

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 9/RP/2020
in
Petition No. 245/MP/2018**

**Coram:
Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri Arun Goyal, Member**

Date of Order: 25th January, 2021

In the matter of:

Review Petition under Section 94(1 (f) of the Electricity Act, 2003 read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 and Regulation 103 (1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking review of order dated 8.1.2020 in Petition No. 245/MP/2018.

And

In the matter of

ONGC Tripura Power Company Ltd.
Registered office:
Udaipur-Kakraban Road, Palatana,
P.O. District: Gomati,
Udaipur, South Tripura,
Tripura-799105

....Review Petitioner

Vs

1. Assam Power Distribution Company Ltd.
2. Department of Power Government of Arunachal Pradesh
3. Department of Power Government of Nagaland
4. Manipur State Power Distribution Company Ltd
5. Power and Electricity Department Government of Mizoram
6. Meghalaya Energy Corporation Ltd.
7. Tripura State Electricity Corporation Ltd.

.....Respondents

Parties present:

1. Shri Sanjay Sen, Sr. Advocate, OTPCL
2. Shri Parinay Deep Shah, Advocate, OTPCL
3. Ms. Surabhi Pandey, Advocate, OTPCL
4. Shri Arup Samrah, OTPCL
5. Shri Sanil Namboodiripad, OTPCL
6. Shri Amit Dabbas, OTPCL

7. Ms. Mandakini Ghosh, OTPCL
8. Shri Bibhu Medhi, APDCL
9. Shri Nilmadhab Deb, APDCL

ORDER

The Review Petitioner, ONGC Tripura Power Company Ltd (hereinafter referred to as “the Review Petitioner”) has filed the instant Review Petition under Section 94(1)(f) of the Electricity Act, 2003 (hereinafter referred to as ‘the Act’) read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 and Regulation 103(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (hereinafter referred to as “the Conduct of Business Regulations”) seeking review of Order dated 8.1.2020 in Petition No. 245/MP/2018 (hereinafter referred to as “the impugned order”).

2. The Petition No. 245/MP/2018 was filed by the Review Petitioner for extension in relaxation in NAPAF (normative annual plant availability factor) from 85% to 76%, for grant of liberty to approach the Commission with actual gas supply position at the time of the truing-up Petition and for re-consideration of the NAPAF norms for Palatana generating station (2x 363.3 MW) considering the actual gas supply position during the control period 2014-2019. The Commission after considering the submissions of the parties, vide order dated 8.1.2020 in Petition No. 245/MP/2018 rejected the prayers of the Review Petitioner (the Petitioner therein) and observed that the responsibility of arranging gas supply for declaration of NAPAF of 85% squarely lies on the generating company.

3. Aggrieved by the said order, the Review Petitioner has filed the present Review Petition on the grounds that there is error apparent on the face of the record, on the following counts:

(a) The Commission has failed to record the submissions of the Petitioner and also failed to analyse and consider the same while passing the impugned order as regards granting parity with NEEPCO.

(b) Paragraph 18 of the impugned order erroneously relies on order dated 5.11.2018 in Petition No. 225/MP/2017.

(c) The Commission has failed to consider that seller of gas to the Review Petitioner i.e. ONGC is unable to supply gas to the Review Petitioner due to unanticipated adverse gas reservoir behavior which is a force majeure event under the GSPA (gas sales and purchase agreement) and that the PPA (power purchase agreement) with the beneficiary Discoms provides that the force majeure under the GSPA shall also be a force majeure under the PPA.

(d) Power to relax is a regulatory power and the same cannot be subject to a blanket restriction by passing directions to that effect in any order.

(e) The Commission has failed to consider that the Review Petitioner's project is a unique case.

(f) Relaxation was given to the Review Petitioner on similar grounds in the previous order.

4. The Petition was heard for admission on 16.7.2020 through video conferencing. After hearing the learned senior counsel for the Review Petitioner, order on maintainability of the Review Petition was reserved.

5. We have considered the submissions of the learned senior counsel for the Review Petitioner and perused the documents on record. We proceed to consider whether any case for review has been made out by the Review Petitioner in terms of Order 47 Rule 1 of the Code of Civil Procedure (CPC) read with Regulation 103 of the Conduct of Business Regulations. Under Regulation 103 of the Conduct of Business Regulations, a review petition seeking review of any order of the Commission shall be filed within 45 days from the date of issue of the order. The

impugned order was passed on 8.1.2020 and the Review Petition has been filed on 20.2.2020. Hence, the Review Petition has been filed within the period of limitation. Section 94(1)(f) of the Act provides that the Commission has the same power as that of a civil court to review its decisions, directions or orders. Under Order 47 Rule 1 of CPC, a person aggrieved by order of a Court can file review on the following grounds, if no appeal against the said order has been filed:

- a) Discovery of new and important matter of evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.
- b) On account of some mistake or error apparent on the face of record;
and
- c) For any other sufficient reason.

6. The Review Petitioner has invoked grounds of a) sufficient reason and b) error apparent on the face of record for review of the impugned order. Therefore, our analysis is confined to whether the Review Petition is maintainable on these grounds and the same have been discussed in succeeding paragraphs.

(a) The Commission has failed to record the submissions of the Petitioner and to analyse and consider the same while passing the impugned order - Parity with NEEPCO.

and

(b) Paragraph 18 of the impugned order erroneously relies on order dated 5.11.2018 in Petition No. 225/MP/2017.

7. The Review Petitioner has submitted that NEEPCO's Assam Gas Based Project (NEEPCO's Project) has been given a relaxation in NAPAF from 85% to 72% and this relaxation has been continuing since 2009 whereas the Review Petitioner had sought relaxation only for 6 additional months over the previous relaxation given for 3 years and 6 months. The argument of the Review Petitioner is that since the Commission had given relaxation in NAPAF to NEEPCO's Project, relaxation in

NAPAF should also be given to the Petitioner's project on the ground of parity. In addition, the Review Petitioner has submitted that the Commission has failed to record the submissions of the Review Petitioner to this effect in the impugned order though the same was submitted in the main petition. The Review Petitioner has submitted that both, the NEEPCO's Project and the Review Petitioner's Project, are located in remote north-eastern region of the country and suffer similar gas supply constraints and that it will be in the interest of justice and fairness that the Review Petitioner is given the same considerations as NEEPCO. The Review Petitioner has contended that since the Commission, in the impugned order, has not taken note of the Petitioner's submission that it must be given a parity in treatment vis-a-vis NEEPCO's Project, the Commission had no occasion to accord the same treatment to the Review Petitioner's Project while passing the impugned order. The Review Petitioner has, therefore, alleged that the Commission has given different treatment to two generating stations placed in similar facts and circumstances.

8. We have considered the submissions of the Review Petitioner. According to the Review Petitioner, the Commission has given different treatment to two generating stations placed in similar situation. The Review Petitioner has argued that while the Commission has been giving relaxation to NEEPCO's Project since 2009, the same treatment has not been provided to the Review Petitioner's Project. Before proceeding with further analysis, it is important to have a look at Regulation 36 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter referred to as 'the 2014 Tariff Regulations') that deals with NAPAF of various generating stations. The same is extracted as under:

"Norms of operation for thermal generating station

36. The norms of operation as given hereunder shall apply to thermal generating stations:

(A) Normative Annual Plant Availability Factor (NAPAF)

(a) All thermal generating stations, except those covered under clauses (b), (c), (d), & (e) - 85%

Provided that in view of shortage of coal and uncertainty of assured coal supply on sustained basis experienced by the generating stations, the NAPAF for recovery of fixed charges shall be 83% till the same is reviewed.

The above provision shall be reviewed based on actual feedback after 3 years from 01.04.2014.

(b) Following Lignite-fired Thermal generating stations of Neyveli Lignite Corporation Ltd:

TPS-I	72%
TPS-II Stage I & II	75%
TPS-I (Expansion)	80%

(c) Following Thermal Generating Stations of DVC:

Bokaro TPS	75%
Chandrapura TPS	75%
Durgapur TPS	74%

(d) Following Gas based Thermal Generating Stations of NEEPCO:

Assam GPS	72%
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(e) Lignite fired Generating Stations using Circulatory Fluidized Bed Combustion (CFBC) Technology and Generating stations based on coal rejects

1. First Three years from COD – 75%
2. For next year after completion of three years of COD – 80%”

9. From plain reading of above provisions of the 2014 Tariff Regulations, it is clear that while NEEPCO’s Project has been allowed NAPAF of 72%, the Review Petitioner’s Project is required to achieve NAPAF of 85% in terms of Regulation 36(A)(a) of the 2014 Tariff Regulations. Similar provisions existed in the 2009 Tariff Regulations. Thus, the Regulation itself makes a distinction between projects of the Review Petitioner with that of NEEPCO. The Review Petitioner, neither in the main petition (245/MP/2018) nor in this Review Petition, has challenged provisions of the Regulations. Even otherwise, provisions of regulations cannot be called in question by filing a petition. Therefore, any relaxation sought in NAPAF has to be compared w.r.t. that provided in the Regulations i.e. 85% NAPAF for Review Petitioner’s Project and 72% NAPAF for NEEPCO’s Project.

10. First, we deal with the Review Petitioner's contention that the Commission has erroneously relied on order dated 5.11.2018 in Petition No. 225/MP/2017 (in NEEPCO's Project) and that based on that order, the Commission rejected request of the Review Petitioner to allow lower NAPAF. While rejecting prayer of NEEPCO in order dated 5.11.2018 in Petition No. 225/MP/2017, the Commission held as under:

"28. It is true that the beneficiaries have no control over the supply of gas. Accordingly, further relaxation of NAPAF due to short supply of gas by the gas supplier would load the beneficiaries extra burden of higher tariff.

29. Based on the above discussions, it is observed that the shortfall in Target Availability is not due to any operational problems and could only be attributed to inadequate gas supply by the gas supplier. We are of the view that risk of non supply of gas up to the requirement of 1.4 MCMD may have to be borne by the petitioner. The generating company and the Gas supplier both are the Government Companies and they should settle the gas supply issues among themselves. Accordingly, we are not inclined to relax the target availability any further to the level of actual availability."

Thus, NEEPCO was not allowed relaxed norms over and above the NAPAF norms as notified in the Regulation 36 of the 2014 Tariff Regulations.

11. In Petition No. 225/MP/2017, NEEPCO had advanced arguments that it was unable to meet NAPAF stipulated in the 2014 Tariff Regulations (i.e. 72%) due to shortage of gas and that it should be allowed lower NAPAF. On similar lines, the Review Petitioner had submitted in Petition No. 245/MP/2018 that it should be allowed relaxation in NAPAF compared to that provided in the 2014 Tariff Regulations (i.e. 85%). While quoting its decision in the NEEPCO's case, the Commission held as under in the impugned order:

"18. The Commission, in the similar issue raised by NEEPCO in Petition No.225/MP/2017, vide order 5.11.2018 had dis-allowed the relaxation sought in NAPAF as per actual gas supply position and observed as below:

"29. Based on the above discussions, it is observed that the shortfall in Target Availability is not due to any operational problems and could only be attributed to inadequate gas supply by the gas supplier. We are of the view that risk of non-supply of gas upto the requirement of 1.4 MCMD may have to

be borne by the petitioner. The generating company and the Gas supplier both are the Government Companies and they should settle the gas supply issues among themselves. Accordingly, we are not inclined to relax the target availability any further to the level of actual availability.”

12. Thus, the Commission, in the impugned order, by drawing parallel with its order in Petition No. 225/MP/2017 (NEEPCO's Project) rejected the prayer of the Review Petitioner to grant any relaxation in NAPAF. It is important to note that the Commission did not pass the impugned order solely by relying on its order in Petition No. 225/MP/2017 in NEEPCO's case and rather it is one of the reasons. Other reasons for disallowing request of the Petitioner included previous order of relaxation in NAPAF vide order dated 30.3.2017 in Petition No. 129/GT/2015; supplier of gas (ONGC) being a major shareholder in the Review Petitioner's Project; and balancing interest of beneficiaries and generators. Relevant extract from the impugned order is as under:

“12. The petitioner in Tariff Petition No. 129/GT/2015 had sought the relaxation in Normative Annual Plant Availability Factor (NAPAF) for the Project from 85% to 68% from COD of Block-II/Unit-II(24.3.2015)to 30.9.2018 due to shortage of gas supply by gas supplier ONGC. The petitioner claimed shortage of gas as force majeure on account of unpredictable low supply of gas from ONGC gas wells. The petitioner had furnished that the gas supplier assured to restore the full gas supply by 30.9.2018. The Commission after considering the shortage of gas supply and considering the quantum of gas available, vide order dated 30.3.2017 in Petition No.129/GT/2015 has allowed the relaxed NAPAF as given below.

“95 The petitioner has submitted that the fuel supplier will be in a position to supply the gas as per requirement for full load generation of the plant, by September 2018. In the light of the above discussions, the normative availability for recovery of annual fixed charges for the period 2014-19, is allowed as under.

96. Further, the relaxation in the availability allowed as above, is subject to the condition that the generating station shall be entitled to incentive corresponding to 50% of the availability in excess of 85% till such time the shortfall in availability from 76% availability during the period 24.3.2015 to 30.9.2018 is made good. We would also like to make it clear that relaxation in availability is a one-time dispensation and no further request for relaxation shall be entertained and consequences of any shortfall in performance shall be borne by the petitioner.”

13. In the instant petition, the petitioner has once again prayed for extension of the allowed relaxation in NAPAF norms (from 1.10.2018 to 31.3.2019) approved by the

Commission vide order dated 30.3.2017 in Petition No. 129/GT/2015 for the period 24.3.2015 to 30.9.2018. -----

xxxx

15. The Commission, considering the unpredictable behaviour of the oil wells during the initial and stabilization period, had allowed the relaxation in NAPAF from 85% to 76 % for the period from COD (24.3.2015) to 30.9.2018. The Commission while allowing the relaxation in NAPAF from 85% to 76 % w.e.f 24.3.2015 (COD of station) to 30.9.2018 has specifically clarified that relaxation in availability is a onetime dispensation and no further request for relaxation shall be entertained and consequences of any shortfall in performance shall be borne by the petitioner. Therefore, there is no merit in the claim of the petitioner for further relaxation in NAPAF beyond the dead line of 30.9.2018. Hence, the prayer of the petitioner for relaxation of NAPAF from 1.10.2018 to 31.3.2019 is rejected.

xxxx

19. The Commission notes that ONGC is the major stakeholder of the OTPC and also the fuel supplier. Besides, ONGC itself owns the entire gas and petroleum fields in entire south zone of NER as well as major areas of rest of NER.

20. Relaxed NAPAF for short supply of gas effectively passes on the risk for such shortfall in gas supplies to the beneficiaries. The question is to what extent such risks of short supply of gas should be allowed to be passed on to the beneficiaries. Should the entire business risk of generator with regard to supply of gas be passed on to the beneficiaries? We are of the view that the responsibility for arranging the gas supply for declaration up to the 85% squarely lies on the generating company.

21. Therefore, the prayer of the petitioner to allow liberty to approach it with actual gas supply position at the time of the truing –up and request a re-consideration of the NAPAF norms for Palatana station considering the actual gas supply position in the control period 2014-2019, is not tenable. We are of the view that risk of non-supply of gas up to the requirement have to be borne by the petitioner. The generating company and the Gas supplier both are partners in the company and they should settle the gas supply issues among themselves in the light of GSA provisions. Accordingly, we are not inclined to relax the target availability any further to the level of actual availability for the period 2014-19.”

13. Therefore, the Review Petitioner’s contention that the Commission has erroneously relied upon order dated 5.11.2018 in Petition No. 225/MP/2017 is misconceived.

14. The Review Petitioner has also contended that the Commission failed to consider its arguments that it should be treated at par with NEEPCO’s project and that due to this, the relaxation in NAPAF could not be considered while same was

allowed to NEEPCO's Project. As is clear from above, no relaxation has been provided to NEEPCO's Project over and above that provided in the 2014 Tariff Regulations. Therefore, drawing any parallel in seeking relaxation in NAPAF for Review Petitioner's Project has no meaning. It is important to point out at this stage that the Review Petitioner has taken a contradictory stand in this Review Petition as regards comparison with NEEPCO's Project. On one hand, it has submitted that it should be treated in a manner similar to that of NEEPCO's Project in granting relaxation, while on the other hand, it has submitted that in the impugned order, the Commission has erroneously relied on order in case of NEEPCO's Project. The Review Petitioner cannot draw parallel with NEEPCO's Project only for its advantage.

15. In light of the above discussion, we are of the view that the contention of the Review Petitioner that the Commission has given different treatment to two generating stations placed in similar facts and circumstances is not sustainable and hence, prayer for review of the impugned order on this count is rejected.

(c) The Commission has failed to consider that the seller (ONGC) is unable to supply gas to the Review Petitioner due to unanticipated adverse gas reservoir behavior which is a force majeure event under the GSPA and that the PPA with the beneficiary Discoms provides that the force majeure under the GSPA shall also be a force majeure under the PPA.

and

(d) Relaxation is given to the Petitioner on similar grounds in the previous order.

16. The Review Petitioner has submitted that Commission has failed to consider that force majeure event is the sole reason for the shortage of supply of gas to the Review Petitioner's Project. Due to shortage in supply of gas, the Review Petitioner's Project is not able to achieve the requisite NAPAF in the control period 2014-19 and is much lower than the 76% relaxation given vide order dated 30.3.2017 in Petition

No. 129/GT/2015. The Review Petitioner has submitted that vide letter dated 12.7.2018, the seller of gas has informed the Review Petitioner that it is experiencing unanticipated adverse gas reservoir behaviour which is a force majeure condition under clause 17(1)(C) of the GSPA. Further, Article 12.2(b) of the PPA provides that all force majeure conditions in the Fuel Supply Agreement (GSPA herein) entered into by the Petitioner shall be deemed to be an event of force majeure affecting the Review Petitioner. The Review Petitioner has submitted that the Commission despite noting this in the impugned order, has made no reference to the same in its analysis and decision and, therefore, this is an error apparent on the face of the record and merits to be reviewed.

17. We have considered the submissions of the Review Petitioner. According to the Review Petitioner as per Article 12.2(b) of the Power Purchase Agreement, all force majeure conditions in GSPA shall be deemed to be an event of force majeure affecting the Petitioner. The event of unanticipated adverse gas reservoir behavior is a force majeure event under Clause 17(1)(c) of the GSPA and also under Article 12.2(b) of the PPA. Therefore, the Review Petitioner ought to have been granted relaxation in NAPAF. The submissions made by the Review Petitioner are the repetition of the submissions made in the Petition No.245/MP/2018. It is pertinent to note that the Commission, exercising the provision of power to relax as provided in the 2014 Tariff Regulations, in its order dated 30.3.2017 in Petition No.129/GT/2015 had allowed the relaxed NAPAF of 76% (compared to 85% provided in the Regulations) with specific direction that relaxation in availability is a one-time dispensation and no further request for relaxation shall be entertained and consequences of any shortfall in performance shall be borne by the Review Petitioner. The period of relaxed norms from 24.3.2015 to 30.9.2018 vide order

dated 30.3.2017 in Petition No. 129/GT/2015 was based on the submissions of the Review Petitioner itself that its majority partner which incidentally is also the fuel supplier, has assured that it would be able to restore the gas supply from 30.9.2018 onwards. The same has been relied upon by the Commission in the impugned order. Relevant extract from the impugned order is as under:

“15. The Commission, considering the unpredictable behaviour of the oil wells during the initial and stabilization period, had allowed the relaxation in NAPAF from 85% to 76 % for the period from COD (24.3.2015) to 30.9.2018. The Commission while allowing the relaxation in NAPAF from 85% to 76 % w.e.f 24.3.2015 (COD of station) to 30.9.2018 has specifically clarified that relaxation in availability is a onetime dispensation and no further request for relaxation shall be entertained and consequences of any shortfall in performance shall be borne by the petitioner. Therefore, there is no merit in the claim of the petitioner for further relaxation in NAPAF beyond the dead line of 30.9.2018. Hence, the prayer of the petitioner for relaxation of NAPAF from 1.10.2018 to 31.3.2019 is rejected.”

xxxx

19. The Commission notes that ONGC is the major stakeholder of the OTPC and also the fuel supplier. Besides, ONGC itself owns the entire gas and petroleum fields in entire south zone of NER as well as major areas of rest of NER.

20. Relaxed NAPAF for short supply of gas effectively passes on the risk for such shortfall in gas supplies to the beneficiaries. The question is to what extent such risks of short supply of gas should be allowed to be passed on to the beneficiaries. Should the entire business risk of generator with regard to supply of gas be passed on to the beneficiaries? We are of the view that the responsibility for arranging the gas supply for declaration up to the 85% squarely lies on the generating company.

21. Therefore, the prayer of the petitioner to allow liberty to approach it with actual gas supply position at the time of the truing –up and request a re-consideration of the NAPAF norms for Palatana station considering the actual gas supply position in the control period 2014-2019, is not tenable. We are of the view that risk of non-supply of gas up to the requirement have to be borne by the petitioner. The generating company and the Gas supplier both are partners in the company and they should settle the gas supply issues among themselves in the light of GSA provisions. Accordingly, we are not inclined to relax the target availability any further to the level of actual availability for the period 2014-19.”

18. In the impugned order, the Commission has clearly explained the rationale for arriving at its decision after considering all aspects and we do not find any error in the impugned order under the stated ground. Considering the Review Petitioner’s submission would amount to reconsideration of the matter on merits which is not permissible under the review jurisdiction. In this connection, reference is made to the

judgment in Lily Thomas & Ors. vs. Union of India & Ors. [(2000) 6 SCC 224] where the Hon'ble Supreme Court held as under:

“56. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review....”

19. Further, In the case of Union of India Vs. Sandur Manganese and Iron Ores Limited & others {(2013) 8 SCC 337}, the Hon'ble Supreme Court held as under:

“23. It has been time and again held that the power of review jurisdiction can be exercised for the correction of a mistake and not to substitute a view. In Parsion Devi & Others Vs. Sumitri Devi & Others, this Court held as under:

“9. Under Order 47 Rule 1 of CPC, a judgement may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 of CPC, it is not permissible for an erroneous decision to be “reheard and corrected”. A review petition, it must be remembered has limited purpose and cannot be allowed to be “an appeal in disguise.”

20. Thus, the legal position is that the power of review can be exercised for an apparent mistake and not to substitute a view. Since the Review Petitioner is in effect seeking substitution of the view earlier taken by the Commission in the order dated 30.3.2017 in Petition No.129/GT/2015 which is not an apparent mistake, this ground for review cannot be sustained.

(e) Power to relax is a regulatory power and the same cannot be subject to a blanket restriction by passing directions to that effect in any order.

and

(f) The Commission has failed to consider that the Review Petitioner's Project is a unique case.

21. The Review Petitioner has submitted that at paragraph 15 of the impugned order, the Commission has rejected the Petitioner's prayer for relaxation in NAPAF, by relying on its observations in order dated 30.3.2017 that the relaxation in

availability is a one-time dispensation and no further request shall be entertained and the consequence of any further shortfall shall be borne by the Petitioner. According to the Review Petitioner, this Commission has erroneously limited its own discretionary power and its power to relax by relying on its statement in its previous order. The only interpretation that may be given to the phrase *“the relaxation in availability is a one-time dispensation and no further request shall be entertained and that the consequence of any further shortfall shall be borne by the Petitioner”* in order dated 30.3.2017 is that no further relaxation would be granted for the period from 24.3.2015 to 30.9.2018 in which period, NAPAF was reduced from 85% to 76%. Thus, if the Review Petitioner had asked for further reduction in NAPAF for the period from 24.3.2015 to 30.9.2018 that would be prohibited by the order.

22. According to the Review Petitioner, the Commission has failed to consider that the Project is located in the remote North Eastern region of the country where there is a marked difference between the anticipated and the actual gas produced. The Project neither has an allocation of APM gas nor is it connected to any other pipelines at national level to arrange for spot gas or RLNG or liquid fuel. Therefore, unlike most other gas-based power plants in other regions of the country, the Project is solely dependent on one gas supplier, i.e. ONGC.

23. We have considered the submissions of the Review Petitioner. The Commission had not denied the relaxation in NAPAF merely based on the earlier observation of Commission that the relaxation in availability was a one-time dispensation but also took into account other factors, inter alia, a) that the gas supplier was a majority partner in the Review Petitioner's Project; b) that the gas supplier owned petroleum fields in entire south zone of NER as well as major areas

of rest of NER; and c) that such a decision was necessary for balancing the interest of consumers and the generator. The generator's interest was taken care of by allowing relaxation from 85% to 76% for a major part of the tariff period based on the teething troubles being faced by the fuel supplier in the oil wells. However, the same cannot be allowed in perpetuity. Thus, the Commission, which is also obligated under the Electricity Act, 2003 to protect the interest of the consumers, had denied further relaxation in NAPAF.

24. The power to relax is in general terms and its exercise is discretionary. It is a well settled position of law that the power to relax cannot be exercised in a manner to make a statutory provision redundant or otiose. Further, exercise of discretion must not be arbitrary and must be exercised reasonably and with circumspection, consistent with justice, equity and good conscience, always in keep with the given facts and circumstances of a case. The Commission did not exercise the power to relax keeping in view these principles and now it is not open to the Review Petitioner to argue the matter again that the Commission should exercise its power to relax to give relief to the Review Petitioner.

25. As regards the exercise of Power to Relax, the Appellate Tribunal for Electricity vide its judgment dated 25.3.2011 in Appeal No. 130/2009 (RGPPL v. CERC & anr) has observed the following:

“18.1 The Regulations of the Central Commission and the decision of the Tribunal and the Supreme Court confer the judicial discretion to the Central Commission to exercise power to relax in exceptional case. However, while exercising the power to relax there should be sufficient reason to justify the relaxation and non-exercise of discretion would cause hardship and injustice to a party or lead to unjust result. It has also to be established by the party that the circumstances are not created due to act of omission or commission attributable to the party claiming relaxation. Further, the reasons justifying relaxation have to be recorded in writing.”

26. In the light of the above judgment, the contention of the Review Petitioner that the Commission should not limit its own power to relax provisions by relying on its statement in its previous order, is not sustainable and review on this ground is rejected.

27. The Review Petition No.9/RP/2020 in Petition No.245/MP/2018 is disposed of in terms of the above.

Sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member

sd/-
(P.K. Pujari)
Chairperson