

Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 118 of 2007

Dated: 13th January, 2009

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member**

IN THE MATTER OF:

M.P. Power Trading Company Ltd.
Block No. 2, Ground Floor,
Shakti Bhawan, Rampur,
Jabalpur – 482008

Versus

1. National Thermal Power Corporation Ltd.
Through its CMD,
7, Institutional Area, NTPC Bhawan,
Scope Complex, Lodhi Road
New Delhi
2. Central Electricity Regulatory Commission
Through its Secretary,
Core 3, 6th Floor, Scope Complex
Lodhi Road, New Delhi- 110003
3. Central Electricity Authority
Through its Chairman,
Sewa Bhawan, R.K. Puram
New Delhi – 110066
4. MAHADISCOM
Earlier known as Maharashtra State Electricity Board,
Through its Chairman-cum-Managing Director
'Prakashgad', Bandra (East),
Mumbai – 400051

5. Gujarat Uрга Vikas Nigam Ltd. (GUVNL)
Earlier known as Gujarat Electricity Board
Through its Chairman – cum – Managing Director
Vidyut Bhawan, Race Course,
Vadodara – 390007
6. Chhattisgarh State Electricity Board,
Through its Chairman, Raipur,
P.O. Sunder Nagar, Danganiya,
Raipur – 492012
7. Goa Electricity Department,
Through its Chief Engineer
Vidyut Bhawan, 3rd Floor, Panjim
Goa
8. Executive Engineer, Electricity Department,
Administration of Daman & Diu,
Through its Competent Authority
Daman – 396210
9. Executive Engineer, Electricity Department,
Administration of Dadra & Nagar Haveli,
Through its Competent Authority
Silvassa Via Vapi.

Counsel for the Appellant : Mr. Pradeep Misra with
Mr. Suraj Singh

Counsel for the Respondent(s): Mr. M.G. Ramachandran with
Mr. Anand K. Ganesan &
Ms. Swapna Seshadri for
Resp.1
Mr. Ajit S. Bhasme for Resp.4

JUDGMENT

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

The Madhya Pradesh Power Trading Company (MPPTC) is the Appellant herein.

2. Through the present Appeal, the Appellant has challenged the impugned order dated 2/12/03 passed in the Review Petition filed by the NTPC by the Central Commission under which the disincentive fee for the years 1996-97 and 1997-98 payable by the NTPC to the Appellant was revised.

3. The background of the case is as follows:

4. The M.P. Power Trading Co. the appellant herein has been assigned work relating to bulk purchase and bulk supply of electricity along with the related agreements and arrangements with the erstwhile Madhya Pradesh Electricity Board (MPEB). The Appellant started functioning from 3/6/06 as the successor of the erstwhile MP Electricity Board.

5. NTPC, the first Respondent herein, is a Government company. It has got various generating stations including the Kawas and Gandhar gas power stations which are located in the state of Gujarat. The power generated from both these power stations is being supplied to bulk power beneficiaries including the Appellant.

6. The Government of India issued various notifications regarding the supply of electricity generated from the above two

power stations. As per notification dated 30/4/94, if generation level of the above-two power stations is above the plant load factor, then the beneficiaries have to pay an incentive fee to NTPC. In case the generation level of the above two power stations is below the plant load factor (PLF) the NTPC has to make the payment of disincentive to the beneficiaries.

7. Since the generation level of Kawas and Gandhar gas power stations (GPS) was less than the PLF threshold, during the particular period, the Appellant requested NTPC to determine the disincentive fee, payable to it and make the payment. Under the said circumstances, NTPC, the respondent herein, filed a petition before the Central Commission (CERC) for determination of incentive fee and disincentive fee in respect of both Kawas and Gandhar gas power stations for the period 1991-92 to 2000-01.

8. The NTPC claimed through the said petition, that the disincentive fee is not payable in respect of these power stations in view of the loss of generation due to inadequate supply of gas during the particular period. NTPC requested the Commission to grant time for the production of certificate of deemed generation on account of the short supply of gas from the Central Electricity Authority (CEA), for the said period. Accordingly, time was granted. However, the same was not produced in time. Hence, on 24/10/2002, the Central Commission disposed off the said petition directing the NTPC to pay disincentive fee to the MP Power Trading Co. for the said period in view of non-production of the said certificate of deemed generation issued by the CEA.

9. Aggrieved over the same, NTPC filed a review petition before the Central Commission contending that the letter dated 12/12/01, which was to be treated as a deemed generation certificate was not taken into account by the Commission and therefore, the order dated 24/10/02 has got to be reviewed in the light of the said letter which was already available on record.

10. During the pendency of the said review application, the NTPC obtained a fresh certificate of deemed generation dated 27/3/03 from the CEA in respect of the period from 1996 to 1998 and filed the same before the Central Commission, and requested for reconsideration of the issue of disincentive fee to be paid by them to the appellant for the said period i.e. from 1/8/96 to 31/3/98 by taking into account both the letter dated 12/12/01 and the certificate dated 27/3/03 respectively.

11. Accordingly, the Central Commission after hearing the parties passed the interim order on 4/4/03 restoring the Review Petition and finding that as the document dated 12/12/01 had escaped the attention of the Central Commission earlier the same has got to be considered, in the light of the deemed certificate of generation issued by the CEA on 27/3/03 on the basis of the said finding, the Commission directed for reopening of the proceedings in respect of the disincentive fee for the period 1996-98 and adjourned the matter for fixing the quantum.

12. Without choosing to wait for the final order, the Appellant challenged the said interim order dated 4/4/03 by way of an

appeal filed before the High Court of Madhya Pradesh contending that the order of review made by the Central Commission was beyond its jurisdiction. Rejecting this contention, the High Court, by the order dated 22/9/03 dismissed the appeal holding that the order of review was valid.

13. In the light of the said order of the High Court dated 22/9/03, the Central Commission proceeded to hear the review and after hearing the parties, ultimately passed the final order on 2/12/03 and fixed the quantum by accepting the certificates dated 12/12/01 and 27/3/03, issued by the CEA for the purpose of computation of disincentive fee for the period 1996-98 in respect of both the above-referred gas power stations of NTPC.

14. Challenging this order, the Appellant again filed a writ petition before the High Court of Madhya Pradesh in 2004. However, by the order dated 13/4/07, the High Court dismissed the same by giving liberty to the Appellant to approach this Tribunal. That is how, the Appellant has approached this Tribunal and filed the present Appeal, challenging the order dated 2/12/03 passed by the Central Commission.

15. Shri Pradeep Mishra, the Learned Counsel for the Appellant while assailing the order dated 2/12/03 passed by the Central Commission would make the following submissions:

1. The Central Commission exceeded its jurisdiction by allowing the review petition preferred by NTPC in the absence of any error apparent on the face of the record. There is no material before the

Central Commission on the basis of which the order dated 24/10/2002 passed earlier could be reviewed.

2. The letter dated 12/12/01 and letter dated 27/3/03 issued by the CEA cannot be considered to be a deemed generation certificate for allowing the review petition. The Central Commission has as a result erred in taking into consideration the certificate dated 27/3/03 which was issued by the CEA subsequent to the earlier order. The Central Commission should not have reopened the matter in review for giving a fresh consideration to the letter dated 12/12/01 in the light of the subsequent letter dated 27/3/03 which was altogether a new document.

3. The notification dated 30/4/94 for the Kawas GPS does not use the word 'backing down'. However, the words 'backing down' has been used in the notification dated 28/4/97 for the Gandhar GPS. Admittedly, the certificate dated 27/3/03 issued by the CEA does not use the word 'backing down'. Therefore, the certificate was not in accordance with the tariff notification dated 28/4/97 for the Gandhar GPS.

4. The letters dated 12/12/01 and 27/3/03 respectively cannot be considered to be a certificate of deemed generation because firstly there is no decision of CEA to issue such a certificate and secondly, the same are contrary to the tariff provisions which has got the force of law.

16. In reply to the above submissions, Shri M.G. Ramachandran, the Learned Counsel for NTPC has made the following submissions:-

1. In the Petition filed by the NTPC before the Central Commission the deemed generation was claimed on account of non-availability of gas in respect of the two gas power stations. Though, initially the Central Commission by the order dated 24/10/02 rejected the claim for deemed generation for the period 1996-98 on the ground that the NTPC had not produced the deemed generation certificate from the CEA, the Commission in the subsequent order dated 4/4/03 passed in the review petition filed by NTPC, validly restored the review petition holding that the NTPC became eligible to make their claim as they obtained the deemed certificates from CEA dated 12/12/01 and 27/3/03 in respect of the period 1996-98. Having held that, it posted the matter for final disposal for calculating the quantum of the disincentive fee for the other period.

2. Against the said order, the Appellant filed an Appeal before the High Court, under Section 16 of the Act contending that those documents ought not to have been considered. Ultimately, the High Court rejected the contentions of the appellant and dismissed the appeal by the order dated 22/9/03 confirming the order of the Central Commission dated 4/4/03. No appeal was filed against this order. Thus, this order has become final. Therefore, the question regarding the powers of review cannot be raised in this Appeal as the same has already been decided by the High Court in the other Appeal.

3. The only issue is with regard to the certificate of deemed generation given by the CEA. In the Impugned order dated 2/12/03, the Commission was never called upon to decide the issue of admissibility or non-admissibility of the deemed generation certificates as those questions have never been raised before the Commission. The Commission, in the impugned order dated 2/12/03, by way of implementing the earlier Order dated 4/4/03 which has been confirmed by the High Court, has merely ordered fixing the quantum during the period of deemed generation to be taken into account. Now, raising the issue with reference to the admissibility of documents as well as the scope of review in this Appeal would amount to challenging the order dated 4/4/03, which has been confirmed by the High Court under the guise of challenging the impugned order dated 2/12/03, which is not permissible under law.

17. On the above points, elaborate arguments were advanced by the Counsel for both the sides.

18. We have given our anxious consideration to the rival contentions urged by the Counsel for the parties.

19. The question in issue relates to the Deemed Generation in the Kawas and Gandhar Gas Power Stations for the tariff year 1-8-96 to 31-3-98 and the consequent fixing of quantum of disincentive fee payable by NTPC to the appellant.

20. According to the learned counsel for the Appellant, certificates for deemed generation dated 12/12/01 and 27/3/03 for the period from 1/8/96 to 31/3/98 ought not to have been factored for calculating the quantum of disincentive to beneficiaries.

21. According to the learned counsel for NTPC, the respondent herein, due to the non-availability of gas during the relevant period being a reason not attributable to it, as certified by the CEA, the NTPC was entitled to include the said period as deemed generation for the purpose of calculation of the disincentive fee.

22. At the outset, it shall be stated that the question of acceptance of Deemed Generation Certificates which had been issued by CEA as is evident from the letters dated 12/12/01 and the certificate dated 27/03/03 cannot be gone into in this Appeal, since the said question had already been decided by both the Central Commission by the order dated 4/4/03 and the High Court by Order dated 22/9/03.

23. As a matter of fact, the High Court gave a specific finding that the order of the Central Commission dated 4/4/03 restoring the review petition on accepting the documents dated 12/12/01 and 27/03/03 issued by the CEA is perfectly justified. It also found that the Central Commission in the earlier order dated 24/10/02 has wrongly omitted to consider and examine the impact of the letter dated 12/12/01 and is vital which would change the complexion of the case. Admittedly, this finding of the High Court has never been challenged in the further appeal.

24. In other words, the High Court's finding, endorsing the act of the Central Commission in accepting the letter dated 12/12/01 and the certificate dated 27/03/03 has become final and as such, the question of admissibility of those documents cannot be gone into in this Appeal, especially when those questions have never been raised, either before the Commission while the first order was passed by the Commission on 4/4/03 or before the High Court while confirming the said order on 22/9/03.

25. In the absence of any further challenge to the order dated 22/9/03, by the High Court, the Appellant cannot challenge the impugned order dated 2/12/03 contending that those certificates cannot be deemed to be Deemed Generation Certificates, especially when the order dated 2/12/03 passed by the Central Commission is merely an order implementing or executing the order dated 4/4/03 passed earlier in the Review Petition, which has attained the finality.

26. As pointed out by the learned counsel for the NTPC, in the impugned order dated 2/12/03 the Central Commission was not called upon to decide the issue of admissibility or non-admissibility of the Deemed Generation Certificates, but it was called upon to decide the question of quantum of deemed generation to be taken into account for determining the fixed charges for deciding the disincentive fee applicable to the two power stations for the relevant period in pursuance of the earlier order of the Central Commission.

27. In this context, it would be appropriate to refer to some of the observations made by the Central Commission in the order dated 4/4/03 which has been ultimately confirmed by the High Court in the Appeal:

“In view of the settled legal position, we consider that the import of CEA’s letter dated 12/12/01 needed to be examined in detail in the Commission’s order dated 24/10/02. This had, however, escaped the attention of the Commission. Therefore, a case for review of the Order dated 24/10/02, so far as the period from 1/8/96 to 31/3/98 is concerned, has been made out.

We also take notice of CEA’s letter dated 27/3/03 wherein the details of the “Deemed Generation” due to shortage/non-availability of gas for these power stations as contained in the letter dated 12/12/01 have been confirmed. The Learned Counsel for Respondent No.1 argued that the letter dated 27/03/03 could not be considered at the stage of review. However, on a query made as to whether the petitioner could file a fresh petition based on the letter dated 27/3/03, his answer was in the positive. He, however, submitted that even if it was so, the benefit of the said letter could not be extended in the review proceedings”.

We find that the petitioner (NTPC) has been consistently following with CEA for the issuance of the “Deemed Generation” Certificate. Even the letter dated 27/03/03 is in response to the petitioner’s letter dated 5/11/01.

The petitioner cannot be blamed and made to suffer on account of the delay if any, on the part of CEA. Accordingly, we do not see much force in the contention raised by the Learned Counsel for the Respondent No.1 to keep the letter dated 27/03/03 out of consideration.

We accordingly direct that the petition No. 78/2001 be set down for hearing on 5/06/03 for reconsideration of the liability of the Petitioner to pay disincentive for the period 1/8/96 to 31/3/98.”

28. The above observations of the Central Commission would make it clear that both the documents have been accepted for taking into consideration and the question of admissibility of documents had never been raised before the Commission.

29. Admittedly, that the impugned order dated 2/12/03 was passed only in pursuance of the order dated 4/4/03 passed by the Commission in the Review Petition and on the strength of the High Court order dated 22/9/03. By said order dated 4/4/03, the Commission restored the review proceedings and adjourned the matter only for reconsideration of the quantum and liability of NTPC to pay disincentive fee for the period 1/8/96 to 31/3/98.

30. Thus, either before the Commission or before the High Court, the question of admissibility of the deemed generation certificates or the contention that the certificates could not be considered to be Deemed Generation Certificates have never been raised or urged.

31. While considering the question of acceptance of the Certificate issued by the CEA for the purpose of computation of disincentive fee for the period 1/8/96 to 31/3/98, the Commission has specifically held in the impugned order dated 2/12/03, that there is no impediment for accepting those certificates for consideration in view of the Judgment of the High Court upholding the order of the Commission. In other words, the impugned order of the Commission dated 2/12/03 while reconsidering the issue of disincentive fee payable by NTPC has been passed in the backdrop

of the order dated 4/4/03 passed by the Central Commission and the Judgment dated 2/12/03 of the High Court.

32. Let us now refer to those observation made by the Commission in the order dated 2/12/03 and the same is as follows:

“Further, CEA, in its communication dated 25-27/07/96, had devised the proforma for submission of data by Member Secretary, Regional Electricity Boards to enable it to consider the matter and issue the “Deemed Generation”, where admissible. From the correspondence placed on record, it is observed that the Member Secretary, WREB had forwarded the necessary data for the period from 1/8/96 to 31/3/98 to CEA for issue of necessary certificate long back. The Petitioner continued to pursue the matter with the concerned authorities. However, it was only vide its letter dated 27/3/03 that such a certificate was issued by CEA. Under these circumstances, we have no doubt in our mind that the letter dated 27/03/03 certifies the “deemed generation” on account of non-availability of gas in respect of the Gandhar Gas Power Station and the Kawas Gas Power Station for the period from 1/8/96 to 31/3/98.

We are not convinced that the contentions raised by the Respondent No.1 that non-generation on account of shortage or non-availability of gas does not amount to “backing down” as used in the Ministry of Power notifications. The petitioner has not been able to generate power because of shortage or non-availability of gas. In our opinion, it amounts to backing down and the conditions for non-generation are not attributable to the petitioner”.

33. The above observation would make it clear that the Commission in the impugned order dated 2/12/03 gave a categorical finding that the documents referred to above would show that the NTPC was not able to generate power because of shortage of gas and as such it amounts to backing down. This

finding would clearly indicate that the same was rendered on the basis of the earlier order dated 4/4/03 and the Order of the High Court dated 22/9/03. In the absence of the challenge of the High Court's order dated 22/9/03, admissibility question cannot now be raised in this appeal.

34. We are only concerned with the questions raised before the Commission and the propriety of the order impugned. In our view, the points raised by the Appellant before the Commission have been dealt with in detail and correct conclusion has been arrived at.

35. Hence, we do not find any infirmity in the order impugned and accordingly, the Appeal is dismissed. No costs.

(A.A. Khan)
Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 13th January, 2009.

REPORTABLE / NON - REPORTABLE