BEFORE THE CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Review Petition No.13/2000

in

Petition No.2/99

Coram:

1. Shri S.L. Rao, Chairman
2. Shri D.P. Sinha, Member
3. Shri G.S. Rajamani, Member
4. Shri A.R. Ramanathan, Member

In the matter of

Availability Based Tariff – Order dated 4.1.2000.

And

In the matter of

National Thermal Power Corporation Limited .....Petitioner

And

Union of India and Others .....Respondents

The following have attended hearing from time to time

1.	Shri M.G. Ramachandran, Advocate, NTPC	.....Petitioner
2.	Shri H.L. Bajaj, Dir.(Comm.), NTPC	-do-
3.	Shri B.N. Ojha, Dir (Opn.), NTPC	-do-
4.	Shri Shyam Wadhera, GM (Comm.), NTPC	-do-
5.	Shri M. Ramakrishna Rao, SM (L), NTPC	-do-
6.	Shri C.K. Mondal, SM, NTPC	-do-
7.	Shri R.K. Mehta, Advocate, GRIDCO	.....Respondent
8.	Shri S. Misra, AGM (E), GRIDCO	-do-
9.	Shri B.N. Ray, SE, GRIDCO	-do-
10.	Shri P. Das, ED (Comm.), NEEPCO	-do-
11.	Shir K.P. Ray, Consultant, NEEPCO	-do-
12.	Shri K.S. Upadhyaya, CEE-RC, KPTCL	-do-
13.	Shri M.Sudhindra Kumar, XEN, KPTCL	-do-
14.	Shri S. Sowmyanarayanan, Consultant, TNEB	-do-
15.	Shri N. Sundaresan, RM, TNEB	-do-
16.	Shri K. Pal Pandy, CE/E, NLC	-do-
17.	Shri V.R. Reddy, ,Senior Advocate, NLC	-do-

18.	Shri R. Saiprabhu, Advocate, NLC	-do-
19.	Shri Venkatachalapti, Advocate, NLC	-do-
20.	Shri R. Suresh, CE (Comm.), NLC	-do-
21.	Shri M. Subramanian, DS (Plg.), NLC	-do-
22.	Shri A. Muthu Narayanan, SE, Ele.Dept., Pondichery	-do-
23.	Shri N.S.M. Rao, AGM (Comm.), NPCIL	-do-
24.	Shri B.T. Sangu, DGM (Comm), NPCIL	-do-
25.	Shri Ashok Kumar, EE (Comm.), NPCIL	-do-
26.	Shri S.K. Dhiman, Chief Law Officer, NPCIL	-do-
27.	Shri Sarup Singh, Advocate, PSEB	-do-
28.	Shir H.S. Bedi, Director ISB, PSEB	-do-
29.	Shir J.K. Gupta, Dy.Dir, ISB, PSEB	-do-
30.	Shri Satjit Singh, Dy.Dir., PSEB	-do-
31.	Shri T.L. Gupta, Addl. SE/ISB, PSEB	-do-
32.	Shri Rakesh Nath, CE, CEA	-do-
33.	Shri B.R. Sharma, SE, DHBUM (Manager)	-do-
34.	Shri Navin Prakash, Advocate, BSEB	-do-
35.	Shri Vinod Devichand, Dir. (I/S), HPSEB	-do-
36.	Shri B. Bhushan, D (O), PGCIL	-do-
37.	Shri V. Mittal, DGM, (SO), PGCIL	-do-
38.	Shri T.S.P. Rao, DGM (L), PGCIL	-do-
39.	Shri A.N. Ghosh, DGM (SPA & TC), UPPCL	-do-
40.	Shri G.C. Jain, EE, UPPCL	-do-
41.	Shri B.K. Saxena, Sr. AE, UPPCL	-do-
42.	Shri R.K. Arora, XEN, HVPN	-do-
43.	Shri S.P. Degwekar, SE (Comm), MPEB	-do-
44.	Shri Bodh Kumar, A.S. Ele., MPEB	-do-
45.	Shri P.T. Yohannan, CE, KSEB	-do-
46.	Shri M. Sivathanu Pillai, DCE, KSEB	-do-
47.	Shri M. Ravindran Nair, EE, KSEB	-do-
48.	Shri K.R. Unnithan, XEN, KSEB	-do-
49.	Shri P.K. Basu, GM, WBSEB	-do-
50.	Shri V.K. Gupta, SE, RSEB	-do-
51.	Shri L.N. Nimawat, XEN (PSS), RSEB	-do-
52.	Shri S.C. Mehta, XEN (ISP), RSEB	-do-
53.	Shri B.P. Sharma, AE (Comm), RSEB	-do-
54.	Shri V.Gupta, Dir (T), HERC	-do-
55.	Shri I.M.N. Soi, CE, HPGC	-do-
56.	Shri S. Kumar, Dir., HPGC	-do-
57.	Shri Brijender Chahar, Advocate, State of Sikkim	-do-

ORDER

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G.S. Rajamani, Member

This review petition has been filed under Section 12 of the Electricity Regulatory Commissions Act 1998 (the ERC Act) on 15th February, 2000 by

National Thermal Power Corporation Ltd (NTPC) against the order dated 04-1-2000 in petition No 2/1999. In order to appreciate the questions raised in this review petition, it would be proper to state the facts giving rise to it.

2. The Central Electricity Regulatory Commission (hereinafter called the Commission), was established under the ERC Act and has been assigned the functions as described in Section 13 thereof. Earlier, the tariff jurisdiction in respect of a Generating Company wholly or partly owned by the Central Government, was exercised by that Government by virtue of powers under proviso to Section 43 A (2) of the Electricity (Supply) Act, 1948 (hereinafter called the ES Act). This Section was omitted with effect from 15th May 1999 by the Central Government in exercise of its powers under Section 51 of the ERC Act and with effect from that date, the Commission is vested with the jurisdiction to regulate tariff of the Generating Companies owned or controlled by the Central Government and other Generating Companies having composite scheme for generation and sale of electricity in more than one State.

3. Prior to omission of Section 43 A(2) of the ES Act, the Government was considering the introduction of what is called the Availability Based Tariff (ABT). The Government constituted a National Task Force (NTF) as well as the Regional Task Forces (RTFs) to debate on various aspects of ABT. A draft notification dated 7.4.1999 for implementation of ABT was prepared by Min of Power but was not finalised. Consequent to the omission of Section 43 A (2) of the ES Act, the Government of India, Ministry of Power , by a letter dated 31.5.1999, considered appropriate that "in keeping with the spirit of the

ERC Act as well as the transfer of relevant powers vested under Section 43 A (2) of the ES Act to the Commission the issue of ABT should be finalised after due deliberation by the Commission" and forwarded the connected documents to the Commission.

4. The Commission, after taking into account the objective behind ABT, initiated the proceedings in the matter in accordance with CERC (Conduct of Business) Regulations, 1999 (the CBR) and the communication received from Ministry of Power was treated as a petition (No 2/1999). After due deliberations and a detailed examination of the submissions made before the Commission by the Central Generating Companies, the State Electricity Boards and other interested parties and the documents available on record, the Commission passed the Order on 4th January 2000 for the implementation of ABT with effect from 1st April 2000.

5. According to the petitioner, the order passed by the Commission suffers from mistakes and errors apparent on the face of record which are required to be corrected and there are other sufficient reasons for reviewing and/or modifying the order. On hearing NTPC on 7th March 2000, the review petition was admitted and the implementation of the ABT Order was also stayed till further orders. However, the Commission expressed its keenness that all arrangements for the implementation of the ABT Order should go on as per schedule in view of the rampant indiscipline in the Grid since none of the parties, including NTPC was against the concept of the ABT and it was agreed to by the parties that the ABT would be useful in controlling

indiscipline. The Commission directed all the parties to cooperate fully with the Central Transmission Utility (CTU) in the arrangements being made for implementing ABT so that the purpose of improving Grid discipline was achieved.

6. The review petition was taken up for hearing on the 18th & 19th April 2000. At the outset, the Commission remarked that there were certain threshold issues. These seem to put the Commission itself in the dock, for example, the review petition seems to suggest that on certain matters what the Commission stated is not true or that natural justice has not been rendered. This becomes a charge on the Commission. If it is meant to be so, then the Commission would not be able to take up the review petition. To this, Shri M.G. Ramachandran, Advocate of NTPC, submitted that the party was not casting aspersions on the Commission. If the language used gave that impression, he was ready to withdraw any words which indicate that the Commission deliberately mis-stated facts or that the NTPC lacked confidence in the Commission. He said he was ready to record this so that there is no misunderstanding on this issue. As such we proceeded to hear the Review Petition.

Scope of Review:

7. At the outset, it may be necessary to examine the exact scope of review of order by the Commission. Under Section 12 of the ERC Act, the Commission is conferred power of review of its decision or order as is vested

in a civil court. The review powers of a civil court are contained in Order 47, Rule 1 of the Civil Procedure Code (CPC) and are reproduced below:

> *"Application for review of judgement – (1) Any person considering himself aggrieved –*
>
> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;*
>
> *(b) by a decree or order from which no appeal is allowed, or;*
>
> *(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgement of the Court which passed the decree or made the order."*

8. It follows that the review of judgement or order is permissible on any of the following grounds:

(i) Discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the aggrieved person or such matter or evidence could not be produced by him at the time when the order was made; or

(ii) Mistake or error apparent on the face of the record; or

(iii) For any other sufficient reason which is analogous to the above two grounds.

9. On the question of the scope of review, the Supreme Court in the case of Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma (AIR 1979 SC 1047) held that

> *"there are definitive limits to the exercise of power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made. It may be exercised where some mistake or error apparent on the face of the record is found. It may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an appellate Court to correct all manner of errors committed by the Subordinate Court."*

10. The question as to what constitutes an error apparent on record has been considered by the Supreme Court in the case of Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhury (AIR 1995 SC 455). The Hon'ble Court ruled that:

> *"The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, CPC. The review petition has to be entertained only on the ground of error apparent on the face of the record and not on any other ground. An error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. The limitation of powers of court under Order 47 Rule 1, CPC is similar to the jurisdiction available to the High Court while seeking review of the orders under Article 226".*

11. The observation of the Supreme Court in the case of Satyanarayan Lakshmi Narayan Hegde Vs. Mallikarjun Bhavanappa Tirumale AIR 1960 SC 137 would also be relevant where in the context of an error apparent on the face of the record the Court observed :

> *"an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an*

error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ."

12. On the question of review, the Supreme Court in a case reported as Sow Chandra Kante and another Vs Sheikh Habib (1975) 1 SCC 674 has summed up the position as under:-

> "A review of a judgement is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different Counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of Counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the Court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. (The review) stage is not a virgin ground but review of an earlier order which has the normal feature of finality."

13. Keeping in view the statutory provisions and the law laid down by the Supreme Court, the following propositions emerge in regard to the exact scope of review:

(i) The power of review can be exercised only for correction of a patent error, whether of law or of fact, which stares in the face, and needs no elaborate argument;

(ii) Where there are conceivably two opinions on an issue, it cannot be said to be an error on the face of the record;

(iii) The error should be self-evident, and

(iv) A review by no means is an appeal in disguise whereby an erroneous decision is reheard and corrected.

14. At the hearing, Shri M.K. Banerji, Senior Advocate for Bihar State Electricity Board (BSEB) and Shri Sarup Singh, Advocate for Punjab State

Electricity Board (PSEB) pointed out that an appeal under Section 16 of the ERC Act has been filed by the petitioner before the High Court of Delhi. It was argued that the petitioner could choose between the two remedies of review and appeal and it cannot avail of both simultaneously. They contended that the review petition was not maintainable and prayed for the vacation of the stay ordered by the Commission. In this regard, reliance has been placed by the learned Senior Counsel for BSEB on the judgement of the Allahabad High Court reported in AIR 1979 All 274.

15. The learned counsel for the petitioner submitted that the review petition was filed before filing of the appeal before the High Court of Delhi and he placed on record a copy of the appeal dated 2-3-2000. He further submitted that this had to be done in view of the limitation of time of 60 days for filing the appeal in the High Court. The learned Counsel for the petitioner informed that the petitioner had already moved an application before the High Court for keeping the appeal pending as the order dated 4.1.2000 against which the appeal was filed, had been stayed by the Commission. According to him, the procedure followed by the petitioner cannot be faulted.

16. The Supreme Court in *Tungabhadra Industries Ltd. VS Government of Andhra Pradesh* (AIR 1964 SC 1372), held that the review petition cannot be dismissed on the ground that an appeal has also been filed by the petitioner against the order sought to be reviewed. In the said case, it was held by the Supreme Court that where the application for review is first made and thereafter an appeal is preferred, (as done in the present case) the review

application can be disposed of, provided the appellate court has not disposed of the appeal before the review application is taken up for disposal. **In view of the law laid down by the Supreme Court in the *Tungabhadra Industries* case and the factual matrix as noted above, we do not find any merit in the preliminary objection raised by PSEB and BSEB and the same is rejected.**

17. The Counsel for NTPC further dealt with the ground for review "for any other sufficient reason". He submitted that any other reason that shocks the conscience of the Court, constitutes a substantial ground for seeking review of the order. To buttress his arguments, he referred to the judgement of Rajasthan High Court in a case reported in AIR 1967 Raj 264. According to this judgement, the provisions of order 47 of CPC provide for three stages for hearing of a review petition. The first stage is reached when the petition is placed before the court which may reject it or order notice to be issued if the court is satisfied that a prima facie case for review is made out. At the second stage, the petition for grant of review is heard by the court. The court may order rejection of the petition if after hearing the opposite party it comes to the conclusion that the petition is not covered by Order 47, Rule 1 of CPC, otherwise it may grant review. At the third stage, the court rehears the original petition in case it grants review. The counsel for the petitioner submitted that the first stage is already over and that he would be addressing his argument in relation to second stage at this instance. At the instance of the Commission and in order to save time it was decided to club stages 2 & 3 and the counsel were advised to address their arguments accordingly.

18. We now proceed to consider the points raised in the review petition. At this stage we may note that Shri V.R. Reddy, Senior Advocate, appearing for Neyveli Lignite Corporation (Respondent No.18) generally supported the submissions made by Shri M.G. Ramachandran, Advocate for the petitioner.

Jurisdiction

19. The learned counsel for petitioner argued that the directions of the Commission on target availability and incentive regime contained in the order dated 4-1-2000 amount to laying down the tariff policy for tariff determination which is within the exclusive jurisdiction of the Central Government in view of Section 13 (e) of the ERC Act. According to him, the tariff policy is to be framed by the Government and the role of the Commission is to aid and advise the Central Government in formulation of such a policy. His contention was that the Commission cannot fix norms and parameters as contained in the order dated 4.1.2000 under its regulatory powers under Section 13 (a) or 13 (b) or under Section 28 of the ERC Act which authorises the Commission to prescribe by regulations, the terms and conditions for fixation of tariff. The norms applicable for tariff fixation are to be decided by the Central Government as part of tariff policy under Section 13 (e) of the ERC Act or in exercise of its sovereign power with the aid and advice of the Commission. The learned counsel for the petitioner contended that the provisions of the ERC Act are to be interpreted harmoniously with the provisions of the Electricity (Supply) Act, 1948. In this connection he relied upon two judgments of the Supreme Court reported as Jagdish Singh Vs Lt.Governor, Delhi, (AIR

1997 SC 2239) and Rajinder Prasad Yadav Vs State of M.P., (AIR 1997 SC 3735). According to the learned counsel, since the Commission's jurisdiction does not cover the entire power sector, it is the Central Government that should formulate the norms and parameters on target availability and incentive regime, as part of the tariff policy applicable to the whole of the power sector. It was his further contention that the powers of the Commission to lay down the terms and conditions of the tariff under Section 28 of the ERC Act have to be consistent with the National Power Plan and Policy which are to be laid down by the Central Electricity Authority under Section 3(1) of the ES Act under the overall direction and control of the Central Government. The learned counsel used, National Power Plan and National Power Policy interchangeably since according to him, there was not much of a distinction between them, and power policy is a big umbrella and covers tariff policy as well.

20. The counsel was asked to clarify that if the Government has to lay down the norms and all the basic principles, what was the role of the Central Commission in the matter. His arguments would seem to reduce the Commission to a mere calculating agency. He was asked to clarify whether Commission had any role in the matter of terms and conditions of tariff. The counsel clarified that whatever the Government has omitted to do, the Commission is competent to fill the gaps since there is no policy laid down by the Government. The learned counsel for the petitioner further contended that the norms for Plant Load Factor, etc. laid down by the Central Electricity Authority in exercise of powers under Section 3 (I) (i) of the ES Act was

binding on the Commission. However, subsequently he modified his submission to argue that the Commission is bound by only those norms that are accepted by the Central Government. According to him, the Central Government notification dated 30.3.1992 issued under Section 43 A (2) of the ES Act, prescribing the PLF and other factors for fixation of tariff falls within the Tariff Policy and is binding on the Commission by virtue of Section 38 of the ERC Act. The learned counsel argued that the omission of Section 43 A (2) with effect from 15th May 1999 does not alter the position since the Central Government's notification dated 30-3-1992, continued to be in force by virtue of Section 24 of the General Clauses Act.

21. Commission drew the attention of the advocate of NTPC that on a reference from the Commission on the jurisdictional aspect, the learned Attorney General of India had expressed the opinion, on the 20th January 2000, that,

> *"Section 51 of the ERC Act, authorises the Central Government to appoint a date from which Sub-section (2) of Section 43 A of the ES Act, shall be omitted. In exercise of powers conferred by Section 51 of the ERC Act, the Central Government by notification dated 22nd March 1999 appointed 15th May 1999 as the date on which sub-section (2) of Section 43 A of the ES Act would be omitted in respect of the generating companies referred to in clause (a) or clause (b) of Section 13 of the ERC Act.*
>
> *Thus the power to regulate tariff in respect of generating companies owned or controlled by the Central Government, which*

earlier vested in the Central Government, can now be exercised by the Central Commission with effect from 15th May 1999. The jurisdiction of the Central Government to determine the tariff in respect of these companies has ceased with effect from that date.

My opinion is sought on the jurisdiction of the Central Commission to adjudicate upon the issues relating to fixation of tariff etc. and other incidental matters for the period prior to 15th May 1999.

As a result of the statutory amendments set out above, there has been a change in the forum for adjudication of certain issues. The Central Government has been replaced by the Central Commission. Change of forum pertains to the field of procedural law. There is no vested right in any particular procedure or in any particular forum for adjudication of disputes. No additional burden is imposed or liability cast on any party as a result of the change of forum.

In my opinion, there is no jurisdictional impediment in the way of the Central Commission to adjudicate upon the issues relating to fixation of tariff etc. and other incidental matters for the period prior to 15th May 1999."

To This, Shri M.G. Ramachandran, advocate of NTPC, said that he cannot comment on the Attorney General's opinion.

22. On the question of jurisdiction, Shri M.K. Banerjee, Sr. Advocate contended that in order to understand the role of the Commission, one should go into the preamble to the ERC Act which provides that it is

"*an Act to provide for the establishment of a Central Electricity Regulatory*

Commission and State Electricity Regulatory Commissions, rationalisation of electricity tariff, *transparent policies regarding subsidies, promotion of efficient and environmentally benign policies and for matters connected therewith or incidental thereto".*

23. According to the learned senior counsel, power to rationalise tariff includes the powers to lay down the norms. In the absence of such a power, the Commission would be handicapped in effecting rationalisation of electricity tariff, which was one of the dominant purposes of the ERC Act. It was his further contention that the Commission by virtue of its function to "regulate" tariff under Section 13 of ERC Act, would have wide powers conferred on it by the Act,. The contention that the norms constitute part of the policy is also not correct, as policy has a general connotation and normally does not deal with elements such as norms, which go in the process of regulation, instead of the policy formulation. He contended that under Section 28, the heading of the Section is "determination of tariff by Central Commission". He referred to the Supreme Court judgement in Jaswant Sugar Mills Limited Meerut Vs. Lakshmichand and others [1963 (Supp.) SCR 242] wherein their Lordships held that the expression 'determination' signifies an effective expression of opinion which ends a controversy or dispute by the same authority to whom it is submitted under a valid law for disposal. It is further laid down that *"determination or order must be judicial or quasi-judicial, purely administrative or executive direction is not contemplated to be made the subject matter of appeal to this Court."* He argued that taking into consideration the totality of the provisions of the ERC Act, the Commission is fully empowered to lay down the norms for regulating tariff. Shri Sarup Singh, the learned counsel for PSEB made similar submissions and adopted the arguments advanced by the learned Senior counsel for BSEB.

24. Shri R.K. Mehta, Advocate, who appeared on behalf of GRIDCO, relying on the definition of "Plan", as given in Corpus Juris Secundam (CJS), argued that the norms for regulation of tariff cannot form part of the plan. According to him, the power to "regulate" tariff carries with it full power over the thing subject to regulation and in the absence of restrictive words, the power must be regarded as plenary over the entire subject. Shri R.K. Mehta, further argued that the principle of harmonious construction may not apply because the provisions of the ERC Act vesting the Commission with the powers to regulate and determine tariff were unambiguous and there was no conflict with the provisions of any other statute and even if there exists any conflict, the provisions of the ERC Act would have over-riding effect by virtue of Section 52. He also referred to the fact that it is at the instance of the Central Government that the Commission took up the ABT petition. He pointed out that the petitioner did not bring up the question of jurisdiction of the Commission during the initial hearing of the petition and, therefore, this aspect cannot be looked into by the Commission in the review petition. In support, he drew our attention to the Supreme Court judgment in Prasun Roy vs Calcutta Metropolitan Development Authority and Another [(1987) 4 SCC 217]. According to this judgment, basically the principle of waiver and estoppel is not only applicable where the award had been made but also where a party to the proceedings challenges the proceedings in which he participated. The principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceedings preclude such a party from contending that the earlier proceedings were

without jurisdiction. Shri Mehta contended that after having participated in the initial proceedings of ABT without raising the question of jurisdiction, it was not proper on the part of the petitioner to raise the issue at the stage of review petition merely because in petitioner's opinion the order was not favourable. He also referred to the omission of Section 43 A (2) of the ES Act by the Central Government with effect from 15.5.1999 and argued that the omission of Section 43 A (2) for Central Generating Companies and the Generating Companies having a composite scheme for generation and sale of power in more than one State, was deliberate with an intention to transfer full powers to the Commission. Accordingly, the Commission was fully empowered to lay down norms as it had done in the case of ABT for Target Availability of the generating stations. The learned counsel argued that this view is also buttressed by the opinion of the learned Attorney General dated 20th January 2000 given to the Commission.

25. We have carefully considered the rival contentions. We find that a jurisdictional issue cannot be an apparent error of law since it would "require a long-drawn process of reasoning" and is, therefore, outside the scope of power of review under order 47 Rule 1 CPC. We have noted that the petitioner had not raised the question of the Commission's jurisdiction at the time of hearing of the original petition. We also find that the written submissions were filed on behalf of the petitioner company in Petitions No 4/99, 5/99, 11/99 and 21/99, duly supported by affidavit on 22-1-2000. In these written submissions, a categorical and positive assertion has been made by the petitioner that in terms of Section 13A [sic 13 (a)] of the ERC Act

the Commission " has been conferred amongst other functions with the jurisdiction to carry out all the functions which the Central Government carried out in terms of 43A(2) of the Electricity (Supply) Act, 1948." and that the Commission "has substituted the Central Government in matters of jurisdiction and powers to provide for rationalization/regulation of tariff and other matters connected therewith or incidental thereto, in respect of generating companies owned and controlled by the Central Government". The present stand of the petitioner is totally at variance with that taken earlier in the proceedings before us. We do not appreciate the ambivalent stand taken by the petitioner in different proceedings before the Commission. The petitioner cannot be permitted to approbate and reprobate on the same issue. For these reasons, we are not satisfied that the order dated 4-1-2000 calls for review under Order XLVIII, Code of Civil Procedure on the question of lack of the Commission's jurisdiction. The question raised on behalf of the petitioner, therefore, calls for summary rejection. However, considering the fact the issue is now being repeatedly raised by the petitioner in other proceedings as well, we consider it appropriate to examine the issue and record our findings.

26. In order to properly appreciate the legal position it may be necessary to have a look at the relevant provisions of the ERC Act and the ES Act. For facility of reference, the relevant provisions of these Acts are set out.

ERC Act:

> **"13.Functions of Central Commission**:- The Central Commission shall discharge all or any of the following functions, namely:-
>
> (a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies, other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of energy including tariff of the transmission utilities;

(d) To promote competition, efficiency and economy in the activities of the electricity industry;

(e) To aid and advise the Central Government in the formulation of tariff policy which shall be :-

(i) fair to the consumers; and
(ii) facilitate mobilisation of adequate resources for the power sector;

(f) to associate with the environmental regulatory agencies to develop appropriate policies and procedures for environmental regulation of the power sector;

(g) to frame guidelines in matters relating to electricity tariff;

(h) to arbitrate or adjudicate upon disputes involving generating companies or transmission utilities in regard to matters connected with clauses (a) to (c) above;

(i) to aid and advise the Central Government on any other matter referred to the Central Commission by that Government."

"28. Determination of tariff by Central Commission:- The Central Commission shall determine by regulations the terms and conditions for fixation of tariff under clauses (a), (b) and (c) of Section 13, and in doing so, shall be guided by the following, namely:-

(a) The generating companies and transmission entities shall adopt such principles in order that they may earn an adequate return and at the same time that they do not exploit their dominant position in the generation, sale of electricity or in the inter-State transmission of electricity;

(b) The factors which would encourage efficiency, economical use of the resources, good performance, optimum investments and other matters which the Central Commission considers appropriate;

(c) National power plans formulated by the Central Government; and

(d) Such financial principles and their applications contained in Schedule VI to the Electricity (Supply) Act, 1948 (54 of 1948) as the Commission considers appropriate."

"30. Reasons for deviation by the Commission – Where the Commissions depart from factors specified in clauses (a) to (d) of Section 28 and clauses (a) to (f) of sub-Section (2) of Section 29, they shall record the reasons for such departure in writing."

"38. Directions by Central Government:-

(1) In the discharge of its functions, the Central Commission shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing;

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest , the decision of the Central Government thereon shall be final."

ES Act

"3. Constitution of the Central Electricity Authority:- (1) The Central Government shall constitute a body called the Central Electricity Authority generally to exercise such functions and perform such duties under the Act and in such manner as the Central Government may prescribe or direct, and in particular to:-

(i) develop a sound, adequate and uniform National Power Policy, formulate short-term and perspective plans for power development and co-ordinate the activities of the planning agencies in relation to the control and utilisation of national power resources."

"43A. Terms, conditions and tariff for sale of electricity by Generating Company

(2) The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in the Official Gazette:

Provided that the terms, conditions and tariff for such sale shall, in respect of a Generating Company, wholly or partly owned by the Central Government, be such as may be determined by the Central Government and in respect of a Generating Company wholly or partly owned by one or more State Governments be such as may be determined, from time to time, by the government or governments concerned."

27. A careful reading of the above provisions shows that under Section 13 (a), 13 (b) and 13 (c), power to regulate tariff of generating companies owned or controlled by the Central Government and other generating companies, if such generating companies have entered into or otherwise have the composite scheme for generation and sale of electricity in more than one State, and to regulate inter-State transmission of energy including tariff of transmission utilities is vested in the Commission. Under clause (g) of Section 13, the Commission has also been given power to frame guidelines in matters relating to electricity tariff. Under clause (e) of Section 13, the Commission is assigned the function to aid and advise the Central Government in the formulation of tariff policy which shall be fair to the consumer and facilitate mobilisation of adequate resources for power sector. Section 28 of the ERC Act, empowers the Commission to determine by regulations the terms and conditions for fixation of tariff and for this purpose the Commission is to be guided by, among other factors specified in that Section, National Power Plan formulated by the Central Government. In view of the provisions of Section 30, the Commission may, while determining the terms and conditions for fixation of tariff, depart from the factors specified in Section 28 and for this purpose it has to record the reasons in writing. Under Section 38 of the ERC Act, in the discharge of its functions, the Commission is to be guided by such

direction in matters of policy involving public interest as the Central Government may give to it in writing.

28. Under Section 3 (1) (i) of the ES Act, the Central Electricity Authority has the power to develop a sound, adequate and uniform National Power Policy, formulate short term and perspective plans for power development and co-ordinate the activities of planning agencies in relation to the control and utilisation of national power resources. Section 43 A (2) of the said Act, as it stood prior to its omission, provided that the tariff for sale of electricity by a Generating Company to the Boards shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in the official gazette. Proviso to Section 43 A (2) further empowered the Central Government to determine the terms, conditions and tariff for such sale in respect of a Generating Company wholly or partly owned by it. There is nothing in the proviso to suggest that the Central Government was bound by the notification issued under the main provision of Section 43 A (2) while determining terms, conditions and tariff of a Generating Company wholly or partly owned by it. In fact, it has been brought to our notice that the terms, conditions and tariff determined by the Central Government for the Generating Companies owned by it are on certain aspects at variance with those contained in the notification dated 30-03-1992, issued under the main provision of Section 43 A (2) of the ES Act.

29. The meaning and scope of "regulate" has been considered by the Supreme Court in K.Ramanathan VS State of Tamil Nadu and another [(1985) 2 SCC 116). After referring to the definition of the word as given in Corpus Juris Secundum, the Supreme Court held that the word "regulate" is difficult to define as having any precise meaning. It is a word of broad import, having broad meaning and is very comprehensive in scope. The Supreme Court further held that "the power to regulate carries with it full power over the thing subject to regulation and in the absence of restrictive words, the power must be read as plenary power over the entire subject. It implies power to rule, direct and control, **and involves the adoption of a rule or guiding principle to be followed or making of a rule with respect to the subject to be regulated"** (emphasis supplied).

30. **In view of the above judgment of the Supreme Court, it clearly follows that the Commission in exercise of its regulatory powers under clauses (a), (b) and (c) of Section 13 of the ERC Act has power, to adopt rules and guiding principles for the purposes of determination of generation and transmission tariff.** Section 28 of the ERC Act expressly confers on the Commission powers to lay down the terms and conditions for fixation of tariff under clauses (a), (b) and (c) of Section 13 of the said Act. The norms and parameters contained in ABT order dated 4.1.2000, are of the nature of rules and terms and conditions for fixation of tariff and are a necessary concomitant of exercise of regulatory powers under the ERC Act. Therefore, it is futile on the part of petitioner to argue that the Commission

does not have the jurisdiction to lay down the norms in exercise of its powers under ERC Act. The rules and the terms and conditions for fixation of tariff to be prescribed by the Commission in exercise of its statutory powers do not fall within the ambit of tariff policy under clause (e) of Section 13 of the ERC Act which *per se* covers other aspects outside the scope of the Commission's powers under the ERC Act. It is a settled principle that a statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make it consistent enactment on the whole. The provisions of one Section of a statute cannot be used to defeat those of another. In the context of contention raised by NTPC, if accepted, it will denude the Commission of its power to "regulate" the tariff and "frame guidelines for determination of tariff" under Section 13 of the ERC Act and determine terms and conditions for fixation of tariff under Section 28. Such a result will be an extraordinary result for which it is difficult to discover any reason or justification. This will do violence to the "principle of harmonious construction" so ably and forcefully expounded by the learned counsel for the petitioner at the hearing of the review petition.

31. In regard to the express provisions of Section 28 of the ERC Act, it was argued on behalf of the petitioner that the power to determine the terms and conditions for fixation of tariff should conform to National Power Plan formulated by the Central Government. However, nothing has been brought to our notice that the norms and parameters prescribed under the order dated 4.1.2000 contravened the National Power Plan formulated by the Central Government. However, it was contended by the learned counsel for the petitioner that the Central Government's notification dated 30th March, 1992,

issued under Section 43 A (2) of the ES Act, is of the nature of National Power Policy and, therefore, the Commission was bound by it. It was contended that the Commission could not prescribe the norms which deviate from any of the provisions of the said notification dated 30th March, 1992. We have already noticed that Section 43 A (2) of the ES Act, in so far as it relates to generating companies owned or controlled by the Central Government and other generating companies entering into or otherwise having a composite scheme for generation and sale of electricity in more than one State, stands omitted w.e.f. 15.5.1999. Therefore, the said notification cannot be said to be in force qua such generating companies as we are unable to find any provision under the ERC Act that may save operation of the notification dated 30-3-1992 consequent to omission of Section 43A (2) of the ES Act. The learned counsel for the petitioner, in support of its contention that notification dated 30th March, 1992 is still in force, relied upon Section 24 of the General Clauses Act. We are of the opinion that no support can be drawn from the said Section of the General Clauses Act. It is to be kept in mind that unlike Section 6 of the General Clauses Act which specifically deals with the case of repeal of any enactment which includes even the Section of Act, Section 24 deals with repeal and re-enactment of the entire Act with or without modification. In the present case, only Section 43 A (2) of the ES Act has been omitted. Therefore, the principle enacted in Section 24 of the General Clauses Act does not apply to the notification dated 30th March, 1992. While arriving at this conclusion, we draw support from the judgment of Gujarat High Court in Godhra Electricity C. Ltd., VS Somlal Nathji Shiroiya (AIR 1967 Gujarat 172).

32. Under Section 30 of the ERC Act, the Commission, while prescribing the terms and conditions for fixation of tariff, can depart from the factors specified under Section 28, which includes National Power Plan formulated by the Central Government. After deletion of Section 43 A (2) of the ES Act, Ministry of Power under its Office Memorandum dated 31.5.1999, forwarded the draft notification dated 7-4-1999 for introduction of ABT to the Commission, *"in keeping with the spirit of the Electricity Regulatory Commissions Act, 1998 as well as the transfer of relevant power vested in Section 43 A (2) of the ES Act, 1948 to the CERC w.e.f. 15th May, 1999"* so that *"the issue of ABT should be finalised after due deliberation by the CERC."* This aspect is duly reflected in our order dated 4.1.2000. Therefore, even on consideration of the provisions of Section 30 of the ERC Act, the Commission is competent to prescribe the norms and parameters as per its order dated 4.1.2000 on ABT.

33. It becomes obvious that in the Central Government's understanding, the issue of the ABT was to be finalised by the Commission. The Central Government has been a party to the present proceedings. It has not filed its response on the issue. It can, therefore, be presumed that its views on the issue remain unaltered. Section 38 of the ERC Act does not support the case of the petitioner for the precise reason that no direction on matter of policy involving public interest, have been given to the Commission by the Central Government that in the discharge of its functions the Commission shall be guided by the notification dated 30-3-1992.

34. NTPC in the review petition has vehemently argued that the Commission ought to have fixed the target availability at 70%. We propose to deal with this leg of the argument at a later stage. At this stage, we may only state that, the argument advanced by NTPC implies that the Commission has the jurisdiction in case it fixes the target availability at 70% and in case it fixes a higher level of target availability, it loses its jurisdiction. There is an apparent fallacy in the argument. The opinion of the learned Attorney General, which has been referred to above in extenso, supports the view that the Commission has inherent power to lay down the terms and conditions of tariff, which is the subject matter of the present review petition.

35. It bears notice that consequent to omission of Section 43A (2) of the Supply Act, the Central Government conveyed its views on implications of the omission of the said Section under its letter No.25/24/98-R&R dated 1.6.1999 addressed to the Commission. It has been mentioned that **" CERC and SERCs in the States like Orissa and Haryana where Section 43 A (2) has been disapplied will, however, be entitled to deviate from such tariff notification issued by the Government. In case of such deviation, reasons will be recorded by the Commission. The Commission will adopt the principles contained in the notification and modify them as the circumstances required. However, the discretion has to be left to the CERC and SERC to follow the norms as they, in exercise of quasi-judicial power, consider just and proper. In doing so, the norms of operation and PLF laid down by the CEA will be a guiding factor and not a binding factor."** Therefore, it is the view of the Central Government that the Central/State Commissions are not bound by the norms of operation and

PLF prescribed by the CEA or the principles contained in the notification dated 30th March, 1992.

36. **On examination of the matter in its various aspects, we are of the considered opinion that the Commission can fix norms and parameters, which are of the nature of step-in-aid to exercise of its regulatory functions under the ERC Act, but subject to the tariff policy framed by the Central Government under Clause (e) of Section 13. Any other interpretation shall render the provisions of clauses (a), (b), (c) and (g) of Section 13 and Section 28 of the ERC Act otiose. We, therefore, reject the contention of lack of jurisdiction raised on behalf of the petitioner.**

37. Having disposed of the question of jurisdiction, the Commission wanted to explore whether there are any mistakes apparent on record and for this purpose, decided to give a hearing on the other points covered by the review petition. The Commission was also conscious of the fact that if the matter goes to the appellate court, the Commission's findings on the various issues may help the appellate court to take a suitable view on these matters. Accordingly, the Commission proceeded to deal with other points covered in the review petition by allowing the counsel of both sides to argue on them.

Target Availability

38. In our order dated 4.1.2000, we had directed that availability for recovery of capacity charges in respect of all thermal stations shall be 80% during 2000-01 and 85% thereafter and at lower levels of availability, the capacity charge recovery shall be pro rata. It has been pointed out on behalf of the petitioner that the Government of India notification dated 30th March,

1992 fixed Plant Load Factor of 68.5% for recovery of annual fixed (capacity) charges. The National Task Force (NTF) recommended 70% target availability that was incorporated by the Central Government in their draft notification dated 7-4-1999. The learned counsel for the petitioner argued that the Commission had erred while fixing availability of 80% for thermal plants for the first year and 85% for the second year onwards. He further argued that there was no evidence in support of the Commission's conclusion in favour of target availability prescribed in the ABT order. He pointed out that the views expressed by TNEB, RSEB and Administrative Staff College of India in their responses and referred to by the Commission in para 5.5.4 of the order dated 4-1-200 are not based on any studies. He further pointed out that ECC report cannot form any valid basis for supporting the Commission's direction in favour of 80-85% target availability as in the executive summary of ECC report, the target availability of 85% has been referred to, but there is no such reference in the main body of the report which recommends that a review and modification of the target availability and associated data be undertaken to make them more closely correspond to actual values. He contended that the Commission's reliance upon the executive summary in support of its order when ECC did not suggest such a high level of target availability in the main body of the report, was uncalled for. It was argued that the executive summary had not been prepared by ECC, but by the staff rendering ministerial assistance to it. Accordingly, it was contended that inconsistency between the executive summary and the main report makes it unworthy of reliance; and reliance by the Commission on the executive summary constitutes an error apparent on the face of record. The learned counsel for the petitioner further

argued that during the NTF meetings, there was a consensus in favour of fixation of target availability at 70%. Therefore, the Commission ought to have fixed the target availability at 70%, arrived at on the basis of consensus amongst the parties at NTF.

39. Firstly, we propose to examine whether there existed a consensus on the question of fixation of target availability. The respondents have denied any consensus on the issue. On the contrary, the learned counsel for GRIDCO has brought to our notice the minutes of the meeting of Eastern Region RTF held on 4-2-1998, a perusal of which reveals that WBSEB favoured the target availability of above 80% and the views of WBSEB were endorsed by BSEB. At the hearing, Shri Bhanu Bhushan, Director (Operations), Powergrid who was associated with ECC as (Co-ordinator) as also with NTF clarified that the executive summary was prepared by the ECC only and that there was no consensus on 70% target availability at NTF meetings. We have also perused the minutes of the NTF meetings, the copies of which were received from Ministry of Power together with the draft notification dated 7th April, 1999 and which forms the records of the original proceedings. We find that at 7th meeting of the NTF held on 8.11.1996, Chairman, EREB/WBSEB had pointed out that the target availability should be fixed at higher level (82 to 85%) to promote efficiency for the units. The question of target availability was not discussed in the 8th meeting of NTF. In the 9th Meeting that was held on 26th March, 1998, it was decided that CEA would submit the draft notification on ABT to Ministry of Power for their consideration. Also a copy of the draft notification was to be furnished to

NTF members and if there were any comments, these could be sent direct to the Ministry of Power. The draft notification was sent to Ministry of Power on 1st May 1998 before the 10th Meeting of NTF held on 7th October 1998. We do not find any record of discussions on the draft notification at the 10th Meeting of NTF. The fact of the matter is that the draft notification on ABT was not even on the agenda for discussion, although agenda for the meeting informed the members of certain modifications to original draft notifications sent to Ministry of Power. It has been argued by the learned counsel for the petitioner that by not raising the question of target availability in the 10th meeting of the NTF the respondent should be deemed to have agreed to it and thus it could be presumed that there was consensus among the constituents on the contents of the draft notification on target availability. We are not inclined to accept the contention raised by the learned counsel for the petitioner. We do not find any evidence of positive consensus on the question of target availability.

40. We now propose to deal with the contention raised on behalf of the petitioner that the Commission had ordered the target availability at 80% to 85% without any supporting evidence. ECC in its report had concluded that each generating unit should have a target availability defined which will be based on past operating experience unless new plant improvement projects indicate higher achievable values and the value should be re-examined every 2 years in order to reflect changes in generation, operation and plant improvement. ECC study team accepted that the availability target should generally be 85% or higher. In para 2.9 of the executive summary, it has been concluded that full recovery of fixed cost for central sector and IPP

generation should be based on achieving availability levels (equivalent availability which compensates for partial outages) of approximately 85% or higher to be set on a unit-by-unit basis or, at a maximum, as an average of similar units within a station. In the main body of the report it has been pointed out that fixation of target availability at 63% is low and it severely limits the unit's ability to increase its output. The ECC study team recommended that the target availability of 5500 hours (63%) should be increased. It pointed out that NTPC documents indicate that 82.6% (7550 hours) was possible. At the hearing of the review petition, it transpired that 82.6% mentioned in the report is a typographical error and it should be read as 86.2% corresponding to 7550 hours (7550/8760 X 100). In its final report, the study team of ECC recommended that the target availability hours recommended in K.P. Rao Report (PLF table) should be increased to reflect more competitive values. Therefore, we do not find any force in the contention raised by the petitioner that figures of target availability levels arrived at by the Commission are without evidence on record. Apart from the issue raised on behalf of the TNEB, etc., the ECC report favours fixation of target availability at 80-85%.

41. The learned counsel for the petitioner brought to our notice the Common Minimum National Action Plan (CMNAP) for power issued by Ministry of Power after the Chief Ministers' meetings held on 16th October and 3rd December, 1996. According to CMNAP, Plant Load Factor (PLF) of those thermal power stations having less than 40% PLF, would be increased by 3% annually, by 2% in case of those plants with PLF between 40% and 60% and by 1% for those plants with PLF over 60%. It further provided that the overall

PLF in the State sector in the country must come up to **minimum** of 65% and a national average to 70% by 2002 AD. According to the learned counsel, PLF is thus a norm fixed as a part of National Power Policy which is binding on the Commission and the Commission could not have fixed any higher levels of target availability in contravention of these PLF norms. We take note of the fact that no arguments based on CMNAP were addressed on behalf of the petitioner at the time of hearing on the main petition. In any case, we are not convinced that PLF referred to in CMNAP refer to the upper ceilings. It only refers to minimum or the lowest levels of PLF targeted to be achieved by the year 2002 AD. It does not preclude the Commission from fixing the higher levels of target availability for promoting efficiency and economy in the electricity sector and in the interest of general consumers.

42. The Commission in support of its conclusion in favour of target availability of 80-85% took into consideration the availability data of NTPC stations called for from NTPC and Vijayawada station belonging to AP Gen. Corporation. The learned counsel for the petitioner argued that the data relied upon by the Commission was of equivalent availability and could not be taken as the target availability since, according to the learned counsel, target availability could be arrived at only after factorising incentive in view of Section 28 (b) of the ERC Act and Regulation 82 and 84 of CBR. He further argued that after factorising planned outages, forced outages and partial non-availability, fixation of target availability at 80-85% could not be justified. According to the petitioner, this is an error apparent on the face of record. As we have already noted, the recommendations made by ECC fully justified the fixation of target availability of 80-85%. Shri Bhanu Bhushan, Director

(Operations), POWERGRID, the coordinator of ECC, has clarified at the bar that, on consideration of good engineering practices, planned outages could account for 35 days/year, forced outages could be as high as 25 days/year and partial outages for 10 days/year. In this manner, the total outages work out to 70 days/year and accordingly, the plant availability works out to 80.6% (295/365 X 100). Thus, on taking into consideration the various outages, the target availability determined by the Commission in its order dated 4.1.2000 cannot be faulted.

43. The learned counsel for the petitioner further argued that the target availability of 80-85% determined by the Commission was not achievable. We have noticed earlier that based on the studies carried out by ECC, it had concluded that target availability level of 86.2% by NTPC units was possible. Based on the data furnished by NTPC, we find that the average availability for the last 5 years is more than 80%. At the hearing of the review petition, the learned counsel for GRIDCO has produced a copy of a paper "Boiler Tube Failure – An NTPC Experience" by Vinod Choudhary of NTPC, presented at International Conference 2000 on Power Plan Operation and Environment Protection (Feb 8-10, 2000) jointly organised by NTPC and the United States Agency for International Development. According to this paper, availability of NTPC coal based stations is to the extent of 89.83% during 1999-2000, 89.48% during 1998-99, 85.02% during 1997-98, 84.1% during 1996-97 and 85.23% during 1995-96, after excluding planned and forced outages. The learned counsel for GRIDCO relied on this data to argue that target availability of 80-85% was possible. We are conscious of the fact that fresh evidence

produced at the hearing of the review petition by the respondents need to be kept out of consideration. However, in the context of certain fresh documents produced on behalf of the petitioner, the learned counsel for the petitioner himself argued that since the proceedings do not relate to *lis pendens* in a strict sense, fresh evidence produced could be taken into account by the Commission. On the same logic, the paper produced by the learned counsel for GRIDCO has been taken on record. On consideration of the above facts, including the data contained in the paper produced by the learned counsel for GRIDCO, we find that the issue raised by the petitioner is untenable.

44. The learned counsel for the petitioner further argued that the target availability of 80-85% has been fixed uniformly for all thermal stations – whether coal based or gas based. For gas based stations, achieving availability depends upon gas allocation by the Central Government and non-allocation of gas may reduce the availability, a factor beyond the control of the petitioner. We may state that no details have been placed on record by the petitioner to establish that in the past, the availability of gas plants was reduced because of non- allocation of gas by the Central Government. **We are also of the view that the issue of non-allocation of gas falls within the realm of the petitioner's commercial risks and making arrangements for adequate fuel is the responsibility of the generating company.**

45. It was next contended on behalf of the petitioner that the norms of target availability decided by the Commission cannot be applied to the projects already approved and in which investments have been made. It was argued that at the time techno-economic clearance is obtained for the project, norms applicable to the project are known and application of stringent norms

at later stage would adversely affect the investment, both by central generators as well IPPs. In support of this argument, the learned counsel for the petitioner adverted to para 3.3 of the notification dated 30-3-1992 which provides that the norms prescribed therein would apply to the projects in whose case financial package was approved after the issue of the said notification. He also attempted to invoke the principle of estoppel to support his claim. We are not moved by the ingenuity of the argument. One of the principal objects of the ERC Act as stated in the preamble, is "the rationalisation of electricity tariff". The statement of objects and reasons for enacting the ERC Act state that "*India's power sector is beset by problems that impede its capacity to respond to the rapidly growing demand for energy brought about by economic liberalisation. Despite the stated desire for reform and the initial measures that have been implemented, serious problems persist. As the problems of the Power Sector deepen, reform becomes increasingly difficult underscoring the need to act decisively and without delay. It is essential that the Government implement significant reforms by focussing on the fundamental issues facing the power sector, namely, the lack of rational retail tariffs, the high level of cross-subsidies, poor planning and operation, inadequate capacity, the neglect of the consumer, the limited involvement of private sector skills and resources and the absence of an independent regulatory authority*". **These objectives cannot be achieved by restricting the application of the terms and conditions prescribed by the Commission to the future projects only. The argument will rather defeat the very objective for which the Commission has been established. So far as the application of principle of estoppel is concerned, it has been**

held by Supreme Court in Indian Aluminium Co Ltd Vs Karnataka Electricity Board [(1992) 3 SCC 580] that the doctrine of promissory estoppel is not attracted in exercise of statutory power. As the Commission in exercise of statutory powers under the ERC Act has issued the impugned order, the question of promissory estoppel does not arise.

46. It was also argued on behalf of the petitioner that the respondent SEBs have in the past accepted 68.5% as the norm for recovery of full fixed costs. The learned counsel for the petitioner brought to our notice the PPAs entered into by some of the SEBs for purchase of power from IPPs wherein the target availability has been agreed to at 68.5% for recovery of fixed charges. He argued that the respondents cannot be now permitted to argue in favour of higher target availability so far as the NTPC units are concerned. We may notice that prior to the ABT order dated 4-1-2000, 68.49% PLF was the industry norm. Therefore, we do not find any inconsistency in the respondents signing PPAs for 68.5% target availability based on industry norm prevalent at the relevant time, and now pleading for higher target availability. The terms and conditions for tariff in case of IPPs are protected by the contracts and therefore plea of discrimination is not sustainable, as held by the Supreme Court in Bisra Stone Lime Co Vs Orissa State Electricity Board [(1976) 2 SCC 167] in the following words:

> " ... when law makes it obligatory for certain special agreements to continue in full force during their currency stultifying the power of the Board to revise the rates during the period, no ground of discrimination can be made out on the score of exempting such industries as are governed by special agreements."

47. Therefore, this part of the argument too deserves rejection as a ground for review. We feel that it does not fall within the statutory prescription of mistake or error apparent on the face of the record or any other analogous ground for review or order or direction.

48. The learned counsel for the petitioner developed a further argument that without incentive, NTPC performance referred to by the Commission in its order dated 4-1-2000 could not have been achieved, because there was no motivating factor to perform beyond 62.8% PLF when the unit could recover full capacity charges. He contended that as per the norms applicable, **there was no legal obligation to generate electricity after recovery of the capacity charges since, thereafter the petitioner recovers the variable or energy charges only based on norms.** In the normal course, there cannot be any room for such an argument. The petitioner as a public utility owes a duty towards the country. **It cannot be expected from a public utility like NTPC to sit idle with folded hands on the ground that it has already recovered full capacity charges. It would result in additional capacity remaining idle and unutilised even in the face of general shortages of power in the country.**

49. It may be pointed out that the ECC recommended 85% Target Availability as early as in 1994. Subsequently there has been substantial improvement in the general availability of the plants as per the data submitted by NTPC in Annexure-F of the Review Petition except for a few plants, which may have certain problems. The relevant weighted average, for the last 5 years, has been indicated as 80.79% equivalent availability for Coal Stations.

Gas Stations have a problem on account of non-availability of gas which is not a justification to adjust the norm. NTPC is at liberty to approach the Commission for suitable relaxation where necessary in such cases.

50. **We are convinced that the immediate fixation of target availability at 80% for recovery of full capacity charges would give an impetus to generation of electricity in the country and therefore, is fully justified on merits. Commission could increase it to 85% subsequently at any time if the experience dictates such a requirement. To this extent, our original order stands partly modified. NTPC are also at liberty to approach the Commission for providing relief/exemptions after due justifications in respect of plants having difficulties for which separate application could be moved in the matter.**

51. **We have analysed the various grounds urged on behalf of the petitioner on the question of target availability. We sum up to say that we do not find any of these grounds to be falling within the statutory prescription of an error apparent on the face of record or any other analogous ground, laid down under Section 114 read with Order 47, Code of Civil Procedure.**

Level Playing Field

52. In accordance with Government of India notification dated 30-3-1992, applicable to IPPs, full fixed charges are recoverable at generation level of 6000 hours/kw/year i.e. at PLF of 68.49%. For generation of above 6000 hours/kw/year, the additional incentive is payable for increase of PLF. For

computing the level of generation, the extent of backing down, as ordered by REB or SLDC, as the case may be, is to be reckoned as generation achieved. However, in accordance with our directions as contained in the order dated 4-1-2000, in case of the generating companies, covered under clauses (a) and (b) of Section 13 of the ERC Act, full fixed charges are recoverable at 80% or 85% of target availability and incentive becomes payable in case the target availability exceeds these levels. The learned counsel for the petitioner argued that NTPC and other generating companies covered under clauses (a) and (b) of Section 13 of the ERC Act have been discriminated qua the generating stations owned by IPPs but not governed by these clauses, without any valid basis. According to him, the same generating company owned by IPP will have different target availability and other norms for different units depending upon whether or not the unit has a composite scheme for generation and sale of power. It is also contended that it would suffer substantial revenue loss by fixation of higher target availability levels ordered by the Commission.

53. The contention of the petitioner was strongly contested by the counsel of the State Electricity Boards and GRIDCO, Orissa. According to the counsel for Punjab State Electricity Board, Section 28 of the ERC Act recognises discrimination. According to the section 28(a) :

> *"the generating companies and transmission entities shall adopt such principles in order that they may earn an adequate return and at the same time that they do not exploit their dominant position in the*

generation, sale of electricity or in the inter-State transmission of electricity."

This would clearly indicate that the law does not provide for any level playing field. On the other hand, it recognises different categories of generators of the power sector. He also argued that the Commission has full powers to revise the norms of even old projects. The arguments of the counsel for the petitioner that the Commission cannot take away the favourable conditions which NTPC was enjoying in the earlier years arises out of the doctrine of 'promissory estoppel'. In this context he drew reference to the case of Indian Aluminium Company Vs. Karnataka Electricity Board 1992 (3 SEC) wherein it was laid down that the "*doctrine of promissory estoppel is not applicable in the sphere of statutory power and since the impugned action was a consequence of the amended provision of section 49, the question of promissory estoppel did not arise."* The counsel for Punjab State Electricity Board argued that since section 43 A (2) of Electricity (Supply) Act, 1948 has been omitted and new ERC Act, 1998 has been passed by the Parliament, which has led to the setting up of the CERC, the question of promissory estoppel as asked by the counsel for NTPC cannot hold good. He also mentioned that most of the NTPC agreements also have a clause for future revision and, therefore, NTPC cannot resort to the arguments that its contention should not be challenged. He also referred to section 52 of the ERC Act, 1998 which gives over-riding effect to the provisions of this Act.

54. The learned counsel for GRIDCO argued that the NTPC and IPPs are differently placed and have always been treated differently. It was only the

IPPs that were governed by the notification dated 30-3-1992 and the tariff of NTPC stations was determined through the separate station-wise notifications issued from time to time. On the question of revenue loss, the learned counsel for GRIDCO pointed out that NTPC was presently earning huge and unreasonable amount at very low level of target availability. He argued that as per the existing notifications, NTPC was recovering 50% of the fixed costs at zero level of availability and full costs at PLF of 62.8%. Further, during 1998, Return on Equity was raised from 12% to 16% based on notification dated 30-3-1992.

55. We have considered the rival contentions. The generating companies owned or controlled by the Central Government and those having a composite scheme of generation of electricity and sale to more than one state form a distinct class, separate from IPPs operating in one state. This is the spirit of the ERC Act. In our opinion, the claim of NTPC to be classified with IPPs operating in one state is untenable and no question of discrimination can arise in such circumstances as they are outside the jurisdiction of the Commission. It is pertinent to refer to the judgement of the Supreme Court in a case reported as Fertilisers and Chemicals Travancore Ltd Vs KSEB [(1988) 3 SCC 382]. In that case Kerala State Electricity Board had enhanced the rate of tariff for supply of power to the appellant, but the consumers having agreement protected under Section 49(3) of the Electricity (Supply) Act were left out of tariff revision. The Supreme Court rejected the general allegations of hostile discrimination made by the appellant against KSEB in the following words:

"...Respondent-Board was rendered, by virtue of the subsistence of an agreement under Section 49(3) powerless to make an unilateral increase, can form a valid ground for differential treatment as between cases covered by Section 49(3) on the one hand and those in which the Board was competent and was at liberty to give effect to the increase, on the other. "

56. It may be stated that NTPC by virtue of being a government company stands on a different footing and cannot claim parity with IPPs and the small undertakings owned by State Governments. In a case reported as Hindustan Paper Corporation Ltd. Vs Government of Kerala [(1986) 3 SCC 398] , the Supreme Court has held as under:

"10. Hence preference shown to government companies under Section 6 of the Act cannot be considered to be discriminatory as they stand in a different class altogether and the classification made between government companies and others for the purpose of this act is valid one. Same is the case with clause which gives power under Section 6 of the Act to the government to exempt sales of forest produce in favour of co-operative societies up to the limit mentioned therein. In PV Sivarajan Vs UOI the exemption in favour of traders carrying on export business in small scale who formed co-operative societies was upheld. In Orient Weaving Mills (Pvt) Ltd Vs UOI this court upheld the exemption granted in favour of power-loom weavers in a co-operative society from the levy of central excise duties..."

57. In another case Indian Express Newspapers Vs UOI [(1985) 1 SCC 641], the classification of newspapers into small, medium and big newspapers on the basis of their circulation for the purpose of levying customs duty on newspapers was upheld by the Supreme Court in the following words:

"The object of exempting all small newspapers from the payment of customs duty and levying only marginal duty on medium newspapers while levying full custom duty on big newspapers is to assist small and medium newspapers in bringing down their

cost of production. Such papers do not command large advertisement revenue. Their area of circulation is limited and majority of them are in Indian languages catering to rural sector. There is nothing sinister in the object nor can it be said that the classification has no nexus with the object to be achieved. It is the duty of the State to encourage education of the masses through the medium of the Press under Art 41."

58. In still another case reported as Malwa Bus Service (Pvt) Ltd Vs State of Punjab [(1983) 3 SCC 237] it has been held by the Supreme Court that adverse effect on business on account of an order cannot be a valid ground to test reasonableness:

" Though patent injustice to the operators of stage carriages in fixing lower returns on the tickets issued to passengers should not be encouraged, a reasonable return on investment or a reasonable rate of profit cannot be sine qua non of the validity of the order of the Government fixing the maximum fares which the operators may collect from their passengers. It cannot also be said that merely because a business becomes uneconomical as a consequence of a new levy, the new levy would amount to an unreasonable restriction on the fundamental right to carry on the said business. It is, however, open to the State Government to make any modifications in the fares if it feels that there is a need to do so. But the impugned levy cannot be struck down on the ground that the operation of stage carriages has become uneconomical after the introduction of the impugned levy...."

59. **On the above considerations, we are of the firm opinion that the order does not call for review on the alleged grounds of discrimination or absence of level playing field and the same is rejected.**

Incentive:

60. As prescribed under the notifications applicable to NTPC stations, the petitioner recovered full capacity charges (fixed cost) at PLF of 62.8%. However, the petitioner became entitled to incentive for generation beyond PLF of 68.49%, including deemed generation on account of backing down. In our order dated 4-1-2000, we have directed that incentive should be linked to actual performance, though recovery of fixed charges could still be linked to

availability. Therefore, for claiming incentive, the actual PLF without including the deemed generation certification shall be the criterion. The learned counsel for the petitioner argued that the Commission had not provided adequate incentive for good performance. According to the learned counsel, in the past NTPC units have performed well because of the incentive factor, since otherwise it would not have generated power beyond 62.8% PLF. The counsel also argued that structure of incentives and disincentives proposed by the Commission was disproportionate as for performance beyond target availability the earnings by way of incentive were limited whereas disincentives for non-performance would be disproportionately high. He contended that these are errors apparent on the face of record necessitating review of the order.

61. The learned counsel for GRIDCO dealing with the incentives, pointed out that the definition of incentives, as accepted by various courts, is the one contained in the Concise Oxford Dictionary, which is as follows:

Incentive - (I) "Motive or incitement especially to action";

(ii) "A payment or condition to stimulate a greater output by workers".

62. He accordingly argued that irrespective of the label 'incentive' which had been used earlier, the fact remains that what was offered as an incentive was more in the nature of a reward and did not constitute incentive in the same manner in which it has been used in the Courts of Law. As far as NTPC is concerned, a higher production beyond the target availability can be achieved by burning more fuel, but this is compensated by full re-imbursement of fuel charges according to the heat rate. No further incentive seems called

for. However, if the incentive is to be given, it can be given only on actual production as correctly decided by the Commission in their ABT Order and not on availability. There is no question of compensating for deemed generation as earlier done, as this was a wrong practice, not being related to actual generation.

63.. The learned counsel for GRIDCO further argued that when the allocations are made to the States, it means that the State Electricity Boards had actually purchased the capacity. 100% of the capacity should be available to the State Electricity Boards. In such a situation, the question of incentive should not normally arise. Incentive cannot be demanded as a matter of right. ABT had correctly mentioned in para 5.4.2 that the earlier system of incentives based on actual PLF plus certification of backing down, has become counter productive and outdated inasmuch as incentive was payable even for backing down. He further brought out that the incentives for power not produced would then have to be borne as additional cost by the consumers. Fixing the incentive on availability instead of on actual production would be unfair to the consumers and would not be in public interest.

64. We have carefully considered the arguments of both sides on the incentive. NTPC argued that without incentive of a substantial amount beyond the target availability, (which should also be lowered to 70%), it would not be possible to have the necessary motivating factor for producing more power. The counsel for NTPC repeatedly talked of incentivising factor of availability. This is a novel idea and a technically defined concept which is not reasonable. We cannot help mentioning at this point that a public sector company also

adds to the social benefit by increasing availability of a service in situation of shortage. The argument that NTPC is bound to supply power only up to a legal limit of target availability and beyond that limit could refuse power generation even with incentive, is something which cannot be accepted under any circumstances. If this argument were to be accepted, this will lead to a situation where the private producers would take recourse to such an argument and may not supply power when it is required. No power generating company, whether it is private or public, can be allowed to place the members of the public at ransom. **Accordingly, we cannot accept the argument that without incentive, the power cannot be produced by a generating company beyond target availability.**

65. The argument that incentive should be related to availability and not to the actual generation, has already been dealt with at length by us in the ABT Order. We had clearly indicated that the incentive should be linked to the actual generation achieved over and above the target level. This appears to be the correct logic on which incentive scheme should work. Demanding incentive for just availability or deemed generation for power not actually produced as was done earlier would not be in public interest.

66. **We would also like to draw the attention to para 5.4.5 of the ABT Order dated 4.1.2000 wherein we had referred to the study on the cost of capital initiated by the Commission. It was indicated that once our study on the cost of capital is completed, it would be possible to reach a firm conclusion regarding the justifiable ROE and Incentives. It was also mentioned that in fairness to all parties concerned, therefore, when both the issues regarding return on equity and method of reckoning**

incentives are yet to be finalised, it would be appropriate to maintain status-quo on both these issues till a final decision on the overall adequate return is arrived at. We would not like to disturb this position at this juncture more so as our orders on the Cost of Capital Studies and other related issues are under finalisation.

67. **In the ABT Order it was indicated that 80% availability would be the target for recovery of full fixed costs. At the same time, for the purpose of incentive, 80% PLF was indicated as the cut off point. It is evident that 80% availability and 80% PLF may not be same in all cases. This is because while availability could also include the idle time of power plant (when power is not actually generated), PLF would indicate actual generation. This aspect has been suitably addressed in our order on terms and conditions of tariff.**

Imposition of Penalty and/or gaming charges

68. NTPC has argued in the review petition that the proposal to impose penalty/gaming charges is unreasonable and arbitrary. They have also contended that this would seriously affect the free market development proposed for the sale of electricity.

69. Shri Bhanu Bhushan of PGCIL argued that the Commission's order dated 4.1.2000 lays a disproportionate emphasis on gaming and misdeclaration of plant capacity. He was of the view that RLDCs can take care of any unreasonable gaming under the provisions of Indian Electricity

Grid Code. He recommended a review of the Commission's order in this regard with a view to delete provisions of penalty.

70. The counsel for State Electricity Boards and the GRIDCO, Orissa argued that the success of the ABT would considerably depend upon punitive measures which need to be taken to discourage mis-declaration and gaming. According to them, the penalty has to be stiff and cannot be diluted. Further, NTPC has argued this only on merit and has not indicated it as an error on record. Accordingly, the argument of NTPC needs to be ignored.

71. The Commission has listened to arguments of both the parties on the question of imposition of penalty for mis-declaration /gaming. It is seen that the argument of the NTPC was not in the nature of pointing any error on record. On the other hand they have only argued on the quantum of penalty. We are inclined to agree with the arguments advanced by the SEBs and the learned counsel for Orissa GRIDCO. We do not see any justification for altering the ABT order in regard to penalties for the gaming possibilities. **We feel that the success of ABT rests squarely on the prevention of mis-declaration and gaming possibilities. To ensure this, deterrent penalties would require to be provided. Without this, we have apprehension that the grid discipline cannot be effectively enforced. In this connection we would also like to draw reference to para 5.8.10 of the ABT Order dated 4.1.2000.**

Unscheduled Inter-change (UI) Scheme not equitable

72. The learned counsel for NTPC argued that the claim of the Unscheduled Inter-change does not provide for identifying the deviations from generation schedule in case of State Electricity Boards although bulk of the

generation in the country, nearly 80%, is owned and managed by them. State Electricity Boards and licensees could also cause deviations from their schedule generations/drawals and such an action on their part may affect NTPC. The Commission should evolve appropriate mechanism to deal with all the players so that UI scheme is equitable.

73. The above prayer does not question the ABT Order in this regard. It only indicates the need for a suitable mechanism, It may be pointed out that Transmission (Amendment) Bill, 1998 has provided for setting up of a Central Transmission Utility (CTU). Power Grid Corporation of India Limited has been identified by the Central Government as the Central Transmission Utility for this purpose. All aspects relating to the grid control would be handled by the CTU. The Indian Electricity Grid Code lays down clearly the role of CTU in this regard. Para 5.9.11 and para 5.9.13 of the ABT Order brings out the responsibilities of the CTU in the matter of handling UI charges. The Commission has also directed the CTU to devise the procedures in this regard and inform all concerned. **Accordingly, we do not think there is any further requirement on the part of the Commission to interfere with this aspect of the order.**

UI Accounting System

74. PGCIL had in an IA No.55/2000 had sought certain clarifications on account of difference on certain points in the ABT Order and IEGC. It was mentioned by the PGCIL that there have been some problems arising out of the fact that the REBs have taken up a position that since ABT order was issued after IEGC, it takes precedence over IEGC Order. At this point, the Commission would like to clarify that it is not the intention to have any such

differences. The main points raised by the PGCIL relate to the details of the accounting system viz. Pool or Bilateral adjustment method and the periodicity. In respect of both these aspects, the Commission suggested that the operation of the Pool Account in case of oil, cement, etc.should be studied by the CTU in order to devise a fool proof accounting system which would address itself to the various questions such as income-tax liability and such other questions under para 7.17 of the IEGC order dated 30.10.1999. **The CTU should outline a detailed procedure of accounting and this could be taken up in IEGC Review Panel. Pending finalisation of such an accounting procedure in time, CTU shall suggest an interim accounting arrangement in the matter.**

Future Investments in Power Sector:

75. The counsel for the NTPC has argued that the increase in target availability to 80-85% , the incentive/disincentive structure as notified in the ABT order would seriously jeopardize the working of NTPC. This would lead to a situation where NTPC would not be able to mobilise adequate resources for the planned capacity addition.

76. The counsel for the Orissa GRIDCO and State Electricity Boards argued that the ABT Order was in the context of ensuring grid discipline. It was not meant to improve the financial situation of a public sector company *per se*. In this regard they pointed out that the Commission had already initiated hearings in respect of cost of capital, depreciation and other operational norms. Decisions which would be taken in regard to these would be of relevance to NTPC. That would also decide the return and other

related aspects which would govern the future investments of NTPC in the power sector.

77. We agree with the learned counsel for Orissa GRIDCO, and State Electricity Boards that the aspects relating to the rate of return, the overall incentive structure and the need to raise resources for future investment are already covered in the Consultation Paper on Bulk Power Tariff issues by the Commission as already stated earlier. This paper has been a subject of public debate and hearing on operational norms and other parameters has been completed. **It would be appropriate for the NTPC to await the final conclusion of these proceedings and take a final view with regard to future investment after terms and principles of bulk tariff are finalised by the Commission.**

Promotion of Competition:

78. The NTPC contended that the ABT Order does not stipulate any measures to promote competition among various categories of generators. Competition can be promoted provided uniform rules are adopted for all the players including State Electricity Boards, licensees, IPPs and power plants connected to the grid. Accordingly it is necessary for the Commission to ensure a level playing field for all the parties.

79. **The above point is only a repetition of the earlier contention of level playing field. For the reasons already stated herein, there is no need to interfere with our ABT Order for this purpose.**

Economy and Efficiency:

80. NTPC has submitted that the Commission should have adopted option A[1]. They have pointed out that NTF took the decision to adopt option C[2] when it did not have the benefit of the new statute. Accordingly a prayer has been made that the Commission should consider option A which would result in overall economy and efficiency in operation in contrast to option C.

81. The counsel for the State Electricity Boards and GRIDCO, Orissa pointed out that the NTF had gone into the matter of options A and C intensively and it came to the conclusion that option C should only be adopted. This would also be in conformity with the federal structure of the Constitution. Option A has already been discarded by the NTF, it would not be appropriate for the Commission to adopt option A. Further, even the draft notification forwarded by the Central Government also reflected preference for option C. Further, it was pointed out that the question of option A or C was a matter of policy and if the Central Government had opted for option C, it would not be appropriate for the Commission to change it to option A. It was also contended by the counsel for GRIDCO that this did not constitute any error on record and, therefore, it did not fall within the purview of the review petition. Accordingly, this argument had to be dismissed.

82. We agree with the arguments of the learned counsel for GRIDCO and the State Electricity Boards as far as the option C is concerned. It is a settled

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[1] Centralised scheduling and dispatch of all generation, including SEB internal resources, centralised scheduling of all internal trading with the Region, and exclusive authority to negotiate inter-regional trading.

[2] Decentralised scheduling and dispatch of Central Sector generation and decentralised inter-State and inter-regional trading.

matter arising out of the consensus reached by the NTF. This position has also been clearly brought out in the ABT Order dated 4.1.2000. **As already stated, the Commission had taken the view that it was not necessary for us to reopen issues where consensus had already been reached. In this connection, para 5.1.9 of the ABT Order reproducing the broad consensus arrived at the 7th meeting of the NTF held on 18.11.1996 may be referred to. For reasons already stated in our Order, we do not see any reason for re-opening this issue.**

Assistance of Consultants

83. In our order dated 4-1-200, we had referred to the help taken by the Commission of the consultants. The learned counsel for the petitioner argued that reliance by the Commission on the report of the consultants in support of its order was violative of rules of natural justice as also Regulations 76 and 77 of CBR since their report was not placed on record and no opportunity was given to NTPC to counter or deal with the same. At the hearing of the review petition, the Commission observed that the observation had been made in the context of non-availability of assistance of technical staff and no specific issue was referred to consultants for study and report. The word " consultants " used in the order is not in the context of the term used in Regulations 76 and 77. **In view of these observations made by the Commission at the hearing, the learned counsel did not press this as a ground for review of the order.**

Non-participation of Member (Ex officio)

84. Chairman CEA is the ex officio member of the Commission. He was associated with the National Task Force constituted by Ministry of Power to study the various aspects of availability based tariff, as its Chairman. In that capacity he had studied the matter and given his comments to the Ministry on the issue. He, therefore, did not participate in the proceedings when the petition was heard. This fact was duly taken note of by the Commission in the order dated 4-1-2000. It was argued by the learned counsel for the petitioner that in case the recommendations of NTF on the question of availability were to be departed from it was the expectation of Chairman CEA & Member (Ex officio) to be consulted before issuance of final ABT order. In fact, an averment to this effect has been made in the review petitioner. **The Commission desired to know the basis for such an assertion on behalf of the petitioner. Faced with this situation, the learned counsel sought deletion of the relevant averment in the review petition. In view of this, this as a ground for review does not survive.**

Submissions of Neyveli Lignite Corporation

85. Neyveli Lignite Corporation (NLC) have also filed a review petition (21/2000) against the Commission's order dated 4-1-2000. The said review petition has been kept pending on the request of NLC. NLC is one of the respondents in the present review petition. At the request of NLC, the issues raised in review petition 21/2000 have been treated as NLC's response to the present review petition. It has been contended on behalf of NLC that the target availability of 77% for the first year and 82% for the subsequent years

for recovery of full fixed charges in respect of its stations is not justified. It has been pointed out that the details furnished earlier on behalf of NLC for the period from 1994-95 to 1998-99 for 3 units of 210 MW (stage-I) and 4 units of 210 MW (stage-II) in respect of TPS-II were of the machine availability at generator terminals and as such, these details could not form the basis for prescribing the target availability of 77%/82%. It has come to the notice of the Commission that the capacity of the mines for stage-I of TPS-II is 47 lakh tones per annum; the capacity of mines for stage-II of TPS is stated as 58 lakh tonne per annum. In these cases, the capacity utilisation of mines has been considered as 85% for arriving at the transfer price. The specific fuel consumption as per the agreement entered into by NLC and the beneficiaries indicates the lignite consumption as 1.24 Kg/Kwh on net basis. The auxiliary power consumption has been agreed at the level of 10% and specific fuel oil consumption has been agreed at 3 ml/Kwh on gross basis. The Plant Load Factor (PLF) that can be achieved with full capacity utilisation of lignite mines is only 73.06% (76.3% for stage I and 70.63 for Stage II). **We propose to take notice of these facts that have come on record for the purpose of finalising the schedule for NLC stations.**

IA No.54/2000

86. National Thermal Power Corporation of India Ltd., has filed this Interlocutory Application, (No.54/2000) on 5-10-2000 with a prayer to direct that the review petition be listed for hearing to consider the effect of the Order dated 26-9-2000 in petition No.24/2000 (Power Trading Corporation Vs. SEAP).

87. The Commission after hearing the parties on the review petition reserved its order on 6th June, 2000 and the final order was not issued till filing of this Interlocutory Application. After the conclusion of the hearing a suggestion was made to convene a meeting between the applicant herein and the beneficiaries to arrive at a consensus on the figures of target availability and other contentious issues raised in the review petition. It was directed that the progress of such discussions shall be reported to the Commission on 13th July, 2000. On further requests received from the applicant, the date was extended from time to time. The applicant has, however, not reported any tangible progress on the issues.

88. Meanwhile, the Commission vide its order dated 26th September, 2000 on Petition No.24/2000 (Power Trading Corporation Vs. M/s. Southern Energy Asia Pacific Ltd. and Others) has approved the tariff for Hirma Mega Power Project. According to the applicant, the Commission has decided that the target availability for purchase of power from Hirma Mega Power Project shall be 85% and that on this target availability the Commission has allowed not only recovery of full fixed costs, but also incentives. It is averred on behalf of the applicant that the inclusion of the incentives in the fixed cost in Hirma Power Project in terms of the Commission's Order dated 26-9-2000 are independent and sufficient grounds for review of the order dated 4-1-2000 wherein the recovery of fixed charges at 85% target availability is restricted without incentive. The present application has been filed against the above background.

89. We heard Shri M.G. Ramachandran, Advocate for the petitioner on 1-11-2000. The petitioner in petition No.24/2000, among others, sought the Commission's approval that the fixed charge component of tariff for Hirma Power Project would be based on guaranteed annual off-take level of energy at 68.5% PLF and for all power sold above 68.5% Annual PLF, incentive @ 25% of the total fixed charge would be payable. As there were areas of disagreement between the petitioner and the respondents 2 to 5 on one hand and the respondent no.1 on the other hand, the Commission, appointed M/s. SBI Caps as consultant to inter-act with the parties with a view to narrowing down the differences between them.

90. On the question of recovery of fixed costs, the consultant reported that the parties had agreed that the fixed charges would be based on an annual "take or pay" level of 68.5% PLF. It was further reported that the parties had also agreed that for power sold above 68.5% annual PLF level, incentive @ 25% of total fixed charge would be payable. As a result of further conciliatory efforts by the consultant, it was mutually agreed by the parties that the guaranteed availability shall be 85% and full fixed charges shall be recoverable at 85% PLF including deemed generation, which is the same as availability. On the question of incentive, it was agreed among the parties that incentive for despatch above 85% PLF would be calculated as 1 paisa/KWH for 1% increase in despatch above 85% PLF, 2 paise /KWH for 2% increase in despatch above 85% PLF and so on. In view of the agreement between the parties regarding off-take of power and recovery of fixed charges at 85% PLF, the Commission has passed the order dated 26-

9-2000 on the question of determination of tariff payable by the beneficiaries of Hirma Mega Power Project to respondent no.1. Thus the Commission's approach on this issue had been based on the consensus. This aspect has been taken due note of by the Commission in its order.

91. As noted above, the applicant, NTPC was also afforded an opportunity to mutually agree with the beneficiaries (respondents in the review petition No.13/2000) on the question of target availability and other contentious issues raised by it in the review petition. The applicant has, however, failed to arrive at any agreement or consensus with the beneficiaries on this issue. The applicant, therefore, cannot seek parity with other projects, where the orders have been passed by the Commission based on agreement and consensus.

92. The tariff of NTPC stations is cost-based tariff. On the other hand, the offer made by SEAP for tariff for Hirma Project is a stand alone offer under the Mega Power Policy of the Government of India. Though to assess the competitiveness and reasonableness, the tariff for Hirma Mega Power Project has been compared with tariff of some other thermal stations, the methodologies for calculation of tariffs remains different. We have already taken note of the fact that the initial tariff offer of SEAP was to recover full fixed charges at 68.5%, incentive was payable @ 25% of the total fixed charge. The word incentive used here is inappropriate. The level of 68.5% is a low level of performance and incentive is by definition an extra payment to encourage high level of performance. However, as a result of conciliatory efforts, the parties have agreed at guaranteed PLF of 85% for recovery of the fixed charges, which does not expressly include the incentive but the incentive

is payable in case PLF exceeds 85%. This is a true incentive, requiring special efforts to perform even better than the high level of 85%.The guidelines contained in Government of India notification dated 30-3-1992, as amended from time to time, do not apply for tariff determination of Mega Power Projects. We may point out that some other fixed charges like increased O&M on account of change of boiler technology have not been included into the fixed costs. For these reasons, we do not find any parity in mechanism for tariff fixation of NTPC stations and that of Hirma Mega Power Project.

93. **Under these circumstances, the applicant cannot be permitted to seek reopening of the review petition which the Commission has already heard in detail. On these considerations, this Interlocutory Application is liable to be dismissed. We order accordingly.**

Final Order:

94. **In view of the findings contained in the preceding paragraphs, we are satisfied that the ABT Order dated 4.1.2000 does not contain any error in law or error apparent on the face of the record. Therefore, the Review Petition No. 13/2000 of NTPC is disposed of accordingly. The stay on implementation of ABT Order shall stand vacated. Revised**

dates for implementation of the order in partial modification of para 5.11.4 of ABT Order would be as under:

Southern Region	:	**1.4.2001**
Eastern Region	:	**1.5.2001**
Northern Region	:	**1.6.2001**
Western Region	:	**1.8.2001**

95. The crucial date for switchover for calculation for incentives shall be reckoned from 1.4.2001 instead of 1.4.2000 as indicated in paras 5.11.4 and 6.2 of the ABT Order.

(A.R. Ramanathan) Member **(G.S. Rajamani) Member** **(D.P. Sinha) Member** **(S.L. Rao) Chairman**

New Delhi dated the 15th December, 2000.