

Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 110 of 2012

Dated 30th April, 2013

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

NTPC Limited
NTPC Bhavan, Scope Complex,
Core-7, Institutional Area,
Lodhi Road, New Delhi-110 003

...Appellant(s)

Versus

1. Central Electricity Regulatory Commission
3rd & 4th Floor, Chandralok Building,
36 Janpath,
New Delhi-110 001
2. West Bengal State Electricity Distribution Company Ltd.,
Vidyut Bhawan, Block 'DJ'
Sector-11, Salt Lake City,
Calcutta-700 091
3. Bihar State Electricity Board,
Vidyut Bhawan, Bailey Road,
Patna-800 021

4. Jharkhand State Electricity Board,
Engineering Bhawan, HEC,
Dhurwa, Ranchi-834 004
5. GRIDCO Limited.,
(Previously Grid Corporation of Orissa Ltd.)
Vidyut Bhawn, Janpath,
Bhubaneshwar-751 007
6. Power Department,
Government of Sikkim,
Kazi Road,
Gangtok-737 101
Sikkim
7. Electricity Department,
Union Territory of Puducherry,
58, Subhash Chandra Bose Salai,
Pondicherry-605 001
8. Tamil Nadu Generation & Distribution Corpn Ltd.,
(TANGEDCO),
NPKRR Maaligai,
144, Anna Salai,
Chennai-600 002
9. Madhya Pradesh Power Trading Co. Ltd.,
Shakti Bhawan, Vidyut Nagar,
Jabalpur-482 008

10. Maharashtra State Electricity Distribution Co.Ltd.,
Prakashgad, 5th Floor,
Bandra (East),
Mumbai-400 051
11. Gujarat Urja Vikas Nigam Ltd.,
Bidyut Bhawan, Race Course,
Vadodara-390 007
12. Uttar Pradesh Power Corporation Ltd.,
Shakti Bhawan, 14 Ashoka Marg,
Lucknow-226 001
13. Power Development Department,
Government of Jammu & Kashmir,
Secretariat, Srinagar-190 009
14. Power Department,
Union Territory of Chandigarh,
Additional Office Building,
Sector-9 D,
Chandigarh-160 009
15. Punjab State Power Corporation Ltd.,(PSPCL),
(Ex PSEB)
The Mall, Patiala-147 001,
16. Himachal Pradesh State Electricity Board,
Vidyut Bhawan, Kumar House,
Shimla-171 004

17. Jaipur Vidyut Vitran Nigam Limited.,
Vidyut Bhawan, Janpath,
Jaipur-302 005
18. Ajmer Vidyut Vitran Nigam Limited.,
Old Power House, Hathi Bhata,
Ajmer-305 001
19. Jodhpur Vidyut Vitran Nigam Limited.,
New Power House, Industrial Estate,
Jodhpur-342 003
20. Chhatisgarh State Power Trading Co. Limited.,
PO Sundar Nagar, Dangania,
Raipur-492 913
21. Haryana Power Purchase Centre (HPPC).,
Shakti Bhawan,
Sector-6,
Punchkula-134 109
22. BSES Rajdhani Power Limited.,
BSES Bhawan, Nehru Place,
New Delhi-110019
23. BSES Yamuna Power Limited.,
Shakti Kiran Building,
Karkardooma, Delhi-110 092
24. Tata Power Delhi Distribution Ltd.,
(Formerly NDPL)
Tata Power DDL House, Hudson Lines,
Kingsway Camp, Delhi-110 009

25. Uttarakhand Power Corporation Limited.,
Urja Bhawan, Kanwali Road,
Dehradun-248 001
26. Electricity Department,
Administration of Dadra and Nagar Haveli,
U.T. Silvassa-396 230
27. Electricity Department,
Administration of Daman & Diu,
Daman-396 210

...Respondent(s)

Counsel for Appellant(s) : Mr. M G Ramachandran,
Mr. Anand K Ganesan
Ms. Swapna Seshadri
Ms. Swagatika Sahoo

Counsel for the Respondent(s): Mr. Mohit Kr Shah
Ms. Shilpi Shah for R-3
Mr. R B Sharma for R-4, 5 & 22
Mr. Manoj Dubey for R-9
Mr. Manoj Kumar Sharma
Mr. Deleep Kr Dhayani
Mr. Pradeep Misra for R-12
Mr. Saurabh Mishra for R-17 to 19

JUDGMENT

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON

1. NTPC is the Appellant herein.
2. The Appellant filed a Petition before the Central Commission under Regulation 44 of Tariff Regulations, 2009 seeking for the exercise of the powers to relax the rigors of the target availability norms as fixed under the Regulations 26(i) (a) of the Tariff Regulations, 2009.
3. This petition was dismissed by the Central Commission by the order dated 25.4.2012. Aggrieved over this, the NTPC has filed this Appeal.
4. The short facts are as follows:
 - a) NTPC is a generating Company owned and controlled by the Central Government.
 - b) It is engaged in the business of generation and sale of electricity generated from its various Generating

Stations to various purchasers like Respondent No.2 to 27.

c) The Generating Stations owned by the NTPC would include Farakka STPS, Kahalgaon STPS Stage-I and Kahalgaon STPS Stage-II. The Farakka STPS and Kahalgaon Stage-I Generating Stations have been under commercial operation since 1986 and 1995 respectively with coal supply to both generating stations from a common source namely the Long Term Linkage for Coal supplied from coal mines of Rajmahal Coal Fields.

d) The Kahalgaon STPS Stage-II was declared under commercial operation on 20.3.2010.

e) The Regulations 26(i) (a) of the Tariff Regulations, 2009 provide for a cumulative annual plant availability factor of 85% for these Generating Stations for recovery of full fixed charges for the period 2009-14. As against the normative availability of 85%, the actual cumulative plant availability factor was achieved during 2009-10

was 73.36% in respect of Farakka STPS, 68.74% for Kahalgaon Stage-I and 65.08% for Kahalgaon Stage-II.

f) The above lower achievement of the plant availability as against the normative availability of 85% was on account of non availability of the requisite quantum of coal from the allocated coal mines. Therefore, NTPC had explored all possible options to improve the coal supply to these Generating Units. However, NTPC was not able to achieve the target availability as stipulated in the Regulations.

g) Under those circumstances, the NTPC filed a Petition in Petition No.189 of 2010 before the Central Commission under Regulation 44 of the Tariff Regulations 2009 seeking for the exercise of the powers to relax the rigors of target availability norms fixed under Regulations 26 (i) (a) of the Tariff Regulations, 2009 in respect of the above Generating Stations.

h) The above Petition was entertained by the Central Commission. During the course of proceedings,

various queries were put to NTPC. The NTPC filed various Affidavits clarifying those queries. In that Petition, the purchasers and the beneficiaries were also heard. Ultimately, the Central Commission rejected the claim of the NTPC for relaxation of the normative availability by the order dated 25.4.2012.

i) Aggrieved by this order of the Central Commission dated 25.4.2012, NTPC has filed this present Appeal before this Tribunal.

5. The grounds urged by the Appellant are as follows:

(a) The Appellant has placed the following reasons for non achievement of 85% of plant availability by the above Generating Stations for recovering full fixed charges:

- (i) The less amount of coal being received through Merry Go Round system due to low production at the linked mines;
- (ii) The delay in development of linked mines for Kahalgaon STPS, Stage-II.

- (b) Due to constraints in transportation of coal from other mines to all the generating stations using railway network and in case of Farakka STPS, due to non availability of cooling water during February and May.
- (c) The NTPC had explored all possible options to improve the coal supply to these Generating Stations. However, it has not been able to achieve the target availability as stipulated as it was beyond the control of the NTPC. All these factors have been placed before the Central Commission. Even then, the Central Commission failed to consider the implication of the non-availability of coal while passing the impugned order.
- (d) The Central Commission, in fact, has not found any deficiency, default or failure on the part of the NTPC in regard to the procurement or arrangement of coal. Having not found the same, the Central Commission ought not to have

rejected the claim of the NTPC merely on the ground that the responsibility for arrangement of coal was of NTPC.

- (e) The Central Commission holding that NTPC is responsible for procurement and transportation of coal and as such it will be liable to be punished, did not take note of the basic point that the non-availability of the coal was a Force Majeure situation and so, the NTPC cannot be penalized for the same.
- (f) The Central Commission has held that the NTPC as well as the Coal Companies being the Government of India undertakings functioning under the Ministry of Coal should have taken the risk of non availability of coal from the said coal companies. But, the NTPC has no control over the said coal Companies. There is no provision whatsoever for the NTPC to compel the said coal companies to develop their mines.

- (g) The Central Commission had adopted a narrow approach to the whole issue of non availability of coal and it has not been realistic in making the NTPC take a risk in an actual cost plus system of the determination of tariff.
- (h) The Central Commission in the past recognized the non availability of the fuel as beyond the control of the NTPC. In fact, in various other orders earlier passed by the Central Commission, the NTPC was allowed the benefit of deemed generation for fixed cost recovery. There was no reason for the Central Commission to deviate from the above orders in the present case.
- (i) The Central Commission has failed to appreciate that the course adopted by the Central Commission in the present case would make it impossible for any Generating Company to invest in generating project involving significant capital expenditure. In case, the fuel is not available for the reasons beyond the control of the Generating

Company, there will be no tariff to service the capital investment based on the capital cost plus tariff. Thus, the decision of the Central Commission is contrary to the well settled principle that the Regulatory Commission is required to balance the interest of the Generating Companies, optimize the use of resources and incentivize much needed investment in generation.

- (j) NTPC as a generator is required to arrange for the coal only if it is available. If the coal is not available, NTPC cannot have the responsibility to do the impossibility. This principle has been laid down by this Tribunal in Appeal No.72 of 2010. However, the said settled law has not been followed by the Central Commission.
- (k) In regard to the diversion of the Coal from Kahalgaon STPS, Stage-I and Farakka STPS Stations to Kahalgaon STPS Stage-II which was found fault with, it is to be stated that the Kahalgaon STPS Stage-II is an expansion project

which was commissioned by the NTPC based on the clear coal linkage allowed for the said project by the Government of India and coal Companies.

- (l) NTPC has acted bonafide on the basis of the above situation and as such, there was no default or failure on the part of the NTPC. NTPC, in fact, had undertaken all efforts to make arrangements for the procurement of coal. Therefore, there was no impropriety on the part of the NTPC to have used the coal linkage commonly.

6. On these grounds, the impugned order is assailed by the learned Counsel for the Appellant.

7. The reply to these submissions made by the learned Counsel for the Respondent is as follows:

- (a) It is the responsibility and the obligation of the Generator to arrange for the fuel. The beneficiaries have no role for arranging for the fuel. According to the Appellant, the coal was not available for full capacity of Farakka STPS and

Kahalgaon STPS as the allocation of coal provided by the Government of India was not sufficient to achieve the target availability fixed by the Central Commission. When that is so, the Appellant ought not to have envisaged Kahalgaon STPS Stage-II until full coal linkage is made to the said plant. Thus, the decision to install Kahalgaon STPS Stage-II when the sufficient coal was not available for the existing stations should not have been taken. If the target availability is reduced, it would amount to burdening the beneficiaries and the consumers at large with payment of fixed-up charges without getting adequate returns in terms of electricity.

- (b) The beneficiaries have agreed for imported coal use in various stations of NTPC, though the cost of imported coal is much higher than the domestic coal. Nevertheless, the Appellant did not arrange for sufficient quantity of the imported coal. Even after coal was arranged, NTPC did not transport to the Generating Stations. For these things, the

Appellant alone is responsible. Therefore, no relaxation in target availability could be granted.

- (c) Admittedly, the Appellant had diverted the coal allocated to Farakka STPS and Kahalgaon STPS Stage-I to Kahalgaon STPS Stage-II. With the result, these three Stations did not achieve the target availability. Even though during the period from 2005-06 to 2007-08 Farakka STPS has achieved the target of electricity and similarly Kahalgaon STPS Stage I has also achieved the availability from 2004-05 to 2007-08, subsequently, the stations could not achieve the target availability only due to the diversion of coal.
- (d) Under cost plus tariff, all the charges especially in the case of Generating Station have to be paid by the beneficiaries. If a generating station has not achieved target availability or the generator failed to make arrangement for procurement of coal, the beneficiaries will be burdened to pay the full fixed up charges which has to be reduced

proportionately. Even the Fuel Supply Agreement executed by the Appellant with Eastern Coal Fields Limited dated 16.9.2011 did not have the provisions for adequate supply of coal. When that being the case, if the prayer of the Appellant is accepted for all times to come, the target availability of all the generating Stations of the Appellant has to be relaxed even when there is no adequate supply of coal. This would be against the law. It is for the Appellant to enter into the Agreement for supply of coal on commercial basis. The bottlenecks in the supply of coal by the Railways or distribution system cannot be the ground for relaxation of the target availability.

- (e) The Normative Actual Plant Availability Factor (NAPAF), has no relationship whatsoever with the supply of coal. The Plant load factor has the relationship with the supply of coal but the availability of the plant for operation has no relationship with the supply of coal. The plant in such a situation may be available for operation but

the same may not be able to operate owing to the supply or non supply of the coal. NAPAF is called as an operating availability. It is described by the percentage with due regard to the capacities of the units or the Stations as the case may be.

- (f) The Plant Load Factor (PLF) is described with percentage of due regard of unit or the stations and its actual generation of electricity. The quantum laid down by the Central Commission has to ensure NAPAF and not the PLF. Therefore, the Central Commission rightly found fault with the Appellant directing the coal meant for Farakka STPS, Kahalgaon STPS Stage-I to Kahalgaon STPS Stage-II. There was no surplus coal available at Rajmahal Coal Fields. But the Appellant by transferring the coal meant for the Farakka STPS and Kahalgaon STPS Stage-I to Kahalgaon STPS Stage-II had magnified the problems. Therefore, the Appellant is responsible for the present situation.

(g) Non availability of sufficient coal due to reasons mentioned, does not fall under the purview of Force Majeure event. The Force Majeure can be defined such as war, rebellion, mutiny, civil commotion, riot, strikes, lockouts, force of nature, accidents, the Act of Gods etc., beyond the control of the concerned party. The lack of efforts, lack of proper planning and the lack of far- sightedness cannot be placed within the ambit of Force Majeure event as being beyond the control of the Appellant. The whole situation developed because of the expansion of Kahalgaon STPS Stage-II. Timely arrangement of Railway network also is the sole responsibility of the Appellant.

8. In the light of the above rival contentions, the real question which arises for consideration is as follows:

“Whether in the above facts and circumstances, the NTPC is entitled for relaxation on the normative availability to be achieved for recovering full fixed cost as claimed by the NTPC?”

9. Before dealing with this question we would refer to the analysis and findings of the Central Commission on this issue. The relevant findings are as under:

Analysis

10. Heard the parties. Taking into consideration the submissions of the parties and the documents on record, we examine the prayer of the petitioner in the subsequent paragraphs.

11. The petitioner vide Annexure –A of its affidavit dated 22.11.2010 has submitted a tabular statement containing details of the coal linkage from different sources namely, Merry Go Round, Coal supplied by Railways, imported coal etc vis-à-vis the actual quantum of coal received from different sources and the actual requirement of coal for achieving the normative NAPAF for recovery of full fixed charges in the respective years for the generating stations in the Eastern Region, considered month-wise for the period from 2005-06 to 2010-11 (upto September, 2010). From the month-wise tabular statement, it is observed that the problem of inadequate receipt of coal considering the actual coal requirement for achieving target availability for these generating stations had arisen only after the commercial operation of Kahalgaon STPS, Stage-II generating station with effect from 1.8.2008. It is also observed from the details given in the tabular statement in Table-I under paragraph 7(b) above that

the availability in respect of Farakka STPS and Kahalgaon STPS, Stage-I were more than 84% and 91% respectively from the period 2005-06 to 2007-08 and the Average availability in respect of Farakka STPS and Kahalgaon STPS, Stage-I taken together was 88% during the said period, which is higher than the NAPAF of 85% specified under Regulation 26(i)(a) of the 2009 Tariff Regulations. Even though the actual availability in respect of Farakka STPS was 84%, the NAPAF of the said generating station was fixed at 85%, considering the fact that Farakka STPS and Kahalgaon STPS, Stage-I generating stations were linked to a common source viz Rajmahal Coal fields, for coal and the requirement of coal could be adjusted in order to achieve 85% NAPAF for both these generating stations. Thus, the details in Table-I amply demonstrate the fact that there has been no shortage of coal in Farakka STPS and Kahalgaon STPS, Stage-I upto the year 2007-08 and both these generating stations were in a position to achieve 85% NAPAF without any difficulty.

12. From the details given in the tabular statement in Table-II under paragraph 7(c) above it is observed that the availability in respect of Farakka STPS and Kahalgaon STPS, Stage-I has gradually decreased since the year 2008-09. The first unit of Kahalgaon STPS, Stage-II was commissioned during August, 2008 and Unit-II was commissioned during December, 2008. It has been submitted by the petitioner that the coal supply to Kahalgaon STPS, Stage-II was linked to MGR system from Chuperbhita, Rajmal expansion and Hurra mines of ECL, but the development of the

identified coal mines has been extensively delayed due to law and order problems etc. This according to the petitioner, has left the coal supply from the linked mines to Kahalgaon STPS, Stage-II in complete disarray.

13. In the light of above, the generation of Kahalgaon stage-II could be sustained by the petitioner through supply of coal from the mines other than linked mines and with the reduction in supply of coal from linked mines to Farakka STPS and Kahalgaon Stage-I as the long term linkage for coal supply to these generating stations has been provided from coal mines of Rajmahal Coalfields under ECL which is connected to both the generating stations with MGR system for transportation of coal.

14. Therefore, it is observed from the documents and the submissions made by the petitioner that the shortage of coal supply is due to non development of linked mines and bottlenecks in the Railway system. However, the question of reasonableness of transferring the cost implication without commensurate benefits to the beneficiaries needs to be seen in the context that the beneficiaries also do not have any control over coal supplies. It is therefore the responsibility of the generator to arrange the coal and bear the associated risks involved. Since the petitioner as well as the coal supply companies are owned by the Government, it would not be appropriate to pass on the fuel supply risks to the beneficiaries.

15. It is noticed that in a similar prayer made by the NTPC-SAIL in Petition No. 245/2010 for relaxation of Target Availability norms for the period 22.4.2009 to 31.3.2010 for non-supply / shortage of coal to its generating station, the Commission by its order dated 27.5.2011 had disposed of the petition rejecting the prayer of NTPC-SAIL. The relevant portion of the order is extracted as under:

"15.We are of the view that the petitioner would be entitled to recover the full fixed charges only if the generating station perform to the normative availability and the risk, if any, for non-performance on account of failure to arrange coal after the date of commercial operation, is required to be borne by the petitioner and it would be unreasonable to burden the beneficiaries on this count.

16. The responsibility and the risk for arranging fuel for the generating station lies with the generator. In the instant case, the supply of coal (annual coal linkage of 2.4 million MT) to the generating station is governed by the Fuel Supply Agreement dated 3.1.2009 between the petitioner and SECL. For the nonsupply/ short supply of coal to the generating station in violation of the FSA, the petitioner has the recourse to seek appropriate remedy in terms of the relevant clauses in the agreement. Hence, the prayer of the petitioner for relaxation of target availability fails on this count."

16. It is also observed that the fixed charges in respect of Farakka STPS (Petition No. 222/2009) is (`565.93 crore per annum) which works out to `0.51/kWh and Kahalgaon STPS, Stage-I (Petition No. 245/2009) is

(`498.39 crore per annum) which works out to `0.87 per kWh claimed by the petitioner as against the fixed charges of `761.60 crore per annum for Kahalgaon STPS, Stage-II (Petition No. 282/2009)) claimed which works out to `1.088 per kWh at 85% corresponding target availability.

Thus, it is observed that the generators interest would get better served by having more generation at Kahalgaon Stage-II generating station and by sacrificing generation at Farrakka SPS and Kahalgaon Stage-I generating stations, by supplying coal to Kahalgaon Stage-II. As noticed, there was no shortage of coal to Farakka STPS and Kahalgaon Stage-I generating stations till the commercial operation of Kahalgaon STPS, Stage- II generating station. On this consideration, the prayer of the petitioner for relaxation of NAPAF in respect of Farakka STPS and Kahalgaon STPS, Stage-I is not justified.

17. The power of relaxation under the 2009 Tariff Regulations is in general terms and its exercise is discretionary. It is settled law that exercise of discretion must not be arbitrary, must be exercised reasonably and with circumspection, consistent with justice, equity and good conscience, always in keeping with the given facts and circumstances of a case. Based on the above discussions, we are of the view that the prayers of the petitioner for revision of NAPAF by relaxation of Regulation 26(i)(a) of the 2009 Tariff Regulations

deserves no merit and is rejected. The petition is disposed of accordingly.

10. The gist of the above analysis and the findings referred to in the impugned order by the Central Commission is as follows:

- (a) From the tabular statement containing details of the coal linkage from different sources submitted by the NTPC, it is clear that the problem of inadequate receipt of coal considering the actual coal requirement for achieving the target availability for these generating stations had arisen only after the commencement of the commercial operation of Kahalgaon STPS Stage II, w.e.f. 1.8.2008. From the details given in the tabular statement, it is evident that the availability in respect of Farakka STPS and Kahalgaon STPS Stage-I generating stations was more than 84% and 91% respectively from the period from 2005-06 to 2007-08. The average availability in respect of Farakka station and Kahalgaon STPS Stage-I, if taken altogether, was 88% during the said period.

This is higher than the NAPAF of 85% specified under Regulation 26(i)(a) of the Tariff Regulations, 2009. This would demonstrate the fact that there has been no shortage of coal in Farakka STPS and Kahalgaon STPS Stage-I station up to the year 2007-08.

- (b) From the details given in the tabular statement in Table-II, it is clear that the availability in respect of Farakka STPS and Kahalgaon STPS Stage-I has gradually decreased since the year 2008-09. The first unit of Kahalgaon STPS, Stage-II was commissioned during August, 2008 and Unit-II was commissioned during December, 2008. According to the NPTC, the coal supply to Kahalgaon STPS, Stage-II was linked to MGR system from Chuperbhita, Rajmal expansion and Hurra mines of ECL and the development of the identified coal mines was extensively delayed due to law and order problems, etc.

- (c) The documents furnished by the NTPC indicated that the shortage of coal supply was due to non development of linked mines and bottlenecks in the Railway system. But, it is to be pointed out that for this situation, the beneficiaries or the consumers do not have any control over the coal supply. It is the responsibility of the generator to arrange the coal and bear the associated risk involved. Since the NTPC as well as the coal supply companies are owned by the Government, it would not be proper to pass the fuel supply risk to the beneficiaries.
- (d) In the similar matter in Petition No.245/2010, filed by the NTPC-SAIL for relaxation of the Target Availability norms, the Central Commission rejected the prayer of the NTPC-SAIL holding that the responsibility and the risk for arranging fuel requirement for the generating stations solely lies with the Generator. This finding would apply to the present case also.

(e) The fixed charges in respect of Farakka STPS is Rs.565.93 crore per annum. This works out to Rs.0.51 per kWh and for Kahalgaon STPS Stage-I is Rs.498.39 Crore per annum which works out to Rs.0.87 per kWh. The fixed charges for Kahalgaon STPS Stage-II are Rs.761.60 Crore per annum which works out to Rs.1.088 per kWh at 85% corresponding target availability. Therefore, the Generator's interest would get better served by having more generation at Kahalgaon Stage-II generating station by sacrificing generation at Farrakka SPS and Kahalgaon Stage-I generating stations, by supplying coal to Kahalgaon Stage-II. As a matter of fact, there was no shortage of coal to Farakka STPS and Kahalgaon Stage-I generating stations till the commercial operation of Kahalgaon STPS, Stage- II generating station. From this, it is clear that the shortage of coal supply is due to non development of linked mines and bottlenecks in the railway system. So, the main reason for this situation is due to the

diversion of the supply of coal from Farakka STPS and Kahalgaon STPS Stage-I Generating Station to Generating Station of Kahalgaon STPS Stage-II. For this act, the beneficiaries cannot be held responsible.

- (f) The power of relaxation under the 2009 Tariff Regulations is in general terms and its exercise is discretionary. It is settled law that exercise of discretion must not be arbitrary, must be exercised reasonably and with circumspection, consistent with justice, equity in keeping with the given facts and circumstances of a case. In the light of the present facts of the case, it has to be held that NTPC is solely responsible for the present situation and so, the prayer of the Appellant for revision of NAPAF by relaxation of Regulation 26(i)(a) of the 2009 Tariff Regulations cannot be granted. Consequently, the Petition is rejected.

11. Keeping in view of the above analysis of the Central Commission, we shall now consider the question as to

whether relaxation in normative availability should be given to the NTPC.

12. The main arguments advanced by the Appellant to claim relaxation are as follows:

(a) The non-availability of the requisite quantum of coal for the power Stations is not on account of any risk attributable to NTPC.

(b) There is no dearth of efforts made by the NTPC to maximize the coal procurement to run the units. The NTPC had done everything humanly possible to arrange the coal.

13. On the basis of the above points, it is submitted that the NTPC had undertaken all efforts to make arrangements of the coal and the Kahalgaon STPS Stage-II which is an expansion project commissioned by NTPC based on the clear coal linkage allowed for the said project by the Government of India as well as the Coal Companies and that under those circumstances, the NTPC had adopted

bonafide and as such, there is no failure or default on the part of the NTPC.

14. As far as the coal linkage is concerned, it is to be stated that Farakka Station and Kahalgaon STPS Station Stage-I have a long term linkage for the coal supply from the coal mines of Rajmahal coal fields under Eastern Coal Fields Limited and thus, these Generating Stations are connected to the coal fields with the Merry Go Round system for transportation of the coal. Admittedly, there is no shortage of coal for Farakka STPS and Kahalgaon STPS Stage-I Generating Stations. The problem of coal shortage was experienced only when the first unit of Kahalgaon STPS Stage-II was commissioned and when the Appellant transferred the coal supply linkages meant for the Farakka STPS Generating Stations and Kahalgaon STPS Stage-I Stations to Kahalgaon STPS Stage-II Stations. It was easier for the Appellant to divert the coal from the coal mines from Rajmahal Coal Fields under Eastern Coal Limited as it was connected to both the Generating Stations with Merry Go Round system for transportation of coal.

15. It is noticed that there was no surplus coal available at Rajmahal Coal Fields but the Appellant, by transferring some of the coal meant for Farakka STPS and Kahalgaon STPS Stage-I Generating Stations to Kahalgaon STPS Stage-II Generating Stations had in fact, created problem for Farakka STPS and Kahalgaon STPS Stage-I as they could not achieve the Normative Plant Availability Factor.

16. In spite of the non development of the linked mines of Kahalgaon STPS Stage-II, its generation was sustained by the NTPC by diverting the coal supply from other mines which resulted in the reduction in supply of coal to Farakka STPS and Kahalgaon STPS Stage-I Generating Stations. The reduction in the coal supply to Farakka STPS and Kahalgaon STPS Stage-I Generating Stations was supplemented through import of coal resulting in increase in fuel cost. Thus, while diversion of coal from Farakka STPS and Kahalgaon STPS Stage I to Kahalgaon Stage II served the commercial interests of NTPC, it resulted in increase in cost of electricity at Farakka STPS and Kahalgaon STPS Stage-I to the detriment of the beneficiaries of these Stations. This is the grievance of the Respondent.

17. The Tariff Regulations, 2009 provide for determination of tariff based on the operational norms as specified in the Regulations. One of the operational norms is the Plant Maintainability Factor which has been specified for the thermal plants in question at 85%. The Power station recovers full annual fixed cost if it achieves the Annual Plant Availability Factor of 85%. If the Plant availability factor is higher than 85%, the Power Station also receives incentives in the form of additional fixed cost. The Plant Availability Factor is computed based on the Declared Capacity.
18. The Declared Capacity is defined in the Tariff Regulations as capability to deliver ex-bus electricity in MW in a time block of the day duly taking into account the availability of fuel or water.
19. Regulation 21 also provides that in case of a fuel shortage in a thermal generating station, the generating company may propose to deliver a higher MW during peak load hours by saving fuel during off peak hours. The Load Dispatch Centre may then specify a pragmatic day ahead schedule for the generating station to optimally utilize its MW and

energy capability in consultation with the beneficiaries. The Declared Capacity in such an event shall be taken to be equal to the maximum peak hour ex power plant MW schedule specified by the Load Dispatch Centre for that day. Admittedly, no such efforts were made by the Appellant in consultation with the beneficiaries in the event of shortage of fuel.

20. The Regulations would indicate that the responsibility for arranging the fuel is entirely that of the generating company. NTPC in spite of utilizing imported coal at Farakka and Kahalgaon Stage-I, failed to achieve the Normative Plant Availability Factor even though the higher cost of generation due to the use of imported fuel was borne by the beneficiaries. As a result of Farakka and Kahalgaon Stage I not achieving the normative plant availability Factor, the beneficiaries also experienced shortfall in power supply. According to the Respondent, the beneficiaries had to procure costly power to make up the shortfall in supply from Farakka and Kahalgaon Stage-I.

21. Coal is the basic raw material for generation of electricity. Arrangements of sufficient quantity of said raw material is the basic responsibility of the Plant developer, the NTPC. At any cost, the responsibility of the Appellant for procurement of the basic raw materials cannot be shifted to the beneficiaries.
22. It is argued by the Appellant that this is purely a Force Majeure event which was beyond the control of the Appellant. This submission is misplaced. Non availability of sufficient coal due to reasons mentioned by the Appellant does not fall under the purview of the Force Majeure event. The Force Majeure Event can be defined such as war, rebellion, civil commotion, lockouts, accidents, the Act of God etc. The non availability of fuel not on account of any of these factors cannot be placed under the ambit of the Force Majeure event saying that it is beyond the control of the NTPC.
23. So, for inability to arrange adequate fuel by NTPC, the beneficiaries cannot be held responsible. Further if the relaxation in the NAPAF is allowed to the Appellant, then it

would tantamount to penalize the beneficiaries and ultimately the consumers for no fault of theirs. Further, it would also lead to re-opening of several similar cases of non achievement of NAPAF and relieve the plant developer from the onus of arranging proper and sufficient quantity of basic raw material.

24. **Summary of Our findings**

- (a) There was no shortage of coal at Farakka and Kahalgaon Stage-I Super Thermal Power Stations upto 2007-08 prior to the commissioning of Kahalgaon Stage-II. Diversion of coal from coal mines linked to Farakka and Kahalgaon Stage-I to Kahalgaon Stage-II has resulted in shortage of coal and reduction of Plant Availability at the former.**
- (b) NTPC has not been able to achieve the Normative Plant Availability at Farakka and Kahalgaon Stage-I despite use of imported coal at high cost, resulting in increase in the cost of supply besides reduction availability of power to the beneficiaries of these power stations for no fault of theirs. Diversion of**

coal from Farakka and Kahalgaon Stage-I to Kahalgaon Stage-II served the commercial interests of NTPC to the detriment of the beneficiaries of Farakka and Kahalgaon Stage-I.

(c) The Regulations indicate that the responsibility for arranging the fuel is entirely that of the Generating Company.

(d) Non availability of sufficient fuel due to the reasons mentioned by the Appellant does not fall under the purview of the Force Majeure Event.

25. In view of our above findings, we do not find merit in this Appeal. Consequently, the Appeal is dismissed while confirming the impugned order of the Central Commission.

26. However, there is no order as to costs.

27. Pronounced in Open Court on the 30th day of April, 2013.

(Rakesh Nath)
Technical Member

Dated: 30th April, 2013

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REPORTABLE/NON-REPORTABLE

(Justice M. Karpaga Vinayagam)
Chairperson