Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 130 of 2009

Dated: 25th March, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of:

Ratnagiri Gas and Power Private Ltd.,
E-Wing, NFL Premises, A-11, Sector-24,
NOIDA, Gautam Budh Nagar,
Uttar Pradesh-201301. ... Appellant(s)

Versus

1. **Central Electricity Regulatory Commission,**
   3rd and 4th Floor, Chandralok Building,
   Janpath,
   New Delhi-110 001.

2. **Maharashtra State Electricity Distribution Co. Ltd.,**
   G-9, Professor Anant Kanekar Marg,
   Prakahgad, Bandra (East),
   Mumbai-400 051 ...Respondent(s)

Counsel for the Appellant(s): Mr. M.G. Ramachandran,
Ms. Sneha Venkataramani
Ms. Ranjitha Ramachandran

Counsel for the Respondent(s): Mr. Nikhil Nayyar &
Mr. Swanil Verma for R-1
Mr. Raunak Jain &
Mr.Mayank Mishra for R-2
Mr. Shantanu Dixit for Prayas-Intervenor

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Ratnagiri Gas and Power Private Limited, a generating company, against the order of the Central Electricity Regulatory Commission (Central Commission) dated 4.6.2009 determining the tariff of the generating station of the Appellant for the period 1st September 2007 to 31st March 2009.

2. The Central Commission is Respondent No. 1. Maharashtra State Electricity Distribution Company Ltd., Distribution licensee in the State of Maharashtra, is Respondent No. 2.

3. Respondent No. 2 is the major beneficiary of the generating station of the Appellant having allocation

and power purchase agreement for 95% of the capacity of the plant.

4. It would be necessary to go into the brief history of the generating station of the Appellant while describing the facts of the case as it has bearing on the various issues raised by the Appellant in this Appeal.

4.1. In December, 1993, the Dabhol Power Co. Ltd. and Enron Group entered into a power purchase agreement with Maharashtra State Electricity Board for establishment and sale of power from the gas based generating station at Ratnagiri, Maharashtra. The Power Project was envisaged with LNG Terminal and associated infrastructure facilities as LNG was proposed to be used as main fuel for the power station.

4.2. In the year 1999 Block-I of Ratnagiri Project out of the three power blocks envisaged with the project was

established by Dabhol Power Co. Ltd. Dabhol and Enron Group ran into financial and other difficulties and they could not continue operation of the plant. The State Electricity Board, the sole beneficiary of the project, and the generating company went into litigation. In May 2001, Ratnagiri Project was closed down and after its closure it was placed under the control of a Receiver appointed by the High Court of Bombay. Thereafter, the assets of the Power Project were lying with the Court's Receiver till 6.10.2005.

4.3. The Government of India and the Govt. of Maharashtra considered various alternatives to revive Dabhol Power Project considering huge investments which had already been made in the Project. Ultimately, in July 2005 Ratnagiri Gas and Power Pvt. Ltd., the Appellant herein, was incorporated as a company under the Companies Act, 1956 to function

as a Special Purpose Vehicle to take over the station with shareholding of NTPC, GAIL, the two public sector undertakings, the Financial Institutions and State Electricity Utility of Maharashtra. On 6.10.2005 the assets of the Project along with the LNG terminal and associated infrastructure facilities were taken over by the Appellant.

4.4. During the period from October 2006 to July 2007 the Central Commission approved tariff for sale of infirm power from the generating station utilizing liquid fuel from time to time.

4.5. On 10.4.2007 the Appellant and Respondent No. 2, the Distribution Licensee executed a power purchase agreement including the terms for determining the tariff consistent with the scheme finalized for revival of the Project.

4.6. On 18.7.2007 the Appellant and Respondent No. 2 filed a joint petition before the Central Commission for approval of tariff for the generating station based on the Power Purchase Agreement executed between them on 10.4.2007.

4.7. Block II and III of the Power Project were declared commercial after revival on 1.9.2007 and 21.11.2007 respectively. However, from January 2008 onwards the generating station suffered forced outages of gas turbine units for long duration mainly on account of failure of compressor.

4.8. In March, 2009 the stakeholders of the Appellant after series of meetings held under the aegis of the Government of India agreed on financial restructuring measures for ensuring long term project viability and to avoid terming of assets as Non Performing Assets in

which various concessions were considered by the stakeholders.

4.9. On 4.6.2009 the Central Commission decided the tariff in Petition No. 96/2007 generally applying the norms and parameters as per its Tariff Regulations, 2004 not accepting the pleadings of the Appellant for relaxation of norms and parameters in view of the special circumstances of the case. Aggrieved by the order of the Central Commission, the Appellant has filed this Appeal.

Submissions of Appellant (Generating Company):

5. Learned counsel for the Appellant has raised the following issues:

(i) Non Relaxation of norms specified in the Tariff Regulations.

(ii) Target Availability

(iii) O&M Expenses

(iv) Servicing of LNG terminal cost

(v) Other issues (interest on loan, working capital, heat rate for generation on Naphtha; etc.).

5.1. In support of its claim for relaxation of norms the learned counsel for the Appellant elaborated the special circumstances under which the Power Project was taken over and revived by the Appellant. The main aspects submitted by the learned counsel are:

i) The Ratnagiri Generating station was not installed or commissioned by the Appellant as a new generating station. The Appellant is not responsible for the condition of the plant and equipment taken over by it as well as the contracts entered into by Dabhol Power Co.

with equipment suppliers for performance of generator, operation & maintenance and supply of spares, etc. No guarantee or warranty was existing at the time of take over by the Appellant and the Original Equipment Manufacturers were not willing to provide guarantee for ensuring reliable operation of the plant.

ii) The generating plant remained closed and inoperative for about 4½ years under the control of the Receiver of the High Court.

iii) The Gas Turbine and Steam Turbine installed at the generating station were of 9FA Advanced Class not comparable with other gas turbines and steam turbines functioning in India. Thus, the Appellant was dependent

on the support of the Original Equipment Manufacturer (OEM) only.

iv) The exact status of the various machines, their working, etc., could not be fully ascertained during the preliminary assessment of repair work after take over.

5.2. The failure of gas turbines and steam turbines were not on account of any factor attributable to the Appellant. Accordingly, the Central Commission should have relaxed the norms for target availability and fixed the same at the actual availability during this period.

5.3. The Operation & Maintenance expenses have been considered as per the Tariff Regulations, 2004 which were based on 'E' class Gas Turbines. The Central

Commission should have relaxed the O&M expenses considering advanced 'F' class machines installed at the generating station of the Appellant.

5.4. The LNG terminal was to be treated as an integral part of the power project. The Central Commission has not considered the requirement of servicing the capital cost incurred in LNG terminal despite the revival package of the plan providing for such servicing immediately. The Central Commission should not have proceeded on the basis that the capital cost of LNG terminal could be serviced only after its commissioning.

5.5. The Central Commission has not considered interest on loan, liquid fuel stock for determining working capital, heat rate for generation on Naphtha as per the power purchase agreement entered by the

Appellant with the Respondent No.2. In the facts and circumstances of the case the Central Commission should have allowed the provisional tariff of Rs. 2.65 per kWh which is the outcome of the financial restructuring as agreed to by all the stakeholders for long term viability of the project.

Respondents' submissions:

6. Learned counsel for Respondent-1/Central Commission argued extensively in support of the impugned order.

7. Respondent-2, the Distribution licensee in its affidavit has maintained the same contentions as submitted before the Central Commission in the joint petition with the Appellant.

8. Prayas, the Respondent/Intervener has submitted written submissions supporting the Central

Commission's order and has prayed for not allowing any deviation from Central Commission's Regulations.

Issues

9. We have perused all the documents submitted by the parties and considered the contentions urged by the learned counsel of the parties. In the light of the rival contentions urged by the respective parties we frame the following questions that may arise for consideration in this Appeal:

i) Whether in view of the facts and circumstances of the case, the Central Commission should have exercised its power to relax and power to remove difficulties as per its Tariff Regulations, 2004?

ii) Whether the forced outage of the machines after declaration of commercial operation

should have been considered in view of circumstances of the case to relax the norm for Target Availability?

iii) Whether Operation & Maintenance norms were required to be relaxed considering that advanced 'F' class machines were installed at the generating station of the Appellant?

iv) Was the Central Commission was right in not including the capital cost of LNG terminal in view of peculiar circumstances of the case?

v) Whether the Central Commission should have considered the cost of maintenance of liquid fuel stock in determining the working capital requirements?

vi) Whether the Central Commission should have allowed provisional tariff of Rs. 2.65 per kWh, as submitted in the joint Application filed by both the parties which is the outcome of financial restructuring as agreed to by all the stakeholders for long term viability of the project?

On these questions, elaborate arguments were advanced on behalf of the parties. We have carefully considered the contentions urged by the learned counsel for the parties and perused all the documents and written submissions filed by the parties.

Discussions & Findings

10. The first and the core issue is whether this is a fit case for exercising power to relax and power to remove difficulties under the 2004 Regulations.

10.1. Let us first examine the relevant Regulations of the Central Commission. Regulations 12 and 13 of Tariff Regulations, 2004 are reproduced as under:

> *"12.* ***Power to Remove Difficulties:*** *If any difficulty arises in giving effect to these regulations, the Commission may, of its own motion or otherwise, by an order and after giving a reasonable opportunity to those likely to be affected by such order, make such provisions, not inconsistent with these regulations, as may appear to be necessary for removing the difficulty.*
>
> *13.* ***Power to Relax****: The Commission, for reasons to be recorded in writing, may vary any of the provisions of these regulations on its own motion or on an application made before it by an interested person."*

10.2. The relevant provisions of the CERC (Conduct of Business Regulations), 1999 are as under:

> ***"Saving of inherent power of the Commission***
>
> *111. Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of Commission.*
>
> *112. Nothing in these Regulations shall bar the Commission from adopting in conformity with the provisions of the Act a procedure, which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters".*

"Power to remove difficulties

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

10.3. In our opinion, power to remove difficulties is to be exercised when there is difficulty in effecting the Regulations and not when difficulty is caused due to application of the Regulations. Thus the exercising of power to remove difficulties does not arise in the present case.

10.4. Let us now examine the matter with respect to "Power to relax". Learned counsel for the Appellant referred to the order dated 26.9.2007 of the Central

Commission where it had exercised the power and relaxed the norms in case of Torrent Power Ltd. This Tribunal also upheld the relaxation granted by the Central Commission in the Appeal filed against the above relaxation of norms in 2009 ELR (APTEL) 124. The relevant extracts of the Judgment are as under:

> *"12. We notice from para 7 of the impugned order extracted above that certain new facts were also brought to its notice which were considered by the Commission.*
>
> *13. In view of the aforesaid we conclude that there are sufficient reasons which justify the enhancement of the percentage of initial spares from 4 to 5.87. The Commission is vested with the power to relax its Regulations and therefore we decide not to interfere with the order of the Commission".*

10.5.Hon'ble Supreme Court in Hindustan Steels Ltd. vs. A.K. Roy reported in (1969) 3 SCC 513 has held as under:-

> *"14. The question, however, still is whether the Tribunal was, in the circumstances of the case, justified in directing reinstatement. It is true that some of the decisions of this Court have laid down that where the discharge or dismissal of a workman is not legal or justified, the relief which would ordinarily follow be reinstatement. The Tribunal, however, has the discretion to award compensation instead of reinstatement if the circumstances of a particular case are unusual or exceptional so as to make reinstatement inexpedient or improper. The Tribunal has, therefore, to exercise its discretion judicially and in accordance with well –recognized principles in that regard and has to examine carefully the circumstances of each case and decide whether such a case is one of those exceptions to the general rule. If the Tribunal*

were to exercise its discretion in disregard of such circumstances or the principles laid down by this Court it would be a case either of no exercise of discretion or of one not legally exercised. In either case the High Court in exercise of its writ jurisdiction can interfere and cannot be content by simply saying that since the Tribunal has exercised its discretion it will not examine the circumstances of the case to ascertain whether or not such exercise was properly and in accordance with the well-settled principles made. If the High Court were to do so, it would be a refusal on its part to exercise jurisdiction".

10.6. This Tribunal in 2007 ELR APTEL 7 in the case of NTPC Ltd. vs. Madhya Pradesh State Electricity Board has held as under:

"It must be held, that the power comprised in Regulation 13 is essentially the "power to relax". In case any Regulation causes hardship to a party or works injustice to him

or application thereof leads to unjust result, the Regulation can be relaxed. The exercise of power under Regulation 13 of the Regulation is minimized by the requirement to record the reasons in writing by the Commission before any provision of the Regulations is relaxed. Therefore, there is no doubt that the Commission has the power to relax any provision of the Regulations".

10.7. The above Regulations and the decision give the judicial discretion to the Central Commission to relax norms based on the circumstances of the case. However, such a case has to be one of those exceptions to the general rule. There has to be sufficient reason to justify relaxation. It has to be exercised only in exceptional case and where non-exercise of the discretion would cause hardship and injustice to a party or would lead to unjust result. In the case of relaxation of the Regulations the reasons

have to be recorded in writing. Further, it has to be established by the party that the circumstances are not created due to act of omission or commission attributable to the party claiming the relaxation.

10.8. In the light of the above principle, let us now examine whether the circumstances in the present case would justify exercise of power to relax by the Central Commission. The Appellant's power project is not a normal green field or expansion project. The Project was set up by Dabhol Power Company Limited which closed down the project and abandoned it due to serious financial and other difficulties. The project remained closed down for about 4½ years under the control of Court's Receiver. Thereafter at the instance of the Government of India and the Government of Maharashtra a Special Purpose Vehicle in the form of the Appellant company was established and the assets

of the Project were taken over by the Appellant on 'as is where is' basis. No guarantees and warrantees were available for the various equipments installed in the project from the Original Equipment Manufacturers when the Appellant took it over after prolonged efforts made by all the stakeholders including the Government of India and the Govt. of Maharashtra to resolve a number of complex issues. The Gas turbines installed at the project were advanced 'F' class machines not comparable with other gas turbines functioning in India at that time. When such a 'foreign' project is taken over by a company not involved earlier with the execution of the project or similar project it takes some time to assess the health and functioning of various equipments which are complex machineries. In such circumstances one could also experience surprises. In this case also

some of the Gas Turbines experienced serious failures after commissioning which required detailed investigations and root cause analysis which are time consuming in such complex machines which operate at very high temperatures and speed.

11. Prayas, the Respondent/Intervener in its written submission has stated that the Tribunal in its Judgment dated 4.4.2007 in Appeal No. 251 of 2006, Reliance Energy Ltd. vs. MERC & Ors. had allowed the Appeal challenging the order of the State Commission improving the operating norms of the generators of Reliance Energy in view of achieving higher performance. This relaxation of norms in the present Appeal would not be in consonance with the above ruling of the Tribunal. We do not think that this Judgment will be of any help to the Respondent/Intervener. In case of Reliance Energy

the State Commission had decided to tighten the norms in deviation from the norms specified in its Regulations in view of better past performance thus depriving the Appellant of sharing the gains on account of such controllable factors which it was entitled to under Regulation 19 of the State Commission's Regulations, 2005. Thus the Tribunal held that it would be against principles of the natural justice if an individual station, instead of being rewarded for better performance is made to meet higher targets of performance and exposed to the risk of not achieving it. However, the Tribunal held that if the Commission wished to revise norms upward, it may do so but such revision has to be made applicable to all players after watching the performance of the industry over a period of time.

12. Thus, we are convinced that the present case would require consideration for exercise of 'power to relax' by the Central Commission in accordance with its Regulations for the initial years of operation of the Project to give it an opportunity to stablise. However, we have to go into each of issues raised by the Appellant before deciding which of these are required to be reconsidered by the Central Commission as we go along to examine the various issues framed by us.

13. We now take up the second issue relating to Target Availability.

13.1. The Central Commission has fixed the Target Availability as 80% at which full fixed charges of the power station are recovered as per its Tariff Regulations, 2004. The Appellant wants payment of full fixed charges at actual generation on the ground

that the failure of Gas Turbine and Steam Turbines were not due to any act of omission or commission attributable to the Appellant. The actual availability of the power station was 70.25% and 34.26% respectively for FY 2007-08 and 2008-09.

13.2. The Central Commission in the impugned order has held the following relating to Target Availability:

> *"The question of relaxation of target availability norms for the generating station during the period 1.9.2007 to 31.3.2009 to the extent of the actual availability, as prayed by Petitioner No.1 has been considered by the Commission. Petitioner No. 1 has declared the date of commercial operation of the Block-II and III of the generating station as 1.9.2007 and 21.11.2007 respectively <u>with the full knowledge that the generating station was not in a position to perform on sustained basis.</u> It has been observed that the actual availability on annual basis was 70.20% in 2007-08, whereas the*

same has been reduced to 34.26% in the year 2008-09. The 2004 regulations provide that generation before the date of commercial operation shall be treated as infirm power and there was no compulsion for Petitioner No.1 to declare commercial operation of the unit/block prior to its stabilization. In the above background, relaxation of target availability norms for the generating station to the level of actual availability, for the purpose of tariff is not justified. The risk of such low level of operation of the generating station has to be borne by the generator. In view of this, the target availability for the generating station for the period 1.9.2007 to 31.3.2009 has been considered as 80%".

13.3. According to the Prayas, the intervener, the Appellant had declared the commercial operation of the generating plant in a haste with full knowledge that the plant was not in a position to perform on a sustained basis. According to the Appellant, on the

other hand, the Blocks II & III were declared commercial after all the conditions required for commercial operation during 14 days trial run were achieved and there was no haste in declaring the project commercial. Between 1.9.2007 and 19.1.2008 Block-II containing two Gas Turbines and one steam Turbine functioned normally and generated electricity to a significant extent. Similarly, between 21.11.2007 and 18.6.2008 Block-III containing two Gas Turbines and one steam Turbine functioned effectively and generated significant quantum of electricity. On 19.1.2008 one of the Gas Turbines of Block–II failed as result of compressor distress. On 18.6.2008 one steam Turbine of Block-III required shutdown on account of the defects in High Pressure control valve and remained out of order till 1.10.2008. This resulted in complete outage of Block III from

18.06.2008 to 01.10.2008. On 8.11.2008 one Gas Turbine of Block-III failed on account of compressor distress. On 19.11.2008 certain cracks were found in the Compressor Blades pertaining to the other Gas Turbine of Block III and remained out of order till 16.3.2009. Accordingly, the Plant Availability of the power station suffered adversely.

13.4. On the last date of hearing on 8.9.2010 the learned counsel for the Appellant filed a written application pointing out subsequent developments. Learned counsel for the Respondent-1 was also directed to file reply to additional written submission of the Appellant. The Appellant in the Additional Affidavit has submitted that the Central Commission has passed order dated 18.8.2010 determining the tariff of the Appellant for subsequent period i.e. 1.4.2009 to 31.3.2014. A copy of the order was also

placed on record. In this order the Central Commission has dealt with relaxation of norms for Target Availability and O&M expenses.

13.5. The Central Commission after going into the history of the Project and prolonged forced outage of Gas Turbine & Steam Turbine in its order dated 18.8.2010 has decided to relax norms for Availability for the period 2009-10 to 2013-14 in view of circumstances of the case. The relevant paras of the said order are:

> *"27. We are of the view that with the long term support of OEM under Comprehensive Service Agreement, the generating station is expected to provide reliable and sustained performance. The Petitioner has indicated that the refurbishment of the gas turbines would be completed by 2010-11. Since refurbishment of various gas turbines would require the shifting of rotor assembly to OEM workshop, it would result in low availability of the*

machines during the period of refurbishment. In the given circumstances, there appears to be no other alternative but to go for the refurbishment of the gas turbines necessarily through the OEM to achieve and ensure the desired availability of the machines in order to make the generating station financially viable and for ensuring supply of electricity to the beneficiaries. The generating station has achieved an availability of 49.9% during the year 2009-10 only. The petitioner has sought to allow NAPAF of 66.72% during 2010-1 due to refurbishment of three more gas turbines. In the light of above facts and circumstances, we are of the view that the NAPAF norms as a special case for the viability of the project in the interest of the public at large during the period 2009-10 and 2010-11 could be relaxed as 49.9% and 66.72% respectively. As regards the period 2011-14, the petitioner has asked for the NAPAF of 80% as against the norm of 85% as specified in the 2009 regulations. Considering the fact that NAPAF of gas based generating station has been increased to 85% in 2009 regulations from the target availability

of 80% in 2004 regulations, the history of frequent failures of gas turbines of the generation station, and the need for stabilization of performance of the gas turbines after refurbishment, we are of the view that marginal relaxation in the NAPAF of the generating station is required during 2011-14 for achieving financial viability of the generating station and in the interest of the consumers".

"29.In view of our observations in para 25 above and in exercise of our power under Regulation 44 of 2009 regulations, we are relaxing the norms of NAPAF for gas based generating stations as specified under Regulation 26 (i) (a) of 2009 regulations in respect of the generating station as a special one time dispensation and allow the following NAPAF for different years of the tariff period 2009-14, for the purpose of recovery of full annual fixed charges:

Financial Year	*Net generation (MU)*	*NAPAF (%)*
2009-10	*8227*	*46.90*
2010-11	*11000*	*66.72*
2011-12 to 2013-14	*131881*	*80.00"*

Thus, the State Commission has relaxed the norms for availability for the years 2009-10 and 2010-11 as per the request of the Appellant at NAPF of 49.9% (equal to actual availability) and 66.72% respectively. For the subsequent years (2011-14) NAPF has been fixed at 80% against the normative value of 85% according to the relevant Tariff Regulations, 2009. Having decided to relax norms for subsequent years for the same reasons the Central Commission ought to consider the same for immediately prior period i.e. 1.9.2007 to 31.3.2009. It is also noticed that the Central Commission in its order dated 18.8.2010 has subjected the relaxation in norms below 80% to sharing of incentive in plant availability above 85% in future with the Respondent-2

and other beneficiaries till the relaxation provided in the order is made good.

13.6. Learned counsel for the Central Commission in its reply to the additional submissions filed by the Appellant has stated that the Central Commission has granted relaxation of the Target Availability norms primarily for the reason that the Appellant has entered into a Comprehensive Service Agreement dated 20.6.2009 with the Original Equipment Manufacturer and that such agreement was not available when the impugned order was passed on 4.6.2009. Learned counsel for the State Commission in support of this agreement has referred to para 26 & 27 of the order dated 18.8.2010. However, we have also noticed that for the period 2011-14 also the Central Commission has decided to relax the NAPAF to 80% as against the norm of 85% keeping in view the history of frequent

failure of gas turbines and need for stabilization of performance of the gas turbines after refurbishment. Thus the Comprehensive Service Agreement is not the only reason for relaxation of norms for Plant Availability for the period 2009-14 but also the past history of frequent failure of gas turbine and need for stabilization of performance after refurbishment.

13.7. In view of above special circumstances of the case and history of the project we are convinced that there is a case for relaxation of Plant Availability Factor norm for the period from 1.9.2007 to 31.3.2009. We accordingly direct the Central Commission to consider relaxation of Target Availability factor in exercise of its power to relax excluding the forced outage of the Gas Turbine and Steam Turbine units due to compressor distress in Blocks II & III and defect in High Pressure Control

Valve in Steam Turbine of Block III for the periods mentioned in para 13.3 above.

13.8. Accordingly, the Central Commission may determine the Target Availability for the period 1.9.2007 to 31.3.2008 and 1.4.2008 to 31.3.2009. However, relaxation in Target Availability norms to be decided by the Central Commission will be subject to the condition that the Appellant in future for its Ratnagiri Plant shall share the incentive in excess of 85% availability with the Respondent-2 and other beneficiaries till such time the relaxation in Target Availability allowed from 80% during the period 1.9.2007 to 31.3.2009 is made good. Accordingly, the Central Commission is directed to devise the appropriate provision for sharing of incentive on the lines of its order dated 18.8.2010.

14. The next issue is Operation & Maintenance expenses.

14.1. According to the Appellant, O&M expenses have been considered as per Tariff Regulations, 2004 which were based on Gas Power Stations of NTPC using 'E' class Gas Turbines; the Central Commission should have considered O&M expenses relevant to advanced 'F' class machines installed at the Appellant's Plant; 'F' class which is a new technologically advanced machine give substantial benefit in the form of higher efficiency but involves significantly increased operation & maintenance cost and that the Central Commission has mechanically applied the Tariff Regulations, 2004 without considering the special factors.

14.2. Let us first examine the provisions of Tariff Regulations, 2004 relating to Operation &

Maintenance norms for Gas based power plants. The Operation & Maintenance norms for gas turbines for plants other than small stations without warranty spares for the year 2007-08 and 2008-09 are as under:

2007-08	Rs. 8.77 lakhs/MW
2008-09	Rs. 9.12 lakhs/MW

The Central Commission in the impugned order has allowed the O&M expenses according to its Tariff Regulations, 2004. The O&M expenses as claimed by the Appellant based on actuals and that allowed by the Central Commission are as under:

'Rs. Lakhs'

	2007-08	2008-09
O&M expenses claimed as per actuals	2263	26801
O&M expenses allowed as per Regulations	5527	12194

Thus the actual O&M expenses of the Appellant were much lower than norms for FY 2007-08 and were much higher than the norms for the FY 2008-09.

14.3. The Central Commission has recorded the reasons for higher O&M expenses for FY 2008-09 as under:

> *"39. The O&M expenses norms for the tariff period 2004-09 in respect of gas/liquid fired generating stations, are also applicable to generating stations with advanced class machines. The major expenditure in the O&M expenses for the year 2008-09 is towards the repair and maintenance cost for refurbishment and overhaul of gas turbine and steam turbine, replacement of major parts like fuel nozzles, combustion liners etc. amounting to Rs. 1918 lakh, out of the total expenditure of Rs. 26801 lakh.*
>
> *40. The claim of Petitioner No. 1 for O&M expenses for the year 2007-08, based on*

actuals, works out to Rs. 3.32 lakh MW/year, which is lesser than the norms for the O&M expenses specified under the 2004 Regulations. However, for the year 2008-09, the claim is higher. On prudence check of the O&M expenses (at actuals) for the year 2008-09, it is noticed that a major portion of the repair and maintenance expenditure relates to repair and replacement of failed GT component which is not a routine expenditure. The O&M expenses for the year 2008-09 include expenditure in the nature of major overhaul and refurbishment undertaken during the year succeeding the date of commercial operation, which are normally incurred after 4 to 5 years of operation of the generating station".

14.4.The learned counsel for the Appellant has referred to a decision of the Central Commission dated 11.1.2010 made in Petition No. 109 of 2010 relating to Sugen Power Station of Torrent Power Ltd. where the

Central Commission has allowed higher O&M expenses for 'F' class machines. Further, in the Additional submissions the learned counsel for Appellant has referred to the order dated 18.8.2010 passed by the Central Commission for Ratnagiri Power Plant of the Appellant for the period 1.4.2009 to 31.3.2014 where relaxed O&M expenses have been allowed on the same lines as decided for Sugen Power Station of Torrent Power Ltd.

14.5. The learned counsel for the Central Commission (R-1) has submitted that the relaxation of the norms for the period 2009-14 was done in consideration of the fact that the long term service agreement signed by the petitioner on 20.6.2009 with the Original Equipment Manufacturer is likely to make the generating station viable for a smooth operation in the longer run (para 76 of the order dated 18.8.2010). In

view of subsequent development of signing of Comprehensive Service Agreement with OEM, the parity of reasoning does not apply to challenge the findings and conclusions in the order impugned in the present Appeal.

14.6. We have noticed that in the Tariff Regulations, 2004 the Central Commission has made no distinction in O&M expenses norms for 'E' class Machines and Advanced class Machines even though lower heat rate norms for advanced class machines was determined compared to the E class machines. The claim of the Appellant of O&M expenses for 2007-08 is based on actuals and works out to Rs. 3.32 lakh/MW/year, which is much lesser than the norm of Rs. 8.77 lakh/MW/year. However, for 2008-09 the claim of the Appellant is much higher than the norms.

14.7. The O&M norms for FY 2008-09 as per 2004 Regulations vis. a vis. Appellant's claim, norms for 2009-10 as per 2009 Regulations and that allowed to the Appellant in Central Commission's order dated 18.8.2010 are tabulated below:

"Figures in Rs Lakh/MW"

Appellant's Claim for 2008-09	Norm for 2008-09 as per 2004 Regulations	Norm for 2009-10 as per 2009 Regulations	Relaxed norms allowed for FY 2009-10
20.04	9.12	14.80	26.41

We have noticed that the relaxed norms allowed for 2009-10 also include the rehabilitation cost according to the order of the Central Commission. Moreover, we also notice steep increase (62%) in the norms adopted for 2009-10 as per 2009 Regulations compared to norms for 2008-09 as per 2004 Regulations which can not be attributable to normal annual escalation due to inflation.

14.8.Learned counsel for the Central Commission in his reply to the Additional submissions filed by the Appellant has stated that the primary reason for relaxing the aforesaid norms was that subsequently the Appellant had entered into a Comprehensive Service Agreement with the OEM on 20.6.2009. Same argument has been extended by the learned counsel in support of relaxed norms allowed in respect of Sugen gas based plant of Torrent Power Ltd. for the period 2009-2014. However, we notice that one of the reasons for adopting relaxed norms was advanced 'F' class machines which involve higher temperatures. The relevant paras of the order dated 11.1.2010 in Petition No. 109 of 2009 are reproduced below:

> *"46..... In the absence of O&M data for the gas/liquid fuel based stations in the country using advance class technology, no distinction was made*

at the time of finalization of norms based on class of technology.

47. We have noticed that gas turbine technology is getting more and more advanced, promising the best of economic and environmental performance. The advance class machines of different make have achieved efficiency levels of the order of 55%-60% by targeting a firing temperature of around 1300°C or more. As project developers continue to select advance technologies to obtain competitive advantages in heat rate, emissions performance and specific costs, a quantitative risk assessment becomes more critical. To reduce financial exposure to technical risk, long-term services agreements (LTSA/LTMA) with the OEM are becoming more prevalent and desirable in order to have appropriate confidence level for the availability and efficiency levels of operation of the advance class machine.

48. We notice that there are significant technological differences between 'E' class and 'F'

class turbines. 'F' class gas turbines have been designed for fuel firing temperature of the order of 1250-1320°C, which is much higher than 'E'-class gas turbine with firing temperature of 1090-1100°C.

49. In the light of these facts, we are of the view that there is a case for a review and relaxation of O&M expenses norms in case of Sugen CCGT station using advance class gas turbines".

14.9. In view of the circumstances of the case explained above and use of Advanced 'F' class machines at the project, we are of the opinion that there exists sufficient grounds and reasonable justification for relaxation of O&M norms for Ratnagiri Power Station of the Appellant for the period from 1.9.2007 to 31.3.2009. The Appellant may not be deprived of the relaxed norms merely because it has taken some time to enter into Comprehensive Service

Agreement with OEM which may be due to prevailing circumstances of forced outage of the gas turbines of Block II & III for prolonged periods.

Accordingly, the Central Commission is directed to consider relaxation of O&M norms in exercise of its power to relax under the Regulations, keeping in view of the increased norms adopted in the 2009 Regulations and the relaxation allowed subsequently for the Appellant's plant and Sugen Power Station of Torrent Power Ltd.

15. The next issue is consideration of capital cost of LNG terminal.

15.1. According to learned counsel for the Appellant, one of the terms of financial package approved by Government of India was that the cost of LNG terminal should also be serviced immediately

though the LNG Terminal may be put into effective use after some time. If the cost of LNG terminal is not serviced, it would result in non-compliance of financial package leading to the asset being termed as non-performing asset.

15.2. According to the learned counsel for the Central Commission (R-1) LNG terminal is not in operation and the said asset was yet to be capitalized. Hence, as per the 2004 Tariff Regulations the cost of LNG terminal can not be serviced through power tariff.

15.3. We have noticed that the Appellant in its petition before the Central Commission had claimed the apportioned cost of LNG terminal on Block II & III as 1415.51 crores in the total cost of 7121.97 crores. According to Regulation 17 of 2004 Regulations of the Central Commission, subject to prudence check by the

Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of final tariff. The LNG terminal has not been commissioned so far. Therefore, its capital cost can not be admitted and serviced through the electricity tariff. If its cost is serviced through electricity tariff it would result in undue burden on the consumer for a facility which has so far not been put to use. Thus, there is no merit in this contention urged by the Appellant. Therefore, this issue is decided against the Appellant.

16. The next issue is regarding inclusion of the cost of maintenance of liquid fuel stock in determining Working Capital requirements.

16.1. According to the learned counsel for the Appellant, Ratnagiri Power Station is maintaining

Naphtha stock and the customer/stakeholders have so far not decided to dispense with the facility in view of uncertain gas tie-ups for the life of the plant. The Power Purchase Agreement also provided for Naphtha as secondary fuel.

16.2. Learned counsel for the Central Commission (R-1) has submitted that both the blocks of the generating stations went into commercial operation after the availability of LNG; the Appellant in its affidavit dated 19.3.2009 had submitted that Block III of the generating station neither procured nor burnt Naphtha as fuel during the three months preceding its commercial operation; the Appellant in its affidavit dated 14.1.2009 had further submitted that the Govt. of India had arranged 1.5 MMTA LNG upto September, 2009 which was sufficient for two power blocks and that the Central Commission keeping in view of the

requirement of the Regulation and actual use of fuel did not consider cost of Naphtha for 15 days stock for computation of working capital as liquid fuel was not being used for the operation of the generating station.

16.3. We have examined the affidavit of the Appellant dated 14.1.2009 submitted before the Central Commission. The relevant extracts from para 12(iii) & 12(v)(d) is reproduced below:

"iii) …… Though RGPPL started first of the power blocks using Liquid fuels (Naphtha and HSD), these were never envisaged for commercial operation due to prohibitive cost, reduced hot gas path component life and higher Heat Rate etc. In order to partially tide over the crises, GOI/EGoM decided a contingency arrangement by advancing construction of Dahej-Dabhol pipeline of GAIL and supply of R-LNG from Petronet LNG Limited, Dahej. The arrangement is for 1.5 MMTPA LNG upto September 2009. The quantity is sufficient for about two power blocks of RGPPL.

v)…….

(d) Gas/LNG prices are market driven and even if the domestic gas serves as the fuel for the power block, LNG terminal is expected to make financial contribution to the revenue stream thereby justifying the cost incurred in the long run. It is also submitted that as domestic gas has been allocated for the power project, use of LNG facility is being planned to be utilized for LNG tolling".

16.4. The Central Commission has allowed fuel cost for one month taking into account operation of the plant only on LNG. Therefore, we do not find any infirmity in the finding of the Central Commission in this regard.

16.5. Learned counsel had also raised a related issue that the Central Commission had not considered heat rate of 2000 Kcal/kWh for generation of a Naphtha. In view of the above findings about

operation of the power station only on LNG, this issue does not survive.

17. The last issue is regarding the Central Commission not accepting tariff as submitted in the joint application by the Appellant and Respondent-2/distribution company before the Central Commission keeping in view of the financial restructuring as agreed by all stakeholders for long term viability of the Project.

17.1. According to the learned counsel for the Appellant, the Central Commission ought to have allowed provisional tariff of Rs. 2.65 per kWh which was the outcome of the financial restructuring agreed to by all the stakeholders under the aegis of the Government of India. The Central Commission should have also considered an interim capacity charge of Rs.

430 Cr. out of tariff for FY 2007-08 and FY 2008-09 and treated it as regulatory asset to be recovered over a period of 10 years along with tariff in equal monthly instalments with embedded capital return factor of 12% per annum.

17.2. According to Prayas, the intervener, the tariff of the Appellant's Power plant as proposed in the tariff petition before the Central Commission is much higher than the tariff in some of the power purchase agreements signed by the Respondent No. 2 with some private developers through tariff based competitive biding and high tariff of the Appellant will cause burden on the consumers. There is also a conflict of interest of the Respondent-2 in procuring power from the Appellant at high cost due to share holding of MSEB holding company in the Appellant's power plant.

17.3. We have noticed that the tariff petition filed before the Central Commission was not in accordance with the formats prescribed in the 2004 Regulations. Accordingly, the Central Commission by its order dated 4.12.2008 directed the Appellant to file the complete details as per the prescribed formats. The Appellant thereafter filed the required information through a revised petition in accordance with 2004 Regulations.

17.4. We find that the Central Commission has determined the tariff as per the 2004 Regulations, rightly so, as the Central Commission can only determine the tariff as per its Regulations and not in any other way. The Central Commission is not expected to mechanically accept the tariff as per the agreements or understanding reached between the

Project stakeholders. There is also no provision of Regulatory Assets in the Regulations. Thus, we find that there is no substance in the ground urged by the Appellant. Accordingly, we decide this issue against the Appellant.

18. **Summary of our findings:**

18.1. The Regulations of the Central Commission and decisions of the Tribunal and the Supreme Court confer the judicial discretion to the Central Commission to exercise power to relax norms in exceptional case. However, while exercising the power to relax there should be sufficient reason to justify the relaxation and non-exercise of discretion would cause hardship and injustice to a party or lead to unjust result. It has also to be established by the party that the circumstances are not created due to act of

omission or commission attributable to the party claiming the relaxation. Further, the reasons justifying relaxation have to be recorded in writing. After careful examination of the circumstances of the present case we have come to the conclusion that there is sufficient justification for the Central Commission to consider relaxation in norms in the initial years of operation of the Appellant's Power Plant to give it an opportunity to stabilize.

18.2. The second issue is relating to target availability. According to the Central Commission there was haste in declaring the units commercial. The Appellant has explained that the units were declared commercial after successful trial run for about 14 days. Block II & III functioned effectively for about 4 and 5 months respectively after declaring them commercial. Thus, there was no

haste in declaring the units commercial. However, thereafter the Gas turbines and steam turbines suffered long outages due to defects in High Pressure Control valve and compressor. We have noticed that subsequently the Central Commission vide its order dated 18.8.2010 has decided to relax norms for Availability for the period 2009-14. According to learned counsel for the Central Commission, the reason for relaxing norms was the signing of Comprehensive Service Agreement dated 20.6.2009 by the Appellant with the OEM which was not available when the impugned order was passed on 4.6.2009. We find that one of the reasons for relaxing norms for Target Availability was frequent failure of gas turbine and the need for stabilization of performance after refurbishment. After considering history of the project and

circumstances of the case there exists sufficient justification for relaxation of norms for Target Availability for the period from 1.9.2007 to 31.3.2009. We, therefore, direct the Central Commission to consider relaxation of Target Availability excluding the forced outage of the Gas Turbine and Steam Turbine due to compressor distress in Blocks II & III and defect in High Pressure Control Valve in steam turbine of Block III for the periods mentioned in para 13.3 above. However, the relaxation in Target Availability made during 1.9.2007 to 31.3.2009 will be subject to the condition that in future the Appellant shall share the incentive in excess of 85% availability with the R-2 and other beneficiaries of the project till the relaxation made during the period 2007-09 is made good. Accordingly, the Central Commission is

directed to devise the appropriate provision for sharing of incentive on the lines of its order dated 18.8.2010.

18.3. The next issue is relaxation of O&M norms. According to the Appellant the O&M norms need to be relaxed in view of Advanced class 'F' Machines installed at Ratnagiri Project. The Appellant also referred to subsequent orders of Central Commission dated 11.1.2010 in case of Torrent Power Ltd. and order dated 18.8.2010 in case of tariff determination of Ratnagiri Project for the period 2009-14 when O&M norms have been relaxed. According to the learned counsel for the Central Commission, the relaxation in these cases is due to Comprehensive Maintenance Contract signed with OEM subsequent to the impugned order. We notice that besides Comprehensive

Maintenance contract another reason for allowing relaxed O&M norms is 'F' class Machine as mentioned in order dated 11.1.2010 in Petition No. 109 of 2009. In view of the circumstances of the case and use of 'F' class machine there is sufficient justification for the Central Commission to relax norms for O&M. The Appellant may not be deprived of the relaxed norms merely because it has taken some time to sign Comprehensive Maintenance Contract with OEM which may be due to prevailing circumstances of forced outage of the units for prolonged periods during the period 2007-09. Accordingly, the Central Commission is directed to consider relaxation of norms for O&M for the period 1.9.2007 to 31.3.2009, keeping in view of the proportionately higher norms adopted

in the 2009 Regulations and relaxation allowed subsequently for Appellant's plant and Sugen.

18.4. The next issue is capital cost of LNG Terminal. The Appellant has claimed apportionment of cost of LNG terminal in Block II & III. According to Regulation 17 of 2004 Regulations, the actual expenditure incurred on completion of the project, subject to prudence check by the Central Commission, shall form basis for determination of tariff. The LNG terminal has not been commissioned therefore, its cost can not be loaded on to electricity tariff causing undue burden on the consumers for a facility which has not been put to use. Thus there is no merit in the contention of the Appellant regarding cost of LNG Terminal.

18.5. The next issue is cost of maintenance of liquid fuel stock in determining Working Capital. We notice that the Appellant in its affidavit dated 14.1.2009 before the Central Commission had submitted that Liquid Fuels were never envisaged for commercial operation due to prohibitive cost, etc., and sufficient domestic gas has been allocated for two blocks of Ratnagiri Project. The Central Commission has allowed fuel cost for one month taking into account operation of the plant only on LNG. Thus, we do not find any fault in the finding of the Central Commission in this regard.

18.6. The last issue is regarding Central Commission not accepting tariff as submitted in joint application by the Appellant and Respondent-2/distribution licensee. We find that the Central Commission has rightly determined the tariff as

per its Regulations as it can determine the tariff only as per its Regulations and in no other way. Thus, we find no substance in the argument of the Appellant.

Conclusion

19. In view of above we allow the Appeal partly in respect of the Target Availability and the Operation & Maintenance expenditure and remand the matter to the Central Commission to re-determine the norms in respect of these factors only in exercise of its power to relax and re-determine the tariff accordingly after hearing all parties who were heard by the Central Commission in Petition No. 96 of 2007. In respect of the other issues, we confirm the impugned order. No order as to costs.

20. Pronounced in the open court on this **25th day of March, 2011.**

(Justice P.S. Datta) (Rakesh Nath) (Justice M. Karpaga Vinayagam)
Judicial Member Technical Member Chairperson

REPORTABLE / NON-REPORTABLE

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