

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

1. Dr. Pramod Deo, Chairperson
2. Shri R. Krishnamoorthy, Member
3. Shri S. Jayaraman, Member
4. Shri V.S. Verma, Member

Petition No.100/2009

In the matter of

Petition under Regulation 44 (Power to relax) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 for relaxation of various provisions for hydro generating stations of NHPC Ltd

And in the matter of

NHPC Ltd, Faridabad

Petitioner

Vs

1. Punjab State Electricity Board, Patiala
2. Haryana Power Generation Corporation Ltd., Chandigarh
3. BSES Rajdhani Power Ltd., New Delhi
4. BSES Yamuna Power Ltd., Delhi
5. North Delhi Power Ltd., Delhi
6. Uttar Pradesh Power Corporation Ltd., Lucknow
7. Rajasthan Rajya Vidyut Prasaran Nigam Ltd., Jaipur
8. Jaipur Vidyut Vitaran Nigam Ltd., Jaipur
9. Jodhpur Vidyut Vitaran Nigam Ltd., Jodhpur
10. Uttarakhand Power Corporation Ltd., Dehradun
11. Ajmer Vidyut Vitaran Nigam, Ltd., Ajmer
12. Himachal Pradesh State Electricity Board, Shimla
13. Engineering Department, UT Secretariat, Chandigarh
14. Power Development Department, Srinagar, J&K

Respondents

Following were present

1. Shri Prashant Kaul, Chief Engineer (Comml.), NHPC
2. Shri C. Vinod, NHPC
3. Shri V.N. Tripathi, NHPC
4. Shri Nitin Singh, NHPC
5. Shri N.K. Chadha, NHPC

Order

(Date of Hearing: 9.6.2009)

The petitioner seeks relaxation and re-fixation of the Normative Annual Plant Availability Factor specified by the Commission under the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereafter “the tariff regulations”) for Dulhasti, Chamera Stage II (Pondage type generating stations) and Salal, Uri, and Tanakpur (Run-Of-River generating stations). The petitioner also seeks relaxation by 5% in the Normative Annual Plant Availability Factor during the first year of commercial operation of all its generating stations. The petitioner further seeks relaxation of timelines specified in the tariff regulations by the Commission for completion of hydro power projects, to enable it to claim additional 0.5% of return on equity when delay in completion is not attributable to the generating company. The application has been made under regulation 44 of the tariff regulations.

2. Heard Shri Prashant Kaul on maintainability of the application.
3. Regulation 44 of the tariff regulations empowers the Commission to relax any of the provisions thereof either on its own motion or on an application made before it by any interested person. It reads as under –

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

4. The power of relaxation under the 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. In the given circumstances, the discretionary relief of relaxation may be refused as it may involve exercising discretion in a judicious and judicial 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.K. Khandelwal v. State of U.P.*, (1981) 3 SCC 592, the Supreme Court noted that

*“6. Dr. Singhvi, who appears on behalf of the appellant, raised a further contention that the ratio 1:1 was relaxed from time to time by the University and that the appellant was discriminated against by the arbitrary refusal of the authorities to relax the ratio in his favour. **We are prepared to accept that if there is a power to relax the ratio, that power must be exercised reasonably and fairly. It cannot be exercised arbitrarily to favour some students and to disfavour some others.**”*

5. The argument made in favour of relaxation is that the petitioner will face hardship and suffer financial losses in case the relaxation is not granted. In this context it may be fair to refer to the judgment of the Hon'ble Supreme Court in *New India Sugar Works v. State of Uttar Pradesh & Ors.* [1981] 3 SCR 29, wherein it was observed:

“It was next strongly contended that in fixation of the price of levy sugar the Government has not taken into consideration that 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)

6. 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.

7. Same considerations should govern to the causes before the Commission as regards exercise of power of relaxation. When viewed in the light of the observations of the Hon'ble Supreme Court in above referred cases, the terms and conditions specified by the Commission under the tariff regulations cannot be categorized as unreasonable so long as to justify resort to exercise of general power of relaxation. The power of relaxation is exercisable in exceptional circumstances on case-to-case basis. The power of relaxation cannot be exercised in a manner so as to nullify the relevant provisions of the tariff regulations and render them otiose or completely redundant. There cannot be any omnibus relaxation in the manner sought by the petitioner. Thus the present application for relaxation is beyond the scope of regulation 44 of the tariff regulations.

8. The petitioner has sought application of separate norms for its generating stations. The application, though termed as the application for relaxation, is an application for review and modification of the tariff regulations in disguise. It is a fundamental principle of construction that rules/regulations made under the statute are treated as if they were in the statute and are of same effect. The tariff regulations having been notified by the Commission in exercise of its legislative powers conferred under the Act have become part of the statute and partake the character of legislation. Clause (f) of sub-section (1) of Section 94 of the Act undeniably confers

powers of review on the Commission on same basis as vested in a civil court under the Code of Civil Procedure (the Code). The powers of the civil court in regard to review are contained in Section 114 read with Order 47 of the Code. The civil court exercises power to review while performing its adjudicatory functions of settlement of civil disputes. Review means judicial examination of the case. The civil courts do not perform the legislative functions on the lines vested in the Commission under Section 178 of the Act. Therefore, for exercise of powers by the Commission under Clause (f) of sub-section (1) of Section 94 of the Act, a distinction has necessarily to be made between the power exercised in legislative capacity and that exercised in the judicial or quasi-judicial capacity. It follows that the powers conferred on the Commission by virtue of Clause (f) of sub-section (1) of Section 94 of the Act to review its decisions, directions and orders are limited to the adjudicatory functions of the Commission under the Act or an order made in exercise of quasi-judicial power.

9. The Appellate Tribunal for Electricity has been consistently following this approach when it has been holding that the regulations made by the Commission under Section 178 of the Act are outside its appellate jurisdiction, they being statutory in nature, get incorporated in the parent statute.

10. Accordingly, the application is not maintainable and is hereby dismissed.

Sd/-
[V. S. VERMA]
MEMBER

Sd/-
[S. JAYARAMAN]
MEMBER

Sd/-
[R. KRISHNAMOORTHY]
MEMBER

Sd/-
[DR. PRAMOD DEO]
CHAIRPERSON

New Delhi, dated 23rd June 2009