for the instant station,

all the works were planned such that the operational flexibility for achieving the target availability separately for both the High and Low demand seasons was secured, and it could supply cheaper power to the benefit of beneficiaries as per their demand.

However, due to the aforesaid reasons, there was some under-achievement of availability despite all-out efforts by the petitioner to mitigate the effect of those circumstances.

n) Rihand STPS Stage-II could not achieve the target of 85% DC in High demand season as a result of COVID-19, 2nd wave whose fallout was beyond the reasonable control of the petitioner as submitted in the above paras.

o) For recovery of full AFC corresponding to the High Demand Season (June 2020, July 2020 and August 2020), the total permissible outage (@ 15%) is equivalent to 310.50 MUs in the said three months with respect to a total of 2070 Mus (@ 100% availability) for 1000 MW capacity of RhSTPS-II.

Despite the DC loss of 259.875 MUs during High demand season (equivalent to 12.55% DC loss) due to the effect of Covid 2nd wave on overhauling works of Unit#2, RhSTPS-II had achieved Availability of 78.96% i.e., 6.04% DC shortfall. As submitted in the preceding paras above, had there been no COVID-19 spread, lockdown and the subsequent fallout, RhSTPS-II would have completed the overhauling works of Unit#2 well before the onset of High Demand Season as per schedule without delay (as done in other units for similar works). Accordingly, the effective availability achievement during the High Demand

Season for RhSTPS-II would have been 259.875 MUs more, resulting in a DC of 91.52%.

p) Further, the total permissible outage (@ 15%) is equivalent to 921.38 MUs in the balance of nine months of Low Demand Season with respect to a total of 6142.50 MUs (@ 100% availability) for 1000 MW capacity of RhSTPS-II.

Despite the DC loss of 259.875 Mus during Low demand season (equivalent to 4.23% DC loss) due to the effect of Covid 2nd wave on overhauling works of Unit#2, RhSTPS-II has achieved Availability of 81.06% i.e. 3.94% DC shortfall. As submitted in the preceding paras above, had there been no COVID-19 spread, lockdown & subsequent fallout, RhSTPS-II would have completed the overhauling works of Unit #2 as per schedule without the delay (as done in other units for similar works). Accordingly, the effective availability achievement during the Low Demand Season for RhSTPS-II would have been 259.875 MUs more, resulting in a DC of 85.29%.

q) The calculation of Deemed DC is given as under:

SN	Particulars	Low Demand Season	High Demand Season (June-August 21)
1	Capacity (MW)	1000	1000
2	No of Days (2021-22)	273	92
3	Maximum ex-bus generation (MUs)	6,142.50	2,070.00
4	Actual DC (MUs)	4,979.14	1,634.52
5	Actual DC (%)	81.06	78.96
6	DC Loss due to COVID (MUs)	259.875	259.875

7	DC Loss due to COVID (%)	4.23	12.55
8	Deemed DC (MUs)	5,239.02	1,894.39
9	Deemed DC (%)	85.29	91.52

r) In view of the above submissions, the following emerges for consideration of this Commission:

i. Had there been no COVID-19 situation and the consequent restrictions, the Petitioner would have revived the instant station as per schedule in about 40 days from the shutdown date, i.e. by 10.05.2021. Accordingly, the effective availability achievement during the High and Low Demand Season for RhSTPS-II would have been 91.52% & 85.29%, respectively.

ii. As stated above, the Petitioner, being a diligent entity, took all mitigative steps, including persuading the contractor to resume work and compliance with Standard Operating Procedures (SOP) issued by MHA from time to time. Despite all out efforts of the Petitioner, the instant station could be synchronized only on 23.06.2021, i.e. only after achieving the normalcy of the situation.

s) In view of the above circumstances, it is submitted that the delay in the resumption of work and consequent loss of Availability during the months of May and June was beyond the reasonable control of the Petitioner and warrants relief under Regulation 76 and 77 of the Tariff Regulations, 2019.

t) Accordingly, it prayed that the Commission may be pleased to relax the provision of achieving the Target Availability in respect of RhSTPS-II for the year

2021-22. Otherwise, the Petitioner would suffer under-recovery of AFC even due to no fault or lack of diligence on its part.

It is further submitted that the delay due to COVID 2nd wave in the overhauling works of Unit #2 had a direct adverse effect on its availability from 10.05.2021 to 22.06.2021. Had there been no COVID 2nd wave and subsequent fallout, the petitioner would have easily restored Unit#2 to its full capacity & there would have been no DC Loss as the availability of RhSTPS-II for the FY2019-20 & FY2020-21 is 88.49% & 97.41%, i.e. over the normative availability.

u) It therefore prayed that the Commission may be pleased to relax the provisions of achieving the Target availability and grant deemed availability equal to the Normative Annual Plant Availability Factor, i.e. 85% as per the Tariff Regulations, 2019, during the High demand Season as well as Low Demand season of FY2021-22.

v) This Commission has requisite powers to relax the said provision of the Tariff Regulations, 2019 and provide relief to the Petitioner.

w) It is submitted that the ambit and scope of 'Power to Relax' provisions of delegated legislation have been interpreted by various Courts and the Tribunal in a catena of cases. It is a settled position of law that the 'Power to relax' can be invoked if the Regulations in any manner cause hardship to a party.

x) Petitioner has placed its reliance on the following judgments:

i. The High Court of Rajasthan in the case of *Hari Singh v. State of Rajasthan,* 1992 SCC Online Raj 210;

ii. The Tribunal's Judgment dated 21.03.2018 in Appeal No. 107 & 117 of 2015 - *Haryana Power Purchase Centre v. Haryana Electricity Regulatory Commission*;

iii. The Tribunal's Judgment dated 20.09.2012 in Appeal No. 189 of 2011 - *TPCL v. Jharkhand State Electricity Regulatory Commission & Anr.*; and

iv. The Tribunal's Judgment dated 24.03.2015 in Appeal No. 55 of 2013 & Batch - *BSES Yamuna Power Limited v. CERC & Ors***.**

y) In view of the above, the present case is ideal for this Commission to exercise its Power to Relax/Power to Remove Difficulties. It is humbly prayed that the Commission may be pleased to relax the provisions of achieving the Target availability and grant deemed availability equal to the Normative Annual Plant Availability Factor, i.e. 85% as per the Tariff Regulations, 2019 during the High demand Season as well as Low Demand season of FY2021-22.

Reply of the Respondents:

10. The Respondent No. 4 (BRPL) and Respondent No. 5 (BYPL) vide affidavit dated 28.04.2023 have submitted the following:

a) In Tariff Regulations, 2014, there was no restriction on the recovery of AFC in a particular season. However, in Tariff regulation 2019, the Commission has introduced a new mechanism for recovery of Fixed Costs (FC) in High and

Low demand seasons. This change was based on feedback from the beneficiaries during finalization of Tariff Regulations, 2019, that Generators sometimes provide low availability during peak season but recover the lost FC by declaring high availability in low demand season. To avoid this issue, new provisions were introduced by the Commission in 2019 with the objective that, in case of low availability being declared in high demand season, lost FC would not be recoverable by declaring higher availability in low demand season.

b) Petitioner tried to re-open issues which have been settled by the Commission during finalization of Tariff Regulations, 2019. In any case, if the Petitioner was aggrieved by the said Regulations specified by the Commission, it ought to have challenged the same before the appropriate forum.

c) Petitioner was required to achieve normative availability in accordance with Regulations 42 and 49 of the Tariff Regulations, 2019 i.e. 85%. The Petitioner has admitted that Rihand-II Station did not achieve target availability in either peak or low demand season.

d) The Petitioner has provided details of various factors which purportedly led to under-achievement of availability in the year 2021. In response to the same, it is submitted that there is no provision under the Tariff Regulations, 2019 which provides for deemed availability due to any exigency. The Petitioner, by way of the present Petition, has sought to amend the Tariff Regulations 2019 by including the concept of deemed availability for Generating Stations. In any case, NAPAF of 85% specified by the Tariff Regulations, 2019 duly takes into

consideration any unforeseen circumstances that may arise and provides for a buffer of about 15% i.e., 54 days, for recovery of full AFC.

e) Even, if the claim of the Petitioner for delay on account of COVID-19 is considered, the total delay in work is about 44 days, which is less than the margin of 54 days already provided under the Tariff Regulations, 2019.

f) Scheduled maintenance activities were supposed to commence on 31.03.2021 and were to end on 09.05.2021. Accordingly, the shutdown of Rihand-II Station on account of COVID-19 during the Low Demand Season was restricted to 22 days out of the nine (9) months, i.e., from 10.05.2021 to 31.05.2021. Petitioner could have easily taken steps to cover up the loss of Declared Capacity (DC) in months after the High Demand Season i.e. from September 2021 to December 2021 and January 2022 to March 2022.

g) It is also noteworthy that the non-availability of workmen cited by the Petitioner are contractual issues arising out of the contract between the Petitioner and its contractor. Any liabilities arising out of the non-performance of the contractor must be recovered from the contractor. Beneficiaries have no privity of contract between the Petitioner and its contractors, and accordingly, any such liabilities arising out of non-performance of contracts, including on account of unavailability of workmen, cannot be passed on to the beneficiaries and must be claimed by the Petitioner as liquidated damages from the contractor.

h) Petitioner has merely stated that the works at Rihand-II Station were affected by the COVID-19 pandemic. The onus is on the Petitioner to prove beyond doubt that it was, in fact, restrained from completing the works even after

taking all reasonable measures. No details have been provided regarding steps taken by the Petitioner within its reasonable control to mitigate the impact of the COVID-19 pandemic.

i) Petitioner has requested the Commission to invoke Regulations 76 and 77 of the Tariff Regulations, 2019 and also exercise power to Relax / Power to Remove Difficulties, as the factors that led to the under-achievement of NAPAF were beyond the control of the Petitioner. In this regard, it is submitted that the Supreme Court, in the case of *M.U. Sinai v. Union of India & Ors., (1975) 3 SCC 765* has held that Power to Remove Difficulties must be exercised in a conditioned and restricted manner, and such exercise of power should not change the basic structure, scheme, and essential provisions of the statute.

j) Further, the Tribunal, in the case of *Tata Power Company Limited v. Jharkhand State Electricity Regulatory Commission, 2012 SCC On Line APTEL 155*, has laid down the scope of Power to Relax and Remove Difficulties vested with the Commission such as there has to be sufficient reason to justify relaxation which has to be exercised only in the exceptional case where non-exercise of the discretion would cause hardship and injustice to a party**.** However, Petitioner has failed to satisfy aforesaid conditions laid down by the Tribunal to substantiate its prayer for invocation of the Power to Relax and Power to Remove Difficulties by this Commission.

Hearing dated 07.02.2023

11. The Petition was heard on 07.02.2023. During the hearing, the learned

counsel for the Petitioner made oral submissions, as submitted in the petition. The learned counsel appearing for the Respondents BYPL and BRPL prayed for a grant of time to file their replies. The Commission, after hearing the parties, admitted the petition.

Hearing dated 02.05.2023

12. The matter was again heard on 02.05.2023. During the hearing, the learned counsel for the Petitioner made detailed oral submissions in support of the prayer for declaration of deemed availability for the period from 10.5.2021 to 22.6.2021. The learned counsel for the Respondent BRPL & BYPL mainly submitted that the prayers sought in the petition are not maintainable since there is no provision for 'deemed availability' under the 2019 Tariff Regulations. The Commission, after hearing the parties, reserved its order in the matter.

Analysis and Decision

13. We have perused and considered the submissions of the parties. The claim of the Petitioner is for the deemed availability of the generating station on the basis that the planned Annual Overhauling for Unit-II of Rihand Stage-II was delayed beyond the scheduled time period due to the COVID-19 lockdown, which was beyond the control of the Petitioner. Accordingly, the Petitioner has prayed to grant deemed availability equal to NAPAF, i.e. 85% as per the Tariff Regulations, 2019, during the High demand Season as well as Low Demand season of FY2021-22. Further, it requests the Commission that the provision for achieving target availability season-wise separately, in respect of this generating station, for the year 2021-22, may be relaxed in the

exercise of the power under Regulations 76 and 77 of the 2019 Tariff Regulations.

14. Per contra, the Respondents BRPL and BYPL have mainly contended that there is no provision for 'deemed availability' under the 2019 Tariff Regulations. It is argued that NAPAF of 85% specified by the Tariff Regulations, 2019 duly takes into consideration any unforeseen circumstances that may arise and provides for a buffer of about 15% i.e., 54 days, for recovery of full AFC. Even if the claim of the Petitioner for the delay on account of COVID-19 is considered, the total delay in work is about 44 days, which is less than the margin of 54 days already provided under the Tariff Regulations, 2019

15. 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.

16. 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 basedon 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… "

17. Petitioner submitted that NTPC had planned Annual Overhauling for Unit-II (500 MW) of Rihand Stage-II from 31.03.2021 to 09.05.2021 i.e. for a period of 40 days. During the commencement of overhauling, there were very few cases of COVID-19 and capital overhaul was going on as per schedule. However, in mid-April, the Covid cases started to surge in the instant station on account of the 2nd wave of the COVID-19 pandemic. By the end of May 2021, all the overhauling works had come to a standstill as all the workers of the main agency, i.e. BHEL, were diagnosed as COVID-positives. As per the prevalent Government Protocols, the COVID positives were isolated for further treatment.

18. Petitioner further submitted that during the 2nd wave of COVID, there was a serious scarcity in the supply of Industrial Oxygen. To ensure the uninterrupted supply of Medical Oxygen, the Ministry of Home Affairs (MHA) vide order dated 22.04.2021 had prohibited the supply of oxygen for industrial purposes w.e.f. 22.04.2021. Due to the diversion of oxygen towards medical purposes only and the prohibition of the supply for industrial purposes, the overhauling activities and the BOFA R&M works came to a standstill. The agency Techno Hitech Pvt Ltd also expressed its inability to arrange the oxygen gas for the aforesaid works.

19. Petitioner further submitted that due to the onset of Covid-19 and the consequent lockdown, the planned overhauling work of the Petitioner was delayed by 4 days. The generating station was under shutdown from 30.03.2021 and could not be synchronized back till 22.06.2021. The above delay is akin to 'Force Majeure' as per Regulation 3 (25) of the Tariff Regulations, 2019, and hence, the Petitioner has requested for the invocation of Regulations 76 and 77 of the Tariff Regulations, 2019.

20. 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 attributableto project developer;

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

22. The 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 the imposition of 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.

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

24. 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 byan interested person."*

25. 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 hardshipand 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."*

26. 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 of the case. 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 also be sufficient reason to justify the 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 by burdening the extra cost on the beneficiaries. Accordingly, Regulation 76 of the 2019 Tariff Regulation cannot be invoked.

27. 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 theseregulations.

28. 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.

29. Further, the petitioner has filed Petition No. 154/MP/2021 with a similar issue wherein the Petitioner claimed deemed availability of the generating station for the period from 1.4.2020 to 30.4.2020 in respect of Ramagundam Super Thermal Power Station Stage-III (1X500 MW) due to COVID-19 lockdown on account of 'Force Majeure' as per Regulation 3(25) of the Tariff Regulations, 2019. Accordingly, the Petitioner had prayed to the Commission to invoke Regulations 76 and 77 of the Tariff Regulations, 2019. The Commission, vide Order dated 20th September 2023, in the said Petition, had not considered COVID-19 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-19 lockdown. The relevant extracts of the said order, dated 20.09.2023, are as follows:

"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."

30. In 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.

31. Accordingly, we are not inclined to grant deemed availability equal to NAPAF i.e. 85%, as per the Tariff Regulations, 2019, during the High demand Season as well as Low Demand season of FY2021-22, on the basis that the planned Annual Overhauling for Unit-II of Rihand Stage-II was delayed beyond the scheduled time period due to reasons that were beyond the control of the Petitioner.

32. Petition No. 225/MP/2022 is disposed of in terms of the above discussions and findings.

Sd/-	**Sd/-**	**Sd/-**	**Sd/-**
(Pravas Kumar Singh)	**(Arun Goyal)**	**(I. S. Jha)**	**(Jishnu Barua)**
Member	**Member**	**Member**	**Chairperson**