IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
[APPELLATE JURISDICTION]

IA NO. 840 OF 2017 IN APPEAL NO. 330 OF 2017

Dated: 25th January, 2019

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

IN THE MATTER OF:

NTPC LIMITED
NTPC Bhawan,
SCOPE Complex,
7, Institutional Area,
Lodhi Road, New Delhi-110003 …**APPELLANT**

VERSUS

1. **GRIDCO LIMITED**
Through its Managing Director,
Janpath, Bhubaneswar-751 002

2. **WEST BENGAL STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED**
Through its Managing Director
Vidyut Bhawan, Block-DJ,
Sector-II, Salt Lake City,
Kolkata-700 091

3. **BIHAR STATE POWER HOLDING COMPANY LIMITED**
Through its Managing Director
1st Floor, Vidyut Bhawan,
Bailey Road, Patna-800 001

4. **JHARKHAND URJA VIKAS NIGAM LIMITED**
Through its Managing Director
Engineering Bhawan,
Heavy Engineering Corporation,
Dhurwa, Ranchi-834004

5. DAMODAR VALLEY CORPORATION
Through its Managing Director
DVC Towers, VIP Road,
Kolkata-700054

6. EASTERN REGIONAL POWER COMMITTEE
Through its Secretary
14, Golf Club Road,
Tollygunj, Kolkata-700 033

7. EASTERN REGIONAL LOAD DESPATCH CENTRE
Through its Managing Director
14, Golf Club Road,
Tollygunj, Kolkata-700 033

8. CENTRAL ELECTRICITY REGULATORY COMMISSION
Through its Secretary
3rd and 4th Floor, Chandralok Building,
36, Janpath, New Delhi – 110 001 …**RESPONDENTS**

Counsel for the Appellant(s)	:	Mr. M.G. Ramachandran Ms. Poorva Saigal Ms. Anushree Bardhan Mr. Shubham Arya
Counsel for the Respondent(s)	:	Mr. Raj Kumar Mehta Ms. Himanshi Andely for R-1 Mr. S.B. Upadhyay, Sr. Adv. Mr. Anand Kumar Srivastava Mr. Shivam Sinha Mr. Nishant Talwar for R-3

J U D G M E N T

PER HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

1. The Appellant, NTPC Limited filed the Appeal under Section 111 of the Electricity Act, 2003 against the Impugned Order dated 20.09.2017

passed by the Central Electricity Regulatory Commission (herein after referred to as the **`Central Commission')** in Petition No. 130/MP/2015 filed by Respondent No. 1 herein – GRIDCO Limited (herein after referred to as **`GRIDCO')** whereby the Central Commission has decided the date of the commercial operation (**COD**) of Unit IV (660 MW) of Barh Super Thermal Power Station Stage II generating station of the Appellant -NTPC Limited (herein after referred to as **`NTPC')**. The Central Commission has proceeded to reject the claim of NTPC for approval of the COD as on 15.11.2014 and instead has decided that the COD would be 8.3.2016 with consequential orders in regard to the tariff terms and conditions payable by Respondents – Procurers to NTPC for generation and sale of electricity from the said Barh Super Thermal Power Station.

BRIEF FACTS OF THE CASE:-

2. The Appellant/NTPC is a Company incorporated under the provisions of the Companies Act, 1956 and has its registered office at NTPC Bhawan, SCOPE Complex, 7 Institutional Area, Lodhi Road, New Delhi – 110 003. NTPC is a generating company within the meaning of Section 2 (28) of the Electricity Act, 2003.

2.1 NTPC is engaged in the business of generation and sale of electricity to various Procurers in India. NTPC is a generating company owned and controlled by the Central Government within the scope of Clause (a) of subsection (1) of section 79 of the Electricity Act, 2003. The generation and sale of electricity by NTPC to the Respondent – Procurers is regulated by the Central Commission under the provisions of the Electricity Act, 2003.

2.2 NTPC has established and/or acquired many generating stations for generation and supply of electricity. One of the generating station of NTPC is the Barh Super Thermal Power Station (herein after referred to as the **`Generating Station').** The subject matter of the present appeal pertains to the 660 MW generating unit established by NTPC at the Stage II Units of the said generating station being Unit IV.

2.3 The issue in the present appeal relates to the declaration of the commercial operation (herein after referred to as the **`COD')** of Unit IV of Barh Generating Station Stage II, namely, whether the COD as claimed by NTPC, as on 15.11.2014 is to be allowed. The Central Commission rejected the above claim of NTPC mainly on account of non-accomplishment of Trial Run Tests and has considered the COD only as on 8.3.2016.

2.4 The issue of COD is to be considered in the light of the Regulations and the provisions of the Indian Electricity Grid Code notified by the Central Commission from time to time. The circumstances leading to the filing of the present appeal challenging the non-consideration of NTPC's claim for COD of Unit IV of Barh Generating Station, as on 15.11.2014 are set out herein.

2.5 On 19.01.2009, the Central Commission notified the CERC (Terms and Conditions of Tariff) Regulations, 2009 (herein after referred to as the **`Tariff Regulations, 2009')** providing for the terms and conditions for determination of tariff for the control period from 1.4.2009 till 31.03.2014. In the Tariff Regulations, 2009, the Central Commission defined the commercial operation of a generating Station. The term Trial Run has not been defined in the Tariff Regulations, 2009 or in any of the previous Regulations notified by the Central Commission. Further, the need for operating the generating unit for a continuous period as a criteria of declaring commercial operation was not specified in the Tariff Regulations, 2009 or in any of the previous Tariff Regulations. NTPC, as well as other Central Sector generating companies were allowed to declare COD of a generating unit upon the construction and commissioning of the unit, on being satisfied of its sustained operation. The Tariff Regulations did however, provide that in case the generating

station is not able to generate electricity up to the contracted level as per the schedule given by the Procurers or the generating station does not declare the Plant Availability Factor up to the normative level specified in the Tariff Regulations, NTPC will be subject to disincentive, proportionate to non-generation of electricity below the targeted Plant Availability Factor. Such a stipulation protects the Procurer in case the generating unit is not able to operate to the requisite level by a generating company.

2.6 The Unit IV of the Barh generating station, Stage II was constructed and commissioned (as claimed by NTPC) on 15.11.2014. A brief summary of events leading upto the declaration of commercial operation on 15.11.2014 are as under:

i. Notice for the trial operation was given to beneficiaries vide letter dated 25/ 26.07.2014;

ii. The generating unit was synchronised on 5.08.2014 at 4:08 hours to start the trial operation;

iii. Thereafter, the Unit ran successfully at almost full load till 10:27 hrs of 08.08.2014 (amounting to 78 hours) with a brief outage from 22:10 hrs of 07.08.2014 to 02:28 hrs of 08.08.2014 i.e. with an outage period of about 04 hrs and 18 minutes. During this trial operation, the unit ran continuously for about 66 hrs and again for a period of about 06 hrs generating 43.82 Mus i.e. at 92.21% PLF and had achieved a maximum instantaneous load of 718 MW.

iv. The brief outage for 4 hours and 18 minutes was caused by spurious tripping inherent in the system. The generating station

was stopped to examine the cause of tripping, namely, whether it is a spurious tripping or whether it is on account of any defect or failure of any of the plant or machinery attributable to the generating company.

v. After the tripping, the machines and equipment were examined and it was found that the tripping was spurious and there were no defect in the plant and machines. Thereafter, the generation was undertaken for another 6 hours, demonstrating sustained and continuous performance.

vi. The Unit has achieved ~100% and more load in 29 time-blocks (more than 7hrs) and more than 95% load in 183 time-blocks (more than 45hrs) during the above trial run. In the circumstances, the Unit IV was ready for declaration of COD, after having completed the above operation. Subsequently, NTPC undertook inspection of the unit including the Boiler Structure and found a number of defects, requiring rectification. After the rectifications, a trial run from 11.11.2014 to 15.11.2014 was conducted to establish the satisfactory boiler structure behavior. Upon being satisfied of the functioning of the generating Unit IV including in regard to the satisfactory Boiler Structure Behaviour, the unit was declared under commercial operation effective from 15.11.2014 by NTPC.

2.7 NTPC has been generating and supplying electricity to the Respondent – Procurers including GRIDCO effective from the date of commercial operation on 15.11.2014 on the terms and conditions contained in the Tariff Regulations notified by the Central Commission being CERC (Terms and Conditions of Tariff) Regulations, 2014 (herein after referred to as the **`Tariff Regulations, 2014').**The relevant extracts of the Tariff Regulations, 2014 dealing with the Trial operation of a Generating Station reads as under:

5. Trial Run and Trial Operation-

(1) Trial Run in relation to generating station or unit thereof shall mean the successful running of the generating station or unit thereof at maximum continuous rating or installed capacity for continuous period of 72 hours in case of unit of a thermal generating station or unit thereof and 12 hours in case of a unit of a hydro generating station or unit thereof:

Provided that where the beneficiaries have been tied up for purchasing power from the generating station, the trial run shall commence after seven days notice by the generating company to the beneficiaries."

2.8 In the Statement of Reasons issued by the Central Commission along with the Tariff Regulations, 2014, it was clarified that the objective of specifying provisions related to trial run and trial operation is to ensure that the generating station or Unit is capable of reliably operating at normative levels:

"7.11 As regards the suggestion to specify PLF or deemed generation provisions for trial run and trial operation, the Commission clarifies that the objective of specifying provisions related to trial run and trial operation is to ensure that the generating station or Unit is capable of reliably operating at normative levels. Moreover, there is already a provision of disincentive in place if a generating station fails to achieve the target availability."

2.9 The electricity generated at the generating Unit IV of Barh Generating Station has been allocated to the Respondents 1 -4 with major share to Bihar State, Respondent no. 3 (77%), the allocation to Respondent No. 1 – GRIDCO was 15%. Each of the Procurers have scheduled and taken

electricity of the quantum required by them from the Generating Unit IV of Barh Generating Station on a regular basis and have paid provisional tariff based on the tariff petition filed before the Central Commission for such generation and supply of electricity. Thus, NTPC as well as the Procurers, particularly, other than GRIDCO had continuously proceeded on the basis of regular supply of electricity from Barh Generating Station as in the case of other generating stations which have been declared under commercial operation.

2.10 On or about 29.4.2015, GRIDCO filed a petition being Petition No. 130 of 2015 before the Central Commission disputing the COD of the Unit IV of the generating station on the alleged ground that NTPC had not declared the COD in accordance with the applicable Regulations.

2.11 NTPC filed its reply to the petition details as to why the COD should be considered with effect from 15.11.2014 and the reasons as to why the claim of GRIDCO should not be accepted.

2.12 On 6.04.2016, the Central Commission notified Central Electricity Regulatory Commission (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016 amending the provisions in respect of trial operation of a generating station:

3. Trial Run or Trial Operation*: Trial Run or Trial Operation in relation to a thermal Central Generating Station or inter-State Generating Station or a unit thereof shall mean successful running of the generating station or unit thereof on designated fuel at Maximum Continuous Rating or Installed Capacity or Name Plate Rating for a continuous period of 72 hours and in case of a hydro Central Generating Station or inter-state Generating Station or a unit thereof for a continuous period of 12 hours: Provided that:*

(i) The short interruptions, for a cumulative duration of 4 hours, shall be permissible, with corresponding increase in the duration of the test. Cumulative Interruptions of more than 4 hours shall call for repeat of trial operation or trial run.

(ii) The partial loading may be allowed with the condition that average load during the duration of the trial run shall not be less than Maximum Continuous Rating, or the Installed Capacity or the Name Plate Rating excluding period of interruption and partial loading but including the corresponding extended period.

(iii) Where the beneficiaries have been tied up for purchasing power from the generating station, the trial run or each repeat of trial run shall commence after a notice of not less than seven days by the generating company to the beneficiaries and concerned RLDC or SLDC, as the case may be.

(iv) Units of thermal and hydro Central Generating Stations and inter-State Generating Stations shall also demonstrate capability to raise load upto 105% or 110% of this Maximum Continues Rating or Installed Capacity or the Name Plate Rating as the case may be."

2.13 By Order dated 20.9.2017, the Central Commission has, inter alia, decided the issues as under:-

"(a) It is noted that NTPC conducted the trial run for declaration of COD of the unit from 5.8.2014 to 8.8.2014 and notice in this regard was given to the beneficiaries on 26.7.2014. Therefore, NTPC has complied with the requirement of seven days notice to the beneficiaries for conducting the trial run of the unit….

Perusal of the trial run data reveals that the unit stated the injection of power at 04.15 hrs of 5.8.2014 and attained the full load at 16.30 hrs (block No. 66) on 5.8.2014 and unit continued to run up to 22.00 hrs of 7.8.2014. The unit could run continuously from 04.15 hrs of 5.8.2014 till 22.15 hrs of 7.8.2014 i.e. for 65.45 hrs only instead of continuously for 72 hrs and unit could attain the full load in 29 time blocks out of 258 blocks. Unit had stopped at 22.00 hrs of 7.8.2014 and again started injecting power from 02.45 hrs of 8.8.2014 and continued operating up to 10.30 hrs. In view of the above trial run could not be stated to be in terms of the 2014 Tariff Regulations.

(b) The unit had demonstrated the full load running capability at MCR during 4.3.2016 to 7.3.2016 i.e. much after the declaration of COD on 15.11.2014 as per the provisions of the 2014 Tariff Regulations.

(c) We have considered the submissions of ERLDC. GRIDCO (Odisha) having a share of around 15% have only raised the issue of COD whereas other Respondents such as BSPHCL (Bihar) holding majority share of around 77% and other beneficiaries such as JUVNL (Jharkhand), Sikkim and MP have not objected the date of COD of the unit. Having known the status of trial run and the declaration of COD as on 15.11.2014 by NTPC, the Petitioner and other beneficiaries have been scheduling power from the unit of the generating station after 15.11.2014 as per their requirement and making the payments. In view of the above, other beneficiaries of the generating station have accepted the COD of the generating station as 15.11.2014.

Despite the fact that other Respondents have not raised objection to COD claimed by the Respondents, it is clear (paragraph 16) that trial run of the unit did not comply with

the provisions of the 2014 Tariff Regulations. Subsequent trial run of 3-5 November, 2014 too could not demonstrate compliance with the 2014 Tariff Regulations. Neither could it be possible for trial run during 11-15 November 2014. Thus, even though other Respondents have accepted COD as stated by the Respondent No. 1, it is not fully correct.

3 In the light of above discussion, it is evident that the unit has successfully run on full load for 72 hours in March 2016 for the first time though the Petitioner declared the date of the commercial operation as 15.11.2014."

2.14 In view of the above findings, the Central Commission has concluded as under in regard to generation and sale of electricity by NTPC before 8.3.2016 to be treated as infirm power:

"Power injected by Respondent No. 1 in respect of the Unit before 8.3.2016 shall be treated as infirm power even though power was scheduled by the beneficiaries during the period. The revenue earned over and above fuel cost from sale of infirm power from 15.11.2014 to 7.3.2016 shall be adjusted in the capital cost."

2.15 Aggrieved by the decision of the Central Commission on the above aspect, the Appellant has preferred the present appeal on the grounds and for reasons stated herein.

3. QUESTION OF LAW:-

The Appellant has raised following questions of law for adjudication by this Tribunal:-

A. Whether in the facts and circumstances of the case, the Central Commission is right in construing the provisions of the Tariff Regulations, 2014 as requiring NTPC to achieve the Maximum Continuous Rating (MCR) of a generating unit of 660 MW at 100% for a continuous period of 72 hours without any break, as a pre-condition for declaration of commercial operation of the unit on 15.11.2014, particularly, as the Central Commission itself recognized the non-feasibility of such sustained 72 hour achievement vide the Fourth Amendment to the Indian Electricity Grid Code effective 6.4.2016 ?

B. Whether the provisions of Regulation 5 of the Tariff Regulations 2014 providing for Trial Run ought to have been interpreted consistent with the subsequent amendment in the Indian Electricity Grid Code (applicable to all Central Generating Stations) recognizing the impractability and difficulty in achieving 100% MCR during 72 hours?

C. Whether, in the facts and circumstances of the case when the Indian Electricity Grid Code was amended for the first time effective 6.4.2016 providing for a comprehensive trial run definition, Regulation 5 of the Tariff Regulations 2014 dealing with Trial Run, ought to be interpreted liberally and not in a strict

manner particularly in the context of the impossibility of a generating station to achieve the Maximum Continuous Rating of 100% for a continuous period of 72 hours for declaring the successful commercial operation?

D. Whether the Central Commission has failed to recognize the differentiation between the installed capacity of the power generating units and the Maximum Continuous Rating while dealing with the definition of the term `Trial Operation' contained in the Tariff Regulations, 2014, before the amendment in the Indian Electricity Grid Code and has erred in law by insisting on 100% generation for a continuous period of 72 hours ?

E. Whether trial run operation, as provided in Regulation 5 of the Tariff Regulations, 2014 should be given a pragmatic and contextual meaning since the same cannot be interpreted mechanically to mean that the generating unit should run at the maximum capacity of 660 MW continuously for a period of 72 hours as a condition for declaring the COD ?

F. Whether the Central Commission is right in ignoring the contextual aspects set out in the affidavits filed by NTPC dated 30.09.2015 and 11.3.2016 and particularly the following salient aspects that

(i) till 31.3.2014, there was no requirement for achieving Maximum Continuous Rating for a continuous period of 72 hours in the Tariff Regulations and the declaration of the COD was an act to be decided by the generating company with all consequences of the inability to generate up to the normative PLF, being to the account of the generating company;

(ii) The provision in regard to non-achievement of the normative Availability and consequent disincentive through reduction in the payment of fixed charges applicable as up to 31.3.2014, is equally applicable for the period from 1.4.2014 onwards as specified in Regulation 30 of the Tariff Regulations, 2014.

(iii) The Unit IV of Barh Generating Station had achieved the performance level of 660 MW in different time block during the period from 5.8.2014 to 8.8.2014 and had continuously performed for a period of 78 hours with a break of only 4 :18 hours.

(iv) Further, the generating station had generated and supplied electricity on regular and continuous basis during the period

from 15.11.2014 to 31.3.2015 achieving a PAF of 83% and during the period 2015-16 the PAF above 90%.

G. Whether in the facts and circumstances of the case, when the Respondent – Procurers had continuously scheduled and taken power from Unit IV of the generating station with effect from 15.11.2014 and the Central Commission having found that the Respondent – Procurers had not objected to the declaration of the COD at the relevant time, the Central Commission is right in deciding that the COD was not achieved on 15.11.2014 ?

H. Whether, in the facts and circumstances of the case, namely the amendment to the Indian Electricity Grid Code to provide for an interruption (upto 4 hours) and considering the peculiar facts of the present casei.e. the interruption of 4:18 hours was during a period prior to the amendment made to the Indian Electricity Grid Code, the Central Commission is right in not exercising the power to relax vested under Regulation 54 of the Tariff Regulations, 2014?

I. Whether the Central Commission has failed to appreciate that the judgment of the Hon’ble Supreme Court in the case of All India Power Engineers Federation –v- Sasan Power Limited and Ors is distinguishable from the present case of NTPC?

4. **Shri M.G. Ramachandran, the learned counsel appearing for the Appellant has filed his written submission as under:-**

4.1 The impugned Order relates to the interpretation of Regulation 4 and 5 of the CERC (Terms and Conditions of Tariff) Regulations, 2014 (herein after referred to as the **`Tariff Regulations, 2014')** which deals with the Commercial Operation and Trial Run and Trial Operation.

4.2 The Impugned Order purports to interpret Regulation 5 as providing for the Trial Operation/Trial Run to be the achievement of 100% of the capacity of the power generating unit, continuously for 72 hours.

4.3 The construction of Regulation 5 by the Central Commission is literal and pedantic. The interpretation is not purposive and is not in line with the objective sought to be achieved by the provision, as held by the Central Commission itself, in the Statement of Reasons issued along with the Tariff Regulations, 2014:

> *"7.11 As regards the suggestion to specify PLF or deemed generation provisions for trial run and trial operation, the Commission clarifies that the objective of specifying provisions related to trial run and trial operation is to ensure that the generating station or Unit is capable of reliably operating at normative levels. Moreover, there is already a provision of disincentive in place if a generating station fails to achieve the target availability."*

4.4 Further, the Central Commission has misconstrued the scope of the expression ` Maximum Continuous Rating' (**MCR)** and also the 'continuous period of 72 hours' used in the said Regulation. The interpretation that MCR is equivalent to 100% of the capacity is patently erroneous as Regulation 5 uses two different expressions, namely, MCR and Installed Capacity. It is well settled that when a legislation uses two different expressions, both will have to be given effect to. It cannot be said that the two expressions are inter-changeable and means one and the same.

4.5 It is a settled principle of interpretation that the expression used should not be rendered redundant. There has to be some purpose for using two different expressions. In this regard reference be made to the following decisions of the Hon'ble Supreme Court:

(a) GP Singh, Principles of Statutory Interpretation, 13th Edition – Pages 362 – 363;
Shriram Vinyl and Chemical Industries v Commissioner of Customs, Mumbai (2001) 4 SCC 286
(b) Kailash Nath Agarwal v Pradeshiya Industrial and Investment Corpn of U.P Limited (2003) 4 SCC 305
(c) Oriental Insurance Co. Limited v Hansrajbhai V Kodala (2001) 5 SCC 175

4.6 Accordingly, when the Installed Capacity means 100%, MCR will have to be given a different meaning. It should be less than 100%. The meaning to be given for MCR is to be deduced from the purpose and

objective of providing the conditions for trial run and trial operation, as dealt above. Considering the objective, the purpose of establishing the trial run is the demonstration of the capability of the generating station to perform at the normative level.

4.7 The normative level is the level at which the Tariff Regulations, 2014 in Regulation 30 provides for the recovery of full fixed charges, namely, in the case of Barh Thermal Power Station at 83%. Such 83% of the installed capacity would be 548 MW. The Barh Station had operated in most of the time blocks of 72 hours at or above the 548 MW**.**

4.8 The fact that it relates to the normative PLF at 83% is further fortified by the Statement of Reasons recognizing disincentive which is again provided in Regulation 30 of the Tariff Regulations, 2014 i.e. NTPC will be subject to the reduced tariff if it does not operate at the normative level.

4.9 The position prevalent prior to 1.4.2014 under the various Tariff Regulations did not require establishment of 100% capacity for declaration of COD. It only provided for a demonstration of the capability, to the satisfaction of the generator that it can operate at the normative level. NTPC takes the risk if it declares the COD when it does not operate at the normative level. Accordingly, the shift in the Tariff

Regulations, 2014 in regard to the trial run and trial operation is only that MCR is equated to the normative PLF of 83%.

4.10 The Central Commission, therefore, has acted contrary to the Tariff Regulations, 2014 in holding that NTPC should have performed the test with continuous 100% generation for 72 hours. The Central Commission should have tested the performance test undertaken by NTPC during the period from 5.8.2014 to 8.8.2014 with reference to the normative PLF of 83%.

4.11 In addition to the above, even in the case of projects selected through the Tariff Based Competitive Bidding Process under Section 63 of the Electricity Act, 2003, the performance test to be conducted is with reference to 95% of the contracted capacity. For a 660 MW power plant is to be calculated after adjusting the auxiliary consumption of 6% and, therefore works out to 589 MW.

4.12 If a plant of 660 MW can be said to have achieved the COD based on the performance test of 589 MW which works out to approx. 89% of 660 MW, there is no reason why the same percentage cannot be accepted for declaration of the COD for a generating station whose tariff is determined under Section 62.

4.13 As in the case of MCR, continuous running cannot be interpreted to mean continuously performing for 72 hours at the installed capacity or at MCR. The interruptions have been accepted by the Commission in the Sasan Power case vide Order dated 8.8.2014 passed in Petition No. 85 of 2013.

4.14 It is also relevant that in the case of Sasan Power (unlike the present case) the proceedings before the Central Commission had been initiated by the Western Regional Load Dispatch Centre on grounds of maintaining grid security and optimum scheduling and dispatch of electricity, in accordance with the Grid Code whereas in the case of NTPC, no such objections have been raised by the Eastern Regional Load Dispatch Centre.

4.15 The expression used in Regulation 5 is 'successful running'. It means that the process of performance test is not abandoned on account of any machine failure, default, deficiency etc. It cannot be applied to a case where during the performance test if there is tripping, the machine cannot be stopped to enquire into the nature of the interruption and even if the interruption is of a spurious nature, the performance test has to necessarily be abandoned. The approach adopted by the Central Commission in regard to the MCR as well as continuous running is contrary to the practical aspects of trial run and trial operation and the object sought to be achieved, in terms of its own Statement of Reasons.

The approach is theoretical and not justified at all. In the circumstances it is submitted that the technical body should not have a hyper-technical and purposeless interpretation of the Regulation.

4.16 In any event, in the facts and circumstances of the case, the Central Commission ought to have exercised its powers to relax under Regulation 54 of the Tariff Regulations, 2014 which is a judicial discretion and ought to be exercised when the circumstances justifies the same. Reference in this regard may be made to the following decisions:

(a) M.P. Jain – Cases and Materials on Indian Administrative Law – 1994 Edition Volume 1, Page 117:

(b) Maharashtra State Power Generation Co. Limited v. Maharashtra Electricity Regulatory Commission & Ors. [2010 ELR (APTEL) 0189]:

(c) NTPC Limited v. Madhya Pradesh State Electricity Board 2007 ELR APTEL 7:

4.17 In addition to the above, the very fact that the Central Commission itself had provided for an interruption of 4 hours as a valid deviation, by the Fourth Amendment to the Indian Electricity Grid Code (IEGC) effective from 06.04.2016 itself fortifies that the some amount of interruption is required to be considered in a practical manner**.**

4.18 NTPC had declared the availability on a regular basis from 15.11.2014 onwards. The beneficiaries - Odisha , Bihar, Sikkim and Jharkhand had

scheduled the power and have benefitted of the regular supply. The infirm power supplied means irregular supply, as and when the generation is done. There will be no requirement for declaring the availability allowing scheduling and despatch and NTPC incurring financial constraints of reduced fixed charges in case of not meeting the normative PLF.

4.19 The Respondent Beneficiaries have already been billed and they have paid the amount as per the provisional tariff. The provisional tariff is continuing even after March 2016. The final tariff is yet to be determined by the Central Commission. NTPC will suffer irreparably if NTPC is required to adjust the revenue over and above the fuel cost from sale of power during the period from 15.11.2014 to 07.03.2016, in case the power supplied is treated as infirm power for this period. In the circumstances NTPC may be granted interim relief as prayed for and status quo be maintained till the Appeal is decided. The Appeal may also be expedited.

4.20 In view of the above, the impugned order is liable to be set aside.

5. **Shri Raj Kumar Mehta, the learned counsel appearing for the Respondent No.1 has filed his written submission as under:-**

5.1 The issue in the present case is whether COD of Barh STPS (Unit-IV) of NTPC was in conformity with CERC Tariff Regulations, 2014. By the impugned order CERC has set aside the COD declared by NTPC on 15.11.2014 as being contrary to the Regulations and held that COD was infact achieved on 08.03.2016. Consequently, it has been directed that the Power injected from 15.11.2014 to 07.03.2016 will be treated as Infirm Power.

5.2 The present case is a gross and glaring case in which even though NTPC was well aware that it had not successfully conducted the Trial Run Test of running at Maximum Continuous Rating of the Unit continuously for 72 hours as mandated by CERC Tariff Regulations, 2014, NTPC illegally and wrongfully declared the COD on 15.11.2014 on the basis of a failed Trial Run Test from 05.08.2014 to 08.08.2014.

5.3 The Trial Run from 05.08.2014 to 08.08.2014 was not only unsuccessful (being in violation of CERC Tariff Regulations, 2014), the Generating Unit could not even withstand the above failed Trial Run Test. Consequently, NTPC moved to the Commission for extension of time for injection of Infirm Power into the Grid, stating that "the **CoD of the Unit could not be achieved**". Taking into consideration the technical problems faced by NTPC in their Generating Unit, the Commission allowed extension of time for injection of Infirm Power into the Grid for

Commissioning Tests including Full Load Test of the Unit upto 30.11.2014.

5.4 On 04.11.2014 NTPC informed GRIDCO that Unit-IV has been synchronized at 07:13 hrs on 03.11.2014 and has achieved full load operation at 18:40 hrs. **It was further stated that Trial Run of the Unit at MCR is in progress and after completion of Trial Run, NTPC intends to declare CoD of the Unit.**

5.5 On scrutiny of Meter Data, when GRIDCO pointed out to NTPC vide letter dated 26.12.2014 regarding mis-declaration of CoD on 15.11.2014, basing on the un-successful Trial Run Test from 11.11.2014 to 14.11.2014, vide letter dated 31.12.2014 NTPC reverted to their failed Trial Run Test from 05.08.2014 to 08.08.2014, for which NTPC had moved the Commission to permit injection of Infirm Power as stated above.

5.6 In Para-18 of the impugned order dated 20.09.2017, CERC has stated as under:

> *"Perusal of the actual generation data at generator terminal block-wise during trial run in November, 2014 prior to declaration of COD on 15.11.2014 reveals that unit of the generating station was synchronized to grid during trial run on 3.11.2014. The trial run was conducted from 07:00 hrs of 3.11.2015 to 03:45 hrs. of 5.11.2014 i.e. 179 blocks (about 45 hrs). The unit has been run on full load and above only*

for 46 time blocks (discontinuous pattern) out of 179 time blocks. …xxX"

5.7 Evidently, NTPC chose the failed Trial Run Test during August, 2014 over the failed Trial Run Test during November, 2014 (following which they declared CoD) for the reason that the results failed Trial Run Test during November, 2014 i.e. from 03.11.2014 to 14.11.2014 were inferior to the Trial Run Test conducted during August, 2014. It is, therefore, clear that since NTPC had already declared CoD on 15.11.2014, to justify such illegal declaration of CoD, NTPC adopted the above illegal course of action instead of repetition of Trial Run Test, as requested by GRIDCO.

5.8 By such mis-declaration of COD, NTPC wrongfully and illegally collected a sum of Rs. 249 crore approx. from GRIDCO even though it was entitled to charge only the Infirm Power Rate until declaration of COD as per 2014 Regulations. From the above, it is crystal clear that NTPC knew fully well that the Trial Run Test was not completed in conformity with the Regulations. NTPC also knew that it had not given 7 days Notice to the Beneficiaries prior to the Trial Run Test as mandated by the Regulations.

5.9 NTPC did not even show its bonafides by either pointing out to the Beneficiaries and/or the Commission that it had any difficulty in

conducting the Trial Run Test as per the Regulations. Even after GRIDCO repeatedly wrote to NTPC that the COD was not as per Regulations, by letter dated 31.12.2014, NTPC reiterated that the COD was declared after a Trial Run Test in conformity with 2014 Regulations.

5.10 NTPC suo-motu conducted the Trial Run Test from 04.03.2016 to 07.03.2016 as per CERC Tariff Regulations, 2014 as stated by it in its additional submission to CERC on 11.03.2016 and also as per Para-20 of Commission's order dated 20.09.2017. When NTPC was able to meet the terms and conditions of Trial Run Test as per CERC Tariff Regulations, 2014 from 04.03.16 to 07.03.16, the alleged technical difficulty for Trial Run Test as per CERC Tariff Regulations, 2014 is patently false.

5.11 One IPP in Odisha, M/s JITPL has successfully conducted the Trial Run Test as per CERC Tariff Regulations, 2014 for their two Nos. of 600 MW Units in presence of GRIDCO's representatives.

5.12 Reference to the period prior to 2014 Regulations, subsequent performance and amended Regulations is irrelevant since admittedly CoD in the present case was not in compliance with 2014 Regulations which were in force at the relevant time. Admittedly, the said Regulations were never challenged by NTPC and were, therefore, binding during the

relevant period as held by the Constitution Bench of Hon'ble Supreme Court in the PTC Case Judgment.

5.13 The 4th Amendment to IEGC Regulations, 2010 dated 06.04.2016 came into force with effect from the date of its publication in Official Gazette, i.e. on 29.04.2016. Hence, 4th Amendment to IEGC Regulations cannot be applied retrospectively. NTPC being a premier Generating Company of Govt. of India is expected to meticulously comply with the Regulations for the Private Generators to emulate and not justify its gross and flagrant violations of the Regulations.

5.14 With regard to the terms and conditions of the CERC Tariff Regulations, 2014, Trial Run from 01.04.2014 (date of commencement of 2014 Regulations) till 06.04.2016 (date of enforcement of Amendment of the 2014 Regulations), it is submitted as under:

(i) NTPC's Internal Circular dated 01.12.2009 with regard to declaring commercial operation of coal based units, also provides for continuous trial run of the unit at full load for 72 hours after intimating the beneficiaries. The objective of this test is to prove the capability of the Boiler-Turbine-Generator Unit along with the Auxiliaries (including common) to run at the Installed Capacity.

(ii) The terms and conditions as per Internal Circular of NTPC for conducting the Trial Run Test are same as in the CERC Tariff Regulations, 2014 for conducting the Trial Run Test for declaration of Commercial Operation Date for Thermal Generating Stations.

(iii) If there would have been any difficulty in conducting the Trial Run Test as per above Circular, NTPC would have brought out the same during the stages of Approach paper, Explanatory Memorandum, Draft Regulations and Public Hearing before Notification of CERC Tariff Regulations, 2014.

(iv) Even when NTPC moved CERC in Petition No. 309/MP/2014 for extension of the period for injection of Infirm Power for testing including Full Load Testing of its Unit, it did not point out any difficulty in conducting the Trial Run Test as per CERC Tariff Regulations, 2014.

(v) It was only when GRIDCO pointed out the illegality in declaration of COD without complying with the terms and conditions of the Trial Run Test as per CERC Tariff Regulations, 2014, that NTPC has started coming out with different pleas so as to cover up their patently illegal and wilful action in declaring the COD in complete violation of the 2014 Regulations.

(vi) In view of the categorical admissions of NTPC with regard to the defects in the Plant, NTPC cannot seek relaxation of the requirement of 72 hours Continuous Trial Run on the basis of 2016 Amendment of the Regulations.

(vii) NTPC cannot be permitted to take advantage of the 2016 Amendment to IEGC in view of its categorical assertions in the letter dated 31.12.2014 to GRIDCO in which NTPC stated as under-

> *"During the trial operation, Unit-IV of BSTPS ran successfully for 72 hours plus, demonstrating MCR and fulfilling the requirements of CERC (Terms and conditions of Tariff) Regulations'2014"*.

5.15 Regarding the submission of NTPC that the Maximum Continuous Rating (MCR) is less than the Installed Capacity (IC), it is submitted that any machine of a particular rating is designed taking into account adequate safety margin above its rated capacity so as to meet the exigencies and also to ensure its operation throughout its life taking into consideration the ageing of the machine. It is for this reason that NTPC has adopted the Installed Capacity (IC), which is the least MCR for conducting the Trial Run Test for declaration of COD of Barh STPS Unit IV. **However, NTPC had given up the this argument during hearing of the Appeal on 28.09.2018.**

5.16 Regarding the contention of the Appellant that if the Unit can run at 83% of the Normative Availability for 72 hours, it can run reliably for a month, a year and life period of Plant for 25 years is misconceived and untenable for the following reasons:-

(i) Normative Availability as per CERC Tariff Regulations, 2014 is the Annual Normative Availability, which has been specified as 83% at Regulation 37 (A) (a) of CERC Tariff Regulations, 2014;

(ii) As per Regulation-3 (44) of CERC Tariff Regulations'2014, the Annual Normative Availability is calculated basing on the average of Daily Declared Capacity throughout a year;

(iii) As per letter dated 03.07.2012 of Ministry of Power on allocation of power to Different Beneficiaries 'Declared Capacity' of the Generating Station is based on auxiliary consumption, planned outage, forced outage and availability of fuel/water etc. after taking into account transmission losses.

5.17 Hence, the Ex-Bus Annual Availability of 83% energy cannot be achieved by running the Generating Unit at 'Declared Capacity' of 83% only without taking into account the planned and Forced Outage and availability of Fuel/Water etc. throughout the year.

5.18 Regarding interruptions during performance test for Sasan Power as per NTPC, it is submitted that NTPC has mis-represented the issue of interruptions of Sasan Power Case vide Order dated 08.08.2014, passed by CERC in Petition No.85/MP/2013. In Para-30 of the Order dated

08.08.2014 of CERC in the above Petition, it has been mentioned as under:-

> – "*xxxxxxx However, it has been noticed that there was a single dip to 575.627 MW in one time block between 17:45 hrs. to 18:00 hrs. on 12.08.2013 xxxxxxx*".

Therefore, it was only a single dip in the voltage (variation in voltage), but not an interruption, as mis-represented by NTPC. The said case is, therefore, not comparable with the present case.

5.19 Regarding regular supply of power from 15.11.2014, it is submitted that GRIDCO has requisitioned Power from the Unit-IV of Barh Stage-II for a total period of 31 Hours 15 Minutes on 4 days only. This would be without prejudice since GRIDCO had objected the COD being in violation of the Regulations from the very beginning.

5.20 The plea of NTPC that 72 hours Trial Run Test at MCR could not be conducted since the beneficiaries were not scheduling adequate power is misconceived and untenable since the scheduling of Power by RLDC on the requisition of beneficiaries will commence only after declaration of COD as per 2nd Amendment to Regulation 8 of the CERC (Grant of Connectivity, Long-Term Access and Medium-Term Open Access in Inter-State Transmission and related matters) Regulations.

5.21 **Relaxation:** With regard to the plea of NTPC for relaxation of the requirement of 72 hour Continuous Trial Run Test, it is submitted that Relaxation can only be contemporaneous and not ex-post facto. At the relevant time in August, 2014, NTPC could have gone to the Commission for relaxation if they had any difficulty in achieving the norm of 72 hours continuous operation at MCR/Installed Capacity. Instead, NTPC only took time in September, 2014 from CERC for declaration of COD along with permission to inject infirm power.

5.22 Reliance is also placed on the judgment of this Tribunal in the case of Ratnagiri Gas and Power Private Ltd. Vs CERC [2011 ELR (APTEL) 0532] in which it has held that there has to be sufficient reason to justify relaxation. It has to be established by the party that the circumstances are not created due to act of omission or commission attributable to the party claiming the relaxation. It is submitted that in the present case, the situation has been created by the acts of omission/commission of NTPC. It is thus submitted that relaxation as sought by NTPC should not be granted.

5.23 There cannot be any Relaxation contrary to Public Interest. In the SASAN Power judgment Hon'ble Supreme Court held that waiver by beneficiaries of the condition of 72 hours Continuous Running cannot be accepted since it is against public interest. It is submitted that for the

same reason relaxation also cannot be allowed against public interest. After GRIDCO pointed out that the COD was not as per Regulations, NTPC had the opportunity to go in for a fresh COD after a successful Trial Run as per Regulations but it chose not go for fresh COD. This is a situation of its own creation. NTPC knowingly took the risk of COD being set aside and should face the consequences.

5.24 Even the 4th Amendment of the Indian Electricity Grid Code Regulation provides that in case interruption in the Trial Run Test is more than 4 hours, a fresh Trial Run Test is to be conducted. In the present case the interruption was admittedly more than 4 hours. There cannot be any relaxation contrary to the Regulations. Remedy is commensurate with the default not disproportionate to the default in view of the gross, flagrant and intentional violation of the Regulations.

5.25 Exercise of Power to relax to condone a willful, gross and flagrant violation of the Regulations would amount to putting a premium on a reprehensible conduct of NTPC in intentionally declaring the COD in gross and flagrant violation of the Regulations. It is in public interest to uphold the impugned order setting aside COD since Rs. 249 Crores (Approx.) will go back to Consumers by way of truing up by State Commission. Consumer interest is paramount under the Electricity Act.

5.26 The present case is fully covered by Sasan Judgment of Hon'ble Supreme Court (2017) 1 SCC 487. In that case the PPA provided for Performance Test of 72 hours continuous operation at 95% or above capacity. CERC had declined to accept the COD on the ground that the Performance Test was not in conformity with the PPA. Hon'ble Tribunal took the view that by Scheduling Power the beneficiaries had waived the requirements of Performance Test. Hon'ble Supreme Court held that there is no question of waiver when Public interest is involved**.** It was further held that waiver cannot be implied and has to be unequivocal and in positive terms.

5.27 The conduct of NTPC disentitles it to any relief. Beneficiaries look upto NTPC and expect it to act fairly. It is a case of breach of faith which beneficiaries repose in NTPC. One could understand if a Private Generator had done such a thing (even though they should also not do it), but NTPC is not expected to act in this manner. This kind of conduct becomes more serious when it involves NTPC.

5.28 The question of de-rating of the Unit, as prayed for by NTPC as a last resort, does not arise since, not only the Unit failed to complete the Trial Run Test for continuous 72 Hours at MCR, but also the Unit was under breakdown from 08.08.2014 to 02.11.2014 due to technical defects in the Unit, for which NTPC moved CERC for permission to inject Infirm Power as they were not able to achieve COD. Even after rectification,

they once again failed to conduct Trial Run Test successfully from 03.11.2014 to 05.11.2014 and 11.11.2014 to 14.11.2014. In spite of the above failures, NTPC illegally went on to declare COD on 15.11.2014. As per impugned order dated 20.09.2017 of the Commission, NTPC has been able to conduct Trial Run Test successfully for the first time from 4.3.2016 to 07.03.2016. It is thus submitted that the Commission was fully justified in directing that Power Injection upto 07.03.2016 shall be treated as 'Infirm Power'. It may also be stated that there was no provision for de-rating in the CERC Tariff Regulations, 2014. The provision for de-rating was introduced for the first time in the 4th Amendment of the Indian Electricity Grid Code Regulations, 2016 which were notified on 29.04.2016. The said amended provision is, therefore, not applicable to the present case. In any event, there cannot be any de-rating of the Unit with retrospective effect. The prayer of NTPC for de-rating of the Plant retrospectively is, therefore, wholly misconceived and liable to be rejected.

5.29 The consequence of COD not being declared as per Regulations is in-built in the CERC (Grant of Connectivity, Long Term Access and Medium Term Open Access in Inter-State Transmission and related matters) (Second Amendment) Regulations, 2012. Clause 8 (7) as inserted by the said Amendment provides that a Unit of a Generating

Station which has been granted connectivity to the Grid shall be allowed to inject Infirm Power into the Grid during testing including Full Load Testing before its COD for a period not exceeding 6 months which can be extended by the Commission in exceptional circumstances. Thus the fact that the power injected into the Grid is to be treated as Infirm Power is the logical consequence of COD being declared in violation of the CERC Tariff Regulations, 2014. Neither Commission nor the Tribunal has any discretion in the matter.

5.30 NTPC is only trying to find some excuse to retain the illegally collected money by such intentional illegal declaration of COD. It is the well settled principle of law that when the Statute requires a thing to be done in a particular manner it has to be done in that manner and no other manner. Reliance in this regard is placed on the following judgments of Hon'ble Supreme Court:

(i) J. Jayalalitha Vs. State of Karnataka **(2014) 2 SCC 401 (Para 34);**

(ii) A.R. Antulay Vs. Ramdas Sriniwas Nayak **(1984) 2 SCC 500(Para 22).**

5.31 The finding of the Commission in Para 14 of the impugned order that NTPC has complied with the requirements of 7 days Notice to the beneficiaries for conducting the Trial Run of the Unit, is clearly contrary

to record and is being challenged by the Appellant under Order 41 Rule 22 CPC. It has been held by the Hon'ble Tribunal in the judgment dated 06.05.2010 in Appeal No. 55 of 2009 that there is no embargo on the Tribunal from invoking the provisions of CPC.

5.32 The case of GRIDCO stands on different footing than Bihar since GRIDCO objected to the COD as being in violation of the Regulations from the very beginning and requested NTPC to go in for fresh COD.

5.33 In the above premises, it is most respectfully submitted that the Appeal is devoid of any merit and is liable to be dismissed.

6. **Shri S.B. Upadhyay, the senior learned counsel appearing for the Respondent No.3 has filed his written submission as under:-**

6.1 The Appellant/NTPC has objected to the "Locus Standii" of the respondent no. 3/BSPHCL in objecting to the present appeal stating that respondent no. 3 had not participated in hearing before CERC and has made payment on the basis of the alleged COD as declared by the NTPC as on 15.11.2014. It, therefore, raises an issue as to whether the respondent no. 3 is debarred in law from supporting the correctness of the impugned order of CERC. Such contention lacks the basic merit and negates the known principle of law that there cannot be any estoppel against law and illegality cannot be allowed to be perpetuated only

because the respondent no. 3 did not participate in the proceeding before CERC or accepted the supply of power. The said contention of the appellant is ill-founded and shall amount to giving premium to the appellant for its own wrong. The law is that there cannot be express or implied waiver of any right affecting the public interest. In this regards, the respondent submits as under: -

i. The respondent no. 3 is within his right in law to support the correctness of the impugned order of CERC then did not participate in the original proceedings in view of order 41 Rule 22 CPC which states as under: -

Order 41 Rule 22

Upon hearing respondent may object to decree as if he had preferred separate appeal.—

(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree 6 [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellate Court

within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

(2) Form of objection and provisions applicable thereto.—Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) **********

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable, apply to an objection under this rule.

Learned counsel placed reliance on the para 7 of **(1982) 1 SCC 232** Choudhary Sahu (Dead) by Lrs and Ors. Vs. State of Bihar and Ors. which reads thus:-

> 7.The first part of this rule authorizes the respondent to support the decree not only on the grounds decided in his favour but also on any of the grounds decided against him in the court below. The first part thus authorizes the respondent only to support the decree. It does not authorize him to challenge the decree. If he wants to challenge the decree, he has to take recourse to the second part, that is, he has to file a cross-objection if he has not already filed an appeal against the decree. Admittedly, the State of Bihar had neither filed any appeal nor cross-objection. Obviously, therefore, on the strength of the first part of Sub-clause (1) of Rule 22 of Order 41 the State of Bihar could only support the decree not only on the grounds decided in its favour but also on the grounds decided against it. The Commissioner however, has not aside the finding in favour of the appellant on the strength of Order 41, Rule 22(1). In our opinion this he could not do.

6.2 There can be no waiver of right to appeal or to object if it affects the public interest as enshrined in Sec. 61(d) of the Electricity Act, 2003 as held by Hon'ble Supreme Court vide 2017 (1) SCC 487 in All India Power Engineers Federation case. There can't be two COD one for respondent no. 3 and another for GRIDCO for the same unit of the project since the COD is a fixed criteria. Illegality once found can't be permitted in law to be perpetuated because of alleged non-participation of respondent no. 3 in the original proceedings before CERC.

6.3 Certain undisputed facts in the present appeal, as noticed by the Central Electricity Regulatory Commission ("**CERC**") in the Impugned Order 20thSeptember, 2017("**Impugned Order**") are as under:

i. The relevant period for determination of Commercial Operation Date ("**COD**") in the present case is governed by the applicable

Regulation 4 & 5 of the CERC (Terms and Conditions of Tariff) Regulation, 2014 ("**Tariff Regulations**").

ii. Appellant declared COD for Barh Generating Unit (Unit IV) on 15.11.2014, for which the Appellant conducted the trial run in August i.e. from 05.08.2014 to 08.08.2014. Moreover, the Generating Unit could only attain full load in 29-time blocks and more than 95% load in 183 time blocks out of total 258 time blocks in the trial run between 05.08.2014 to 08.08.2014. Therefore, it was unable to meet the requirement of Regulation 4 & 5 of the Tariff Regulations.

iii. Appellant has admitted to the fact of not complying with Tariff Regulations and have stated that due to spurious tripping there was outage of 4.18 hours. Another trial was conducted in November i.e. 03.11.2014 to 05.11.2014 though the same was for boiler stabilisation. Even in that trial run, Applicant was not able to meet the requirement of running the Generating Unit for 72 hours at maximum continuous rating ("**MCR**").

6.4 On the basis of the applicable Regulations, i.e. Regulation 4 & 5 of Tariff Regulations which were applicable during the relevant period, Central Electricity Regulatory Commission ("**CERC**")vide Impugned Order at page 52, paragraph 16, 17, 18& 26 while responding to the issue no. 1 & 4 i.e. as to whether the provisions of Tariff Regulations regarding trial run for declaration of COD have been complied with by the NTPC before the declaration of COD of the generating station on 15.11.2014 and what should be the COD for the unit generating stations, held clearly against the Appellant.

6.5 Thus, on the basis of the examination of documents on record, submission of the parties and relevance and applicability of Regulation 4

& 5 of Tariff Regulations, the CERC recorded against the Appellant that the Appellant could not comply with the requirement of Regulation 4 & 5 above and thus, the declaration of COD of 15.11.2014 by the Appellant was invalid and was accordingly set-aside. In view of above finding, there is no prima-facie case in favour of the appellant for grant of any interim stay of the Impugned Order. Whether such finding is recorded by CERC right or wrong is not the subject matter of the stay application. Rather, it has be presumed for the purpose of the present stay application that there is no prima facie case in favour of the appellant for grant of stay of impugned order, after, the CERC, at the first instance, had held so.

6.6 The Appellant in support of its case relied upon on 4th amendment, 2016 dated 06.04.2016 made in the Indian Electricity Grid Code("**Grid Code**") which states as under: -

> *"3. Trial run or Trial Operation: Trial Run or Trial Operation in relation to a Thermal Central Generating Station or Inter-State Generating Station or a unit thereof shall mean successful running of the generating station or unit thereof on designated fuel at Maximum Continuous Rating or installed capacity or Name Plate Rating for a continuous period of 72 hours and in case of hydro central generating station or inter-state generating station or a unit thereof for a continuous period of 12 hours:*
>
> *(i) The short interruptions, for a cumulative duration of 4 hours, shall be permissible, with corresponding increase in the duration of the test. Cumulative Interruptions of more than 4 hours shall call for repeat of trial operation or trial run.*

(ii) The partial loading may be allowed with the condition that average load during the duration of the trial run shall not be less than maximum continuous rating or the installed capacity or the name plate rating excluding period of interruption and partial loading but including the corresponding extended period.

(iii) Where the beneficiaries have been tied up for purchasing power from the generating station, the trial run or each repeat of trial run shall commence after a notice of not less than seven days by the generating company to the beneficiaries and concerned RLDC or SLDC, as the case may be.

(iv) Units of thermal and hydro central generating stations and inter-state generating stations shall also demonstrate capability to raise load upto 105% or 110% of this Maximum continues rating or installed capacity or the name plate rating as the case may be."

6.7 The amendment also clearly states that the Trial run period of 72 hours should be a continuous one however, certain minor interruptions can be overlooked. It should be noted that the Applicant's Trial Run was interrupted for a long duration of 4 hours and 18 minutes from 22:10 hrs of 07.08.2014 till 02:28 hrs. of 08.08.2014. The interruption was neither short nor was it within the cap of 4 hours as provided under the 4thamendment to the Grid Code. Also, it should be noted that partial loading as per proviso 2 is only allowed wherein the average load is not less than MCR. Admittedly, the average load during the Trial Run was less than MCR. Therefore, Ld. Commission was right in not relying on the said amendment.

6.8 The expression 'MCR' and 'Installed Capacity' ("**IC**") have been defined under the Tariff Regulations. Similarly, 'Plant Load Factor' ("**PLF**") is a defined term under the Tariff Regulations. Each of these expressions have to be read as per their definition. Therefore, it cannot be suggested that MCR has to be read as PLF. The contention of the Applicant that MCR is equivalent to 100% of the capacity is misconstrued. The definition of MCR nowhere provides it to be 100% of the installed capacity. The words used in the definition are "***maximum continuous output at the generator terminals, guaranteed by the manufacturer at rated parameters***". Therefore, MCR refers to the maximum rated output and not the nameplate capacity. The two maybe different.

6.9 Moreover, the suggestion in the Written Submission that meaning of MCR has to be deduced from the purpose and objective of providing the conditions for trial run, and thereby to equate it with Normative PLF is misconstrued. The definition of MCR is exhaustive and therefore, do not allow for purposive interpretation. The definition is clear and unambiguous and does not call for external aid to look at the object and purpose of trial run. MCR refers to the maximum continuous output at the rated parameters guaranteed by the manufacturer. This is an absolute value and is not subject to the legal, contractual or regulatory framework under which a plant is to be operated.

6.10 It is pertinent to note that draft of the Tariff Regulations proposed trial run to be conducted at MCR or IC for continuous period of 72 hours. The stakeholders suggested for trial run to be conducted at 85% PLF and in minimum 10% time blocks of 15 minutes each, the Unit should achieve 100% MCR. However, CERC clarified that the trial run is to ensure that plants run reliably at normative levels. Therefore, the rationale for a plant to demonstrate continuous maximum output during trial run is to verify the performance of the plant at maximum output guaranteed by manufacturer. CERC has negated the suggestion of the stakeholders on the draft Tariff Regulations and has not included suggestion of carrying out trial run at 85% PLF.

6.11 Hence, CERC at the time of framing regulations had rejected the contentions considering the trial run in terms of the PLF and reiterated the necessity of achieving 100% MCR at the time of the trial run. Further, with regard to the Grid Code, it is submitted that the 4th amendment became effective from 29.04.2016 and can apply only prospectively. It has no application in the facts of the present case which relates to the trial test of the year 2014. In ***Hitendra V. Mathur vs. State of Maharashtra 1994 (4) SCC 602***, the Hon'ble Supreme Court while dealing with the applicability of a statute held in para 26 (i) that a statute which affects substantive right is presumed to be prospective in operation unless made

retrospective either expressly or by necessary intendment. While enacting the 4th Amendment, to the Grid Code w.e.f. 29.04.2016, there is neither express nor necessary intendment to make the same provision applicable for retrospective date.

6.12 As regards, declaration of COD, somewhat similar issues arose in ***All India Power Generation Federation vs. Sasan Power Ltd. 2017 (1) SCC 487***, wherein the Hon'ble Supreme Court held in paragraph 39 & 40 that requisite tests needed for declaring COD are must to perform.

6.13 CERC in view of the applicable of Regulation 4 & 5 of the Tariff Regulations, has correctly held that the declaration of COD by the Appellant as on 15.04.2014 was not correct. The declaration of COD has to be decided as per the provisions of Regulation which was applicable during the relevant period. The Hon'ble Supreme Court in ***Gujarat Urja Vikas Nigam Ltd. vs. Essar Power, 2008 (4) SCC 755***, Para 35 held as under: -

> *"35. It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner, vide Chandra Kishore Jha v. Mahavir Prasad MANU/SC/0594/1999 : AIR1999SC3558 , Dhananjaya Reddy v. State of Karnataka MANU/SC/0168/2001 : [2001]2SCR399 (para 22), etc. Section 86(1)(f) provides a special manner of making references to an arbitrator in disputes between a licensee and a generating company. Hence by implication all other methods are barred."*

6.14 The Ld. Counsel for the Appellant has argued that the Impugned Order has not provided reasons for rejecting Appellant's contention for exercising power to relax and reeks of non-application of mind. It is submitted that the Impugned Order is well thought of and an order that follows an intelligent structure and scheme. It is well settled principle of law that reasons in an order or judgment need not run into pages and the briefest of reasons, which are indicative of application of mind, suffice the requirement of law. Further, the Supreme Court has held that the judicial process does not apply to commissions with the same rigour as courts because the commissions are not manned by judicial persons but technical members. ***(Ram and Anr. vs. State of Karnataka 2004 (7) SCC 796 – Para 6).***

6.15 In the light of above facts, the Appeal is devoid of merits and should be dismissed.

7. **We have heard learned counsel appearing for the Appellant and learned counsel appearing for the Respondents at considerable length of time and we have considered carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following principal issues emerge in the instant Appeal for our consideration:-**

Issue No. 1 (a): Whether the Central Commission had failed to recognize differentiation between MCR and installed capacity while dealing with the term 'Trial operation' contained in Tariff Regulations, 2014?

Issue No.1 (b): Whether the Central Commission is right in considering the COD of Barh Generating Unit-IV w.e.f. 08.03.2016 instead of 15.11.2014 proposed by the Appellant?

Issue No.2: Whether the Central Commission is right in not exercising its power to relax under Regulation 54 of the Tariff Regulations, 2014 in view of the subsequent amendment to the Indian Electricity Grid Code to provide for an interruption upto 4 hours?

OUR FINDINGS AND ANALYSIS:-

8. **Issue No. 1 (a):-**

8.1 Though this issue was argued by learned counsel for the Appellant at length but subsequently, during proceedings, the same was withdrawn as not pressed. Hence, not further analyzed.

8.2 **Issue No.1 (b):-**

8.3 Learned Counsel Mr. M.G. Ramachandran appearing for the Appellant submitted that the impugned order purports to interpret Regulation 5 of CERC Tariff Regulations, 2014 as providing for the Trial Operation to be the achievement of 100% of the capacity of the generating unit, continuously for 72 hours. Learned counsel for the Appellant further pointed out that prior to 01.04.2014, the Tariff Regulations did not require establishment of 100% capacity for declaration of COD and in fact it only provided for a demonstration of the unit capability, to the satisfaction of the generator that it can operate at the normative parameters.

8.4 Learned counsel for the Appellant further contended that the Central Commission has acted contrary to its Tariff Regulations, 2014 in holding that NTPC should have performed the trial test with continuous 100% generation for 72 hours and instead, it ought to have tested the performance test undertaken by NTPC during the period from 5.8.2014 to 8.8.2014 with reference to the normative PLF of 83%. Learned counsel for the Appellant vehemently submitted that even in the case of projects selected through the Competitive Bidding Process under Section 63 of the Electricity Act, 2003, the performance test is allowed to be conducted with reference to 95% of the contracted capacity by virtue of which a 660

MW generating unit after adjusting the auxiliary consumption of 6%, generating capacity works out to only 589 MW at which test is to be undertaken.

8.5 Learned counsel for the Appellant further submitted that unlike the present case, in the case of Sasan Power, the proceedings had been initiated by the WRLDC before the Central Commission on the grounds of maintaining grid security and optimum scheduling/dispatch of electricity, in accordance with the Grid Code whereas in the case in hand, no such objections have been raised by the ERLDC.

8.6 Learned counsel for the Appellant further advanced his arguments to submit that the expression used in Regulation 5 is 'successful running', which means that the process of performance test is not abandoned on account of any machine failure, default, deficiency etc. and it cannot be applied to a case where during the performance test if there is tripping, the machine cannot be stopped to enquire into the nature of the interruption.

8.7 Learned counsel for the Appellant further submitted that the Unit IV of Barh Generating Station had achieved the performance level of 660 MW in different time block during the period from 05.08.2014 to 08.08.2014 and had continuously performed for a period of 78 hours with a break of

only 4:18 hours. Further the generating station had generated and supplied electricity on regular and continuous basis during the period from 15.11.2014 to 31.03.2015 achieving a PAF of 83% and during the period 2015-16 the PAF above 90%. Citing these performance parameters, the learned counsel for the Appellant contended that when the Respondent – Procurers had continuously scheduled and taken power from Unit IV of the generating station with effect from 15.11.2014 and the Central Commission having found that the beneficiary had not objected to the declaration of the COD at the relevant time, the Central Commission ought to have considered the COD of the reference generating unit w.e.f. 15.11.2014.

8.8 **Per Contra** the learned counsel Mr. R.K. Mehta appearing for the Respondent No.1 submitted that the present case of NTPC is a gross and glaring case in which despite failure of Trial Run Test as per the Tariff Regulations, 2014, Appellant illegally and wrongfully declared the COD on 15.11.2014. He further submitted that the Trial Run Test from 05.08.2014 to 08.08.2014 was not only unsuccessful (being in violation of Tariff Regulations, 2014), but also the Generating Unit could not even withstand the above Trial Run Test and resulted into several technical problems. Learned counsel vehemently submitted that even Trial Run Test from 11.11.2014 to 14.11.2014 was also unsuccessful and the

Respondent No.1 pointed out to NTPC vide its letter dated 26.12.2014 that the COD has been declared by the NTPC on 15.11.2014 wrongly and illegally.

8.9 Learned counsel for the Respondent No.1 also contended that the NTPC has not given 7 days notice to the beneficiaries prior to undertaking the Trial Run Test as mandated by the Regulations in all the Trial Tests. Learned counsel for the Respondent No.1 further pointed out that by such mis-declaration of COD, NTPC wrongfully and illegally collected a huge sum from the Respondent No.1 even though it was entitled to charge only the Infirm Power Rate until declaration of final COD as per 2014 Regulations. Further NTPC suo-motu conducted the Trial Run Test from 04.03.2016 to 07.03.2016 as stated by it in its additional submission to CERC on 11.03.2016 which was found to be the Trial Run Test as per Regulation and accordingly the Central Commission considered the COD from 08.03.2016.

8.10 Learned counsel for the Respondent No.1 also referred to Internal Circular dated 01.12.2009 of NTPC with regard to declaring of COD for coal based units which also provides for continuous trial run of the unit at full load for 72 hours after due intimation to the beneficiaries. Regarding the contentions of the Appellant that if the Unit can run at 83% of the Normative Availability for 72 hours, it can run reliably for a month, a

year and life period, learned counsel contended that such arguments cannot be sustainable and tenable considering the various technical as well as regulatory provisions which define the method for calculation of normative availability such as 83% etc. The annual normative Availability of a Generating Station is based on auxiliary consumption, planned outage, forced outage and availability of fuel/water etc. after taking into account transmission losses and hence the Ex-Bus Annual Availability of 83% energy cannot be achieved by running the Generating Unit at Declared Capacity. Regarding regular supply of power from 15.11.2014, learned counsel submitted that GRIDCO has requisitioned Power from the Unit-IV for a total period of 31 Hours 15 Minutes on 4 days only which is without prejudice since GRIDCO had objected that declaration of the COD by NTPC being in violation of the Tariff Regulations from the very beginning.

8.11 To substantiate his arguments, learned counsel for the Respondent No.1 placed reliance on the Judgment of Hon'ble Supreme Court in Sasan case (2017) 1 SCC 487 in which, it was held that there is no question of waiver when Public interest is involved and waiver cannot be implied but had to be unequivocal and in positive terms.

8.12 Advancing his submissions further learned counsel for the Respondent No.1 contended that the question of de-rating of the Unit, as prayed for

by NTPC as a last resort, does not arise since, not only the Unit failed to complete the Trial Run Test for continuous 72 Hours at MCR, but also the Unit came under breakdown from 08.08.2014 to 02.11.2014 due to technical defects in the Unit. Learned counsel for the Respondent No.1 was quick to point out that on account of these reasons, NTPC requested the CERC for permission to inject Infirm Power as they were not able to achieve COD. Accordingly, the Central Commission in its impugned order dated 20.09.2017 considered that NTPC has been able to conduct Trial Run Test successfully for the first time from 04.03.2016 to 07.03.2016 and held the COD as 08.03.2016 directing that Power Injection by NTPC upto 07.03.2016 shall be treated as 'Infirm Power'.

8.13 Learned counsel for the Respondent No.1 alleged that NTPC is only trying to find some excuse to retain the illegally collected money from the beneficiaries by such intentional illegal declaration of COD. Learned counsel for the Respondent No.1 emphasized that it is the well settled principle of law that when the Statute requires a thing to be done in a particular manner it has to be done in that manner and no other manner only and learned counsel for the Respondent No.1 placed reliance on the judgments of Hon'ble Supreme Court in ***J. Jayalalitha Vs. State of Karnataka (2014) 2 SCC 401 (Para 34);*** and ***A.R. Antulay Vs. Ramdas Sriniwas Nayak. (1984) 2 SCC 500(Para 22).***

8.14 Learned senior counsel Shri S.B. Upadhyay appearing for the Respondent No.3 at the outset presented his submission on the Locus-Standi of Respondent No.3 objected by the Appellant and substantiated his case by placing various provisions of CPC and judgments of the Apex Court. Learned senior counsel for Respondent No.3 submitted that under the settled principles of law, Respondent No.3 is not debarred from supporting the correctness of the impugned order passed by the Central Commission and the law is that there cannot be express or implied waiver of any right affecting the public interest.

8.15 Learned senior counsel for Respondent No.3 cited the provisions of Section 61 (d) of the Electricity Act, 2003 and also the decisions in the judgment of the Hon'ble Supreme Court in All India Power Engineers Federation case (Sasan case). He further submitted that on the basis of the documents on record, the Central Commission has rightly decided the COD of the generating unit from 08.03.2016 instead of 15.11.2014 erroneously self-declared by the NTPC.

8.16 Learned senior counsel vehemently submitted that as held by the Apex Court through its judgment from time to time that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner. To substantiate his submissions, learned senior counsel for Respondent No.3 relied upon the

judgment of the Hon'ble Supreme Court in ***Gujarat Urja Vikas Nigam Ltd. vs. Essar Power, 2008 (4) SCC 755***, Para 35 which held as under: -

> *"35. It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner, vide Chandra Kishore Jha v. Mahavir Prasad MANU/SC/0594/1999 : AIR1999SC3558 , Dhananjaya Reddy v. State of Karnataka MANU/SC/0168/2001 : [2001]2SCR399 (para 22), etc. Section 86(1)(f) provides a special manner of making references to an arbitrator in disputes between a licensee and a generating company. Hence by implication all other methods are barred."*

8.17 Summing up his submission, learned senior counsel for Respondent No.3 reiterated that the Central Commission has passed the order by giving cogent reasoning in accordance with settled law and any interference from this Tribunal is not called for.

OUR CONSIDERATION

8.18 We have gone through the submissions of the learned counsel for the Appellant and learned counsel for the Respondents and also took note of the decisions contained in various judgments of the Hon'ble Supreme Court and this Tribunal relied upon by the learned counsels. What emerges therefrom is that though the Appellant tried to perform the Trial Run Test on several occasions, first in August, 2014, second in November, 2014 but the machine could not run successfully for

continuous 72 hours as required under the relevant Regulations of the Central Commission. It is also relevant to note from the records that the generating unit in question not only could not pass the Trial Run but also encountered several defects in it.

8.19 Having failed to conduct Trial Run Test and to rectify the defects in the unit, the Appellant approached the Central Commission for allowing more time to inject infirm power in the Grid with categorical submission that they could not achieve the requisite Trial Run for 72 hours uninterrupted in any of the case. Finally the generating unit could pass the Trial Run Test for 72 hours during 04.03.2016 to 07.03.2016 and accordingly, the Central Commission considered the COD w.e.f. 08.03.2016 with clear directions that all the energy injected into the Grid upto 07.03.2016 would be treated as infirm.

8.20 We do not find force in the arguments of the learned counsel for the Appellant that prior to 2014 Regulations, there was no requirement of the Trial Run for 72 hours and Central Sector generating companies were allowed to declare COD of a generating unit upon the construction and commissioning of the unit, on being satisfied of its sustained operation. On the other hand, Respondents have alleged the illegality in the self-styled declaration of the COD without even properly conducting Trial Run Test as per Regulations and also not affording advance notices to the

beneficiaries for witnessing such tests. Besides, learned counsel for the Respondents have also alleged that the Appellant has collected undue charges from the beneficiaries based on the wrongful COD and now trying to search ways and means to justify its erroneous COD so that excess money wrongly collected is not returned by them.

8.21 It is well settled principle of law that when a statute requires a thing to be done in a particular manner, it has to be done in that manner, and in no other manner. As such, COD of a unit could be declared only after fulfilling the eligibility requirement prescribed under the Tariff Regulations. Further, the Apex Court in Sasan case has also held that requisite tests for COD declaration are must to perform without any waiver when public interest is involved. We accordingly hold that the Central Commission has passed the impugned order after critical evaluation of the facts and figures based on submissions and pleadings of all the parties and has recorded cogent reasoning for the same. Thus, any interference by this Tribunal is not called for.

9. **ISSUE NO. 2**

9.1 Learned counsel for the Appellant has submitted that in the facts and circumstances of the case, the Central Commission ought to have exercised its powers to relax under Regulation 54 of the Tariff

Regulations, 2014 which is a judicial discretion and may be exercised when the circumstances justifies the same. Learned counsel for the Appellant to substantiate his contentions relied upon the decisions of the following judgments:

(a) ***M.P. Jain – Cases and Materials on Indian Administrative Law – 1994 Edition Volume 1, Page 117;***

(b) ***Maharashtra State Power Generation Co. Limited v. Maharashtra Electricity Regulatory Commission & Ors. [2010 ELR (APTEL) 0189];***

(c) ***NTPC Limited v. Madhya Pradesh State Electricity Board 2007 ELR APTEL 7***

9.2 Learned counsel for the Appellant further submitted that in addition to the above, the very fact that the Central Commission itself had provided for an interruption of 4 hours as a valid deviation, by the Fourth Amendment to the Indian Electricity Grid Code (IEGC) effective from 06.04.2016 itself fortifies that the some amount of interruption is required to be considered in a practical manner**.** He was quick to submit that the Respondent Beneficiaries have already been billed and they have paid the amount as per the provisional tariff and even after March 2016, the same provisional tariff is continuing as the final tariff is yet to be determined by the Central Commission. In view of this, NTPC will suffer irreparably if it is required to adjust the revenue over and above the fuel cost from

sale of power during the period from 15.11.2014 to 07.03.2016, in case the injected power supplied upto 07.03.2016 is treated as infirm.

9.3 Learned counsel for the Appellant further submitted that in the case of projects selected through the Tariff Based Competitive Bidding Process under Section 63 of the Electricity Act, 2003, the performance test to be conducted is with reference to 95% of the contracted capacity. He also referred the case of Sasan Power wherein the Central Commission vide its Order dated 08.08.2014 passed in Petition No. 85 of 2013 has accepted the similar interruption as in the instant case.

9.4 Learned counsel for the Appellant advancing his arguments further submitted that the expression used in Regulation 5 is 'successful running' and it means that the process of performance test is not abandoned on account of any machine failure, default, deficiency etc. However, it cannot be applied to a case where during the performance test if there is tripping, the machine cannot be stopped to enquire into the nature of the interruption and even if the interruption is of a spurious nature, the performance test has to necessarily be abandoned. He vehemently submitted that the approach adopted by the Central Commission in this regard is contrary to the practical aspects of trial run operation and the object sought to be achieved, in terms of its own Statement of Reasons.

9.5 Learned counsel for the Appellant accordingly emphasized that the case in hand was a fit case for exercising 'power to relax' under Regulation 54 of the Tariff Regulation, 2014 which the Central Commission has failed to do.

9.6 **Per contra** learned counsel for the Respondent No.1 contended that due to various technical problems such as water wall leakage, distortion of Rolled Beam (RB) and modification of boiler suspension etc., the COD of the generating unit could not be achieved by the Appellant and accordingly at the request of the Appellant, the Central Commission extended the time period upto 30.11.2014 for rectification of the problems and injection of infirm power into Grid. Learned counsel was quick to point out that it is crystal clear that the Unit was not capable of withstanding the stress of the Trial Run Tests during August, 2014 and November, 2014, and the same has been categorically admitted by the Appellant.

9.7 Learned counsel for the Respondent No.1 contended that the Appellant in no way can be permitted to take advantage of the 2016 Amendment to IEGC in view of the categorical assertions made by the Appellant in the letter dated 31.12.2014 to GRIDCO which stated as under-

"During the trial operation, Unit-IV of BSTPS ran successfully for 72 hours plus, demonstrating MCR and fulfilling the requirements of CERC (Terms and conditions of Tariff) Regulations'2014".

9.8 Learned counsel for the Respondent No.1 further submitted that a party who intentionally violates the Regulations must face the consequences and cannot seek the relief of relaxation of the Regulations. Besides, a person cannot commit an offence involving the financial implications and then say that he should not be convicted because he used the money in public interest.

9.9 Learned counsel for the Respondent No.1 to fortify his contentions, placed reliance on the judgment of this Tribunal in the case of ***Ratnagiri Gas and Power Private Ltd. Vs CERC [2011 ELR (APTEL) 0532]*** in which it was held that there has to be sufficient reason to justify relaxation by establishing conclusively by the party that the circumstances are not created due to act of omission or commission attributable to the party claiming the relaxation. Learned counsel for the Respondent No.1 also cited the decision of the Hon'ble Supreme Court in Sasan Power judgment wherein it was held that waiver by beneficiaries of the condition of 72 hours Continuous Running cannot be accepted since it is against public interest. Further, even in the 4th Amendment of the Indian Electricity Grid Code Regulation, it is provided that in case of

interruption in the Trial Run Test being more than 4 hours, a fresh Trial Run Test is to be conducted.

9.10 Learned counsel for the Respondent No.1 reiterated that exercise of Power to relax to condone a willful, gross and flagrant violation of the Regulations would amount to putting a premium on a reprehensible conduct of the Appellant in intentionally declaring the COD in utter violation of the Regulations. Placing his further reliance on the judgments of the Apex Court in ***J. Jayalalitha Vs. State of Karnataka (2014) 2 SCC 401 (Para 34); and A.R. Antulay Vs. Ramdas Sriniwas Nayak (1984) 2 SCC 500(Para 22),*** learned counsel for the Respondent No.1 contended that when the statute requires a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner and accordingly any relaxation to the Appellant is not justified.

9.11 Learned counsel for the Respondent No.3 adopting the submissions and contentions of the learned counsel for the Respondent No.1 further submitted that the unit of the Appellant could only attain full load in 29-time blocks and more than 95% load in 183 time blocks out of total 258 time blocks in the trial run between 05.08.2014 to 08.08.2014 and accordingly it was unable to meet the requirement of Tariff Regulation. Similar was the fate of the Trial Test in November, 2014 which reveals that the generating unit was not able to withstand the performance test

requirement. Learned counsel for the Respondent No.3 brought out that while adopting the final Tariff Regulations, 2014, CERC clarified that the trial run is to ensure that plants run reliably at normative levels and the rationale for a plant to demonstrate continuous maximum output during trial run is to verify the performance of the plant guaranteed by manufacturer.

9.12 Learned counsel for the Respondent No.3 further submitted that the 4th amendment to IEGC which became effective from 06.04.2016 can apply only prospectively and it has no application in the facts of the present case which relates to the trial test of the year 2014. To substantiate his submissions, learned counsel placed reliance on the judgment of the Apex Court in ***Hitendra V. Mathur vs. State of Maharashtra 1994 (4) SCC 602*** which held that a statute which affects substantive right is presumed to be prospective in operation unless made retrospective either expressly or by necessary intendment.

OUR FINDINGS:-

9.13 We have gone through the contentions of the learned counsel for the Appellant as well as the learned counsel for the Respondents and also took note of the decisions of various courts on the subject as placed reliance by the learned counsels. After critical evaluation of the

submissions of both the parties, what emerges is that the reference generating unit could not run at its full load/MCR for continuous 72 hours as required under the Tariff Regulations, 2014. Besides, it is also noted that despite several trial runs, the unit could not attain the requisite parameters of the regulations and developed several defects which were to be rectified by the Appellant after the trial run. It is noticed from the findings of the Central Commission that in spite of machine not passing through the trial test, the Appellant irrationally declared the COD from 15.11.2014 and billed the beneficiaries at provisional tariff considering the machine to have attained the COD.

9.14 Accordingly, the Central Commission after careful evaluation of all the material placed before it found that there does not appear sufficient ground which necessitates the exercise of its power under Section 54 of the Tariff Regulation, 2014 to relax the prerequisite conditions of Trial Run before declaration of COD. Having regard to submissions and pleadings of both the parties and taking note of the findings of the Central Commission, we are of the considered opinion that the instant case of the Appellant does not qualify for exercising the regulatory powers of the Commission to relax the conditions which are required to be fulfilled before decelerating COD of a generating unit. Hence, we do not consider

necessary to interfere in the decision of the Central Commission in this regard.

ORDER

In the light of above, we are of the considered view that the issues raised in the present appeal being Appeal No. 330 2017 are devoid of merits. Hence the Appeal filed by the Appellant is dismissed. Needless to say that IA No. 840 of 2017 does not survive, hence stand disposed of.

The impugned order passed by the Central Electricity Regulatory Commission dated 20.09.2017 in Petition No. 130/MP/2015 is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **25th day of January, 2019.**

S.D. Dubey
[Technical Member]

Justice Manjula Chellur
[Chairperson]

√ **REPORTABLE/~~NON-REPORTABLE~~**