

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 89 of 2006

Dated: 22nd January, 2007

**Present: Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member**

N.T.P.C. Limited

...Appellant

Versus

- 1. Madhya Pradesh State Electricity Board,
Shakti Bhavan, Vidyut Nagar,
Jabalpur – 482 008**
 - 2. Maharashtra State Electricity Distribution
Company Limited,
'Prakashgad', Bandra (East)
Mumbai – 400 051**
 - 3. Gujarat Urja Vikas Nigam Limited
Vidyut Bhavan, Race Course,
Vadodara – 390 007**
 - 4. Chhattisgarh State Electricity Board,
Dhagania, Raipur – 492 103**
 - 5. Electricity Department,
Govt. of Goa, Vidyut Bhavan,
3rd Floor Panaji, GOA**
 - 6. Electricity Department
Administration of Daman & Dlu (DD)
Daman – 396 210**
 - 7. Electricity Department
Administration of Dadra and Nagar Haveli (DNH)
Silvassa, Via VAPI**
 - 8. Central Electricity Regulatory Commission
Core 3, Sixth Floor Scope Complex,
7, Institutional Area, Lodhi Road
New Delhi – 110003**
- ...Respondents**

**Counsel for the Appellant: Mr. M.G. Ramachandran, Ms.
Taruna Singh Baghel & Ms.
Saumya Sharma**

**Counsel for the Respondents: Mr. Pradeep Misra for MPSEB
Ms. Yogmaya Agnihotri for CSEB**

**Mr. Kamlesh P. Jangid, COA CON),
GUVNL**

JUDGMENT

Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson

1. This appeal is directed against the order of the Central Electricity Regulatory Commission (for short 'CERC') dated Feb. 16, 2006 in Petition No. 46/05, whereby the CERC has rejected the plea of the appellant for relaxation of the combined Target availability level fixed by the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001, for recovery of fixed capacity charges for Kawas Gas Power Stations (for short 'Kawas GPS') and Gandhar Gas Power Stations (for short 'Gandhar GPS'). The facts leading to the appeal are as follows:-
2. In the year 1992-93, Kawas GPS was set up by the National Thermal Power Corporation Ltd. (for short 'NTPC') for generation of electricity with gas linkage of 2.25 MMSCM per day. During the year, 1994-95,

- Gandhar GPS was also commissioned by the NTPC with gas linkage of 1.5 MMSCM per day to be increased to 2.25 MMSCM. On April 30, 1994, Notification was issued by the Govt. of India under Section 43A of the Electricity (Supply) Act, 1948, whereby tariff for Kawas GPS was determined for the period upto March 31, 1998. The Target Availability PLF was fixed at 62.78% for the full fixed cost recovery.
3. By a subsequent Notification dated April 28, 1997, the Govt. of India under Section 43A of the Electricity (Supply) Act, 1948 determined the tariff for Gandhar GPS for the period upto March 31, 2000. The target availability PLF for the full fixed cost recovery was also fixed at 62.78%.
 4. It appears that due to non-availability of sufficient quantity of gas, the Gas Power Stations were not able to achieve the optimum level of generation. In the 95th Meeting of the Western Regional Electricity Board, held on March 18, 1994, the issue relating to shortage of

availability of gas for Kawas and Gandhar Gas Power Stations was discussed. It was suggested during the discussion that to overcome reduced availability of gas, half of the stations should be run on Naptha and the other half on gas and the incremental costs should be distributed on the total generation of the stations.

5. The Board agreed to examine the matter and requested the appellant to send a detailed proposal in this regard.

6. In the 96th meeting of the Western Regional Electricity Board, held on August 13, 1994, the matter again cropped up for discussion. It was decided to allow the use of Naptha for generation of power in the two gas stations. The respondent nos. 1 to 7, who were members of the Western Regional Electricity Board, agreed to bear the extra cost of installing alternative liquid fuel firing facility in Kawas GPS. It is not in dispute that in so far as the Gandhar GPS is concerned, it is not technically feasible to install liquid fuel firing facility.

7. In consonance with the aforesaid decision, during June-July, 1997 liquid fuel (Naptha) firing facility was installed in Kawas GPS. In view of the commissioning of the liquid fuel firing facility at Kawas, it was considered appropriate to divert gas from Kawas GPS to Gandhar GPS and to operate some or all the gas turbines at Kawas GPS using liquid fuel in order to maximize the generation of power from these two stations.
8. In the 107th Western Regional Electricity Board's meeting held on April 18, 1998, the beneficiaries consented to the proposal of the NTPC to link Kawas and Gandhar with HBJ pipeline.
9. After the Electricity Regulatory Commissions Act, 1998 came into force the Central Commission on March 26, 2001 notified the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001. The target availability norms applicable for the tariff period from April 1, 2001 to

March 31, 2004 for the various NTPC generating stations was fixed at 80%.

10. On Feb. 7, 2002, the NTPC filed a petition, being petition no. 31/2001, before the CERC, for determination of tariff for Kawas GPS for the period April 1, 2001 to March 31, 2004. The NTPC in the petition prayed for relaxation of the target availability norms due to the reduced availability of gas and Naptha. Again on Feb.13, 2002, the NTPC filed a petition, being petition no. 33/2001 before CERC for seeking determination of tariff for Gandhar GPS for the period April 1, 2001 to March 31, 2004.
11. On July 1, 2002, the NTPC filed yet another petition, being petition no. 86 of 2002, for relaxation of target availability norm for both the stations. In petition no. 86 of 2002, the CERC by its order dated November 1, 2002 directed that two generating stations, for the purpose of recovery of capacity charges and the fuel capacity charges shall be recovered at 65% PLF provided machine

availability is 80%. This view of the CERC was based on non-availability of adequate quantity of gas and the fact that it was not possible for both Kawas GPS and Gandhar GPS to achieve availability level of 80% simultaneously. The CERC observed that the position will be reviewed while considering the revision of the norms after March 31, 2004.

12. On April 1, 2005, the CERC determined the tariff for Gandhar GPS for the period April 1, 2001 to March 31, 2004. While determining the tariff, the Commission referred to its order dated November 1, 2002 in Petition No. 86 of 2002, for relaxing the target availability of the plant. It allowed machine availability of 80% coupled with PLF of 65% for recovery of full fixed charges and computation of fuel element in the working capital for the period from April 1, 2001 to March 31, 2004. Thereafter, on April 7, 2005, the CERC in Petition No. 31 of 2001 determined the tariff for Kawas GPS for the period April 1, 2001 to March 31, 2004. In view of the order dated

- November 1, 2002 in Petition No. 86/2002 and on the parity of reasoning, CERC considered machine availability of 80% coupled with PLF of 65% for recovery of full fixed charges and computation of fuel element in the working capital for the same period. Thus, it is clear that Orders dated April 1, 2005 and April 7, 2005 in Petition Nos. 33 and 31 of 2001 respectively were passed in relaxation of the target availability PLF of 80%, which was fixed by Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001 under Electricity Regulatory Commission Act, 1998.
13. On March 26, 2004, CERC framed and notified the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 under the Electricity Act, 2003. These norms were made applicable for tariff period April 1, 2004 to March 31, 2009. It needs to be noted that the Target availability norm laid down in these Regulations for NTPC's generating stations was kept at 80%.

14. On May 5, 2005, NTPC filed a Petition before the CERC being Petition NO. 46 of 2005 for relaxation of the Target availability norms for the Kawas and Gandhar GPS upto 65% PLF for recovery of full fixed cost and for treating both the Stations as one integrated unit.

15. While Petition No. 46 of 2005 filed by the NTPC was pending, Gujarat Urja Vikas Nigam Ltd. (hereinafter referred as 'GUVNL') on August 17, 2005 filed a petition, being Petition No. 95 of 2005 before the CERC seeking the following directions amongst others:-
 - “1.The Hon'ble Commission may direct to NTPC to immediately give consent for laying the gas pipeline of GSPL in to the power plant premises of Kawas and Gandhar power stations.

 2. The Hon'ble Commission may direct NTPC to make sincere efforts for procurement of adequate gas at economical rates through firm and long term arrangements, for Kawas and Gandhar power stations, so that maximum generation can be achieved.”

16. In the Petition no. 95 of 2005, it was pointed out that GUVNL had requested the NTPC to arrange gas supply

from various agencies at competitive prices, so as to achieve maximum utilization of Kawas and Gandhar power stations. It was also claimed in the Petition that the NTPC was informed that many of the gas based power stations of the **GUVNL, that were not** being fully utilized earlier due to non-availability of gas and high cost of liquid fuel, had entered into long term Power Purchase Agreements with the Independent Power Producers (IPPs), as a result whereof they have been able to achieve maximum generation. The Commission, however, in Petition No. 95 of 2005 took the view that NTPC had made efforts for procurement of the gas supply and it had been pursuing the matter diligently and sincerely. On the same day, the CERC also passed the impugned order in Petition No. 46 of 2005, filed by the appellant, NTPC. The plea of the appellant for relaxation of the Target Availability of 80%, fixed by the Regulations of 2004, on the ground of non-availability of adequate quantity of gas was rejected by the Commission. While

rejecting the contention of the appellant, the Commission observed as follows:-

“4. The terms and conditions for determination of tariff for the period 1.4.2004 to 31.3.2009 have been specified by the Commission in terms of the Central Electricity Regulatory Commissions (Terms and Conditions of Tariff) Regulations, 2004 (the regulations). As specified in sub-clause (a) of clause (i) of regulation 16 of the regulations in respect of all thermal power generating stations, except those specifically mentioned, under sub-clauses (b) and (c) thereof, target availability for recovery of full capacity (fixed) charges is 80%. These, two generating stations are not exempted in terms of sub-clauses (b) and (c) and thus, the target availability for recovery of full capacity (fixed) charges of 80% applies to Kawas GPS and Gandhar GPS individually. The petitioner seeks relaxation under proviso to Clause (2) of Regulation 2 and also Regulation 13.

5.

6. *We have considered the rival submissions. Proviso to clause (2) of regulation 2 cannot be*

invoked in the present case as the said provision applies only where the tariff for the period ending 31.3.2004 was not determined under the terms and conditions for determination of tariff applicable for the period 1.4.2001 to 31.3.2004 in respect of Kawas GPS and Gandhar GPS tariff was determined based on the terms and conditions applicable for that period.

7. The relaxation, in the Normative Target Availability Level granted by order dated 1.11.2000 was "one time" act. This, inter alia, was for the reason that target availability level for recovery of capacity (fixed) charges was increased from 62.78% to 80% with effect from 1.4.2001. While granting relaxation, the Commission had noted that the special dispensation being allowed was to be reviewed while considering revision of norms for the period beyond 31.3.2004. The terms and conditions for determination of tariff for the period 1.4.2004 onwards have already been notified. The target availability of 80% has been retained in respect of the generating stations belonging to the petitioner except for Tanda TPS. When specifying the fresh norms for tariff determination applicable from

1.4.2004, the Commission did not consider it appropriate to provide for relaxed target availability for any generating station in case of inability of the petitioner to obtain sufficient quantity of fuel. Sufficient time was available with the petitioner to make necessary arrangements for supply of gas from alternative sources after grant of relaxation by order dated 1.11.2002. The petitioner as a commercial entity has to bear the responsibility to ensure that its generating stations are available to the respondents, who do not have any role in arranging availability of fuel for the generating stations in question. Therefore, considering the totality of the circumstances we do not consider it to be a fit case for grant of relaxation in target availability, as prayed for, by invoking powers under regulation 13. The petitioner is, however, at liberty to divert gas supply from Kawas GPS to Gandhar GPS in terms of the consent already given by the beneficiaries in the Western Region. The petitioner is also at liberty to declare availability of Kawas GPS based on liquid fuel for which also the beneficiaries have given their consent”.

17. Aggrieved by the order of the CERC dated Feb. 16, 2006 in Petition No. 46 of 2005, the NTPC has filed the instant appeal.
18. We have heard the learned counsel for the parties extensively.
19. The learned counsel for the appellant has submitted that Kawas GPS and Gandhar GPS should be considered as single integrated unit for the purpose of target availability as the gas facility for both the stations is being operated in an unified manner. It is also pointed out that CERC has allowed diversion of gas from Kawas GPS to Gandhar GPS in view of inadequate availability of gas. It was also contended that in the circumstances, the Target Availability norm of 80% ought to have been relaxed under clause (2) of Regulation 2 and Regulation 13 of the Regulations of 2004. On the other hand, the learned counsel for the respondents submitted that the Target Availability for recovery of full capacity charges has been fixed by the CERC at 80%, making no exception for

- Kawas and Gandhar GPS. According to the learned counsel, the Target Availability for recovery of full capacity charges of 80% applies to both the GPS separately and individually. As per the learned counsel the appellant is not entitled to seek relaxation of Target Availability norms as the issue of non-allocation of gas falls within the realm of appellant's commercial risks and in order to cover that risk, the appellant ought to have made adequate arrangement for supply of gas as the same is freely available in the open market and for additional gas it could have tied up with GSPC-Niko, CAIRNS, GUVNL in addition to GAIL.
20. It was also canvassed on behalf of the respondents that sub-clause (2) of Regulation 2 is applicable to generating stations for which the tariff is not determined in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001. It was further contended that since the tariff of Kawas and Gandhar Gas Power Stations of the Appellant for the period April 1, 2001 to March 31,

2004 was determined by the CERC in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001 vide orders dated April 7, 2005 and April 1, 2005 respectively, sub clause (2) of Regulation 2 is not applicable.

21. We have considered the submissions of the learned counsel for the parties.
22. The first issue which requires determination is whether the Commission is empowered to relax the norms laid down in the Regulations of 2004. The relaxation of the Target availability has been claimed by the appellant under proviso to sub-clause (2) of Regulation 2 and Regulation 13 of the Regulations. At this stage, it would be convenient to set out these Regulations for facility of reference:

“2. **Scope and extent of application**

(2) *These regulations shall apply in all other cases where tariff is to be determined by the Commission based on capital cost.*

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”.

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”.

23. It is clear from proviso to clause (2) of Regulation 2 that CERC can prescribe the relaxed norms of operation including the norms of target availability in respect of a generating station only in a case, where the tariff was not determined in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001. It is, however, not necessary to examine the argument of the learned counsel for the appellant based on Regulation 2(2) of the Regulations of

2004 or to construe Regulation 2(2) and its implication as Regulation 13 of the Regulations of 2004 empowers the Commission to vary the provisions of the Regulations on its own motion or on an application made before it. This power has been conferred on the Commission to relax the rigor of the Regulations in appropriate cases.

24. In order to appreciate the import of Regulation 13, it is necessary to look at the heading pre-fixed to it. The title to the Regulation 13 reads as under:

“Power to relax”

In *Bhinka vs. Charan Singh*, AIR 1959 SC 960, it was held that headings or titles pre-fixed to a section can be referred to for construing the same. In *Ralph Godrej Carriton*, AIR 1955 559, it was held that a heading is to be regarded as key to the interpretation of the clause under examination. In *Qualter Hall & Co. Ltd. vs. Board of Trade*, 1961(3) AU E.R. 389, it was held that heading can be treated as preamble to the provision following it. These principles can also be utilized for construing the Regulations, which are quasi legislative in nature. Therefore, Regulation 13 can be construed in the light of its Heading. Reading the Regulation in the light of its

Heading, it must be held that the power comprised in Regulation 13 is essentially the 'power to relax'. In case any Regulation causes hardship to a party or works injustice to him or application thereof leads to unjust result, the Regulation can be relaxed. The exercise of power under Regulation 13 of the Regulations is minimized by the requirement to record the reasons in writing by the Commission before any provision of the Regulations is relaxed. Therefore, there is no doubt that the Commission has the power to relax any provision of the Regulations.

25. The power to relax any provision by the Commission can be invoked by the Commission itself or on an application made by an interested person. The appellant in consonance with the provisions of Regulation 13 had preferred a petition, being Petition No. 46 of 2005, for relaxation of Target availability norm of Kawas GPS and Gandhar GPS for the period April 1, 2001 to March 31, 2004. The Commission however, proceeded on the basis that earlier by an Order dated November 1, 2002, the Commission as 'one time' measure had relaxed the

Target availability level from 80% to 62.78% for recovery of fixed charges w.e.f. April 1, 2001 and it was recorded that the special dispensation was to be reviewed, while considering revision of norms for the period beyond March 31, 2004. The Commission was of the view that since the norms for determination of tariff for the period April 1, 2004 onwards have already been reviewed and the target availability of 80% has been retained in respect of the generating stations belonging to the appellant except for Tanda TPS, it was not appropriate to provide for relaxed target availability for any generating station in case of inability of the appellant to obtain sufficient quantity of fuel. The Commission also took the view that sufficient time was available with the appellant to make necessary arrangements for supply of gas from alternative sources after it was granted one time relaxation by the order dated November 1, 2002. The Commission also observed that the appellant being a commercial entity has to bear the responsibility to ensure that its generating stations are available to the

respondents, who do not have any role in arranging the fuel. In this view of the matter, the Commission did not consider it to be a fit case for grant of relaxation of norms for target availability.

26. It is significant to note that the Commission in its order dated February 16, 2005, in Petition No. 95 of 2005, had recognized the efforts of the appellant for procuring gas supply for Kawas GPS and Gandhar GPS. The Commission had also come to the conclusion that the appellant had been pursuing the matter diligently and sincerely. It also recorded that the efforts made by the appellant had been appreciated by the beneficiaries in the 127th meeting of the Western Region Electricity Board held on May 20, 2005. The Commission took note of the fact that Kawas GPS had acquired dual fuel firing facility since 1997, after the beneficiaries had given their consent to avail power generated by using liquid fuel. It rejected the contention of the GUVNL that the appellant cannot be allowed to recover capacity charges on the

basis of target availability of liquid fuel. In this regard, the observations of the Commission read as follows:-

“On perusal of the reply of NTPC, we are satisfied that it has made efforts for procuring gas supply for Kawas GPS and Gandhar GPS. The evidence made available on record by NTPC leads us to believe that in the past NTPC has been pursuing the matter diligently and sincerely. At times its efforts met with partial success. It could procure 2.7 MMSCMD gas supplies from GAIL, 0.45 MMSCMD gas (RLNG) from GIPCL and 1.0 MMSCMD from GSPC. NTPC has also taken up the matter with GSPC for supply of additional 2 MMSCMD of gas. In fact, the efforts made by NTPC have been appreciated by the beneficiaries in the region at 127th WREB meeting held on 20.5.2005. We hope and trust NTPC will continue its efforts with equal, if not more, vigour and force so that the two generating stations are able to utilize the full available capacity.

As we have noted above, Kawas GPS has dual fuel firing facility. Liquid fuel firing facility at this generating station was commissioned in 1997 after the beneficiaries had given their consent to avail power generated by using liquid fuel. Therefore, the petitioner, and for that matter the other beneficiaries

in the region, cannot escape their liability to pay the capacity charge for the station, in case availability of the generating station is so declared by NTPC. We do not find any force in the petitioner's contention that NTPC should not be allowed to recover capacity charges on the basis of target availability of liquid fuel”.

27. Thus, the Commission found the appellant to be diligent in making efforts for procuring the gas for Kawas GPS and Gandhar GPS. The Commission was also of the view that the appellant was entitled to recover capacity charges for the stations.
28. It may be recalled, even at the risk of repetition, that after the Regulations of 2001 were notified by the Commission on March 26, 2001 for the period April 1, 2001 to March 31, 2004, the appellant filed a petition, being Petition No. 86 of 2002, for relaxation of target availability norms for both the stations. The Commission by its order dated November 1, 2002 expressed its satisfaction that on account of non-availability of adequate quantity of gas, it was not possible for both

Kawas GPS and Gandhar GPS to achieve availability level of 80% simultaneously. The Commission recognized that for the circumstances and reasons beyond control of the appellant, it would not be possible to achieve the target availability of 80% for the purpose of recovery of capacity charges. Both the stations were considered as a single integrated unit. The observations of the Commission are significant in nature and need to be extracted:

“We have considered the submissions made on behalf of the petitioner as also respondent No. 2, Madhya Pradesh Electricity Board both orally as well as in writing. We are satisfied that on account of non-availability of adequate quantity of gas, it is not possible for both Kawas GPS and Gandhar GPS to achieve availability level of 80% simultaneously at present. We are satisfied that “impossibility” is not on account of conduct of the petitioner and is for the circumstances and reasons beyond its control. Law does not force a person to do an impossible act. Therefore, we consider it necessary to allow one-time relaxation in the normative target availability level for recovery of capacity charges in respect of Kawas GPS and Gandhar GPS.

16. In order to do even handed justice to both the parties, we direct as under:-

(a) For the purpose of recovery of capacity charges Kawas GPS and Gandhar GPS shall be considered as single integrated unit. This is basically for the reason that the gas supply to these two stations has

been operated in an integrated manner by transferring it from Kawas GPS to Gandhar GPS.

(b) Recovery of full capacity charges in respect of Kawas GPS and Gandhar GPS shall be allowed on the “unit” achieving 80% machine availability and 65% PLF, subject to dispatch instructions by WRLDC. The petitioner shall be liable to demonstrate the machine availability when asked to do so by WRLDC/WREB.

(c) In case the “unit” is unable to achieve 65% PLF coupled with 80% machine availability, the petitioner shall be liable to pay disincentive on pre-rata basis to the beneficiaries.

(d) The petitioner shall not be entitled to incentive even in case the “unit” achieves PLF of more than 77%.

(e) Special dispensation being made shall be applicable from 1.7.2000, the date of introduction of ABT in the Western Region and up to 31.3.2004, that is, during the current tariff period.

(f) Special dispensation shall be reviewed while considering revision of norms for the period beyond 31.3.2004.

(g) The parties shall be at liberty to seek review of these directions in the event of improvement of supply of gas for the “unit”.

29. Therefore, it is clear from the aforesaid observations that the norms were relaxed for non-availability of adequate quantity of gas and no fault was found with the appellant

for not being able to procure sufficient volume of gas. Both the stations were considered as one unit by the Commission for the basic reason that the gas supplied to these stations was being provided in an integrated manner by transferring it from Kawas GPS to Gandhar GPS. The recovery of full capacity charges in respect of both the stations were allowed for achieving 80% machine availability and 65% PLF. The appellant was not held entitled to incentive for achieving PLF beyond 77% and at the same time in case the unit was not able to achieve 65% PLF and 80% machine availability, the appellant was liable to pay the beneficiaries on account of disincentive on pro-rata basis.

30. The scarcity of gas for which the appellant was not able to reach the target availability was taken note of in the orders of the CERC dated April 1, 2005 and April 7, 2005 in Petition Nos. 33 of 2001 and 31 of 2001 respectively. Petition No. 31 of 2001 was filed by the appellant for approval of tariff in respect of Kawas GPS and Petition

No. 33 of 2001 was in respect of determination of tariff for Gandhar GPS. The Commission dealing with the target availability did not find any justification to take a view different from the view taken in the Order dated November 1, 2002 in Petition No. 86 of 2002. Since the observations in regard to target availability in both the orders are almost identically worded, we consider it appropriate only to set out the observations of the Commission in the order passed in Petition NO. 31 of 2001:

“ The Commission in its order dated 1.11.2002 in Petition No. 86/2002, relaxed the target availability for Kawas GPS and Gandhar GPS from 1.7.2002 to 31.3.2004 after deliberating the issue at great length. It was held that recovery of full capacity charges in respect of Kawas GPS and Gandhar GPS should be allowed on their together achieving 80% machine availability and 65% PLF, subject to dispatch instructions by WRLDC. The petitioner is liable to demonstrate the machine availability when asked to do so by WRLDC/WREB.”

31. In four orders viz. order dated Nov., 1, 2002 in Petition No. 86 of 2002, Order dated April 1, 2005 in Petition No. 33 of 2001, Order dated April 7, 2005 in Petition NO. 31

of 2001 and order dated February 16, 2006 in Petition No. 95 of 2005, the Commission has recognized the fact that due to non-availability of gas and not for the reason of failure of the appellant, target availability of 80% could not be achieved by the Kawas GPS and Gandhar GPS. The Commission in one of the order dated November 1, 2002 in Petition No. 86 of 2002, observed that it cannot ask the appellant to perform an impossible task of achieving Target Availability level of 80%. After having said that, the Commission in the impugned order has taken a different view of the matter by holding that the appellant was a commercial entity and had to bear the responsibility to ensure that the generating stations are available to the respondents. This order of the Commission, which is impugned in the appeal, and the order passed by it in Petition No. 95 of 2005 are of the same date. In the order passed in Petition No. 95 of 2005 the appellant has not been held responsible for not reaching the target availability, while in the impugned order, without any change in the fact situation, the

appellant has been faulted for falling short of the target availability. Thus, the commission has passed contradictory orders in the two matters, without there being any distinction on facts.

32. The learned counsel for the respondents, however, contended that the appellant could have arranged gas from the open market, especially from GSPC. They also referred to certain correspondence exchanged between the appellant and Gujarat State Petronet Ltd. and GSPC and submitted that the appellant could have negotiated with them for supply of adequate quantity of gas for running the stations. The correspondence forms part of the affidavits filed in Petition No. 95/2005 before the CERC. Copies of the affidavits alongwith Annexures have been presented before us. We have gone through the affidavits and the correspondence. We, however, do not find that it was because of the appellant that the negotiations could not fructify. As already pointed out, in the order dated February 16, 2006, passed by the CERC

- in Petition No. 95/ 2005, the appellant has not been faulted for not being able to secure adequate quantity of gas for the two stations in question.
33. It needs to be noted that the appellant in petition No. 95/2005 in its reply affidavit stated that it had been making consistent efforts with Ministry of Petroleum and Natural Gas and Gas Authority of India Ltd. directly and through Ministry of Power, Govt. of India for securing additional supply of gas for its gas based stations at Kawas and Gandhar. It is further averred that it was only because of the efforts of the appellant through Ministry of Power that two MSCMD gas withdrawn by GAIL was restored to the appellant.
34. According to the affidavit, GAIL had offered to the appellant RLNG at a price of around US \$ 4.5, but this was not acceptable to the beneficiaries and therefore, clearance could not be given to GAIL for supply of additional gas. It is also asserted that both GAIL and Gujarat State Petronet Ltd. (GSPCL), and Gujarat

Petroleum Corporation Ltd (GSPC) did not submit any firm offer for supply of gas to NTPC power stations.

35. In a letter dated December 3, 2004 of the appellant to the GSPC, the latter was asked to submit a detailed proposal. The respondents have not brought on record any document to show that in response to the letter of the appellant dated December 3, 2004, any proposal was submitted. From the affidavit, it appears that the appellant had made efforts for securing adequate quantity of gas for its Kawas and Gandhar stations and that is also the finding of the CERC in the other application.
36. It cannot be disputed that the appellant cannot buy gas from the open market at any price, as otherwise the beneficiaries would suffer and will not agree for an imprudent price. The scarcity of gas for which the appellant was not able to reach the target availability ought to have been taken note of by the CERC in the impugned order. In the circumstances, it is fit case in which the commission ought to have exercised its powers

under Regulation 13 of the Regulations for relaxing the target availability for Kawas and Gandhar GPS, especially when in the order passed in Petition No. 95/2005, the commission has held to the effect that the evidence on record leads it to believe that the NTPC has been pursuing the matter diligently and sincerely for securing the supply of gas.

37. It is not disputed that the gas is supplied to the Kawas Station through HBJ pipeline and thereafter the balance gas is diverted to Gandhar power station. Both the stations are linked together and are being operated in a unified manner, in so far as the supply of gas is concerned. Therefore, both the stations are to be considered as one integrated unit for the purpose of fixing target availability till such time adequate quantity of gas is available to operate both plants independently.
38. It appears from the rejoinder affidavit of the appellant filed before the CERC that the combined availability of

power from Kawas and Gandhar stations has increased as per the following Table:-

Year	Availability/ PLF including deemed generation \$		Combined Availability/ PLF including deemed generation
	Kawas	Gandhar	
2000-2001	87.05	48.46	67.74
2001-2002	72.54	62.85	67.69
2002-2003	81.96	59.21	70.57
2003-2004	86.72	57.16	71.93
2004-2005	91.19	71.19	81.18
Average	83.89	59.77	71.82

39. Thus, over the last five years i.e. 2000-01; 2001-02; 2002-03; 2003-04; and 2004-05, the combined availability has increased steadily. The average combined availability for the aforesaid period is 71.82%. It is also clear from the Table that for the year 2004-05, the combined availability was 81.18%, while for the year 2003-04, it was 71.93. The significant gain is indicative of better availability of power from the stations.

40. In the circumstances, therefore, the appellant is not justified in asking for permitting recovery of full capacity charges for Kawas and Gandhar GPS together at 65% PLF. It also needs to be recognized that the beneficiaries

have been paying full capacity charges to the appellant, even though they are not receiving full benefit of the stations. We, therefore, can allow the relaxation of norms up to a reasonable limit & length of time.

41. In the circumstances, we are of the view that the norms ought to be relaxed suitably for the years 2004-2005; 2005-2006; 2006-2007 and 2007-2008. But beyond this period, the appellant must arrange for adequate supply of gas for running the two stations independently to their full capacity. For securing gas beyond the aforesaid period, the appellant has enough time.
42. Looking to the average combined PLF for the two stations together for the years 2000-2001; 2001-2002; 2002-2003; 2003-04 and 2004-2005, we are of the view that the recovery of full capacity charges in respect of Kawas and Gandhar GPS should be permitted on their together achieving 80% machine availability and 72% PLF.

43. Having regard to the aforesaid discussion, the appeal is allowed and the impugned order passed by the CERC is set aside. In relaxation of the norms, the combined target availability for the years April 1, 2004 to March 31, 2008, for recovery of full capacity charges for Kawas and Gandhar GPS together, is fixed at 72% PLF. Thereafter, no relaxation will be available to the appellant.

(Justice Anil Dev Singh)
Chairperson

(A.A. Khan)
Technical Member

Dated the January 22, 2007