

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 154/MP/2021

Coram:

**Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member**

Date of Order: 30th December, 2022

In the matter of:

Petition under Section 79(1)(a) of the Electricity Act, 2003 read with Regulation 76 and Regulation 77 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 praying for declaration of Deemed Availability for the period from 1.4.2020 to 30.4.2020, in respect of Ramagundam Super Thermal Power Station, Stage-III (500 MW).

And

In the matter of

NTPC Limited
NTPC Bhawan, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi – 110003.

...Petitioner

Vs

1. Andhra Pradesh Eastern Distribution Company Limited,
Corporate Office, P&T Colony, Seethammadhara,
Vishakhapatnam, Andhra Pradesh – 530013.
2. Andhra Pradesh Southern Distribution Company Limited,
Corporate Office, Back Side Srinivasa Kalyana Mandapam,
Tiruchhanur Road, Keasavayana Gunta, Tirupati,
Andhra Pradesh - 517503.
3. Telangana State Northern Power Distribution Company Limited,
H. No. 2-5-31/2, Vidyut Bhawan, Nakkalgutta, Hanamkonda,
Warangal, Telangana – 506001.
4. Telangana State Southern Power Distribution Company Limited,
Mint Compound, Corporate Office, Hyderabad, Telangana – 506063.
5. Tamil Nadu Generation & Distribution Corporation Limited,
144, Anna Salai, Chennai, Tamil Nadu – 600002



6. Bangalore Electricity Supply Company Limited,
Krishna Rajendra Circle, Bengaluru, Karnataka – 560009.

7. Mangalore Electricity Supply Company Limited,
MESCOM Bhavana, Corporate Office, Bejai,
Kavoor Cross Road, Mangaluru, Karnataka – 575004.

8. Chamundeshwari Electricity Supply Corporation Limited,
Corporate Office, No. 29, Vijaynagar, 2nd Stage, Hinkal,
Mysore, Karnataka – 570017.

9. Gulbarga Electricity Supply Company Limited,
Main Road, Gulbarga, Karnataka -585102.

10. Hubli Electricity Supply Company Limited,
Corporate Office, P.B. Road, Navanagar,
Hubli, Karnataka – 580025.

11. Kerala State Electricity Board Limited,
Vaidyuthi Bhavnam, Pattom,
Thiruvananthapuram, Kerala – 695004.

12. Government of Puducherry,
137, Netaji Subhash Chandra Bose Salai,
Puducherry – 605001

...Respondents

Parties present:

Shri Ashutosh Srivastava, Advocate, NTPC
Shri Abhishek Nangia, Advocate, NTPC
Shri Vinay Garg, NTPC
Shri S. Vallinayagam, Advocate, TANGEDCO
Ms. B. Rajeswari, TANGEDCO
Ms. R. Ramalakshmi, TANGEDCO
Ms. R. Alamelu, TANGEDCO
Shri Arunav Patnaik, Advocate, Karnataka Discoms
Ms. Bhabna Das, Advocate, Karnataka Discoms

ORDER

The Petitioner, NTPC Limited has filed this Petition seeking the following prayers:

- “(a) Grant deemed availability for the period from 01.04.2020 to 30.04.2020 for instant station;*
- (b) Pass such orders as deemed fit and necessary in the facts and circumstances of the present case.”*



Submissions of the Petitioner

2. In support of the above prayer, the Petitioner, in the petition, has made the following submissions:

- (a) The Petitioner is having power stations/ projects in different regions and places in the country and Ramagundam Super Thermal Power Station, Stage-III (500 MW) (in short 'the generating station') is one such station located in the State of Telangana. The power generated from the generating station, is being supplied to the Respondents beneficiaries herein.
- (b) Due to reasons beyond the control and being akin to force majeure, the Petitioner was not able to declare availability during the period from 1.4.2020 to 30.4.2020, which ultimately culminated into under recovery. Hence, due to the difficulty faced by the Petitioner, appropriate relief is requested in accordance with Regulation 76 and Regulation 77 of the 2019 Tariff Regulations.
- (c) Difficulty in the present situation is arising out of Regulation 42 of the 2019 Tariff Regulations, which, *inter alia*, provides a target availability of 85% for high demand season. The Commission has requisite powers to relax the said provision of the 2019 Tariff Regulations, under Regulations 76 of the 2019 Tariff Regulations.
- (d) Regulation 42 of the 2019 Tariff Regulations, introduced a new mechanism for calculation of availability for computing annual fixed charges as under:
 - (i) Generation has been divided under two segments of the year, i.e. high demand season (period of three months, whether consecutive or otherwise) and low demand season (period of remaining nine months, whether consecutive or otherwise); and
 - (ii) Further, for each day of the season, generation has been bifurcated in two parts, viz., peak period (4 hours fixed) and off-peak period (20 hours fixed).
 - (iii) The concerned RLDCs are made responsible for specifying the high demand and low demand seasons, at least six months in advance, and peak / off-peak hours, at least one week in advance, for the respective regions.
 - (iv) The above mechanism was stipulated to come into effect from 1.4.2020 onwards as per Regulation 42 (7) of the 2019 Tariff Regulations.
- (e) For the purpose of full recovery of annual fixed charges of a thermal generating station the Normative Annual Plant Availability Factor (in short 'NAPAF/Target Availability') was tightened over the control periods 2001-2004 to 2009-14 from 62.8% to 85%. Thereafter, for the period 2014-19,



the target availability, for full recovery of annual fixed charges of a generating station, was specified as 85%, except for the period from 2014 to 2017, wherein NAPAF was lowered to 83%, in view of the coal shortage scenario in the country.

- (f) The reasoning of specifying the target availability of 85% for thermal generating stations under the 2014 Tariff Regulations, has been provided in the statement of reasons to the 2014 Tariff Regulations. The NAPAF of 85% was specified for thermal power stations so as to provide operation flexibility and to mitigate any risk arising out of fuel and operational contingency. The operating margin was allowed with a view that thermal units operate at high temperature, high pressure and involve high rotating speed equipment which are more prone to wear & tear and forced outages in spite of diligently carrying out unit overhauls.
- (g) The Petitioner, in most of its generating stations could achieve the target availability (except under *force majeure* conditions) specified in the extant Tariff Regulations, by meticulously planning its units' overhauls at the same time meeting the grid demand etc.
- (h) With the introduction of recovery of annual fixed charges based on the seasonal target availability, w.e.f. 1.4.2020, the operational flexibility to achieve the season wise NAPAF, is further reduced specially for generating stations with single unit, as per Regulation 42 of the 2019 Tariff Regulations. In terms of the said Regulation, a generating station, in order to recover full annual fixed charges, has to comply with following:
 - (i) Achieve target availability separately for two seasons namely high demand season (period of three months, consecutive or otherwise) and low demand season (period of remaining nine months, consecutive or otherwise).
 - (ii) High demand season and low demand season are specific to region depending upon its seasonal/ demand variations and the same has to be declared by respective RLDCs six months in advance.
 - (iii) The generating company cannot compensate under-recovery or over-recovery of one season with under-recovery or over-recovery of another season. Therefore, for high demand season, the flexibility of a generating station has been substantially reduced.
- (i) The Petitioner was preparing itself to make maximum energy available to the beneficiaries in the month of April, 2020 being high demand season. The generating station being a single unit station, the annual overhaul was planned in such a manner, that it could make maximum energy available to its beneficiaries during the high demand season (i.e. no planned shut down during the high demand season) and it could achieve the seasonal target availability and recover full annual fixed charges for 2020-21.



- (j) The Southern Regional Load Dispatch Centre (in short 'SRLDC') on 30.9.2019, declared 'high demand season' for the year 2020-21 as April, 2020, February, 2021 and March, 2021 and the remaining 9 months i.e., from May, 2020 to January, 2021 as 'low demand season' for the Southern Region stakeholders, in terms of Regulation 42 (7) of the 2019 Tariff Regulations.
- (k) There was a sudden steam leakage from 'high pressure turbine seal ring area' in the generating station on 11.3.2020. Due to the said leakage, the operation of the unit, was not possible, as high pressure and temperature steam was leaking from the turbine, causing safety issues for equipment and personnel working in the area. On a primary inspection and analysis of data, it was decided to take the unit under shutdown for inspection of turbine & replacement of damaged parts.
- (l) Generally, the overhauls are carried out between 18 days to 45 days, for a unit, which correspond to loss of availability of about 5% to 12% for a single unit. The balance margin of availability provides operational flexibility for loss of availability arising out of fuel or forced outage due to equipment problems. The operational flexibility is also achieved by taking planned shutdown of units one by one in case of multiple units' shutdown. However, the operation flexibility in respect of target availability, is reduced drastically/ lost for generating stations having single units, such as the present generating station.
- (m) The repair work of turbine was immediately awarded to M/s Power Mech on 16.3.2020. It was planned that the repair work would be completed in the month of March, 2020 and the unit would be brought back on bar by 31.3.2020, to declare availability during the high demand season.
- (m) The Petitioner successfully facilitated the mobilization of work force and tools & tackles, so that the work could commence at full swing immediately. The workforce was successfully mobilized and M/s Power Mech was at site for the work. However, the work could not be carried out in full swing due to the onset of Covid-19 and the same is evident from the letters issued by the contractor i.e. M/s Power Mech stating that the workers were hesitant to enter the site due to the risk of infection.
- (n) In order to mitigate the situation and resume the operations, the Petitioner carried out frequent sanitization of workplace, installed additional washing facilities and provided sanitizer at all locations etc. Despite all efforts, the work force of the contractor did not turn out in full numbers, due to fear of spread of Covid-19, and also in view of advocacy of the Government for maintaining social distancing.



- (o) Due to reasons beyond the control, the repair work could not be initiated due to the onset of Covid-19 in India. Covid-19 was declared as a global pandemic by World Health Organization on 11.3.2020
- (p) The Government of Telangana, in order to contain the spread of Covid-19, issued G.O. Ms. No. 45 dated 22.3.2020 and imposed a complete lockdown in the entire State of Telangana from 22.3.2020 till 31.3.2020. The onset of Covid-19 and the consequent lockdown delayed the planned repair work of the Petitioner and in this regard the following are relevant: -
- (i) M/s Power Mech, vide email dated 22.3.2020 informed the Petitioner that due to the Covid-19 pandemic, the resources were being demobilized from the work site;
 - (ii) On the same day, the Petitioner responded to the said email and stated that power sector comes under essential services and all work related to power sector needs to be continued. Accordingly, M/s Power Mech was requested to carry out the work by following all the advised precautions;
 - (iii) In response, M/s Power Mech vide its email, stated that the workers were hesitant to enter the work site and wished to be isolated to avoid the risk of infection. Further, the service providers did not wish to provide their services on account of Covid-19.
 - (iv) The Petitioner responded to the above email and reiterated that power is an essential activity and exempted from the lockdown orders. Therefore, the maintenance work must be resumed. Despite the above, the repair and maintenance work could not be resumed.
- (r) On 24.3.2020, the Ministry of Home Affairs, Government of India extended from time to time vide orders dated 14.4.2020, 1.5.2020 and 17.5.2020, imposing a lockdown across the country with strict preventive measures to contain the spread of Covid-19. The said restriction, *inter alia*, include restrictions to transport and travel in international and domestic routes, including travel through land borders.
- (s) The situation worsened in view of the lockdown imposed by the State of Telangana, as well as MHA, GOI due to which all movements were restricted. The Petitioner even issued emails to the contractor and tried to convince that electricity has been declared as essential commodity/ service and exempted from such lockdown. The contractor was requested to carry out the assigned maintenance/repair without fear of any proceedings. However, the workers/laborers denied working under the prevalent state of affairs. The contractor issued emails to the Petitioner stating the unworkable situation.
- (t) The district administration cordoned off about 1 km radius area of Ramagundam and declared the nearby Annapurna colony under 'Red



Zone'. This further hampered the mobilization of workers from the nearby areas and all restoration work came to standstill from 22.3.2020.

- (u) Due to the aforesaid reasons, the generating station was under shutdown from 11.3.2020 and could not be synchronized till 8.6.2020. The revival of unit was possible only after the complete lockdown order was withdrawn. Due to the restrictions on movement of people, fear of pandemic amongst workers and mandated social distancing measures, the restoration works resumed slowly with restricted norms with effect from 4.5.2020 and finally the unit got synchronized on 8.6.2020. Accordingly, the Petitioner could not declare the target availability during the month of April, 2020. The above delay caused is akin to 'Force Majeure' as per Regulation 3(25) of the 2019 Tariff Regulations and therefore, the Petitioner has invoked Regulation 76 and Regulation 77 of the 2019 Tariff Regulations.
- (v) The Petitioner, after realizing that the repair work of HP turbine seal ring area would not be completed within the stipulated time, wrote letters to Southern Regional Power Committee (SRPC) and the Central Electricity Authority. Further, vide letter dated 24.3.2020, the Petitioner intimated SRPC that the delay was apprehended due to non-commencement of repair work at the generating station on account of Covid-19 and, it was mentioned that the Petitioner may not be able to declare cumulative Availability of 85%.
- (w) The Petitioner took all mitigative steps including persuading the contractor to resume work and compliance with the Standard Operating Procedures issued by MHA, GOI from time to time. Despite all efforts, the generating station could only be synchronized on 8.6.2020 i.e. after lifting of the lockdown.
- (x) Delay in resumption of work and the consequent loss of availability during the month of April, 2020 was beyond the reasonable control of the Petitioner and warrants relief under Regulation 76 and Regulation 77 of the 2019 Tariff Regulations. Accordingly, the provision of achieving target availability season-wise separately in respect of this generating station may be relaxed for the year 2020-21, otherwise, the Petitioner would suffer under-recovery of annual fixed charges for high demand season, due to no fault or lack of diligence on its part.
- (y) In order to achieve the target availability corresponding to the high demand season (April, 2020, February, 2021 and March 2021), the total outage of the generating station could only be for 13 days (15% of 89 days) during the total high demand season of 89 days. Had there been no Covid-19 situation and the consequent restrictions, the Petitioner would have revived the generating station in about 28 days from the shutdown date i.e. by 8.4.2020.



(z) The ambit and scope of 'power to relax' provisions of a delegated legislation has been interpreted by various courts and the Tribunal in a catena of cases. It is settled position of law that 'power to relax' can be invoked if the Regulations in any manner cause hardship to a party. The following judgments are relied upon:

(i) The Hon'ble High Court of Rajasthan order in Hari Singh v. State of Rajasthan, 1992 SCC OnLine Raj 210. (ii) The judgment dated 21.3.2018 of the APTEL in Appeal No. 107 & 117 of 2015 (HPPC V HERC) (iii) The judgment dated 20.9.2012 of APTEL in Appeal No. 189 of 2011(TPCL v. JSERC & anr); and the judgment dated 24.3.2015 of APTEL in Appeal No. 55 of 2013 & batch (BYPL v CERC & Ors)

Reply of the Respondent TANGEDCO

3. The Respondent TANGEDCO vide affidavit dated 10.11.2021 has raised preliminary objections on the 'maintainability' of the petition and has submitted the following:

- (a) The prayer in the petition is not tenable, as there is no provision in the 2019 Tariff Regulations to claim 'deemed availability' of a thermal generating station under force majeure and more so under 'deemed availability, due to situations akin to force majeure'.
- (b) The high and low demand seasons were decided in the 170th OCC meeting held by SRPC on 11.9.2020 after the due deliberations and in accordance with the proviso (1) to Regulation 42(3) of the 2019 Tariff Regulations, after consultation with all stakeholders, based on the previous five years consumption and other considerations.
- (c) The year 2020 being a Covid-19-year, appropriate weightage will be considered in future years. Hence the petition is unwarranted, as it has already been decided that appropriate weightage will be given in future.
- (d) The impact of Covid-19 has been worldwide and not restricted to the Petitioner's one particular station. The steam leak from high pressure turbine was observed on 11.3.2020; the work was awarded on 16.3.2020 with the idea of bringing back the unit by 31.3.2020, so as to declare availability during the high demand season of April, 2020. However, the Petitioner been fully aware of the impending high demand month, has not disclosed any reason for taking five working days, to award a contract for rectification. Being a pioneer in operation and maintenance of thermal stations and even more so under the control of the Central Government, the Petitioner should have received information about the Covid-19 issues and impending lock down, especially when the WHO declared Covid-19 as global pandemic on 11.3.2020.



- (e) No explanation has also been given by the Petitioner, as to when the contractor M/s. Power Tech started mobilizing men and materials after receipt of order on 16.3.2020 and it has simply been stated that the contractor informed about demobilizing on 23.3.2020, that too when the State Government of Telangana had clarified that the power sector was essential service and lock down was not applicable for the same.
- (f) The State Government of Telangana in para 2 of its G.O Ms.45/22.3.2020, has clarified that plying of private vehicles shall be restricted only to the extent of procuring essential commodities and activities permitted. The power sector being an activity permitted under the G.O, there was clearly no embargo either on the Petitioner or their contractor in plying men and materials to the site.
- (g) From the Petitioner's submission that the works resumed on 4.5.2020 and unit was synchronized on 8.6.2020, it can be confirmed that there is no way the Petitioner, having entrusted the work on 16.3.2020, would have brought back the Unit on bars on 31.3.2020, to declare availability from 1.4.2020, even if lockdowns were not imposed.
- (h) There is no merit in the claim of the Petitioner that Covid-19 lockdowns were the reasons for the generating station not being available during April, 2020. The whole claim seems to be an afterthought, as the Petition has been uploaded on 28.6.2021, more than a year after the said problem occurred.
- (i) The Petitioner is seeking relief under Regulation 3(25) read with Regulation 76 and Regulation 77 of the 2019 Tariff Regulations. Regulation 3(25) of the 2019 Tariff Regulations deals with force majeure, which is not a ground for seeking 'deemed availability' and there is no provision for seeking 'deemed availability' at all in the said Regulations.
- (j) The Petitioner is trying to challenge the Regulations under the guise of seeking relief, as the relief sought is not eligible/ available as per said Regulations. The Commission in its order dated 16.3.2018 in Petition No. 179/MP/2017 had clearly stated that 'power to relax' is not arbitrary.
- (k) The Commission in its order dated 26.6.2019 in Petition No. 68/MP/2018, had referred to *the APTEL judgment dated 25.3.2011 in Appeal No. 130/2009 (RGPPL v CERC & anr.)*, wherein the APTEL has observed that the 'power to relax' cannot be applied arbitrarily. The above claim, if admitted will lead to unjust enrichment for the generator and injustice to beneficiaries, as the beneficiaries have to suffer double impact, by not availing power from the station during high demand season, as well as paying the capacity charges when the station was completely unavailable.



This will set a bad precedence where loss of capacity charges due lack of efficiency and diligence in completing break down works can be passed on to beneficiaries making them suffer double damage.

Hearing dated 23.11.2021

4. The Petition was heard on 'admission' through virtual hearing, on 23.11.2021. During the hearing, the learned counsel for the Petitioner and the learned counsel for the Respondent TANGEDCO made detailed oral submissions, as submitted in their petition/reply. The Commission after hearing the parties, reserved its order on the 'admissibility' of the petition.

Hearing dated 15.7.2022

5. As the order in the Petition could not be passed prior to the Chairperson Shri P. K. Pujari demitting office, the matter was re-listed for hearing on 15.7.2022. During the hearing, the learned counsels appearing for the Petitioners and the Respondents submitted that since pleadings have been completed in the matter, the Commission may reserve its orders. Accordingly, order in the Petition was reserved on 'admissibility'.

Rejoinder of the Petitioner, NTPC

6. The Petitioner vide its rejoinder affidavit dated 22.7.2022, while reiterating its submissions in the petition, has also clarified as under:

(a) As the Petitioner is regulated by this Commission under Section 79 (1)(a) of the Act and in terms of the law laid down by the Hon'ble Supreme Court in PTC India vs. CERC & ors (2010) 4 SCC 603, the absence of Regulation does not debar this Commission to act in conformity with the provisions of the Act. In this case, the payment for deemed generation and other associated costs, would ensure the continuous recovery of costs by the Petitioner, as enshrined in Section 61 of the Act. The Commission in its Order dated 5.11.2018 in Petition No. 172/MP/2016, had recognized the aforesaid principle and granted relief even where the Regulations were silent on a particular issue.

(b) This is a fit case for the Commission to relax the provisions for achieving the target availability season-wise separately in respect of the generating



station for the year 2020-21. Otherwise, the Petitioner would suffer under-recovery of annual fixed charges for the high demand season, due to no fault or no lack of diligence on its part.

Analysis and Decision

7. We have considered the submissions of the parties. The main grievance of the Petitioner, in the present petition, is that the delay in commencement of work of HP Turbine seal ring area by the contractors was only on account of the onset of Covid-19 during March, 2020 and the restrictions imposed by the MHA, GOI and the State Government of Telangana, from time to time and the consequent loss of availability during the month of April 2020, was on account of an event akin to force majeure, which was beyond its reasonable control. Accordingly, the Petitioner has prayed that the provision for achieving target availability season-wise separately, in respect of this generating station, for the year 2020-21, may be relaxed in exercise of the power under Regulation 76 of the 2019 Tariff Regulations. *Per contra*, the Respondent TANGEDCO has mainly contended that since power sector activities were permitted under the guidelines of MHA, GOI and the orders of the State Government of Telangana and there was no embargo either on the Petitioner or their contractor in plying men and materials to the site, the prayer of the Petitioner is not maintainable. It has also argued that there is no provision for seeking 'deemed availability' under the provisions of the 2019 Tariff Regulations.

8. As regards Covid-19 lockdown, it would be pertinent to note that MHA, GOI guidelines dated 24.3.2020, provided for measures to be taken for containment of Covid-19, exempted the units and services relating to generation, transmission and distribution from lockdown. It is however noticed from the email correspondences dated 22.3.2020, exchanged between the parties, that the workers of the contractor M/s Power Mech, were hesitating to enter the site, due to fear of the virus. We also



notice from the submissions of the Petitioner, that due to restrictions on movement of people, fear of pandemic amongst workers and mandated social distancing measures, the repair works could not be completed in time. According to the Petitioner, the mobilization of workers from nearby areas were hampered due to the District Administration cordoning of 1 km area of Ramagundam and declaring the nearby Annapurna colony under Red Zone. The Respondent TANGEDCO has submitted that the Petitioner has not disclosed any reason for taking 5 working days to award the contract and that there is no provision for seeking 'deemed availability' under the 2019 Tariff Regulations. In the above background, we are of view that the Petition requires detailed hearing on merit of the case. Accordingly, we 'admit' the same and direct issuance of notice to the Respondents. The Respondents are directed to file their replies on 'merits' on or before **16.1.2023**, after serving copy on the Petitioner, who may file its rejoinder, if any, by **30.1.2023**. Parties are directed to complete their pleadings in the matter, within the due dates mentioned and no extension of time shall be granted for any reason.

9. Petition No. 154/MP/2021 shall be listed for hearing on **7.2.2023**.

Sd/-
(Pravas Kumar Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I.S. Jha)
Member

