

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 184 Of 2009

Dated : the 7th January, 2011

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

In the matter of:

**NTPC Limited (Formerly National Thermal Power Corporation Ltd.)
NTPC Bhawan, Scope Complex,
Core-7, Institutional Areas, Lodhi Road,
New Delhi- 110 003 Appellant**

Vs

- 1. Central Electricity Regulatory Commission,
3rd & 4th Floor, Chanderlok Building, 36, Janpath,
New Delhi- 110 001.**
- 2. Madhya Pradesh State Electricity Board,
(Through Madhya Pradesh Power Trading Company Ltd.)
Shakti Bhawan, Vidyut Nagar, Jabalpur 482 008.**
- 3. Maharashtra State Electricity Board,
(Through Maharashtra State Elec. Dist. Company Ltd.),
Prakashgad, Bandra (East), Mumbai 400 051.**
- 4. Gujrat Electricity Board,
(Through Gujrat Urja Vikas Nigam Limited),
Vidyut Bhawan, Race Course, Vadodra- 390 007.**
- 5. Goa Electricity Department,
Vidyut Bhawa, 3rd Floor, Panaji 403 001, Goa**

6. **Electricity Department,
Administration of Daman & Diu, Daman 396 210**
7. **Electricity Department,
Administration of Dadra & Nagar Haveli,
Silvassa, Via Vapi 396 210**
8. **Chhattisgarh State Power Trading Co. Ltd.,
P.O. Sunder Nagar, Danganiya, Raipur 492 013.**
9. **Central Electricity Authority (CEA),
Sewa Bhawan, R.K. Puram, New Delhi- 110066.**
10. **Western Regional Electricity Board,
(Through Western Regional Power Committee),
F-3, MIDC Area, Marol, Aandheri (E), Mumbai 400 093.**

..... Respondents

**Counsel for Appellant: Mr. M.G. Ramachandran
Ms. Swapna Seshadri**

**Counsel for Respondents: Mr. Pradeep Misra,
Mr. Shashank Pandit**

J u d g m e n t

Per Hon'ble Shri Rakesh Nath, Technical Member:

1. This Appeal has been filed by NTPC Ltd., a generating company, against the order dated

24.10.2002 of the Central Electricity Regulatory Commission dismissing the petition of NTPC for claim of deemed generation for Kawas and Gandhar gas based stations. The Central Commission is Respondent-1. M.P. State Electricity Board and other beneficiaries of the Kawas and Gandhar power stations are Respondents 2 to 8. Central Electricity Authority (CEA) and Western Regional Electricity Board (WREB) are the Respondent No. 9 and 10 respectively.

Background:

2. The brief background of the case is discussed in the following paragraphs.
3. NTPC set up Kawas and Gandhar gas based thermal power stations in Gujrat between the years 1992-93 to 1995-96. The tariff for these stations was to be determined according to the Notification issued by the Government of India in exercise of

the powers under Section 43A of the Electricity (Supply) Act, 1948. The notification had a provision of incentive payable by the beneficiaries to NTPC for generation above upper normative level and disincentive to NTPC if the actual generation in any financial year fell below the lower normative level. It was also specified that for the purpose of incentive/disincentive calculations, the actual generation achieved will include the quantum of backing down, as certified by the Regional Electricity Board due to lack of system demand and due to other conditions not attributable to NTPC as certified by Central Electricity Authority (CEA) as deemed generation. The power stations could recover full fixed charges if they achieved generation, including deemed generation, at lower normative level. On achieving generation level above upper normative level including deemed generation, they were entitled to incentives too besides recovering full fixed charges.

4. Gandhar and Kawas Gas based Stations could not get adequate supply of gas due to which they suffered loss of generation. As a result of non-availability of gas these power stations could not achieve lower normative generation level required for claiming full fixed charges.
5. NTPC approached CEA with the contention that non-availability of gas was a condition not attributable to NTPC and accordingly requested CEA for deemed generation certification on account of non-availability of gas.
6. On 29.11.1995, CEA accepted NTPC's request for deemed generation but advised NTPC to explore the possibility of entering into commercial and legally enforceable fuel supply agreement with gas suppliers to avoid such problem in future. On 27.7.1996 CEA informed NTPC that such benefit for deemed generation would be given only if actual generation at a station is less than the normative

lower limit attracting disincentive. Thus such deemed generation would be available only for recovery of full fixed charges of the station and not for claiming incentive. It was also decided by CEA that in future NTPC would furnish the information in requisite format to Western Regional Electricity Board (WREB) for verification and the verified figures would be submitted to CEA. For the certification of deemed generation for past period for which no data was available with WREB, it was decided by CEA that the certification would be done based on NTPC data provided constituents agreed for certification based on NTPC data.

7. On 28.1.1998 CEA communicated its decision to NTPC that the existing application of deemed generation benefit would be continued only till 31.03.1998. Thereafter, the risk of non-availability of fuel and transportation has to be borne by NTPC as the same could not be absolved from the

responsibility of arranging fuel for its power stations.

8. NTPC, on direction from the Central Commission, filed petition No. 78 of 2001 on 6.9.2001 with request for direction to CEA to issue certification for deemed generation upto 31.3.1998 for Kawas and Gandhar power stations. However, the Central Commission by its order dated 7.11.2001 declined to give any direction to CEA. However, NTPC was granted time to furnish CEA certification. NTPC could not obtain the certificate from CEA and finally the Central Commission vide its order dated 24.12.2002 dismissed the petition of NTPC in view of non-submission of the certification from CEA by NTPC.
9. In the mean time, CEA issued the deemed generation certificate for the period from 1.8.1996 to 31.3.1998, the period for which data was available with the WREB. The WREB Secretariat

also collected the data for the period prior to 1.8.1996 from NTPC and also verified the same from the records of NTPC. The data was put up before the Board meeting of WREB but the constituents did not agree to certification of the deemed generation.

10. NTPC filed a review petition along with deemed generation certified by CEA for the period 1.8.1996 to 31.3.1998. The Central Commission by its order dated 4.4.2003 allowed deemed generation as per CEA certification but did not allow the same for the prior period (FY 1992-93 to 31.7.1996).
11. Earlier, NTPC aggrieved by the order dated 24.12.2002 passed by the Central Commission had filed an Appeal before the Hon'ble High Court of Delhi. By order dated 4.2.2008, the Hon'ble High Court of Delhi transferred the Appeal to this Tribunal.

NTPC Ltd. (Appellant):

12. Learned Counsel for the Appellant has argued that the Central Commission has rejected the claim of NTPC for the period FY 1992-93 to 31.7.1996 merely on the ground that deemed generation certificate from CEA was not made available by NTPC. The reason for CEA not issuing the certificate was that the constituents of WREB did not agree to the data made available by NTPC. The constituents of WREB had not agreed to the data of NTPC without any justification and for ulterior purpose. The Central Commission should have adjudicated on the issue based on the relevant material and evidence on record.

13. In its order dated 23.6.2000 in another matter, the Central Commission had held that the decision on disincentive and incentive is an adjudicatory function of the Central Commission and not a procedural matter. Yet in the impugned order, the

Central Commission has treated the issue of deemed generation due to non-availability of gas and consequent application of incentive/disincentive as procedural matter dependent on certification by the CEA. Thus the Central Commission has failed to exercise its adjudicatory function in accordance with the provision of the Act. NTPC's claim has to be decided on merits and can not be rejected on technicalities.

14. According to the Learned Counsel for the NTPC, as per the decision of CEA on 27.7.1996, NTPC was required for the first time, to maintain the records in specified format to enable it to claim deemed generation. NTPC had, accordingly, maintained the data in the prescribed format for the period 1.8.1996 to 31.3.1998. For the period prior to 1.8.1996 there was no direction to maintain data in any specific format. However, it maintained the log book and other records as per its own practice. The representative of WREB Secretariat had

subsequently verified the NTPC record. Thus WREB Secretariat is in a position to certify the deemed generation. Accordingly, the Central Commission should be directed to accept the certification of WREB in the absence of consent from the beneficiaries.

MPSEB/MPPTC Ltd. (Respondent No. 2):

15. Learned Counsel for Respondent No.2 argued that responsibility for arranging fuel was entirely that of the generating company and non-availability of fuel could not be considered as a condition not attributable to NTPC. In any case loss of generation due to non-availability of gas could not be considered as 'backing down' due to reasons not attributable to NTPC as specified in Government of India Notification. CEA for the first time in July, 1996 had decided that deemed generation benefit due to short supply of gas should be given to NTPC. Even assuming that the same

decision is applicable then also it cannot be applied retrospectively from 1992-93. According to Government of India Notification CEA has to certify deemed generation for reasons not attributable to NTPC, except low demand. Thus the Central Commission has rightly rejected the claim of NTPC in the absence of certification by CEA.

Respondent No. 10, WRPC also filed written submissions giving the factual position relating to deemed generation certification.

16. On the basis of the rival contentions of both the parties, the following questions would arise:

- (i) Whether the Central Commission was correct in rejecting the claim of the Appellant for deemed generation merely on ground that the certificate from CEA was not available?
- (ii) Whether the deemed generation on account of non-availability of gas could be allowed to NTPC based on the data submitted by NTPC even without certification by CEA?

ANALYSIS AND FINDINGS:

17. Both these issues are inter-related and therefore are discussed together. Let us first examine the Government of India tariff notification for Kawas and Gandhar gas based stations. The notification dated 30.4.1994 and 28.4.1997 for Kawas and Gandhar respectively clearly indicate that for the purpose of incentive and disincentive calculation the actual generation level achieved in any financial year will include the quantum of backing down as certified by Regional Electricity Board due to lack of system demand and other conditions not attributable to NTPC as certified by CEA, as deemed generation. Thus the backing down of generation due to low system demand has to be certified by the Regional Electricity Board and backing down of generation due to other conditions not attributable to NTPC by CEA.

18. It is also not clearly mentioned in the Government of India Notifications dated 30.4.1994 and 28.04.1997 that non-availability of fuel will be considered as a condition not attributable to the generating company and loss of generation on this account can be considered as 'backing down' for the purpose of deemed generation. This is a debatable issue. CEA after deliberation in July, 1996 on the representation of NTPC decided that deemed generation benefit due to short supply of gas should be given only if the actual generation is less than the normative lower limit attracting disincentive to enable NTPC to recover the full fixed cost. CEA for future also devised a format for certification of deemed generation in which NTPC had to submit information to Member Secretary, Regional Electricity Board who in turn had to verify and forward the information to CEA. CEA would then certify the deemed generation on the basis of the figures as may be verified by the Member Secretary, Regional Electricity Board. For the past

period, for which data was not available with Regional Electricity Board, CEA decided to certify deemed generation based on NTPC data provided the constituents agree for certification based on NTPC data. Subsequently, in December 1998 CEA decided that the deemed generation benefit on account of short supply of gas would be continued till 31.3.1998 and thereafter the fuel risk has to be borne by NTPC as NTPC cannot be absolved of the responsibility of arranging fuel for its power stations.

19. Thus, it is clear that the CEA had arrived at a decision to allow deemed generation for a certain period subject to certain conditions for verification of data and only to the extent of NTPC recovering its fixed charges for its gas based stations. CEA's decision to allow deemed generation and that too in case the actual generation was less than the lower normative level was not exactly as per the notification of Government of India. As per

Government of India notification backing down due to reasons non-attributable to NTPC as certified by CEA has to be considered as deemed generation even for the purpose of claiming incentive. However, CEA deemed it fit to allow deemed generation due to shortage of fuel only if the actual generation is less than the normative lower level and allow NTPC to recover its fixed charges and not allow any incentive due to such deemed generation. Thus CEA's decision was an administrative decision to allow NTPC to recover its full fixed charges for a certain period after which they were responsible to make necessary arrangement for fuel.

20. Admittedly, CEA has certified the deemed generation for the period between 1.8.1996 to 31.3.1998 on the basis of the data submitted by the NTPC to the WREB in the requisite format duly verified by WREB. However, for period prior to 1.8.1996 for which no data was available with

WREB, it was decided by CEA to certify the deemed generation based on NTPC data provided constituents agree to certification based on NTPC data. Admittedly, the constituents have not agreed to the NTPC data. CEA, therefore, did not certify the deemed generation due to non-availability of gas.

21. NTPC had earlier submitted a petition on 6.9.2001 before the Central Commission only on the direction of the latter regarding incentive/disincentive for Gandhar and Kawas gas based power stations with a prayer to advise CEA to expedite certification of deemed generation and thereafter to determine the incentive/ disincentive. The Central Commission by order dated 6.11.2001 directed NTPC to amend the prayer. The relevant portion of the order is reproduced below:

“7. We have carefully gone through the notifications dated 30.4.1994 and 28.4.1997, copies at annexure-III & IV respectively for

Kawas and Gandhar stations. We feel that it was the petitioner's own responsibility to obtain "deemed generation" certificate from CEA, if the backing down was on account of "other conditions not attributable to NTPC" and a direction to CEA for giving a certificate of 'deemed generation' under the circumstances was not within the purview of the Commission. When faced with the situation, Shri K.K. Garg, GM, appearing for NTPC submitted that the petitioner would make further efforts with CEA to persuade for certification of 'deemed generation' on account of non-availability of gas. He prayed for three months time for the purpose and submitted that the 'deemed generation' certificate shall be filed accordingly.

8. In view of the statement made by Shri Garg, we do not propose to go into the

contention raised on behalf of MPEB at this stage and leave this issue open to be considered at the time of final disposal of the petition. We allow three months time to the petitioner to place on record the necessary certificates. Accordingly, the direction sought by the petitioner to CEA does not survive. In the light of this, the petitioner is directed to take steps for amendment of the prayer clause.”

22. NTPC did not file Appeal against this order but complied with the order by submitting an amended petition before the Central Commission in February 2002 praying for approval of incentive/disincentive payable for Kawas and Gandhar gas based power stations. The Central Commission, however, did not entertain the claim of NTPC in the absence of deemed generation certificate from CEA.

23. Learned Counsel for the Appellant has now argued that the Central Commission should have allowed the deemed generation based on the NTPC data verified by WREB Secretariat (now WRPC Secretariat). We feel that the Central Commission's order for the period prior to formation of the Central Commission and its Regulations has to be based on the Government of India notification and any agreement between the parties. In the Government of India notification, it is not specified that non-availability of fuel has to be considered as a condition non-attributable to NTPC for the purpose of deemed generation.

24. According to the notification, CEA has to certify deemed generation due to backing down for reasons non-attributable to NTPC. CEA has taken an administrative decision to allow deemed generation only if the actual generation fell below the normative lower limit, that too till 31.3.1998, and subject to certain conditions for verification of data

for the past and future. According to the notification, CEA was the concerned authority to certify the deemed generation for reasons non-attributable to NTPC. CEA has certified the deemed generation for the period 1.8.1996 to 31.3.1998 and accordingly the benefit for the same has been passed on to NTPC by the Central Commission. For prior period for which data was not available with WREB, the requisite condition of agreement on NTPC data by the constituents has not been met. Therefore, CEA has not issued the deemed generation certificate. The Central Commission has rightly decided not to give any directions to CEA, a statutory authority under the Act, to certify the deemed generation for the past period prior to August, 1996. Thus we do not find any fault in the decision of the Central Commission. The data verified by WREB Secretariat from NTPC records cannot be considered by the Central Commission for allowing deemed generation without a certification by CEA.

25. It is also argued by the Learned Counsel for the Appellant that Maharashtra and Gujrat Electricity Boards (Respondent 3 & 4 respectively) have settled the matter relating to deemed generation due to non-availability of gas with NTPC as 'one time settlement' and therefore the same should also be applicable to other constituents. We do not accept this argument. Agreement by some of the Respondents as 'one time settlement' can not be imposed on other Respondents, who have not accepted the deemed generation due to non-availability of gas based on NTPC data.

Conclusion:

26. In view of above, we find that there is no substance in the Appeal. The Appeal, is therefore, dismissed. No order as to costs.

27. Pronounced in the open court on this 7th day of
January, 2011.

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

_INDEX : REPORTABLE / NON-REPORTABLE.

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