

In the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 168 of 2012

Dated: 12th December, 2013

Present:- Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Justice Surendra Kumar, Judicial Member

IN THE MATTER OF:

Indraprastha Power Generation Company Limited
"Himadri", Rajghat Power House Complex,
New Delhi – 110 002

..... Appellant/Petitioner

Versus

1. Delhi Electricity Regulatory Commission,
Viniyamak Bhawan, C - Block,
Shivalik, Malviya Nagar,
New-Delhi-110 017
2. BSES Rajdhani Power Limited,
BSES Bhawan, Nehru Place,
Delhi-110 019
3. BSES Yamuna Power Limited,
Shakti Kiran Vihar,
Karkardooma,
Delhi-110 092
4. Tata Power Delhi Distribution Limited,
Sub Station Building,
Hudson Lines, Kingsway Camp,
Delhi-110 009

... Respondents

APPEAL UNDER SECTION 111 OF THE ELECTRICITY ACT, 2003

Counsel for the Appellant : Ms. Swapna Seshadri
Counsel for the Respondent(s) : Mr. R.K. Mehta
Mr. Antaryami Upadhaya for R-1
Mr. Vishal Anand &
Mr. Gaurav Dudeja for R-2
Mr. Ashish Gupta &
Ms. Tarunima Vijra for R-3

J U D G M E N T

JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant appeal has been preferred by the appellant under Section 111 of the Electricity Act, 2003 against the order dated 13th July, 2012 passed in the Petition No. 7 of 2012 by the Delhi Electricity Regulatory Commission (hereinafter referred to as 'the State Commission') in the matter of determination of Generation tariff for the appellant Indraprastha Power Generation Company Limited (in short, 'IPGCL') for the control period from FY 2012-13 to 2014-15 and truing-up of the financials for the previous control period from FY 2007-08 to FY 2011-12, whereby the State Commission decided the said petition on different aspects of the Aggregate Revenue Requirement (ARR) and applicable tariff for the generating stations. Thus, the tariff order of the appellant for the aforesaid control period and truing up period is under challenge in this appeal before this Tribunal.

2. Relevant facts of the case are as under:-

- a) That the Appellant is a generating company incorporated under the Companies Act, 1956 and is an undertaking wholly owned by the

Government of NCT of Delhi. The Appellant is undertaking the activities of generation of electricity in the National Capital Territory of Delhi. The Appellant has succeeded to and has been vested with the function of generation of electricity upon the unbundling of the erstwhile Delhi Vidyut Board.

- b) That the Appellant owns and operates the following generating stations:
 - (i) Rajghat Power House (RPH) having a total capacity of 135 MW with two units of 67.5 MW each using coal as fuel; and
 - (ii) Gas Turbine Power Station (GTPS) with a total capacity of 270 MW having six gas turbines of 30 MW each, using NG/RLNG as fuel and three Waste Heat Recovery Steam Turbines of de-rated capacity of 30 MW each.
- c) That the State Commission has framed the Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulations, 2011 (hereinafter referred to as the **"DERC(Tariff Regulations), 2011** .
- d) That on 15.02.2012, the Appellant had filed the Petition No. 7 of 2012 for approval of the Aggregate Revenue Requirement (ARR) for the multi year period from FY 2012-13 to FY 2014-15 and truing up of the financials for the control period from FY 2007-08 to FY 2011-12. The State Commission has passed the aforesaid impugned tariff order dated 13.07.2012 in petition no. 07 of 2012 filed by the appellant/petitioner before the State Commission.

3. We have heard the learned counsel for the parties and have gone through the material on record cautiously and carefully including the Regulations of the Delhi Commission and that of Central Electricity Regulatory Commission. We have also gone through the detailed written submissions/arguments filed by the rival parties.

4. The first issue raised by the learned counsel for the appellant is that the State Commission has not tried up the aspects for the control period from FY 2007-08 to FY 2011-12 allowed in favour of the appellant by the decision of this Tribunal in its judgment dated 07.04.2011 in Appeal No. 26 of 2008 for Financial Year 2007- 08 to Financial Year 2010-11 in respect of Indraprastha Power station which has subsequently been closed down. This plea was taken in the memorandum of appeal by the appellant. In the note of arguments filed on behalf of the appellant it has been mentioned and pointed out by the learned counsel for the appellant that the issue of non-implementation of the aspects allowed by this Tribunal in its judgment dated 07.04.2011 in Appeal No. 26 of 2008 has now been implemented in the order dated 31.07.2013 passed by the State Commission and no grievances of the appellant remains in respect thereof. Thus, the judgment dated 7th April, 2011 of this Tribunal has now been implemented by the State Commission and this issue has become infructuous.

5. The second point raised by the learned counsel for the appellant is about the different issues concerning Rajghat Power House and Gas Turbine Power Station.

6. The issues concerning Rajghat Power House and Gas Turbine Power Station are, in short, set out as under:-

A) Issues concerning Rajghat Power House-

(i) Station Heat Rate of Rajghat Power House

A margin of only 5 % has been allowed by the State Commission on the heat rate derived as per the performance test as against the margin of 6.5 % as allowed by the Central Commission in the Tariff Regulations, 2009

(ii) Plant Availability Factor of Rajghat Power House

The Plant Availability Factor has been fixed by the State Commission at 75% as against 70% proposed by the Appellant in view of vintage, imminent closure of the station, average performance during the last control period and recognition by the State Commission by not modifying the norms of operation for any of the existing generating stations in its Concept Note of notifying the DERC Tariff Regulations

(iii) Auxiliary Power Consumption of Rajghat Power House

The norm of Auxiliary Power Consumption of 11.28% has been fixed by the State Commission at the same level for many years without considering the vintage, average actual performance of the station, and the relaxation provided by the Central Commission for other similarly situated stations.

(iv) Computation of Depreciation for Rajghat Power House not in accordance with the DERC Tariff Regulations:-

Wrong calculation of depreciation against the claim by the Appellant based on the balance life of the plant and the provisions of the DERC Tariff Regulations, 2011.

B) Issues concerning Gas Turbine Power Station-

(i) Station Heat Rate of Gas Turbine Power Station in combined cycle mode-

The heat rate of 2450 kCal/kWh has been fixed in combined cycle mode by the State Commission whereas the Central Commission has allowed the heat rate of 2500 kCal/kWh for similar Assam gas based station of NEEPCO based on the actual performance.

(ii) Relaxation in Station Heat Rate of Gas Turbine Power Station in Open cycle mode-

The heat rate of 3125kCal/kWh in open cycle mode has been fixed against the claim of the Appellant for 3370 kCal/kWh and not considering the heat rate of 3440 kCal / kWh in open cycle mode for similar Assam gas based station of NEEPCO allowed by the Central Commission.

(iii) Relaxation in Plant Availability Factor of Gas Turbine Power Station

The Plant Availability Factor has been fixed by the State Commission at 80% as against 70% as proposed by the Appellant in view of vintage and average performance during the last control period and recognition of the State Commission by not modifying the norms of operation for any of the existing generating stations in its Concept note.

(iv) Relaxation in Auxiliary Power Consumption of Gas Turbine Power Station

The norm of Auxiliary Power Consumption of 3% in combined cycle mode has been fixed by the State Commission without considering the vintage, part load operation of backing down by the State Load Despatch Centre and average actual performance of the station.

(v) Computation of Depreciation for Gas Turbine Power Station not in accordance with the DERC Tariff Regulations:-

Wrong calculation of depreciation against the claim of the Appellant has been based on the balance life of the plant and the provisions of the DERC Tariff Regulations.

7. The learned counsel for the appellant, throwing light on the findings recorded in the impugned order has submitted as follows:-

- (i) That the State Commission has erred in mechanically applying the provisions of the DERC Tariff Regulations, 2011 with respect to all norms and parameters even though the Appellant had placed detailed reasons seeking relaxation due to actual plant conditions, vintage of the generating stations and as recognized in the previous Judgments of this Tribunal.
- (ii) That the State Commission has failed to appreciate that the very purpose and objective of the provisions in the tariff regulations, namely, Regulation 11.10 dealing with Power to Relax, Regulation 11.9 dealing with Power to remove difficulties and Regulation 11.2 dealing with inherent powers of the State Commission is to provide, for circumstances as in the present case of the appellant, where it is not realistically possible to achieve the norms and parameters fixed and the discretion vested in the State Commission is judicial discretion and ought to be exercised when the circumstances warrant.
- (iii) That the State Commission has failed to appreciate the rationale of the various decisions of this Tribunal whereby it has been held that the truing up of financials is an essential process for determining the actuals and adjusting the applicable revenue requirements in

accordance with the final actuals and audited figures of the utility. The State Commission can undertake the truing up process even in the absence of the audited accounts based on the provisional accounts of the utility.

- (iv) That the State Commission erred in not following the judgment of the Hon'ble Tribunal dated 29.09.2010 in Delhi Transco Limited vs. Delhi Electricity Regulatory Commission (Appeal No. 28 of 2008), observing that the State Commission ought to effect the true-up exercise as early as possible without waiting for the current control period to be over in order to help in the early recovery of the past revenue dues.

8. The following points in detail have been raised on behalf of the appellant with regard to **Rajghat Power House:-**

A. Station Heat Rate

(i) That the Appellant had sought for the Station Heat Rate of 3248 Kcal / Kwh whereas the State Commission fixed the same at 3200 Kcal / Kwh. The State Commission has applied the margin of 5 % applicable for gas based station on the heat rate derived from performance Test. As per the directions of the State Commission, the Appellant conducted the Performance Test for determination of Heat Rate on the units of Rajghat Power House.

- (ii) That the State Commission in its earlier Order dated 26.08.2011 for determination of Tariff for FY 2011-12 after receiving the report of the Performance Test noted that the actual station heat rate achieved by the Unit 1 and Unit 2 of the Rajghat Power House is 3049.8 kCal/kWh and

3220.1 kCal/kWh. This performance report was submitted by NTPC CenPEEP. However, the State Commission fixed the Station heat rate of both the Units at 3049.8 kCal/kWh though the same was achieved by only one unit. The State Commission ought to have considered differential station heat rate accordingly.

- (iii) That the Central Electricity Regulatory Commission (hereinafter "**Central Commission**") has after due consideration of the nation - wide figures has fixed a margin of 6.5% for the coal/lignite based stations in the Tariff Regulations, 2009. The Central Commission has also adopted the margin of 6.5 % for newly set up coal based thermal generating stations in the CERC Tariff Regulations, 2009 whereas the Rajghat Power House is an old station. The State Commission ought to have at least allowed the margin of 6.5 % instead of 5 %.
- (iv) That the State Commission has failed to appreciate that the station is envisaged to be closed down in near future and no major R & M expenditure is being incurred except only the need based expenditure. Hence, the Station Heat Rate of 3200kCal/kWh fixed for the station is not possible to be achieved by the station and the relaxation of norms should have been given considering the proposed closure.

B. Plant Availability Factor / Plant Load Factor (PLF)

1. That the Appellant had sought for a Plant Load Factor of 70 % as against 75 % which has been fixed by the State Commission. The State Commission itself in its Concept Note issued on Draft Generation Tariff Regulations had clearly recognized the vintage and current operations of the generating stations and stated

that there is no merit in modifying the norms of operation for any of the existing generating stations.

2. That however, the State Commission in the impugned Order has still fixed the Plant Availability at 75% increasing the same from 70% which was fixed in the previous control period. The State Commission has mechanically applied the DERC Tariff Regulations, 2011 without considering the actual circumstances of the matter. The State Commission has failed to appreciate that with the technological obsolescence and aging of the station, the operating performance of the station deteriorates.

3. That the Appellant had specifically pleaded before the State Commission that the station is proposed to be closed down shortly and no major expenditure on renovation and modernization is being incurred. In such a situation the fixing of higher availability of 75% during the control period is not achievable, therefore, there was to justification for the same. The targets should have been relaxed with aging of the plant from the existing one, rather than fixing tough targets which cannot be practically achieved.

C. Auxiliary Power Consumption

It has been submitted that the State Commission has fixed Auxiliary Power consumption at 11.28 % as against 12.50 % sought for by the Appellant. The State Commission has failed to appreciate the norms fixed or relaxed by the Central Commission for Tanda Station which was of comparable size to that of Rajghat Power House of the appellant. The auxiliary power consumption of the station according to the appellant is in the range of 12.25% to 14.43% and despite the best

efforts, Rajghat Power House has been able to achieve only 12.25% during the last control period. With the ageing and the deterioration in the performance of the station, the Auxiliary Power Consumption is bound to increase.

D. Computation of depreciation not in accordance with DERC Tariff Regulations, 2011

1. The next contention raised on behalf of the appellant is that the State Commission has erred in the computation of the depreciation for Rajghat Power House for FY 2014-15 deviating from the stipulations in the DERC Tariff Regulations, 2011 (Regulations 6.30, 6.31, 6.32, 6.33 & 6.34). According to these Regulations of Tariff Regulations, 2011 the depreciation should be calculated for each year of the control period, on the amount of capital cost of the fixed assets provided that depreciation shall not be allowed on assets funded by any capital subsidy/grant. Thus, depreciation for each year of the control period shall be determined based on the methodology specified in the Regulations including Appendix-I. The same shall be calculated annually based on the straight line method, over the useful life of the project. In the case of exiting projects, the balance depreciable value as on 01.04.2012 shall be worked out by deducting the cumulative depreciation including advance against depreciation upto 31.03.2012 from the gross depreciable value of the assets. The rate of depreciation shall be continued to be charged at the rate specified in Appendix –I till cumulative depreciation reaches 70% and thereafter the remaining depreciation value shall be spread over the remaining life of the assets such that maximum depreciation does not exceed 90%.

2. In the impugned order the State Commission has erred in computing percentage of depreciation during FY 2014-15 by applying depreciation rate as per

DERC Tariff Regulations, 2011 based on the opening cumulative depreciation for the full financial year while the cumulative depreciation of plant is reaching threshold limit of 70% during the year. The State Commission ought to have computed the depreciation in two parts for the Financial Year 2014-15, namely, in the first part tariff depreciation rate as per Appendix of the Regulations till the cumulative depreciation reached the threshold limit of 70% and thereafter the balance depreciation upto 90% of the asset value to be spread over the remaining useful life of the units of the plant. This error has resulted into lower depreciation for the FY 2014-15.

The State Commission has failed to consider allowance of proportionate allocation of depreciation during the control period from FY 2012 – 13 to 2014-15 as the useful life of 25 years of unit no. 2 will be completed by January, 2015 and that of unit no.1 by May, 2015 and as otherwise there will be a large loading of depreciation in tariff in the last years.

9. The learned counsel for the appellant has raised the following points/issues with regard to **Gas Turbine Power Station (GTPS) of the appellant:-**

A. Station Heat Rate

10. The learned State Commission has not relaxed the station heat rate of 2450 kCal/kWh in combined cycle mode in spite of aging and technological obsolescence and has failed to appreciate the following aspects:

- i. The turbines of the station are more than 25 years old and of 30 MW size.

- ii.** The combined cycle of the station was installed after retrofitting of waste heat recovery by M/s BHEL, after operation in open cycle mode for around 10 years.
- iii.** By the time the retrofitting was done, the Original Equipment Supplier had closed operations. Therefore, the retrofitting of the machines was done by M/s BHEL which was not the original equipment supplier and such retrofitting by a supplier other than the supplier of the turbines had inherent problems.
- iv.** The capacity of Steam Turbine Generator of the station is de-rated.
- v.** Since heat input is same for de-rated capacity of STGs, the combined cycle heat rate has been impacted and needs to be revised accordingly.
- vi.** Since the Station is achieving a lower Plant Load Factor, the same adversely affects the heat rate of the station. This aspect has been recognized by Central Commission in its Statement of Objects and Reasons for terms and conditions of Regulations, 2009 that PLF affects the Station Heat Rate and Auxiliary Power Consumption of the station.
- vii.** The State Commission has failed to appreciate that there has been substantial gap between Availability and plant load factor of the station due to backing down. The plant load factor has been on lower side as compared to availability which further aggravates the station heat rate and auxiliary power consumption of the station.
- viii.** The State Commission has not considered that as per the manufacturer design data curve, the operation of station at 60% PLF requires

approximately 3.6% more heat as compared to the operation at a level of 70%. Station Heat Rate of GTPS is also on higher side due to frequent backing down during night time by State Load Despatch Centre (SLDC), resulting in partial operation. Sometimes, transmission evacuation constraints have also led to partial operation of the station resulting in higher heat rate.

- ix.** The Central Commission in an Order dated 07.06.2012 has relaxed the combined cycle heat rate to 2500 kCal/kWh from 2400 kCal/kWh for Assam Gas Based Station, a similar station as that of GTPS. The Central Commission while relaxing the heat rate for Assam Gas Based Station has taken the note of actual heat rate of Indraprastha Gas Turbine Power Station- a similar station as that of Assam Gas Based Station.

B. Relaxation in Station Heat Rate of Gas Turbine Power Station in open cycle mode:

- i)** That the State Commission has erred in not relaxing the norm of heat rate of 3125 kCal/kWh in open cycle mode despite the manufacturer's data curve specifying the guaranteed heat rate in open cycle mode.
- ii)** That the State Commission has failed to appreciate that the heat rate achieved by the station in open cycle mode is around 3400 kCal/kWh.
- iii)** That the station is expected to run in combined cycle mode most of the time and open cycle operation is rare. It is submitted that the station runs in open cycle mode only as and when requisitioned by State Load Dispatch Centre, Delhi. Further, the Central Commission

has allowed the heat rate of 3440 kcal/kWh in open cycle mode for similar gas based station as above which is much higher than the norm of 3125 kcal/kWh allowed by State Commission for GTPS.

- iv) The Central Commission in the Tariff Regulations for FY 2009-14 has fixed a heat rate of 3440 Kcal/Kwh in single cycle mode for similar Assam gas station of NEEPCO having capacity of 291 MW (6 Gas Turbines of 33.5 MW and 3 STG of 30 MW), even though the station was commissioned in 1995-98. The Central Commission has in the case of the Assam Gas Based Station, further relaxed the norms for heat rate in combined cycle mode and open cycle mode for the period 2009-14 as compared to the previous Tariff Regulations of 2004-09 in view of the age and condition of the station. The said Assam Gas Based Station is relatively a newly commissioned station as compared to the GTPS. The State Commission ought to have allowed a similar relaxation to the Appellant.

C. Plant Availability Factor of Gas Turbine Power System

11. That the State Commission has erred in not relaxing the norm of Target Availability of 80% to 70% as prayed by the appellant whereas the State Commission in its concept note had clearly recognized the vintage and current operations of the generating stations and has provided that there is no merit in modifying the norms of operation for any of the existing generating stations. The State Commission has increased the target Availability to 80% from the existing norm of 70% in the final Regulations without mentioning any reasons. In the Impugned Order, the DERC Tariff Regulations, 2011 have been

mechanically applied without considering the practical difficulties of the operation of the station.

12. That the State Commission has failed to appreciate that with the technological obsolescence and aging of the station, the operating performance of the station deteriorates. Hence, with aging of the plant, the targets should be further relaxed from the existing one rather than fixing higher targets which cannot be practically achieved.

13. That the State Commission has not considered the factors considered by the Central Commission while fixing the norms of Operation. As per the Section 61 of the Electricity Act, 2003, the State Commission shall be guided by the principles and methodologies adopted by the Central Commission. The State Commission should have considered the following factors relevant for determination of Operation norms for a Control Period as followed by Central Commission:-

- i) The norms should be specified having due regard to the actual performance of the coal/lignite based stations for the period 2004-05 to 2007-08.
- ii) To leave the scope for operational flexibility in case of poor supply of fuel, any operational contingency, deterioration in the fuel quality etc.
- iii) A very high performance norm may also discourage the new investment in the sector as in the regulated regime it may be difficult for them to mitigate any risk for not achieving the specified high performance
- iv) The Commission has considered the average performance during the period to set the operational targets.

v) The Commission has considered the practical difficulties being faced by the stations.

14. That the State Commission has failed to appreciate the average availability of 73.14% achieved by the Station during the Control Period from FY 2007-08 to FY 2011-12. The Central Commission has fixed the norm of 72% availability for similar station like Assam Gas based Station based on the average of actual availability achieved during the period FY 2004-05 to FY 2007-08 considering the difficulties being faced by station. Thus, fixing of higher availability of 80% during the next control period is not achievable and is not justified.

D. Auxiliary Consumption

15. That the State Commission has not relaxed the Auxiliary Power Consumption of 3 % in combined cycle mode as prayed by the Appellant. The Gas Turbines of the station were commissioned in the year 1985-86 and the Waste Heat Recovery Units were retrofitted in the year 1995-96. The Steam Turbine Generators of the station are not able to produce the rated output and hence the auxiliary power consumption of the station calculated in terms of percentage over the gross generation of the station increases.

16. That the State Commission has failed to appreciate that Plant Load Factor affects the Auxiliary Power Consumption. Lower the Plant Load Factor, higher is the Auxiliary Power Consumption. The same has also been recognized by Central Electricity Regulatory Commission in its Statement of Objects and

Reasons for terms and conditions of Regulations, 2009 that Plant Load Factor affects the Station Heat Rate and Auxiliary Power Consumption of the station.

17. The State Commission has failed to consider that due to less system demand, the generation of the station was backed down, resulting in partial operation of the units.

18. That the plant load factor measures the actual generation of the station based upon the scheduled generation whereas the availability measures the capacity of the station to inject the power into the system. This lower plant load factor has resulted into higher Auxiliary Power Consumption of the station.

19. E. Computation of Depreciation not in accordance with the DERC Tariff Regulations, 2011

i) That the DERC Tariff Regulations, 2011 make it clear that the rate of depreciation shall be continued to be charged at rate specified in the Appendix-I of the Regulations till the cumulative depreciation reaches 70%. Thereafter the remaining depreciation value shall be spread over remaining life of the asset such that maximum depreciation does not exceed 90%.

ii) The State Commission in computing percentage of depreciation during the FY 2014-15 has applied the depreciation rate as per the DERC Tariff Regulations, 2011 based on the opening cumulative depreciation, for the full financial year while the cumulative depreciation of the plant is reaching the threshold limit 70% during the year. The State Commission should have computed the depreciation in two parts for the year FY 2014-15 i.e. in the first part depreciation rate as per the Appendix of the Tariff Regulations could have applied till the cumulative

depreciation reached the threshold limit of 70% and thereafter the balance depreciation upto 90% of the asset value should have been spread over the remaining useful life of the units of the plant. This error has resulted into lower depreciation for the FY 2014-15.

iii) The State Commission has failed to appreciate the submissions of the Appellant in its petition as well as in additional information submitted to the State Commission for allowance of proportionate allocation of depreciation during the Control Period from FY 2012-13 to 2014-15 as the useful life of 25 years of the station has already been completed and otherwise, there will be a large loading of depreciation in Tariff in the last years.

20. In the present appeal, the appellant has challenged the aspects of non-relaxation of the provisions of the operating norms provided in the DERC Tariff Regulations, 2011 while fixing the tariff for the Multi Year Tariff (MYT) Control Period from 2012-13 to FY 2014-15. According to the appellant, the appellant has not been able to achieve the plant availability factor, station heat rate and auxiliary consumption for Rajghat Power House. The appellant has also not been able to achieve the station heat rate in open cycle mode and auxiliary consumption in combined cycle mode for gas turbine power station. Since the appellant has not achieved the said norms, its request for relaxation of the provisions of the operating norms provided in DERC Tariff Regulations, 2011 while fixing the tariff for the MYT aforesaid control period has not been allowed by the Learned State Commission, hence this appeal by the appellant before this Tribunal.

21. It may be mentioned here that the appellant Indraprastha Power Generation Co. Ltd. has filed Writ Petition (Civil) No. 2903 of 2013 captioned as Indraprastha Power Generation Co. Ltd. Vs. Delhi Electricity Regulatory Commission in the

Hon'ble High Court of Delhi challenging the Regulations 6.33, 6.36 and 7.1 of DERC (Tariff Regulations), 2011 .

Thus, the Regulation No. 6.33, Regulation No. 6.36 and Regulation No. 7.1 have been challenged by the appellant before the Hon'ble High Court of Delhi claiming that it was not possible for the generating station to achieve the auxiliary power consumption norm because the generation of the station had been backed down resulting in partial operation of the units, taking almost the same grounds which have been argued before us in this appeal on behalf of the appellant. The appellant has preferred a general challenge on the issue of operating parameters not being achievable by the appellant before us.

22. Per contra, the learned counsel for the respondents have made the following submissions against the submissions advanced on behalf of the appellant:-

- a) That the two parallel proceedings cannot be taken in the self same relief before two forums. Admittedly, the appellant has challenged the Delhi Electricity Regulation Commission (Terms and Conditions for Determination of Generation Tariff) Regulations, 2011 by way of a Writ Petition being Writ Petition (Civil) No. 2903 of 2013 before the Hon'ble High Court of Delhi and in the present appeal before this Tribunal the appellant is seeking relaxation of the Regulations. Since the relief claimed by the appellant in the Writ Petition and present appeal is overlapping, the appellant should not be permitted to pursue both the remedies simultaneously as has been held by the Hon'ble Apex Court in cases titled Meghmala Vs. G. Narsimha Reddy (2010) 8 SCC 383 and State of H.P. Vs. Surendra Singh (2006) 12 SCC 484.

- b) That the concept note repeatedly argued by the appellant is prepared by the staff of the Commission in support of the Draft Regulations and is subject to further deliberations by the Commission. It is only after the public hearing and detailed deliberation by the Commission that the final Regulations are framed. However, in the concept note all the parameters were kept at the same level as in the previous MYT Regulations except in case of availability. All other operational norms as shown in the concept note, draft regulations and final Regulations were the same. Hence, the submissions of the appellant based on the observations in the concept note are mis-conceived and untenable.
- c) That the appellant has sought relaxation of the norms prescribed in the Regulations, 2011 under various heads. The relaxation of the Regulations is an exception and not rule. Such relaxation cannot be claimed as a matter of course. In the present case, no case for relaxation has been made out in the opinion of the learned State Commission, hence the impugned order was passed.
- d) That the Rajghat Power Station (RPH) of the appellant was commissioned in the year 1989-90 and it has still not completed its stipulated useful life. Too much emphasis on the vintage of the stations is therefore not justified. The Commission has already taken the actual vintage of the stations into consideration while deciding the Operational Norms as stated in Regulation 7.1 of the Regulations 2011. These stations cannot be compared with very old stations like the I.P. Station which was commissioned in the year 1967 in which the Hon'ble Tribunal had taken the view that a case for relaxation of norms was made out .

There is no warrant for any further relaxation of norms laid down under the Tariff Regulations, 2011 in case of these two stations of the appellant.

- e) That there is no justification for repeated reference to imminent closure of the station and claiming relaxation of the norms laid down under the Regulations on that ground. The closure of the station has been in the offing for the last many years. So long as the station has to be run, it must be run properly. Moreover, the Commission has approved substantial additional capital expenditure during the previous MYT period to improve the performance of the stations of the appellant.

23. According to the learned counsel for the respondents the present appeal has been preferred against the ARR and Generation Tariff Order dated 13.07.2012 passed by the learned Delhi Commission in the matter of Indraprastha Power Company Ltd (IGPCL) for the control year FY 2012-13 to FY 2014-15 on the following main grounds:-

- i) Truing up financials for the FY 2007-08 to FY 2011-12 as prayed by the petitioner.
- ii) Issues concerning Rajghat Power House; and
- iii) Issues concerning Gas Turbine Power Station.

24. As per clause 5.7 of the MYT Regulations, 2007, for certain controllable parameters viz- Station Heat Rate, availability, auxiliary energy consumption etc., no true up is required to be done on account of actual performance of the generation company. The Commission has set targets for each year of the Control Period for aforesaid items or parameters which are deemed to be controllable.

25. According to Regulation 5.8 of 2007 Regulations any financial loss on account of underperformance on targets for parameter specified in Clause 5.7 (a) to (e) is not recoverable through tariff. Similarly, any financial gain on account of over-performance with respect to these parameters is to the Generating Company's benefit and shall not be adjusted in tariffs.

26. The Commission has extended the MYT Regulations, 2007 and the controllable period for a period of one year to March, 31, 2012. Accordingly, it has been decided by the Commission in its order dated 26.08.2011 that it shall carry out true up for each year of the control period from FY 2007-08 to FY 2011-12, at the end of extended control period when the audited accounts for all the years of the control period are available.

27. Taking us through detailed grounds of the appeal, learned counsel for the respondents have justified the impugned order of the learned Delhi Commission saying that the same has been passed on correct and proper appreciation of the Tariff Regulations, 2011. The impugned order suffers from no perversity or illegality and the same is not warranted to be interfered with in this appeal.

28. It has been strenuously argued by the learned counsel for the respondents that the appellant has failed to show how relaxation of norms will be in the "public interest". Regulation 11.10 on which the appellant is relying upon, expressly provides that MYT Regulations can be relaxed only in furtherance of "public interest". In the present appeal, it is not the case of the appellant that relaxation of the operation norms in the MYT Regulations will be in the "public interest".

Relaxation of operating norms specially the availability factor as prayed for by the appellant will be adverse to the “public interest”. Relaxation of the operational norms for availability factor will result in increase in tariff and then the same will be passed on to the ultimate consumers and will result in higher retail tariff for the consumers of the respondents. Therefore, the relaxation of station heat rate, in MYT Regulations without any valid reason, will not be in “public interest”.

29. The last argument of the respondents’ learned counsel is that the norms fixed by DERC/State Commission for the said plants of the appellant are below the national average in as much the national average fixed in the CERC (Terms and Conditions of Tariff) Regulations fixes a national average of 85% whereas the norms fixed for the appellant is 75%. Therefore, there is no need for further relaxation of the norms. The norms fixed for the appellant are already relaxed as compared to norms fixed for similar plants like Talchar and BTPS. The appellant has failed to give any reason as to why the already lenient norms fixed for the appellant should be further relaxed.

30. After going through the grounds of appeal, submissions made orally and written submissions filed by rival parties, following points arise for our consideration:-

Issues

1. Whether the station heat rate, plant availability factor/plant load factor, auxiliary power consumption of the appellant Rajghat Power House and issues concerning station heat rate in combined cycle mode as well as in open cycle mode and plant availability factor and

auxiliary power consumption relating to gas turbine power station of the appellant have been properly decided by the State Commission in the impugned order?

2. Whether the calculations of depreciation claimed by the appellant have not been, in relation to both the power stations of the appellant, correctly made in accordance with the DERC (Tariff Regulations) 2011 by the Delhi Commission?
 3. Whether the appellant's request for relaxation of the provisions of the operating norms provided in DERC (Tariff Regulations) 2011 while fixing the tariff for the MYT aforesaid control period has been wrongly refused by the State Commission, in case the appellant has failed to achieve the said norms?
 4. Whether this Tribunal is competent to entertain and decide the legality or validity of the DERC (Tariff Regulations) 2011 particularly when the same are under challenge before the Hon'ble Delhi High Court through Writ Petition (Civil) No. 2903 of 2013 filed by the appellant himself against the State Commission seeking relaxation of the aforesaid norms as it was not possible for the generating stations of the appellant to achieve the said norms?
 5. Whether the relaxation in DERC (Tariff Regulations), 2011 is in the public interest?
31. By way of filing the present appeal in this Tribunal, the appellant has sought relaxation of the norms prescribed in DERC Tariff Regulations, 2011 under various counts on the ground that the appellant's power stations have not achieved

the same norms due to the various factors (which we have mentioned in the upper part of the judgment) and it was not at all possible for the appellant's power generating stations to achieve the said norms. The reasons advanced by the appellant before us and also raised before the learned State Commission have been cited by us above and the repetition of the same is not proper. The appellant has not been able to make out any case for relaxation of the norms specified for that purpose, hence the appellant is not entitled to the relaxation of DERC, Tariff Regulations 2011 in the case in hand before us considering the circumstances of the matter. The learned State Commission in support of its findings has cited proper, cogent and valid reasons for arriving at the correct conclusion to which we are in full agreement. The appellant has miserably failed to establish that the relaxation of the norms prescribed under DERC Tariff Regulations, 2011 as sought by the appellant is in the public interest. The learned State Commission has not found the said relaxation in the public interest and rightly rejected the said contention of the appellant.

32. After going through the impugned order of the learned State Commission, we find that the learned State Commission has rightly and correctly not allowed the request of relaxation of the norms for the power generating stations of the appellant.

33. It is evident from the record and also evident from the conclusions made by the learned State Commission in the impugned order that the appellant is already charging an excessive tariff for the power generated by it and the relaxation of the Multi Year Tariff Regulations as sought by the appellant will result in further increase in the tariff which will cost additional burden on the respondents and the ultimate consumers of electricity. The tariff of the appellant is already more than

the tariff charged by other similar plants. The appellant is already enjoying the relaxed norms as compared to other similarly placed plants which is quite evident and established from the comparative study of the tables available on record. The evidence on record establishes that any kind of relaxation of operation norms in the station heat rate will also result in allowing higher consumption of coal and the relaxation on this score is not in public interest.

34. It is also evident from the careful and deep scrutiny of the evidence and material on record that the appellant has failed to give any technical reason to explain why it would not be able to achieve the heat rate than the ceiling heat rate as determined by the MYT Regulations, 2011 when other similar plants are able to do so. The learned State commission has been vested with power to relax any of the provisions of the MYT Regulations, namely, Regulation 11.10, in the public interest and for reasons to be recorded in writing. The power of relaxation of the State Commission is discretionary in nature which has been rightly and properly exercised by it in passing the impugned order while determining generation tariff of the appellant's both power stations for the aforesaid control period from FY 2012-13 to FY 2014-15 and truing up the financials for the previous control period from FY 2007-08 to FY 2011-12. In the case in hand before us, the learned State Commission has correctly and properly exercised the discretion vested in it under Regulation 11.10 of the MYT Regulations, 2011 and has rightly refused to relax any of the provisions of the MYT Regulations, 2011.

35. The appellant has also failed to give any reason whatsoever justifying the relaxation of the operation norms fixed in the MYT Regulations. The only reason argued before us, that the station is an old station and is envisaged to be closed down in near future, is not acceptable. We also agree to the finding recorded by

the learned State Commission in the impugned order that the relaxation of the said norms/provisions of DERC (Tariff Regulations), 2011 is not in the public interest and there is no material on record to deviate from this finding recorded by the learned State Commission.

36 After going through the impugned order and the material on record, we are also of the view that the calculation of the depreciation allowed by the Commission is completely in accordance with MYT Regulations and the issues raised by the appellant do not find any merit. The State Commission in accordance with MYT Regulations has applied the straight line method for calculation of depreciation. In the event the actual depreciation is less than the depreciation allowed by the learned State Commission the same may be trued up at the end of the financial year. The State Commission cannot be asked to split the calculation of depreciation into two periods for the same financial year. Since the same relevant Regulations of the DERC Tariff Regulations, 2011 are under challenge before the Hon'ble Delhi High Court in the Writ Petition filed by the appellant itself almost on the same grounds argued before us by the appellant, we are not competent to decide the legality or validity of the said Regulations framed by the learned State Commission in view of the law laid down by Constitutional Bench of Hon'ble Supreme Court in the case of **PTC India Ltd. Vs. Central Electricity Regulatory Commission reported in AIR 2010 SC 1338: (2010) 3 SCR 609 in para 60** observing that:

“The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.”

37. We have considered all the submissions made on behalf of the appellant according to the DERC Tariff Regulations, 2011 as they exist on statute book today. We fully agree to all the findings recorded by the learned State Commission in the impugned order as there is no justification to deviate from the same.

38. The appeal is dismissed being devoid of merits and the impugned order dated 13.07.2012 passed by the learned Delhi Commission in petition no. 07 of 2012 is hereby affirmed. No order as to costs.

Pronounced in open Court on this 12th day of December, 2013.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

Reportable/Non-reportable

rkt