

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

1. **Shri Ashok Basu, Chairman**
2. **Shri K.N. Sinha, Member**
3. **Shri Bhanu Bhushan, Member**
4. **Shri A.H. Jung, Member**

Petition No.91/2005

In the matter of

Revision of norms of Target Availability in respect of Farakka Super Thermal Power Station on account of acute shortage and poor quality of coal during the year 2004-05.

Petition No.92/2005

In the matter of

Revision of norms of Target Availability in respect of Farakka Super Thermal Power Station on account of acute shortage and poor quality of coal during the years 2002-03 and 2003-04.

And in the matter of

National Thermal Power Corporation Ltd

.....Petitioner

Vs

1. West Bengal State Electricity Board, Kolkata
2. Bihar State Electricity Board, Patna
3. Jharkhand State Electricity Board, Ranchi
4. Grid Corporation of Orissa Ltd., Bhubaneswar
5. Damodar Valley Corporation, Kolkata
6. Power Deptt., Govt. of Sikkim, Gangtok
7. Tamil Nadu State Electricity Board, Chennai
8. Electricity Department, Union Territory of Pondicherry, Pondicherry
9. Uttar Pradesh Power Corporation Ltd., Lucknow
10. Power Development Department, Govt. of J&K, Srinagar
11. Power Department, Union Territory of Chandigarh, Chandigarh
12. Madhya Pradesh State Electricity Board, Jabalpur
13. Gujarat Urja Vikas Nigam Ltd., Baroda
14. Electricity Department, Admn. Of Daman & Diu, Daman
15. Electricity Department, Admn. of Dadra and Nagar Haveli, Silvassa
16. Delhi Transco Ltd., New Delhi
17. Maharashtra State Electricity Board, Mumbai

.....Respondents

The following were present

1. Shri V.B.K. Jain, NTPC
2. Shri I.J. Kapoor, NTPC
3. Shri S.K. Samvi, NTPC
4. Shri Vivake Kumar, NTPC
5. Shri R. Datt, NTPC
6. Shri G. Singh, NTPC
7. Shri B.M. Gulati, NTPC
8. Shri R. Mazumdar, NTPC
9. Shri G.S. Aghesh, NTPC
10. Shri Satya Prakash, NTPC

**ORDER
(DATE OF HEARING : 20.9.2005)**

The petitioner, National Thermal Power Corporation Ltd, has made these applications for relaxation of norms of target availability in respect of Farakka Super Thermal Power Station (Farakka STPS) located in Eastern Region on the ground of acute shortage and poor quality of coal during the years 2002-03, 2003-04 and 2004-05. In petition No 91/2005 an additional prayer has been made for in principle approval for the installation of two Wagon Tiplers and associated system at Farakka STPS.

2. The petitioner has submitted that Farakka STPS was set up with a coal linkage corresponding to norms of full fixed charges recovery at 62.78% PLF. Different units of the generating station were commissioned during the period from 1986 to 1996 and the coal supplies were largely met by the coal companies as per the coal linkages. Since in Eastern Region, for a considerable period, there was less requirement of power, coal linkages were adequate for meeting the demand of power generation and to achieve PLF of 62.78%. This, as per the petitioner, did not create any constraints for recovery of full fixed charges of the station with corresponding level of coal supplies till the year 2000-01. Since 1.4.2001 onwards, the Commission vide its regulations dated 26.3.2001 and 26.3.2004 on terms and conditions for determination

of tariff has fixed target availability of 80% for full fixed cost recovery. The petitioner has submitted that during the period 2001-2004, with the commissioning of inter-regional links though it was possible to generate and evacuate power to comply with the norms of 80% target availability, but this could not be achieved in the years 2002-03, 2003-04 and 2004-05. According to the petitioner, this was mainly for the reason that coal companies could not deliver the required quantity and the quality of coal matching with the required level of utilization at the generating station. The actual availability achieved at the generating station during these years was 75.03%, 70.12% and 70.53% respectively.

Shortage in coal supply

3. The petitioner has submitted that the generating station is receiving coal through captive MGR system from Lalmatia/ Hura Block of Rajmahal Coalfields of ECL located at a distance of about 85 kms and other coalmines of CCL and MCL etc. The coal requirement for the generating station as per design coal and also as per actual quality of coal receipt during 2002-03 to 2004-05 furnished by the petitioner is tabulated below:

	GCV (kcal/kg)	Coal Required Per Annum for 80% TA (MT)	Coal Received Per Annum (MT)
DESIGN COAL	3200	8.19	-
2002-03	2892	9.50	7.28
2003-04	2643	10.44	8.66
2004-05	2644	10.33	8.98

4. The petitioner has brought out that as per Fuel Supply Agreement signed with ECL, the coal is being supplied from the Rajmahal mines of Eastern Coalfields Limited at Lalmatia. The existing Fuel Supply Agreement also stipulates that ECL shall supply coal from alternate coal mines of ECL other than Rajmahal, through railway rakes,

that is, other than MGR, in case the coal production at Rajmahal is inadequate to meet the Annual Contracted Quantity (ACQ). Accordingly, coal was also being transported from other ECL mines during the above period which is also being continued presently. Further, to meet the additional requirement, the petitioner is said to have made efforts to transport the coal from other non-linked sources like BCCL, CCL and MCL etc. The details in this regard have been submitted as below:

Year	Qty. in Million MT			
	Coal required for 80% TA	Coal receipt from linked sources	Coal receipt from other sources	Total coal
2002-03	9.50	5.288	1.993	7.281
2003-04	10.44	6.203	2.453	8.656
2004-05	10.33	5.405	3.576	8.981

5. The petitioner has pointed out that against the total coal requirement of 10 Million MT for achieving 80% target availability; only about 50% coal was supplied from the linked mines. The petitioner is said to have made efforts with other coal companies and was able to get about 1.993, 2.453 and 3.576 MT additional coal during the years 2002-03, 2003-04 and 2004-05 respectively. This supply of coal from the non-linked mines itself was to the extent of 27% in the year 2002-03 to 40% in the year 2004-05. However, despite these arrangements for procurement of coal, there was deficiency in supply of coal to achieve 80% target availability. The petitioner has further submitted that it has been highlighting the difficulties/constraints from time to time at all appropriate forums, including at the level of the Central Government but without any apparent success. It has also been submitted that in addition to above, the petitioner had initiated efforts from the year 2002-03 for allotment of coal-mine block to enable it to cater to some of the requirements. This has resulted in allocation of coal –mine block at Pakri Barwadih in the year 2004-05 which is expected to be operational from 2008-09.

6. In the past, the petitioner is reported to have taken up the issue with ECL to increase the coal supply. CIL/ECL on several occasions assured the petitioner of improvement in the supply position of coal to meet the requirements of the generating station. As CIL/ECL could not honour their commitments time and again and it was hampering electricity supply position to the ultimate customer as well affecting the viability of Farakka STPS, the petitioner is said to have finally decided to import the coal to meet the shortages and finalized an agreement with MMTC on 22.2.2005 for such coal imports.

Coal quality

7. On the quality of coal, the petitioner has submitted that the generating station is designed for using coal of 3200 kcal/kg GCV. GCV of coal supplied from ECL in particular and other CIL sources in general over last four years has been continuously of poor quality resulting in higher specific coal consumption. This has been adversely affecting the operational efficiency of the generating station. The details given in the petition are summarised below:

Year	Actual Coal Consumption (MT)	Actual GCV (Kcal/kg.)	Design GCV (Kcal/kg.)
2001-02	6.835	3016	3200
2002-03	7.576	2892	3200
2003-04	8.805	2643	3200
2004-05	8.934	2644	3200

8. The petitioner submitted that though with the efforts made by it, the supply of coal had increased but the corresponding increase in PLF could not be achieved due to deterioration in coal quality.

9. The petitioner is said to have made necessary arrangements to ensure adequate quantity of coal to achieve target availability of 80% specified by the Commission during 2005-06 and onwards.

10. In support of its claim for relaxation, the petitioner has relied upon sub-para (c) of para 2.3 of the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2001 (“the 2001 regulations”) as regards relaxation for the years 2002-03 and 2003-04. For relaxation for the year 2004-05, the petitioner has supported its claim based on sub-para (2) of para 2 and paras 12 and 13 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (“the 2004 regulations”).

11. We heard Shri V.B.K. Jain on admission.

12. The relevant provisions of the regulations are extracted hereunder:

The 2004 Regulations

“2(2) Provided that the Commission may prescribe the relaxed norms of operation, including the norms of target availability and Plant Load Factor contained in these regulations for a generating station the tariff of which is not determined in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001, and the relaxed norms shall be applicable for determination of tariff for such a generating station.

12 Power to Remove Difficulties: *If any difficulty arises in giving effect to these regulations, the Commission may, of its own motion or otherwise, by an order and after giving a reasonable opportunity to those likely to be affected by such order, make such provisions, not inconsistent with these regulations, as may appear to be necessary for removing the difficulty.*

13 Power to Relax: *The Commission, for reasons to be recorded in writing, may vary any of the provisions of these regulations on its own motion or on an application made before it by an interested person.”*

The 2001 Regulations

“2.3(c) The Generating Company may approach the Commission for relaxation of “Target Availability” in exceptional circumstances with due justification. The

Commission on being satisfied of the reasons and justification furnished by the Generating Company may grant such relaxation as may be considered appropriate.

Provided that no relaxation shall be granted without notice to the parties likely to be effected by such relaxation.”

Para 2(2) of the 2004 Regulations

13. We may first consider whether the petitioner's case is covered under para 2(2) of the 2004 regulations. A bare look at the relevant provision would reveal that it applies to a generating station the tariff of which is not determined in accordance with the 2001 Regulations, and the relaxed norms could be applicable for determination of tariff for such a generating station. In case of Farakka STPS, the tariff for the period 1.4.2001 to 31.3.2004 was determined by the Commission by its order dated 19.7.2004 in petition No 36/2001 under the 2001 regulations. Therefore, applicability of para 2(2) of the 2004 regulations to this generating station is ruled out.

Power to Remove Difficulties

14. Next we consider the scope of regulation 12 of the 2004 regulations, (Power to Remove Difficulties) according to which in case of any difficulty arises in giving effect to these regulations, the Commission may, make appropriate provisions for removing the difficulty, but such provisions cannot be inconsistent with the 2004 regulations. In other words, whatever provisions are made for removal of difficulty, those provisions have to conform to the other provisions made in the 2004 regulations.

15. The scope and import of the “removal of difficulties clause” in the Income Tax Act, 1922 has been considered by the Hon'ble Supreme Court in the Commissioner of Income-tax, Hyderabad Vs Dewan Bahadur Ramgopal Mill Ltd. - [1961] 2 SCR 318.

In that case the majority judgment took the view that the existence or arising of a difficulty was the *sine qua non* for the exercise of the power under the clause. It was held that the "difficulty" had to be a difficulty arising "in giving effect to" the provisions of the Act, (Income Tax Act in the case before the Hon'ble Court) and not a difficulty arising aliunde or an extraneous difficulty. In *Straw Products Ltd Vs Income Tax Officer* [AIR 1968 SC 579], the Hon'ble Supreme Court held that the power conferred under the "removal of difficulty clause" is a power to remove a difficulty which arises, in the application of the statute; it can be exercised in the manner consistent with the scheme and essential provisions of the statute and for the purpose for which it is conferred. The Hon'ble Supreme Court in *Madhav Upendra Sinai Vs Union of India* [(1975) 3 SCC 765] considered the object and purpose of the "removal of difficulties clause". It was held that in order to obviate the necessity of approaching the legislature for removal of every difficulty, howsoever trivial, encountered in the enforcement of a statute, by going through the time-consuming amendatory process, the legislature sometime invests the Executive with a very limited power to make minor adaptations and peripheral adjustments in the statute, for making its implementation effective, without touching its substance. It was emphasised that the existence or arising of a "difficulty" is the *sine qua non* for the exercise of the power. If this condition precedent is not satisfied as an objective fact, the power under the "removal of difficulties clause" cannot be invoked at all. The Hon'ble Supreme Court held the object of the "removal of difficulties clause" is to confer "very limited power to make minor adjustments in the statute, for making its implementation effective, without touching its substance." According to the Hon'ble Supreme Court, in the facts of the case before it, the Central Government could exercise the power under the clause only to the extent it was necessary for applying or giving effect to the Act etc., and no

further. The Hon'ble Supreme Court ruled that the "removal of difficulties clause" may slightly tinker with the Act to round off angularities, and smoothen the joints or remove minor obscurities to make it workable, but it cannot change, disfigure or do violence to the basic structure and primary features of the Act. In no case, can it, under the guise of removing a difficulty, change the scheme and essential provisions of the Act.

16. On a fair reading of the decisions in the above cases it appears to us that where an anomalous result would follow in giving effect to the different provisions of the 2004 regulations, the "power to remove difficulties clause" may be invoked to address the anomaly. In the facts on record in the present case, no such anomaly in the 2004 regulations has been pointed out. Mere physical difficulty faced by the petitioner in the procurement of adequate quantity and the desired quality of coal for the generating station cannot be a legitimate ground for invoking the "power to remove difficulties clause" because the ground will be extraneous to the purpose of the regulations. The pre-condition on which the Commission is to make any provision under the "removal of difficulties clause" has not come into existence. Further, under the regulations target availability of 80% is prescribed for recovery of full fixed cost. In case of the target availability of 80% is not achieved, the recovery of the capacity charges gets reduced. If the target availability is lowered, as prayed for, it may amount to changing the basic scheme of the regulations. This is not permissible when seen in the light of law laid down by the Hon'ble Supreme Court. Therefore, under the facts and circumstances of the present case the justification for invoking the "power to remove difficulties clause" is not made out.

Power to Relax

17. Lastly, we examine the matter in the context of power of relaxation, available under the 2001 regulations and the 2004 regulations. The provisions relating to grant of relaxation are specific to target availability in the 2001 regulations, but the power of relaxation is in general terms as regards the 2004 regulations. It is settled law that grant of relaxation is a discretionary relief and cannot be claimed as of right. Exercise of discretion in such cases 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. In the given circumstances, the discretionary relief of relaxation may be refused as it involves exercising discretion in a judicious manner. In *West Bengal State Electricity Board Vs Patel Engg Co Ltd – (2001) 2 SCC 451* the Hon'ble Supreme Court held that where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules. In *R. R. Verma vs Union of India – (1980) 3 SCC 402*, the power of the Central Government for grant of relaxation under the rules was in issue. The Hon'ble Supreme Court held that the Central Government is bound to exercise the power in the public interest with a view to secure civil servants of efficiency and integrity, and when and only when undue hardship is caused by the application of the rules, the power to relax is to be exercised in a just and equitable manner but, only to the extent necessary for so dealing with the case.

18. Same considerations govern to the causes before the Commission as regards exercise of power of relaxation. One of the primary considerations in the fixation of tariff is the interest of consumers, as mandated by Section 61 of the Electricity Act, 2003, under which the Commission is presently functioning. Before granting any

relaxation, the Commission has to be satisfied that it would serve the public interest. We are convinced that exercise of power of relaxation in the present case will be detrimental to public interest. In case the target availability is relaxed the petitioner will become entitled to claim the capacity charges at the relaxed norms. This in turn will add to the burden of the electricity consumers. We also point out that neither the respondents nor the ultimate consumers, have any role in ensuring availability of coal in the needed quantity and of the desired quality. The arrangement for fuel supply is the responsibility of the petitioner as a commercial entity. The petitioner has prayed for relaxation for the years 2002-03 and onwards, the accounts of which were settled long back. Relaxation, if allowed, will burden the consumer retrospectively. In our considered view, the benefit presently available to the consumer could not be taken away with retrospective effect thereby saddling him with financial burden in respect of the past period when he had drawn and consumed power on the faith of the existing regulations. A similar view was taken by the Hon'ble Supreme Court in the case of Prag Ice and Oil Mills & Anr. Vs Union of India [1978] 3 SCR 293 where the Hon'ble Court observed that to achieve the object to secure equitable distribution and availability at fair price, the determining factor is the interest of the consumer. Relaxation in terms of the prayer made may benefit the petitioner but will result in recovery of higher tariff from the consumers.

19. The petitioner has further submitted that it will suffer financial losses in case the target availability is not relaxed because in that case it will not be able to recover full capacity charges. In our opinion the ground canvassed by the petitioner does not stand the legal scrutiny. The price or tariff for supply of electricity by a generating company, like the petitioner, is regulated by the Commission in view of the shortage

conditions in the country. In the past, through a series of judgments the Hon'ble Supreme Court has held that the policy of price control has for its dominant object equitable distribution and availability of the commodity at fair price so as to benefit the consumers. In *New India Sugar Works v. State of Uttar Pradesh & Ors.* [1981] 3 SCR 29, the Hon'ble Supreme Court observed:

"It was next strongly contended that in fixation of the price of levy sugar the Government has not taken into consideration the fact that the petitioners would undergo a serious loss because the price would not be sufficient even to cover their manufacturing cost. We are, however, unable to agree with this argument. The policy of price control has for its dominant object equitable distribution and availability of the commodity at fair price so as to benefit the consumers. It is manifest that individual interest, however, precious they may be must yield to the larger interest of the community viz., in the instant case, the large body of the consumers of sugar. In fact, even if the petitioners have to bear some loss there can be no question of the restrictions imposed on the petitioners being unreasonable." (Emphasis added)

20. In *Shree Meenakshi Mills Ltd. v. Union of India*, the Hon'ble Supreme Court observed that the mere fact that some of those who are engaged in the business are alleging loss after the imposition of law will not render the law unreasonable. When viewed in the light of these observations of the Hon'ble Supreme Court, the norm of target availability prescribed by the Commission, does not call for any modification.

21. The petitioner has further contended that when Farakka STPS was set up the norm for recovery of the capacity charges was 62.78% PLF. It is urged that the level of target availability has been increased to 80% with effect from 1.4.2001 and it took the petitioner time to achieve the target availability of 80% by ensuring availability of additional coal during 2005-06. Even this submission of the petitioner does not convince us. The Commission through its order dated 4.1.2000 in petition No.2/1999 had for the first time specified the target availability of 80% for recovery of full capacity

charges. This decision of the Commission was implemented with effect from 1.4.2001. Thus, the petitioner had enough time (more than one year) at its disposal to arrange for additional supply of coal. It appears that target availability level of 80% was achieved during 2001-02 as the petitioner, in the present petition, has sought relaxation for the years 2002-03 to 2004-05. We find no justification for seeking relaxation for any subsequent period.

22. On consideration of the whole conspectus of circumstances, we are not satisfied with the petitioner's demand for relaxation of the target availability level during 2002-03 to 2004-05. The prayer is accordingly rejected.

Procurement of Wagon Tiplers

23. In petition No 91/2005 the petitioner has also sought 'in principle' approval for the installation of two wagon tiplers and associated system. In an attempt to justify the requirement of two additional wagon tiplers, the petitioner has submitted that there is likely to be a constraint in handling the coal receipts at the generating station even if the required coal is made available, mainly because the coal receipt system at generating station was designed to handle the coal through MGR system. The petitioner has explained that the coal receipts through Railway rakes (in Box-N wagons) involves manual unloading of coal received at track hoppers which takes considerably long time and that the track hoppers are also occupied till these are completely unloaded which has a direct bearing on unloading of coal receipts from MGR system. The petitioner has estimated that about five to six Box-N wagon rakes are required to be unloaded on daily basis to achieve coal receipt corresponding to 80% PLF/TA. And additional rakes are required to be inducted if coal is not of

standard quality. Anticipating this difficulty, the petitioner has proposed to immediately install two wagon tippers to handle the situation to unload the BOX-N wagons and also maintain simultaneously availability of the track hopper for receiving MGR rakes, without which the petitioner will not be able to unload the coal received from other sources. The proposal for installation of two wagon tippers and associated system at Farakka STPS is said to have been taken up by the petitioner at EREB forum and the beneficiaries have been requested to give their formal consent. Under these circumstances, the petitioner has sought approval for installation of two wagon tippers and associated system so as to ensure adequate coal supply for the generating station in future.

24. The petitioner's proposal indeed involves additional capitalisation of the expenditure likely to be incurred on procurement of two wagon tippers. The matter may be considered in accordance with law as and when the petitioner approaches the Commission for revision of fixed charges on account of additional capital expenditure on two wagon tippers. No specific approval of the Commission for installation of wagon tippers is necessary at this stage, since it is presumed that the additional expenditure would be incurred only after a cost-benefit analysis by the petitioner, on the basis of which the beneficiaries would give their consent.

25. With the above observations, both the petitions stand dismissed.

Sd/-
(A.H. JUNG)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

Sd/-
(K.N. SINHA)
MEMBER

Sd/-
(ASHOK BASU)
CHAIRMAN

New Delhi dated the 24th October 2005