

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO. 94 of 2016

Dated : 21st August, 2020

**PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

IN THE MATTER OF :

**Rajasthan Rajya Vidyut Utpadan Nigam Limited,
Vidyut Bhawan, Jyoti Nagar,
Janpath, Jaipur – 302005.**

.... APPELLANT

Versus

- 1. Rajasthan Electricity Regulatory Commission,
Through its Secretary
Vidyut Viniyamak Bhawan,
Near State Motor Garage,
Sahkar Marg, Jaipur – 302001.**
- 2. Jaipur Vidyut Vitaran Nigam Limited,
Through its Managing Director,
Vidyut Bhawan, Janpath
Jaipur – 302 005.**
- 3. Ajmer Vidyut Vitaran Nigam Limited
Through its Managing Director,
Vidyut Bhawan, Panchsheel Nagar,
Makarwali Road, Ajmer – 305004.**

4. **Jodhpur Vidyut Vitaran Nigam Limited**
Through its Managing Director,
New Power House,
H. I. Area Phase II, Basni,
Jodhpur, Rajasthan - 342001.

.... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Ramnesh Jerath

Counsel for the Respondent(s) : Mr. Raj Kumar Mehta
Mr. Elangabam Premjit Singh
Ms. Himanshi Andley **for R-1**

Mr. Bipin Gupta
Mr. Sunil Bansal
Mr. Paramhans **for R-2 to 4**

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. This Appeal is filed against the order dated 23.07.2014 passed by the Rajasthan Electricity Regulatory Commission (hereinafter referred to as "**Commission/RERC**") in the Petition No. RERC/382/2013 filed by the Appellant - Rajasthan Rajya Vidyut Utpadan Nigam Limited (for short "**RRVUNL**") for Annual Performance Review ("**APR**") for the Financial Year 2010-11 for Kota Thermal Power Station (hereinafter referred to as

“**KTPS**”) (unit 1 to 7), Suratgarh Thermal Power Station (hereinafter referred to as “**STPS**”) (unit 1 to 6), Ramgarh Gas Thermal Power Station (hereinafter referred to as “**RGTPS**”), Dholpur Combined Cycle Gas based Thermal Power Plant (hereinafter referred to as “**DCCPP**”), CTPP Unit I, Mahi Hydel Power Station and Mini Micro Hydro Project of Rajasthan Vidyut Utpadan Nigam Limited.

2. The Appellant is a generating company, a Government Enterprise and a company incorporated under the Companies Act, 1956 entrusted with the job of development of power projects in the state along with operation and maintenance of state owned power projects stations.

3. This Appeal is preferred on the limited ground of reduction of the fixed cost by the RERC for Appellant’s plants at DCCPP and RGTPS, proportionately, based on Plant Load Factor (for short “**PLF**”) instead of plant availability (for short “**PAF**”) without considering that the non-availability of the gas is an uncontrollable factor, so also despite the fact that the gas supplier itself pleaded non-availability of gas as an event of force majeure.

4. The facts that led to filing of the present Appeal, in brief, are as under:

5. On 13.5.2005 An Agreement was entered into between Gas Authority of India Limited (in short "**GAIL**") as transporter and the Appellant as the shipper for the transmission of natural gas.

6. On 31.10.2005, the Appellant entered into a Gas Sales and Purchase Agreement with Oil and Natural GAS Corporation Limited (in short "**ONGC**") for supply of 1.5 MMSCMD (548 MMSCMM Per annum) of gas for its 330 MW gas based combined cycle power plant at Dholpur, Rajasthan for a period of 12 years commencing delivery from commencement date as provided therein.

7. On 22.12.2007, the Appellant also entered into a tripartite agreement with effect from 01.01.2008 with ONGC and GAIL for assignment of the contract dated 31.10.2005 from ONGC to GAIL on the same terms and conditions. The Appellant further entered into an agreement with GAIL for the sale and purchase/ transmission of natural gas dated 01.05.2008.

8. On 06.01.2009, GAIL informed the Appellant that due to force majeure gas supplies to all PMT customers including RRVUNL Dholpur had been affected. Further on 19.02.2009, GAIL informed the Appellant that while it was endeavouring to supply requisite quantity of natural gas to all its customers, however, due to curtailed supply from upstream suppliers, GAIL is forced to go for pro-rated reduction of supplies to its customers.

9. On 03.08.2009, the Appellant wrote to GAIL appraising that the reduced gas is not adequate to run both gas turbines at minimum operational load and a request was made to allocate requisite RLNG gas till PMT gas availability is normalized since GAIL had pleaded force majeure event having taken place vide its letter dated 31.07.2009.

10. According to Appellant, on 07.08.2009, the Appellant entered into a Gas Sales and Transmission Contract agreement with GAIL for the sale and purchase/transmission of 0.2MMSCMD (initial quantity) and additional 0.75MMSCMD natural gas from Block RJ-ON/6 Field for its RGTPP. The Appellant and GAIL had agreed that from subsequent start date till the

completion of the commissioning period the DCQ shall vary from 0.62 MMSCMD to 0.95 MMSCMD including supply of gas as per requirement.

11. According to Appellant, GAIL was liable to supply 1.5 MMSCMD to DCCPP on daily basis. However, the Appellant did not receive the full capacity of gas contracted since 26.03.2010. In terms of the said GPA the contracted capacity of gas to be made available by GAIL to the Appellant for DCCPP was PMT Gas 53571MMBTU/day (1.5MMSCMD/day) and for 110.5 MW RGTPP: OIL gas 0.7MMSCMD, ONGC Gas 0.05 MMSCMD and FOCUS Gas 0.2 MMSCMD to be made available from 09.07.2010.

12. They further contend that the actual gas allocated by GAIL to the Appellant for its DCCPP plant during the FY 2010-11 is approximately 17023728.07 / 12898465.00 MMBTU against contracted capacity of 19553415.00 MMBTU.

13. Appellant also contends that in order to keep its plants going on, the Appellant kept on following up with GAIL in relation to steep fall witnessed by the Appellant's plants as regards availability of the contracted gas supply. Since PMT allocation was reduced to a substantially low level, the Appellant had also entered into a contract with GAIL for SPOT RLNG

dated 01.11.2011 for supply of 0.46 MMSCMD RLNG / Pooled gas so as to smoothly operate its DCCPP plant, however the same also was reduced by GAIL to 0.2 MMSCMD only. Not only this, GAIL also imposed restrictions on gas flow as far as the Appellant is concerned which further contributed to running of machines on partial load.

14. According to Appellant, on 19.08.2009, the Appellant wrote to GAIL apprising GAIL that allocation of gas to DCCPP has not been made by GAIL as nominated by the Appellant. In the absence of the same, the gas turbines could not be run as per the rated capacity. On 06.10.2009 Appellant again wrote to GAIL stating that the reduced allocation is not adequate to run both the gas turbines at their rated capacity and requested GAIL to allocate at least 1.10 PMT gas. Again on 26.03.2010, the Appellant wrote to GAIL to arrange expensive Spot R-LNG /pooled gas from April 2010 – June 2010 for its DCCPP plant. On 30.03.2010, the Appellant once again wrote a letter seeking extension of existing spot gas sales agreement for DCCPP up to 30.06.2010.

15. According to Appellant, on 12.05.2010, the Appellant intimated GAIL that owing to shortfall in the quantity of gas supplied by GAIL against the

contracted capacity, the Appellant was forced to purchase gas under SPOT RLNG, so that the gas turbines of DCCPP plant could run at rated capacity which led to increase in the financial burden of the Appellant. According to Appellant, they requested that the matter be taken up with the appropriate authority of GAIL for allocation of PMT gas to the tune of 1.5 MMSCMD as per the contracted capacity.

16. Appellant contends that while the Appellant purchased expensive spot RLNG gas for its DCCPP plant, however, in case of RGTPP the same could not be affected since the said plant is located in an isolated border area where there is no alternative arrangement of any kind except OIL ONGC Focus through GAIL.

17. On 27.05.2010, Appellant wrote to GAIL that the latest progress for the up-gradation of terminal at RGTPP is to receive 0.90 MMSMD gas from oil and interconnection facilities for supply of 0.20 MMSCMD gas from Focus energy fields to existing unit of Ramgarh GTPP.

18. On 25.06.2010, the Appellant informed GAIL that GAIL has been allocating much less gas than the contracted capacity to DCCPP and that

the shortfall in the quantity supplied was around 15.31 % and that the state of Rajasthan was facing acute shortage of gas owing to which the plants could not be run efficiently.

19. On 05.07.2010, the Appellant sought from GAIL for enhancement of gas from OIL and ONGC since both the gas turbines of the plant were in service and hence a request was made for enhancement of gas as per the Agreement. On 09.07.2010, the Appellant conveyed GAIL that Appellant is ready to take 0.2MMSCMD gas from Focus Energy with effect from 05.07.2010.

20. On 02.08.2010, the Appellant entered into gas transportation agreement with RGTIL for transmission of 0.1 MMSCMD KG D 6 Gas from Kakinada to Ankot (Gujarat) for 330 MW DCCPP.

21. On 03.08.2010 the Appellant entered into a Gas Sales and Purchase Agreement with M/s Reliance Industries Limited and M/s NIKO (NECO) Limited for purchase of gas for DCCPP plant.

22. On 06.08.2010, the Appellant entered into a gas transportation agreement for down-stream transportation of 0.1 MMSCMD KG – D 6 Gas from Ankot (Gujarat) to Dholpur Gas power project.

23. On 08.11.2010, the Appellant sought from GAIL to increase the allocation of PMT gas to DCCPP, in response to intimation from GAIL that as per information received by GAIL from PMT JV the effect of force majeure event at Panna – Mukata field had ceased and the supply was restored from 29.10.2010.

24. Appellant contends that since due to the reduction in contracted capacity, the plants could not be operated at full load. On 06.12.2010, the Appellant intimated GAIL regarding reduced allocation of OMT gas to DCCPP and apprised that since the winter season was going on with ambient temperature being low more gas was required to achieve full load.

25. On 15.12.2010, the Appellant intimated GAIL regarding the continuous reduction in allocation of PMT gas to DCCPP plant as well as about the shortfall which was around 30% of the contracted capacity.

Appellant contends that there was no definite time schedule provided by GAIL by when the increased capacity could be made available to DCCPP.

26. Appellant further contends that on 23.12.2010, they intimated GAIL regarding reduced allocation of PMT Gas to DCCPP and apprised about the acute shortage faced by the Appellant who was unable to operate and run its plant at full load as during the winter season when the ambient temperature is low, more gas is required to achieve full load and requested that all efforts be made to increase the PMT allocation to DCCPP Plant.

27. On 04.02.2011, the Appellant also wrote to GAIL with regard to reduced allocation of PMT and RLNG gas to DCCPP since the average allocation of gas on actual basis was only around 68% of the contracted capacity.

28. On 01.11.2011, the Appellant entered into a contract with GAIL for SPOT RLNG for supply of 0.46 MMSCMD RLNG / Pooled gas for operating its DCCPP plant. According to Appellant, however the same also reduced by GAIL to 0.2 MMSCMD only.

29. On 19.03.2013, the Appellant filed a Petition before RERC for determination of the APR for financial year 2010-11 for KTPS (unit 1 to 7), STPS (unit 1 to 6), RGTPS, DCCPP, CTPP Unit I, Mahi Hydel Power Station and Mini Micro Hydro Project of Rajasthan Vidyut Utpadan Nigam Limited, in accordance with Regulation 8 (1) (2) (3) of RERC (Terms and conditions) for determination of Tariff Regulations, 2009 and other applicable provisions of Electricity Act 2003.

30. On 19.12.2013 the said Petition was admitted. Public notice dated 01.01.2014 and 02.01.2014 was issued in the newspapers named Rajasthan Patrika and Times of India inviting objections and comments from any desirous person. The Petition was also placed on the RERC's website.

31. According to Appellant, on 30.01.2014, the Commission informed the Appellant that objections / suggestions on the petition filed by the Appellant have been received from Mr. Ravi Goyal and Mr. G. L. Sharma on 21.01.2014 and 22.01.2014 and directed the Appellant to file its reply to the said objections as per Regulation 44 and 45 of RERC (Transaction of business) Regulations, 2005. Mr. Ravi Goyal had sought the information

with regard to generation losses due to LD instructions as per grid requirement for the Financial Year 2010-11 and also to clarify whether the above losses have been included in the Plant Load Factor of the generating plant. Mr. G. L. Sharma on 22.01.014 sought various information with regard to other plants of the Appellant.

32. Further, Appellant contends that on 06.03.2014 the Appellant provided the required information as sought by the said Objectors. On 18.03.2014, additional rejoinder information was sought by Mr. G L Sharma in response to the information supplied by the Appellant. Accordingly the information was provided. On 15.05.2014, the Appellant submitted point-wise reply to the rejoinder/additional submissions filed by Mr. G L Sharma on 18.03.2014. On 03.06.2014, point-wise reply to the additional objections / submissions made by the Commission on the Petition was submitted also. On 10.07.2014, the Appellant provided the month-wise weighted average Gross Calorific Value (GCV) and price of coal for KTPS (Unit 1-7),STPS (Unit 1-6), CTPDD (Unit).

33. Appellant contends that the low PLF for DCCPP and RGTPS was owing to the fact that there was no gas available in the market for the said

plants. Although the Appellant could have opted for the procurement of the gas through spot gas arrangement, however, the same was an extremely expensive affair which did not offer a long term economic solution to the gas crisis prevalent in the country. Further, the fixed charges for the plant are determined based on the plant availability and not on the PLF in line with the regulations framed by RERC itself. Appellant also contends that although RERC was apprised of the correspondence between the Appellant and GAIL seeking earliest supply of the gas, the same proved to be of no avail. As regards the incentive which was sought as per the Regulations, the Appellant had provided all the facts and figures and the reasons for lower PLF in its reply dated 06.03.2014. Appellant contends that the Fixed Charges are allowed on the basis of availability and not on the basis of PLF; the availability of STPS Unit 1-5 and STPS Unit 6 being 85.29% and 36.4%, respectively.

34. Appellant further contends that they were forced to seek making pro-tem and an alternate arrangement for availability of gas which was made in the Financial Year 2010-11 in relation to DCCPP plant. Although the Appellant in order to keep the plant operationalized in the interest of the consumers, purchased gas from alternate source for DCCPP plant,

however, the same led to increase in the financial burden for the Appellant. The actual gas price being OIL Rs. 1600/TH SCM on 4000 to 4500 Kcal/SCM (NCV) Basis, ONGC Rs. 3200 / Th. SCM on 10000Kcal/SCM (NCV) Basis and Focus 4.11 USD /MMBTU. Further, Appellant also contend that they wrote to Zonal Manager GAIL seeking extension of the existing Spot Gas Sales Agreement dated 01.11.2008 up to 31.03.2011. According to Appellant, there is no firm availability of gas for DCCPP or RGTPP on APM basis and as such the plight of the Appellant is continuing. Further, owing to the technicalities involved, it is not possible at DCCPP to change the fuel from gas to Naptha /HSD, since no furnace has been envisaged in the said project for the same being a gas based plant.

35. According to Appellant, as a result of disallowance of the claim on account of non availability of gas, the Appellant has suffered an adverse financial impact of Rs 45.54 crores. Also the plight of the Appellant still subsist even in the subsequent years whereby RERC continues to decline the relief to the Appellant on the ground of non-availability of gas which being an event of Force Majeure.

36. They further contend that even the Central Government has taken note of the plight of the Appellant and other similarly situated utilities which are undergoing immense financial and operational stress as a result of the non-availability of gas.

37. According to Appellant, RERC has failed to appreciate that the issue of non-availability of gas is a national problem and is not an isolated case with the Appellant for which the Appellant can be held responsible.

38. Based on the above pleadings, the following questions of law arise according to Appellant:

- “A. Whether the Rajasthan Electricity Regulatory Commission is justified in not considering the contention of the Appellant that the non availability of the gas is “an event beyond the control of the Appellant and is an uncontrollable factor”?
- B. Whether the Rajasthan Electricity Regulatory Commission was justified in reducing the fixed charges proportionate to the “Plant Load Factor” for the RGTPS and DCCPP stations instead of the “plant availability”?

- C. Whether or not the Appellant is entitled to be permitted recovery of the financial impact suffered by it as a result of the non-availability of the gas for its plants?”

39. Being aggrieved by the impugned Order passed by the RERC, the Appellant has filed the present appeal seeking the following reliefs:

- “A. It is, therefore, prayed that the Tribunal may kindly *declare (the impugned order dated 23.07.2014 passed in the petition bearing No. RERC/382/2013 as null & void and quash the same to the extent it reduces the fixed cost for the DCCPP and RTGPS plants proportionately based on the PLF instead of the plant availability and allow to the Appellant the financial impact of Rs. 45.54 crores along with carrying cost up to the date of order and for subsequent years also;*
- B. By an appropriate Order or directions, the Tribunal may kindly allow the Appellant to procure the fuel/gas through some alternate arrangement by way of agreement or any other appropriate arrangement and allow the additional cost on this

account as pass through in the tariff and for subsequent years also;

C. Cost of the Appeal may kindly be awarded to the Appellant.”

40. *Per contra*, 1st Respondent-Commission filed reply, in brief, as under:

41. 1st Respondent-Commission contends that the Appellant has filed the appeal on the limited ground that the Commission has reduced the fixed costs of the Appellant’s plants of DCCPP and RGTPS proportionately based on the PLF instead of Plant Availability Factor (in short “**PAF**”) without considering that the non-availability of gas which is an uncontrollable factor and further, despite the fact that the gas supplier itself pleaded non-availability of gas as an event of force majeure. The Commission in its order doted 27.04.2011 in the matter of truing up of RVUN generating stations for FY 2004-05 to 2008-09 has held that Fuel Supply arrangement is the responsibility of RVUN. Therefore, non-availability of gas cannot be considered as a valid reason for non availability of plant. The Order dated 27.04.2011 was not challenged by the Appellant and has become final.

42. According to RERC, relying the Order dated 27.04.2011, in the impugned Order dated 23.07.2014, the Commission has held that the responsibility for arrangement of fuel lies with the Generator. The Tribunal also in its Order dated 30.04.2013, at para 21 in Appeal No. 110 of 2012, has also held that to make arrangements for fuel is the responsibility of the Generator.

43. 1st Respondent further contends that the Commission has considered the PAF as equal to the PLF in absence of SLDC certificates of actual availability of RVUN's plants. Further, the contention of the Appellant that the Commission has reduced the fixed cost based on PLF instead of PAF is not correct. The Commission has reduced the fixed cost based on PAF. However, the Commission has considered the PAF as equal to PLF in absence of SLDC certificates of actual availability.

44. 1st Respondent-RERC therefore, submits that the Appeal is devoid of any merit and is liable to be rejected.

45. Respondent Nos. 2 to 4 - Discoms also filed reply to the Appeal, in brief, as under:

46. According to Respondent No. 2 to 4 - Discoms, the contentions of the Appellant and grounds for impugning judgment are totally wrong. According to Respondents-Discoms, the Commission passed the impugned order on the basis of the fact in the order dated 27.04.2011 on the truing up of the Financial Year 2004-05 to Financial Year 2008-09.

47. The Order dated 27.04.2011 never came to be challenged by the Appellant and has attained finality. Thus, the Appellant now cannot claim non supply of fuel as force majeure under the APR of the Year 2010-2011 as Order dated 27.04.2011 has attained finality.

48. Respondents-Discoms further contend that the contention of the Appellant that while reducing the fixed cost proportionately, the Commission has considered PLF instead of plant availability is not correct. The correct fact is that the Commission had asked the Appellant to submit SLDC certificate of availability of its Unit/Plant. However, RVUNL/Appellant did not furnish the SLDC Certificate about plant availability factor and therefore, the Commission has considered PLF in place of PAF. The Commission has thus correctly done reducing annual

fixed charges proportionately, and there is no illegality which is liable to be interfered.

49. Respondents-Discoms further contend that the Appellant cannot claim the entire fixed cost when the availability of plant in actual was very less than the normative availability, so also as the fixed charges are based on the fact that the plant would be available at least up to the normative available. Therefore, reduction of fixed cost in proportionate to non availability of the plant up to the extent of normative available on the proportionate basis is legal, since due to the default of the Appellant or his supplier of Gas, consumers of Discoms cannot be made to suffer.

50. With these averments, Respondents-Discoms submit that the Appeal filed by the Appellant may be rejected.

51. *Per contra*, the Appellant filed rejoinder to the reply of Respondents-Discoms, in brief, as under:

52. The Appellant in its rejoinder contends that the Commission has not dealt with the issue raised by the Appellant on merits in the Impugned Order. Also, the Respondents have failed to appreciate the cause raised

by the Appellant in the instant appeal and has wrongly proceeded to term the Appellant in default. The plight of the Appellant is premised on the fact that the Appellant stands to be adversely affected by the Force Majeure event at the gas supplier's end which has rendered the plant of the Appellant stranded.

53. Appellant further contends that the force majeure event has adversely affected the Appellant's generation ability and has rendered the performance under the contract impossible. Reliance by the Commission on its earlier order is misplaced and erroneous. The Commission has erroneously overlooked the larger issue involved which is presently impacting the gas based plants in general and has merely passed an arbitrary order without providing for any solution to the plight of the Appellant nor issuing any specific directions in that regard to enable the Appellant in tiding over the difficulty posed thereby.

54. According to Appellant the finality or otherwise of the order dated 27.04.2011 will not come in the way of the plea made by the Appellant which is based solely on the order dated 23.07.2014 and not that dated 27.04.2011. By way of the impugned order, the Commission has again committed the grave error of holding the Appellant responsible for the non-

availability of gas which is based on force majeure event of the gas supplier and has again vested Appellant with a fresh cause which is validly raised by the Appellant.

55. Appellant further contends that merely because the Commission, while disposing the said Petition, referred to and relied upon its earlier findings in the Order dated 27.04.2011; the same would not preclude the Appellant from reasserting the cause which is still subsisting and has been left unresolved by the Commission itself in the earlier round. The order dated 27.04.2011 was non reasoned and non-speaking and the Respondent No. 2-4 cannot seek to take any shelter or place any reliance thereon de hors appreciating the real plight of the Appellant who stands adversely affected by the force majeure event pleaded by the supplier of gas. Respondent No. 2 to 4 – Discoms however, are seeking to mislead this Tribunal by making irrelevant averments having no nexus to the issue raised. The Respondents No. 2-4 very conveniently seek to forget that the case of the Appellant is that the Appellant is being affected by force majeure and the non-availability of gas is not attributable to the fault or failure on the part of the Appellant.

56. According to Appellant, it is not disputed that the responsibility for arrangement of fuel lies with the generator and in view of the same the Appellant has duly made all efforts to purchase alternate gas. In furtherance of the same, a separate agreement to purchase SPOT gas was made however the price of SPOT gas is much higher than PMT gas thereby resulting in higher generation cost. Appellant contends that the matter was discussed with the distribution companies/ Respondents No. 2-4 and they were apprised of the problem as it existed. However, still the Discoms denied to purchase the electricity generated with the SPOT gas being high cost of generation and insisted on discharge of obligation as per agreed terms despite acknowledging that the Appellant was indeed rendered unable to do so in changed scenario. The Appellant is obliged to sell the power to Respondents-Discoms only and when the Respondents-Discoms themselves have unanimously refused to accept the power with higher generating cost in view of the alternate gas being SPOT RLNG, the Appellant cannot be put to peril. Hence, the situation is well covered under the force majeure event and the Appellant cannot be penalised for the same.

57. Appellant also contends that the Appellant is not raising any challenge against the Order dated 27.04.2011. However, decision of the RERC pertained to the relevant tariff year and in particular to the issues raised and decided in that specific order and the same was not a judgment in *rem* to be so applicable for any issues whatsoever or when-so-ever raised. The said decision which was relevant to the said year cannot operate as *Res Judicata* as to bar the Appellant from preferring the present Appeal. Further, it needs no assertion that each tariff period constitutes a different block and the Appellant is not seeking reopening of issues settled in past for any specific tariff block.

58. They further contend that the issue of non-availability of gas as fuel is an issue which has been repeatedly raised by the Appellant since the Financial Year 2010-11 and denied by the RERC. With each year's denial of the claim raised by the Appellant, there arises a new cause of action in favour of the Appellant. Since in the Financial Year 2010-11 by the Order dated 23.07.2014 the Commission disallowed the claim made by the Appellant on this count, the Appellant is entitled to raise the fresh cause, which it aptly did before the Commission in Petition No. 382 of 2013.

59. According to Appellant, the attempt of the Respondents to justify perverse findings contained in the impugned order of RERC based on the assertion that it has considered the PAF equal to PLF in absence of SLDC certificates of actual availability of Appellant's plants is flawed. There are no such certificates issued by the SLDCs and the reliance placed by the Commission is thus highly unjust and erroneous. SLDC does not issue any certificate for actual availability of projects. Rajasthan Urja Vikas Nigam (RUVN)'s Intra state ABT is not in actual operation at RUVN power stations and SLDC verifies the deemed generation due to back down & box up evaluated as per their instructions. In the absence of any such process or procedure devised by the SLDC, the Appellant could not have furnished such a certificate.

60. Further, According to Appellant, holding the generator liable for non-availability of gas as fuel, even in force majeure event, would imperil and defeat the conspectus of the PPA dated 23.06.2004 which specifically recognises any unforeseeable and uncontrollable event as a force majeure event thereby discharging the affected party of the further performance under the contract. The Commission as well as the Respondent No. 2-4 are reading the relevant extracts in isolation and devoid of the contextual

reference warranted in the facts of the present case. The Respondents are trying to misguide this Tribunal by seeking to assimilate the responsibility for fuel arrangement being vested in the generator under normal circumstances and the inability of the generator to do so being affected by a force majeure event, that too of the magnitude which has impacted the larger section of the Indian power sector. While the Appellant is not shying from its contractual responsibilities, it however seeks to enforce the spirit of that very contract itself by asserting to invoke force majeure clause contemplated thereunder and agreed to by the Respondent No. 2-4 which in the submission of the Appellant is not open for the Commission to amend or vary without consent of contracting parties.

61. According to Appellant, on one hand the Commission fastened the entire responsibility for fuel arrangement on the Appellant and on the other hand did not allow any additional cost for power procurement which could have bailed the Appellant out of the financial stress to procure power from alternate sources. In case of coal, there is no such situation of shortage of coal which is abundantly available but shortage of gas is a national problem. All gas based projects in the nation are suffering badly due to shortage of gas. In fact some of the stations are under shut down due to

non-availability of gas and the Appellant has no special dispensation as far as the availability or crisis of the gas is concerned. The Appellant has on continuous basis made best efforts to procure power however owing to nation-wide scarcity for the gas the same could not be procured. Not only this, the Appellant had well in time made adequate fuel supply arrangements for procurement of fuel by entering into gas agreements with GAIL and ONGC.

62. According to Appellant, there is no imminent solution being visible for the gas crisis in the country and the generation capacity of the Appellant cannot be kept stranded owing to no fault of it. In case the present Appeal is not allowed the same will lead to deterioration of the financial interests of the Appellant who will then be rendered in difficulties in serving the debts raised from financial institutions and the lenders. As far as the DCCPP plant is concerned, the Appellant is unable to arrange fuel/gas from alternate source owing to the topography and the geographical terrain of the said plant which makes things far more difficult for the Appellant. Further, the Appellant instead of pleading for discharge from the further performance under the contract on the ground of force majeure has instead been seeking assistance earlier from the Commission and now

from this Tribunal to be able to discharge the same in the interest of the investment made and that of the consumers who will otherwise be deprived of the reliable supply from the plant/alternate source in view of lack of financial ability to continue to perform. Appellant contends that either the Appellant be permitted to buy expensive fuel from alternate source and pass the burden onto the consumers or be permitted to recover the fixed charges for the plant based on plant availability instead of PLF.

63. Appellant further contends that on 27th March 2015, Ministry of Power, GOI vide resolution 4/2/2015-Th-I conveyed implementation scheme for utilization of Gas based power generation capacity for the year 2015-16 & 2016-17 with provision of eligible utilities to receive supply of e-bid RLNG on subsidized rates whose actual average PLF achieved during April 2014 to January 2015 was below target PLF of 30%. List of such power plants is placed as Annexure-I to the said notification, whereas DCCPP falls in Annexure – II thereof with PLF of 31.2%, wherein the power plants receiving domestic gas with PLF of above 30%. Therefore, the same also could bring no relief to the Appellant since 2015-2016 for purchase of e-bid RLNG gas.

64. With these submissions, the Appellant prays that the Appeal may be allowed.

65. The Appellant filed written submissions, in brief, as under:

66. Appellant contends that although the Appellant could have opted for the procurement of the gas through spot gas arrangement, however, the same was an extremely expensive affair which did not offer a long-term economic solution to the gas crisis that has been since long prevalent in the country.

67. They also contend that the fixed charges for the plant are determined based on the PAF and not on the PLF which is in line with the regulations (Regulation No. 53) framed by the RERC itself. However, the Commission in the impugned Order held that the responsibility for arrangement of fuel lies with the generator. The Commission in its Order dated 27.04.2011 in the truing up for RVUN for FY 2004-05 to FY 2008-09 also observed that fuel supply arrangement is the responsibility of RVUN. Therefore, non availability of gas cannot be considered as a valid reason for non-availability of plant. Appellant contends that therefore, the impugned order is arbitrary and passed without appreciating the true and

correct facts in totality in as much that the Commission did not take into account the contentions made by the Appellant which were duly borne out of and corroborated by the record placed before the Commission. Further, according to Appellant, the impugned order as passed cursorily dealt with the issue raised and did not provide any solution to the plight of the Appellant nor provided any cogent adjudication thereof.

68. Appellant further contends that the Appellant has entered into various arrangements like Heads of Agreement with GAIL, Tripartite Agreement with ONGC and GAIL dated 22.12.2007, Agreement with GAIL dated 01.05.2008 and Gas sales and Transmission Contract agreement dtd, 07.08.2009 with GAIL for securing firm fuel supply. However the same could not be of any avail to the Appellant since the gas suppliers themselves got affected by force majeure. Further, in terms of the said agreements as against the daily entitlement of the Appellant, the actual capacity of the gas received by the Appellant from GAIL for RGTPP was as under:

SUPPLIER	Actual quantity received (MMSCM)	Contracted quantity of gas (MMSCM)
OIL	151.09	255.5
ONGC	11.72	18.25
FOCUS	20.7	50.4

69. However, the reduced gas was not adequate to run both gas turbines at minimum operational load. Appellant further contends that in order to operate the plant, the Appellant was constrained to purchase expensive spot RLNG gas for its DCCPP plant. However in case of RGTPP, the same could not be effected, since the said plant is located in an isolated border area where there is no alternative arrangement of any kind except OIL ONGC Focus through GAIL.

70. According to Appellant, the issue raised by the Appellant before the Commission had not arisen out of any fault or failure on the part of the Appellant in making adequate arrangements for fuel sourcing, rather the same was caused by the nation-wide crisis suffered by various industries and sectors where from the limited gas supply was reduced/regulated in order to serve the needs of more sensitive and important sectors.

71. They further contend that while the Commission allowed the plea of the Appellant in relation to its Mahi Hydro plant which could not be operated at the desired levels in view of the non-availability of water which is the primary fuel for its operation, it adopted an altogether opposite approach while dealing with the facts of the thermal plants suffering from non-availability of gas. The Commission observed that the non availability of water for generation is uncontrollable for RVUN/Appellant and hence allows the relaxation in the target capacity index for full recovery of fixed charges. However, whilst the role and conduct of the Appellant has been the same as regards making adequate arrangements for the fuel, the Commission however, rightly allowed the same for the Mahi plant and arbitrarily denied any relief to the Appellant with regard to gas based plants.

72. Appellant also contends that the subject matter of the present appeal is of grave concern to the nation as a whole including the Ministry of power which has even notified the Scheme on 27.03.2015 for utilisation of gas-based power generation capacity for resolution of such affected plants. The said scheme also stated that the gas-based capacity has been operating at the average PLF of 32.2% for the period is relevant to the

Appellant's case. However, the plant of the Appellant although finding mention in the said scheme, was left out from any bail out since the PLF was at higher level than was prescribed as the threshold limit for the eligibility.

73. Further, according to Appellant, the plant of the Appellant was not entitled since it was performing a bit better than the minimum threshold required there-under. The Appellant could have met the targets as laid down in relation to operation of the plant and generation of the power, provided the fuel supply was received by it as contemplated and sourced.

74. Appellant further contends that they, in pursuance of clause 11 i.e. force majeure of the PPA, had duly complied with the agreed contractual recourse that in as much that it had duly intimated the Discoms about the occurrence of such event, which led to inability of the Appellant to discharge its obligation under the PPA. Further, the reason of inability of the Appellant was caused by a conglomerate of various factors beyond its control including those adversely affecting the gas supplier like suspected leakage of Panna Oil Evacuation system, quality of gas, fluctuating availability of gas, sectoral re-prioritization in pursuance of direction of Petroleum and Natural Gas.

75. Appellant also contends that even in the earlier tariff order dated 27.04.2011 passed in the petition filed by the Appellant for truing up of ARR determined by the Commission for the years 2004-05 to 2007-08 and 2008-09, the Commission had dismissed the plea raised by the Appellant and completely overlooked its plight and practical difficulties. Therefore, the impugned order is a reiteration of the earlier indifference shown by the Commission without having examined deeper and without appreciating the underlying cause thereof, is the stand of the Appellant.

76. Further, the commission did not take note of the practical difficulties and commercial/economic constraints which held back the Appellant from sourcing alternate /expensive fuel.

77. They also contend that since no approval was provided by the Discoms which are the procurers and the ultimate bearers of the cost of the power from Appellant's plants, the Appellant could not have proceeded in the direction for purchase of gas from alternate source under short term arrangement being SPOT RLNG /Power Exchange Purchase.

78. According to Appellant, the Commission in its reply has stated that it has reduced the fixed cost based on PAF having considered the same equal to PLF purportedly in the absence of the LDC certificates of the actual availability. The same is patently erroneous as the Appellant in addition to submission of its tripping details of various generation plants for the period 2010-2011, had submitted the backing down certificates with the SLDC which fact although was duly taken note of by the commission in the impugned order, however the same was eventually overlooked and incorrectly overturned while concluding in the said order.

79. According to Appellant, as far as certification by SLDC of the generation loss in the context of the present issue is concerned, the RVUN would declare day ahead availability of generation to SLDC on the basis of actual gas availability. Thereafter SLDC would endorse the availability declared by RVUN Power Stations to Discoms/RUVN. In turn, Discoms/RUVN access their requirement on day ahead/intra-day basis and submit the same to SLDC. Thereafter SLDC issues message to all generators to supply load according to the requirement/demand raised by Discoms/RUVN and also issues directions to back down/ box up the units. Appellant contends that SLDC certifies the quantum of back down/box up

on monthly basis to each power station. However, since RVUN (DCCPP) declares its generating capacity on the basis of actual availability of gas, the generation loss on account of non-availability of gas cannot be certified by SLDC. In any case, the said certification has no relevance or bearing on the issue at hand.

80. According to Appellant, the approach adopted by the Commission falls badly against the principles of legal and equitable principles including regulatory activism required of it, since the Commission has erred in not exercising the discretion vested in it in allowing the petition of the Appellant though the facts of the matter warranted the same.

81. Appellant further contends that in its report of November 2018, on the issue of stressed Thermal Power Projects, the High level Empowered Committee, Govt. of India also took grave notice of the paucity of gas which report has taken the due consideration of the issue of low utilisation of gas plant capacity due to paucity of natural gas. It observed that the total installed capacity of the gas based power plants in the country is 24987MW (67 plants). The quantity required to run these plants is 116.59 MMSCMD. However, the total supply of domestic gas during the year 2017-18 was 20. 80 MMSCMD which has led to decline in average PLF to

approximately mere 22%. It also states that the total and further of the fact that a huge capacity [around 14305MW] has been rendered stranded owing to non-availability of the gas. In the light of the above, the Commission did not appreciate that the Appellant is being penalized for no-fault or failure on its part since the Appellant has taken all relevant and essential steps to seek that the gas is being made available for its plants so that the consumer interest does not suffer, is the stand of the Appellant.

82. According to Appellant, the impugned order is cryptic in as much the Commission did not appreciate that with the reprioritisation of the gas supply owing to change in central government's policy decision, the Appellant was unable to receive gas despite diligently made adequate fuel sourcing arrangements .

83. Appellant further contends that the Commission failed to appreciate that the Appellant could not have used another fuel for running the said plant since the same was designed as a gas plant and had specific features for the same. Further, despite having taken note of the essential facts, the Commission failed to appreciate that the central government is also posed with the gas crisis prevalent in the country and has taken adequate notice of the same. Also, the Commission has failed to

appreciate that there is no firm availability of the gas supply even in near future and merely disallowing the Appellant's claim will not lead to any resolution of the crisis faced. However, despite being apprised of the difficulties faced by the Appellant the Commission has failed to appreciate that the plant and machinery of the projects need adequate and minimum required quantity of gas as fuel so as to operate and run at efficient parameters which could not be attained owing to lack of the gas availability.

84. Respondent 2 to 4 – Discoms also filed written arguments, in brief as under:

85. Respondent No. 2 to 4-Discoms contend that the reduction in fixed cost for the said plants by the Commission is on account of Clause 53 & Clause 46 of the Rajasthan Electricity Regulatory Commission (Terms and conditions for determination of Tariff) Regulation 2009. The Appellant has never challenged the above regulation which was notified on 23.01.2009. The commission on the basis of the said regulation has passed the order for reduction of full capacity charges as the target was not achieved. In regulation there is no provision of any force majeure and therefore, the Appellant cannot claim force majeure. Further, there is

nothing in regulation or in PPA that if the generator does not achieve target availability due to shortage of fuel, then the generator will be paid full capacity charges, therefore, the said claim of the Appellant also is baseless.

86. Respondents-Discoms also contend that while passing order on the APR for financial year 2010-2011, the Commission passed the impugned order on the basis of the fact mentioned in the order dated 27.04.2011 which was passed on the truing up of Financial Year 2004-05 to FY 2008-09. This order never came to be challenged by the appellant and has attained finality. Thus, the appellant now, under the ARR for the year 2010-2011 cannot claim non supply of fuel as force majeure as order dated 27.04.2011 has attained finality which was passed on the truing up petitions of appellant for Financial Year 2004-05 to Financial Year 2008-09. According to the answering Respondents, the Appellant has also not challenged the subsequent APR in which the reduction has been made in terms of the Regulations.

87. Respondents-Discoms also contend that the argument of the Appellant that while reducing the fixed cost proportionately, the Commission has considered PLF instead of PAF of the Appellant is not

correct. The correct fact is that the Commission had asked RVUNL to submit SLDC certificate about plant availability of its Unit/Plant. However, the RVUNL did not furnish the said SLDC Certificate and therefore, the Commission has considered the PLF in place of PAF. Further they contend that the Commission has reduced annual fixed charges proportionately which is correct and there is no illegality which is liable to be interfered by the Appellant.

88. According to Respondents-Discoms, the documents placed by the Appellant in its written arguments are the documents which are much subsequent to the period in dispute and even otherwise on the basis of these reports, no relief can be granted to the Appellant more so in the facts and circumstances of the case when the Discom is not a party to the fuel agreement entered between the Appellant and its fuel supplier and therefore, the Appellant cannot claim force majeure against the Discoms as Regulations do not provide any such clause. According to Respondents-Discoms, the Appellant has not placed on record any of the letters claiming force majeure against the Discoms during the relevant period and thus now at this stage, the Appellant cannot be permitted to raise issue of force majeure. Further, even otherwise non availability of

fuel by a particular supplier with whom the Appellant has entered into contract cannot bind the Discom as the fixed charges were supposed to be paid as per the Regulation only in a case if target availability is achieved by the generator and therefore, the Appellant's claim for force majeure is without any basis. Moreover, the Commission has passed the impugned order not under its adjudicatory power but on the basis of power exercised under section 61 and 62 of the Electricity Act 2003 read with tariff Regulation 2009.

89. With these submission Respondents-Discoms pray that the Appeal filed by the Appellant may be rejected.

ANALYSIS & CONCLUSION:

90. Apparently, this appeal is filed on the limited question of reducing fixed cost by State Commission so far as Appellant's plants at DCCPP and RGTPS proportionately for the financial year 2010-2011.

91. It is contended by the Appellant that the Respondent-Commission has based its decision on the Plant Load Factor (PLF) instead of plant availability. Appellant further contended that non-availability of gas is an uncontrollable factor i.e., beyond the control of the Appellant. The problem was that gas supplier could not supply gas to the Appellant in terms of

contract between the Appellant and Suppliers of gas, therefore, the issue squarely falls within the event of force majeure. Appellant further contends that in spite of supplier of gas i.e., GAIL and ONGC admitting the said fact of non-availability of gas as an event of force majeure, the Respondent-Commission totally ignored the said event of force majeure. They also bring on record several facts especially the correspondence between the Appellant and GAIL pertaining to reduced supply of gas which was not adequate to run both gas turbines at minimum operational load. They also refer to their request to R-LNG gas till PMT gas availability was normalised since GAIL pleaded force majeure by their letter in 2009. Therefore, the Appellant contends that there was no deficit on their part to keep the plants going on in terms of Regulations. In other words, according to the Appellant, on account of reduction to a substantial level in the allocation of PMT Gas, the Appellant was not able to run the machines on full load. They also bring on record that the Appellant was forced to purchase gas by spending more money i.e., higher rate of supply of Spot RLNG. This was only in respect of DCCPP plant. In respect of RGTPS, such purchase of gas at higher rate was also not possible as the plant is located in an isolated border area where there was no possibility of alternative arrangement of any kind for transportation of gas except

through GAIL. Even in respect of DCCPP, GAIL was allocating much less gas than contracted capacity in spite of several requests and reminders by the Appellant. Therefore, in the State of Rajasthan, there was acute shortage of gas which led to the plants being not run efficiently. The Appellant has referred to, as stated in the pleadings, various correspondence pertaining to their efforts seeking increase in the allocation of gas.

92. Apparently, the Appellant filed Petition for determination of APR (Annual Performance Review) for the FY 2010-11 pertaining to seven units of KTPS, six units of STPS, RGTPS, DCCPP, CTPP Unit 1, Mahi Hydel Power Station and Mini Micro Hydro project of Appellant in accordance with Regulation 8 (1)(2)(3) of RERC (Terms and Conditions) for determination of Tariff Regulations of 2009 so also provisions of Electricity Act of 2003.

93. Respondent-Commission invited objections from public through public notice. Several objections were received. Appellant was asked to provide required information sought in the objections pertaining to generation losses due to LD instructions as per Grid requirement for the FY 2010-11 and they were also required to clarify whether generation

losses were included in the Plant Load Factor of the generating plant. According to the Appellant, the PLF so far as DCCPP and RGTPS was on account of deficit gas availability in the market which compelled them to purchase gases through Spot gas arrangement which became an expensive affair, therefore they could not afford such expensive purchase of gas as a long term economic solution. According to them, the fixed charges need to be determined based on the plant availability and not on the PLF as opined by the Respondent-Commission. They contend that the Appellant provided all facts and figures including the reasons for lower PLF, but the Respondent-Commission has erroneously passed the impugned order. Due to disallowance of the claim on account of non-availability of gas, the Appellant has suffered financial impact to a tune of Rs.45 Crores. The said situation persisted even in the subsequent years because of non-availability of gas, which is on account of event of force majeure. They sought quashing of the impugned order to the extent it reduced fixed cost for DCCPP and RGTPS plants proportionately based on the PLF instead of plant availability, and consequently they seek for allowing the Appellant to recover Rs. 45.54 Crores along with carrying cost up to the date of the order and so also for subsequent years. They have also sought for permission to the Appellant to procure fuel/gas through

alternate arrangement and allow the additional cost accrued on account of such alternative arrangement.

94. As against this, Respondent-Commission defends impugned order. The Respondent-Commission opined in the impugned order that on earlier occasion in its order dated 27.04.2011 pertaining to truing up of Appellant's generating stations for FYs between 2004-05 to 2008-09 had opined that fuel/gas supply arrangement is the responsibility of the Appellant. Therefore, non-availability/deficiency in the availability of gas was opined as not a valid reason for non-availability of the plant. This order of 2011 never came to be challenged by the Appellant, therefore said opinion pertaining to responsibility of supply of fuel/gas was with the Appellant has reached finality. Based on the order dated 27.04.2011, the Respondent-Commission affirmed its earlier opinion that the responsibility for arrangement of fuel lies with the generator alone. It is also seen from the impugned order that the Respondent-Commission asked for certificates from SLDC to know the actual availability of plants of Appellant. However, the Appellant did not furnish said details to ascertain actual availability of the plants of the Appellant. It is also seen that the Respondent-Commission reduced the fixed cost based on PAF since the

Commission treated PAF equal to the PLF. This has to be done on account of deficit on the part of the Appellant in providing SLDC certificates of actual availability of the plants.

95. It is also seen that in the impugned order at Paras 4.11 to 4.13 the Respondent-Commission in detail considered what exactly the Appellant was asked to submit during the proceedings in question, which read as under:

*“4.11 The Commission asked RVUN to submit the SLDC Certificate of actual availability of its units/plants. RVUN submitted the log sheet for the SLDC instructions to back down the Generating Stations, however, RVUN could not furnish the SLDC Certificate regarding actual availability. In view of the above, the Commission has not considered the above submission for relaxing the target Availability for recovery of full fixed charges. The Commission also asked RVUN to submit the SLDC Certificate showing that the loss in generation is due to the SLDC instructions to establish that the generation loss is uncontrollable. The Petitioner has not been able to submit the SLDC certificate showing the loss in generation due to SLDC instructions. **The Commission directs RVUN to submit the SLDC Certificates towards actual availability and reasons for loss in generation, if any, along with the true-up Petitions from FY 2011-12onwards.***

4.12 In view of the above the Commission has considered the Actual availability equal to actual PLF. The Availability/Capacity Index approved by the Commission for FY 2010-11 is as shown in the Table below:

Table 5: Availability / Capacity Index approved by the Commission for FY 2010-11:

Particulars	KTPS (Unit 1-6)	KTPS (Unit 7)	STPS (Unit 1-5)	STPS Unit 6	RGTPS	DCCPP	Mahi	CTPP Unit1
As claimed by Petitioner	92.23%	92.08%	85.29%	36.40%	54.99%	82.29%	27.28%	64.99%
Availability considered by Commission	89.82%	95.16%	78.74%	35.36%	31.18%	69.12%	27.28%	53.64%

Plant Load Factor (PLF)

4.13 The actual PLF submitted by RVUN for its Stations for FY2010-11 is as shown in the Table below:

Table 6: PLF for FY 2010-11 as submitted by RVUN

Particulars	KTPS (Unit 1-6)	KTPS (Unit 7)	STPS (Unit 1-5)	STPS (Unit 6)	RGTPS	DCCPP	CTPP Unit1
Target PLF for incentive	82.00%	82.00%	82.00%	82.00%	70.00%	80.00%	80.00%
Considered in Tariff Orders	90.00%	82.00%	88.00%	82.00%	77.86%	80.00%	80.00%
Actual as claimed by Petitioner	90.09%	96.27%	78.89%	35.21%	31.29%	69.01%	55.07%

96. It is also seen that the RERC Tariff Regulations of 2009 provide incentives to generating companies if they achieve generation target beyond the Plant Load Factor. We cannot find fault with this procedure since such incentive is provided to encourage better and better performance by the generators which would result in optimum utilisation of the assets created by making huge investments. It is also seen that the

Respondent-Commission allowed all the prudent expenses met by the Appellant based on the availability of its stations. It also opined that the Appellant must achieve higher PLF so that more energy is available at a lower price within the State of Rajasthan, therefore the Respondent-Commission was justified in opining that the Appellant must strive hard to achieve higher PLF. It also observes the functioning of the Appellant i.e., achieving better PLF pertaining to KTPS units, in fact, Respondent-Commission appreciate its performance at KTPS units and advises the Appellant to implement best practices of KTPS in other stations also. It refers at Para 4.15 of the RERC Tariff Regulations 2009 which specifically defines PLF, which reads as under:

“(43) “Plant Load Factor”, for a given period, means the total sent-out energy corresponding to scheduled generation during such period, expressed as a percentage of sent out energy corresponding to installed capacity in that period and shall be computed in accordance with the following formula:

$$\text{Plant Load Factor (\%)} = \frac{10000 \times \sum_{i=1}^N \text{AGi}}{\{N \times \text{IC} \times (100 - \text{AUXn})\}} \%$$

where - N = number of time blocks in the given period

AGi=Actual Generation in MW for the ith time block in such period

IC=Installed Capacity of the generating station in MW

AUXn = Normative Auxiliary Consumption in MW, expressed as a percentage of gross generation”

97. At Para 4.16 it refers to table 7 PLF approved by the Respondent-Commission for FY 2010-11 in terms of the formula, which reads as under:

“Table 7: PLF approved by the Commission for FY 2010-11

Particulars	KTPS (Unit 1-6)	KTPS (Unit 7)	STPS (Unit 1-5)	STPS (Unit 6)	RGTPS	DCCPP	CTPP Unit1
Actual as submitted by the Petitioner	90.09%	96.27%	78.89%	35.21%	31.29%	69.01%	55.07%
Actual reworked by the Commission	89.82%	95.16%	78.74%	35.36%	31.18%	69.12%	53.64%
Considered for true-up	89.82%	95.16%	78.74%	35.36%	31.18%	69.12%	53.64%”

98. At 4.40 it refers to components of annual fixed charges. At 4.97 of the impugned order, the Respondent-Commission makes comparison of all the stations of the Appellant pertaining to annual fixed charges, wherein Table 43 refers to annual fixed cost approved by the Commission and Table 44 refers to approved annual fixed cost and reduction of annual fixed charges for not achieving the availability target, which is as under:

“Annual Fixed Charges

The actual availability of some of the stations of RVUN has been lower than the normative availability approved by the Commission in this Order. For such stations, the Commission has reduced the recovery of Annual Fixed Charge on pro-rata basis. The approved Annual Fixed Charges and Annual Fixed Charges reduced by the Commission are as shown in Tables below:

Table43: AFC as approved by the Commission (Rs.Crore)

S.N	Particulars	KTPS (Unit 1-6)	KTPS (Unit-7)	STPS (Unit 1-5)	STPS (Unit 6)	RGTPS	DCCPP	Mahi	CTPP Unit1	RVUN (Total)
1	O&M Expenses	139.34	26.00	166.67	33.33	13.40	32.97	11.50	26.85	450.07
2	Depreciation	59.37	41.59	222.99	48.88	13.92	58.19	6.18	47.47	498.59
3	Interest&Finance Charges	13.60	72.94	75.63	87.42	3.01	76.64	0.00	74.49	403.73
4	Intereston transitional loan	13.79	0.00	75.18	0.00	1.98	2.41	0.00	0.00	93.36
5	Intereston working capital	50.29	10.61	70.42	11.47	3.55	13.65	0.62	8.11	168.70
6	Lease Rental	0.00	0.00	0.01	0.00	0.00	0.00	0.00	0.00	0.01
7	Insuranceon fixed assets	0.79	1.28	1.72	0.70	0.43	1.69	0.00	1.01	7.61
8	InterUnit Account Balance Written Off	10.01	0.00	4.96	0.00	0.38	0.00	0.32	0.00	15.67
9	Recovery of ARR & Tariff Petition Fees	0.52	0.10	0.63	0.13	0.06	0.17	0.01	0.13	1.73
10	Addl. contribution towards Pension & Gratuity Fund	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
11	Extraordinary items	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
12	Prior Period Charges	3.66	0.00	6.73	0.00	0.21	0.63	0.27	0.48	11.97
13	Total fixed charges	291.36	152.52	624.92	181.92	36.94	186.34	18.90	158.53	1651.43
14	Less: Non TariffIncome	8.95	3.21	9.92	3.89	0.18	2.12	0.13	4.68	33.08
15	Net fixed charges	282.41	149.30	615.00	178.03	36.76	184.22	18.78	153.84	1618.35

Table 44: Approved AFC and AFC Reduced for not achieving the target availability

Station	AFC after true-up (Rs. Crore)	Actual Availability considered by the Commission	Normative Availability	Reduced AFC (Rs. Crore)	AFC reduced (Rs. Crore)
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KTPS (Unit 1-6)	282.41	89.82%	82.00%	282.41	0.00
KTPS Unit-7	149.30	95.16%	82.00%	149.30	0.00
STPS (Unit 1-5)	615.00	78.74%	82.00%	590.57	24.43
STPS Unit-6	178.03	35.36%	82.00%	76.76	101.27
RGTPS	36.76	31.12%	70.00%	16.34	20.42
DCCPP	184.22	69.09%	80.00%	159.10	25.12
CTPP Unit-1	153.84	53.64%	80.00%	103.15	50.69
Mahi	18.78	27.28%	27.28%	18.78	0.00
Total	1618.35			1396.42	221.93"

99. At 4.106 it refers to revenue earned from fixed charges and variable charges for various stations of the Appellant. Same revenue was considered for truing up purpose. Table 49 at Para 4.106 refers to all the units of the Appellant including DCCPP and RGTPS. It clearly indicates which station was given generation incentive etc., which reads as under:

“Table 49: Revenue considered by the Commission

Station	Fixed Charges	Variable Charges	FPA	Generation Incentive
KTPS (Unit 1-6)	294.36	1459.35	22.04	16.23
KTPS (Unit 7)	151.94	277.57	-3.56	5.12
STPS Unit (1-6)	753.65	1999.81	57.44	0.00
DCCPP	188.43	453.21	-2.02	0.00
CTPP (Unit 1)	142.33	124.67	-1.21	0.00
RGTPS	28.78	52.26	53.14	0.00
Mahi	5.74	1.71	0.00	0.00
Total for true-up	1565.23	4368.58	125.83	21.34
Revenue from sale of power for true-up	6059.64			
Revenue from Generation Incentive	21.34			
Total Revenue	6080.98"			

100. Force majeure Clause in terms of PPA between the parties reads as under:

“11. FORCE MAJEURE

The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock-out, forces of nature, accident, act of God and any other reason beyond the control of concerned party. But any party claiming the benefit of this clause shall reasonably satisfy the other party of the existence of such an event and give written notice within a reasonable time to the other party to his effect. Generation/drawal of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.”

101. Apparently, at the time of truing up of the different generating stations of the Appellant for financial years between 2004-05 to 2008-09 when the Appellant pleaded deficiency of fuel/gas supply from the gas suppliers, the Respondent-Commission by its Order dated 27.04.2011 opined that such

shortage of gas cannot be considered as a sufficient reason for not maintaining normative availability of the generating plants in question. It is seen that non-availability of gas was not accepted as a valid reason. This Order of the Commission was never challenged; therefore, it remains valid between the Appellant and the Commission so far as non-availability of gas as not a valid reason was determined and had become final between the parties way back in 2011. Now it is not open to plead the same non-availability of sufficient gas as a valid reason as long as the Order of the Commission dated 27.04.2011 remains valid. Therefore, the opinion of the Respondent-Commission that gas supply arrangement for the generating plants in question is with the Appellant cannot be found fault with.

102. It is also seen that in the absence of certification from SLDC certifying actual availability of the plants, the Respondent-Commission has treated PLF as PAF. The deficit is with the Appellant in not giving proper information. Even now they are not able to place on record that the plant availability was otherwise than what is referred to in the impugned order.

103. In that view of the matter, we do not find any good ground to interfere with the opinion expressed by the Respondent-Commission so far as reduction of fixed charges/fixed cost. If the Appellant kept quite without challenging the opinion of the Commission at the time of truing up in its order of 2011, it is too late in the day to raise grievance now by the Appellant.

104. In the light of the above discussion and reasoning, we are of the opinion that there are no merits to interfere with the impugned order. Hence, we decline to interfere with the impugned order. Accordingly, the Appeal is dismissed. All the pending IAs, if any, shall stand disposed of.

105. Pronounced in the Virtual Court on this, **the 21st day of August, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson


REPORTABLE / NON-REPORTABLE

ts/tpd