

3. The appellant statedly was unable to meet the standards for Normative Annual Plant Availability Factor (“NAPAF”) – prescribed as 72% for Assam GSPA – during Financial Year (FY) 2016-17 and thereafter, on account of deficiency in the gas supply. The appellant has contractual arrangements for sale of electricity generated by it through above mentioned generating station by different Power Purchase Agreements (“PPAs”) with the distribution licensees of the States in the North Eastern Region of the country, they being first to seventh respondents herein. The non-achievement of the requisite NAPAF resulted in under recovery of capacity charges.

4. The appellant had approached the Central Commission by Petition no. 225/MP/2017, *inter alia*, for consideration of the actual NAPAF achieved by it during the period 01.07.2016 to 31.03.2017 as the NAPAF so as to allow recovery of capacity charges due to inadequate availability of fuel gas for the reasons beyond its control and for the relaxation to be allowed for future period beyond the said FY whenever losses occur due to such reasons, the reliance being placed on the power of the Central Commission under Regulation 54 of Central Electricity Regulatory Commission (Terms & Conditions for Determination of Tariff) Regulations, 2014 (“the *Tariff Regulations*”), which would apply to the period in question.

5. It was, *inter alia*, argued before the Central Commission that under the GSPA, there was provision for protection of the interest of the appellant, as the procurer of the gas from OIL, on the principle of *Force Majeure* [Clause 15.3(f)]. The deficiency in the supply of gas during the relevant period seems to have occurred because OIL was unable to supply the contracted capacity due to its obligations to make available requisite quantity of gas for other priority sectors, particularly the industry generating *urea* (i.e. *Brahmaputra Valley Fertilizer Corporation Limited*), this being the directive of the Central Government by its decision communicated through letter dated 17.08.2016 followed by reiteration through letter dated 31.10.2016, resultantly the supply to the appellant having been restricted to 0.8 MMSCMD as against the contracted supply of 1.4 MMSCMD.

6. The Central Commission, by its Order dated 05.11.2018, declined to grant any relief to the appellant observing primarily that the shortfall in target availability was attributable to inadequate gas supply which was a risk undertaken by the appellant which must bear the consequences. The Commission closed the chapter on the case by also adding that both the generating company (NEEPCO) and the gas supplier (OIL) are government companies and it is desirable that they should settle the gas supply issue amongst themselves.

7. It does appear from the facts presented before us that the reliefs that the appellant herein could have claimed under the GSPA could have been directed against OIL, the distribution licensees which are respondents before us being not party to that contract. At the same time, we cannot shut out eyes to the fact that the directions of the Central Government *vis-à-vis* the obligations of OIL to supply gas have created a situation which is beyond the control of the appellant, it having been resultantly rendered impossible for it to meet the requisite standards under the Tariff Regulations and the targets under its other contractual arrangements, particularly with the beneficiaries of the electricity thereby generated.

8. We note that the Central Commission has not examined the prayer for relaxation from the above perspective. The impugned order is virtually silent on the reasons for disinclination to examine prayer to that effect.

9. On the forgoing facts, and in the circumstances, we find it just and proper to remit the matter back to the Central Commission for revisit on the prayer for relaxation under Regulation 54 referred to earlier.

10. Needless to add, before granting any such relief, should the Central Commission feel persuaded to do so, it will be obliged to hear all

parties that are affected including and particularly the distribution licensees.

11. The observations recorded by us above are for the purposes of dealing with the contentions urged before us and will not be treated as final expression by this Tribunal on merits. All issues are kept open.

12. The impugned order is thus set aside. The matter is remanded to the Central Commission in light of above directions. The Central Commission is directed to take up the matter on 25.08.2022.

13. Needless to add, we would expect the Central Commission to decide the issue expeditiously and pass fresh order in accordance with law at an early date.

14. The appeal is disposed of in above terms.

**(Sandesh Kumar Sharma)**  
**Technical Member**

*vt/mkj*

**(Justice R.K. Gauba)**  
**Officiating Chairperson**