

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Coram:**

- 1. Shri Ashok Basu, Chairman**
- 2. Shri G.S. Rajamani, Member**
- 3. Shri K.N. Sinha, Member**

**Review Petition No. 137/2002  
in  
Petition No. 78/2001**

**In the matter of**

Review of Order dated 24.10.2002 – incentive/disincentive for Kawas GPS  
and Gandhar GPS.

**And in the matter of**

National Thermal Power Corporation Ltd.	...	<b>Petitioner</b>
<b>Vs</b>		
1. Madhya Pradesh State Electricity Board, Jabalpur		
2. Maharashtra State Electricity Board, Mumbai		
3. Gujarat Electricity Board, Vadodara		
4. Electricity Deptt., Govt. of Goa, Panaji, Goa		
5. Electricity Deptt., Admn. of Dadra and Nagar Haveli, Silvassa		
6. Electricity Deptt., Admn. of Daman & Diu, Daman		
7. Chattisgarh State Electricity Board, Raipur		
8. Central Electricity Authority, New Delhi		
9. Western Regional Electricity Board, Mumbai	.....	<b>Respondents</b>

**The following were present**

1. Shri MG Ramachandran, Advocate, NTPC
2. Shri Shyam Wadhera, ED, NTPC
3. Shri KK Garg, GM, NTPC
4. Shri MS Chawla, Addl GM, NTPC
5. Shri DK Dogra, DGM , NTPC
6. Shri SK Samvi, Sr Manager, NTPC
7. Shri Balaji Dubey, Sr Law Officer, NTPC
8. Shri Satish Agnihotri, Advocate, MPSEB
9. Shri Rohit K Singh, Advocate, MPSEB
10. Shri SP Degwekar, Commercial Officer, MSEB
11. Shri UV Gupte, SE, GEB
12. Shri OP Sheemar, Director, CEA
13. Shri Rafi-ud-Din, Director, CEA
14. Shri Manjit Singh, SE , WREB

**ORDER**  
**(DATE OF HEARING 28.3.2003)**

The petitioner, NTPC has filed this application to seek review of order dated 24.10.2002 in petition No 78/2001.

2. The facts giving rise to filing of the application are in narrow compass. Petition No 78/2001 was filed by the petitioner for approval of disincentive for Kawas GPS, for the years 1992-93 to 1997-98 and Gandhar GPS for the years 1994-95 to 2000-01, based on the tariff notifications issued by Ministry of Power for the respective stations as ordered by the Commission, in its order dated 6.11.2001. These tariff notifications provided, inter alia, for payment of incentive/disincentive to/by the petitioner by/to the beneficiaries. According to these notifications, where actual generation level in kWh/KW/year as certified by Regional Electricity Board and Central Electricity Authority in any financial year exceeded the normative upper limit of operating range in kWh/KW/year, the petitioner became entitled to incentive. However, where actual generation level in kWh/KW/year fell below the normative lower limit of operating range in kWh/KW/year for the reasons attributable to the petitioner, it became liable to pay disincentive to the beneficiaries drawing power from these two stations. For the purpose of incentive/disincentive calculations, actual generation level achieved in any financial year would include the backing down as certified by WREB due to lack of system demand and due to other conditions not attributable to the petitioner, as certified by CEA as "deemed generation". The petitioner claimed benefit of "deemed generation" for lack of system demand and also due to other conditions not attributable to it for shortage/non-availability of gas. It filed "deemed generation" certificates issued by Member Secretary, WREB as

regards backing down due to lack of system demand. As regards "deemed generation" due to other reasons not attributable to the petitioner, it was contended that a part of loss of generation was also on account of shortage/non-availability of gas, for which it was not responsible.

3. The petitioner had initially filed the petition on 7<sup>th</sup> September 2001. It, however, filed the amended petition on 12.2.2002, as a follow up of the Commission's observations order dated 6.11.2001. The petitioner filed a copy of CEA's letter dated 12.12.2001 along with the amended petition, which, inter alia, stated as under:

"In case of Gandhar & Kawas GPS data is available with WREB since August 96 only and WREB have computed and certified the following figures for loss of generation due to shortage/non-availability of gas in respect of Gandhar & Kawas GPS for the year 1996-97 & 1997-98 by restricting the total generation including deemed generation to 62.79% PLF to enable NTPC to recover its full fixed charges :

1996-97 (August 96 to March 97)

1. Gandhar GPS 573.222 MU
2. Kawas GPS 1449.088 MU

1997-98 (April 1997 to March 98)

1. Gandhar GPS 952.616 MU
2. Kawas GPS Nil (as the PLF for the year was above 62.79%)

The loss of generation due to shortage/non-availability of gas for the period prior to 1.8.96 could not be computed and certified by WREB as the necessary data was not available with WREB and constituents of Western Region did not agree for allowing deemed generation benefit on account of loss of generation due to shortage of gas based on NTPC data. The issue was also discussed in the 114<sup>th</sup> WREB meeting but constituents did not agree for deemed generation benefit due to shortage of gas to NTPC and it was clarified by CEA/WREB to NTPC that certification could be made by WREB based on NTPC data provided constituents agreed to it."

4. The petition was disposed of by order dated 24.10.2002. The Commission did not consider the contents of letter dated 12.12.2001 extracted above for the purpose of calculation of quantum of disincentive for the period from 1.8.1996 to 31.3.1998. Similarly, for the period prior to 1.8.1996, the benefit of “deemed generation” for loss of generation on account of shortage/non-availability of gas was also not permitted in the absence of a certificate to that effect by CEA.

5. The petitioner filed the application for review of order dated 24.10.2002, wherein it urged a number of grounds. The application for review was admitted by us vide order dated 14.2.2003, limited to two grounds. All other grounds urged by the petitioner in support of review of application were rejected. The two grounds on which the application for review was admitted are summarised as under :-

(a) Whether non-consideration of letter dated 12.12.2001 amounted to an error apparent on the face of record for the purpose of review, and

(b) Whether the Commission in exercise of its adjudicatory function ought to have considered the data filed by the petitioner to compute its liability to pay disincentive, so far as the period prior to 1.8.1996 is concerned.

6. The application for review has been heard after notice.

7. Shri M.G. Ramachandran, Advocate, appearing for the petitioner argued that the Commission ought to have looked into CEA's letter dated 12.12.2001 in order to assess its real impact on the issue raised in the petition. According to the learned

counsel, non-consideration of the said letter by the Commission in the order dated 24.10.2002 amounted to an error apparent on the face of record. He urged that the error can be corrected through review. The learned counsel also produced a copy of CEA's letter dated 27.3.2003, the relevant portion of which is extracted below :-

"The information received from WREB in the case of Gandhar and Kawas GPSs regarding loss of generation due to shortage/non-availability of gas for the period August, 1996 to 31<sup>st</sup> March, 1998, has been examined in CEA and the following are the certified figures of deemed generation due to shortage/non-availability of gas for these stations :

1996-97 (August 96 to March 97)

1. Gandhar GPS 573.222 MU
2. Kawas GPS 1449.008 MU

1997-98 (April 1997 to March 1998)

1. Gandhar GPS 952.616 MU
2. Kawas GPS Nil (as the PLF for the year was above 62.79%)

The loss of generation due to shortage / non-availability of gas for the period prior to 1<sup>st</sup> August, 1996 could not be certified by CEA as the constituents of Western Region did not agree for allowing deemed generation benefit due to shortage of gas to NTPC as deliberated in the 114<sup>th</sup> WREB meeting."

8. The learned counsel for the petitioner further contended that so far as the period from 1.8.1996 to 31.3.1998 was concerned, letter dated 27.3.2003 reconfirmed the contents of the letter dated 12.12.2001 and that there was no shadow of doubt that the petitioner was entitled to benefit of loss of generation on account of shortage/non-availability of gas for the purpose of claiming fixed charges in respect of both the stations. So far as the period prior to 1.8.1996 is concerned, the learned counsel argued that the Commission, based on records in Petition No.78/2001 should have adjudicated the petitioner's claim for recovery of fixed charges after taking into account the "deemed generation" on account of

shortage/non-availability of gas. Learned counsel submitted that the Commission in its earlier order dated 23.6.2000 in Petition No.4/1999 and other related petitions has held that **"the question of notification of incentive by the Commission is not only a matter of procedure but necessarily involves adjudication of the rights of the parties"**. (Emphasis added)

9. The replies to the application for review have been filed on behalf of Respondent No.1, MPSEB and Respondent No.2, MSEB. However, at the hearing before us, the matter was argued by Shri Satish Agnihotri, Advocate, on behalf of Respondent No.1. His arguments were adopted by Shri UV Gupte, representative of GEB, Respondent No.3. None was present on behalf of other respondents.

10. Shri Satish Agnihotri, Advocate, submitted that the application for review was not maintainable. He relied upon the Supreme Court judgements in Satya Narayan Laxmi Narayan Hegde Vs Mallikarjun Bhavanappa Tirumale [(1960) 1 SCR 890], Aribam Tuleshwar Sharma Vs Aribam Pishak Sharma [(1979) 4 SCC 389], Devendra Pal Singh Vs State and another [(2003) 2 SCC 501) and in particular Ajit Kumar Rath Vs State of Orissa and others [(1999) (9 SCC 596)]. It was contended by the learned counsel for MPSEB that the power of review can be exercised on discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the person concerned or could not be produced at the time when the order was made. According to the learned counsel, the power can also be exercised on account of some mistake or error apparent on the face of record or for any other sufficient reason and a review cannot be sought merely for fresh hearing or argument or correction of an erroneous view taken

earlier. It was urged that power of review could only be exercised for correction of a patent error of law or fact, which stares in the face without any elaborate argument being needed for establishing it. Relying upon the above noted judgements of the Supreme Court, the learned counsel argued that the expression "any other sufficient reason" used in Order 47, Rule 1 CPC means a reason sufficiently analogous to that specified in the rule. Based on the above legal position, the learned counsel developed the argument that the present application for review was not covered under any of the above grounds and was, therefore, liable to be dismissed with costs.

11. We have given our anxious consideration to the contentions raised on behalf of the parties. As we have already noticed the Commission in its order dated 24.10.2002 did not consider the contents of CEA's letter dated 12.12.2001 while disposing of the petition. The court in the case of Naurata Vs Anokha (AIR 1954 Pepsu 85) has held that

"When important documentary evidence already on record was not brought to notice of the Court, and referred to by either party when the appeal was heard, all the same the documents being already there, the error is apparent on the face of the record, such an error whether it occurs by reason of the counsel's mistake or it creeps in by reason of an oversight on the part of the court can always be a good ground for exercise of the jurisdiction of the court to reverse its direction."

12. In view of the settled legal position, we consider that the import of CEA's letter dated 12.12.2001 needed to be examined in detail in the Commission's order dated 24.10.2002. This had, however, escaped the attention of the Commission. Therefore, a case for review of order dated 24.10.2002, so far as the period from 1.8.1996 to

31.3.1998 is concerned, has been made out keeping in view the statutory provisions of Order 47 Rule I of the Code of Civil Procedure. We order accordingly.

13. We also take notice of CEA's letter dated 27.3.2003 wherein the details of "deemed generation" due to shortage/non-availability of gas for these stations, as contained in the letter dated 12.12.2001 have been confirmed. The learned counsel for Respondent No.1 argued that the letter dated 27.3.2003 could not be considered at the stage of review. However, on a query made as to whether the petitioner could file a fresh petition based on the letter dated 27.3.2003, his answer was in the positive. He, however, submitted that even if it was so, the benefit of the said letter could not be extended in the review proceedings.

14. We have considered the objection taken by learned counsel for Respondent No.1. We find that the petitioner has been consistently following up with CEA for issuance of the "deemed generation" certificate. Even the letter dated 27.3.2003 is in response to the petitioner's letter dated 5.11.2001. The petitioner cannot be blamed and made to suffer on account of delay, if any, on the part of CEA. It cannot be denied that justice is a virtue, which transcends all barriers. The rules or procedures or technicalities of law cannot stand in the way of administration of justice. The man-made procedure must yield to substantive justice, which is divine. In case the situation is not rectified, it shall result in miscarriage of justice. Accordingly, we do not see much force in the contention raised by the learned counsel for Respondent No 1 to keep the letter dated 27.3.2003 out of consideration.



15. As regards period prior to 1.8.1996, as we have noticed above, learned counsel for the petitioner wanted us to adjudicate the issue based on the pleadings of the parties in Petition No.78/2001 and in support of his claim he relied upon the Commission's earlier order dated 23.6.2000, which has been adverted to above. He, therefore, vehemently argued that the application for review should be allowed for the prior period as well and the petitioner's claim deserves consideration. His submissions were opposed by the learned counsel for MPSEB.

16. We do not find much force in this submission made by the learned counsel for the petitioner. In our opinion, certification of backing down for reasons other than lack of system demand by CEA is a necessary condition to enable the petitioner to claim the benefit. A petition for approval of incentive/disincentive unaccompanied by such a certificate deserves to be thrown out at the threshold. The role of Commission as an adjudicatory body shall arise only after the petition for incentive/disincentive has been properly presented in conformity with the tariff notifications. The certificate of backing down due to conditions not attributable to the petitioner had not been issued by CEA for the period prior to 1.8.1996. The position remains the same even today as in letter dated 27.3.2003 produced by the learned counsel for the petitioner, it has been categorically stated by CEA that loss of generation due to shortage/non-availability of gas for the period prior to 1.8.1996 could not be certified by CEA. Accordingly, we reject the prayer made by the petitioner for review of order relating to period prior to 1.8.1996.

17. We accordingly direct that Petition No.78/2001 be set down for hearing on 5.6.2003 for reconsideration of liability of the petitioner to pay disincentive for the

period from 1.8.1996 to 31.3.1998. In view of this direction, the Commission's earlier direction in order dated 24.10.2002, in so far as it relates to liability of the petitioner to pay disincentive to the beneficiaries for this period, that is, 1.8.1996 to 31.3.1998 shall not be given effect to, till further order on the main Petition No.78/201.

18. Review Petition No.137/2002 in Petition No.78/2001 stands disposed of.

Sd/-  
**(K.N. SINHA)**  
**MEMBER**

Sd/-  
**(G.S. RAJAMANI)**  
**MEMBER**

Sd/-  
**(ASHOK BASU)**  
**CHAIRMAN**

New Delhi dated the 4<sup>th</sup> April, 2003