

Supreme Court Holds That “Failure to Demonstrate Declared Capacity” Attracts Strict Liability and is Distinct from “Gaming”

5 June 2026

Introduction and Background

- The Supreme Court of India (Supreme Court) in Punjab State Power Corporation Limited v Talwandi Sabo Power Limited & Ors., 2026 INSC 515 (Judgment), set aside the order of the Appellate Tribunal for Electricity (APTEL) and restored the penalty order of the Punjab State Electricity Regulatory Commission (PSERC) against Talwandi Sabo Power Limited (TSPL), confirming a penalty of approximately INR 162 crores payable to Punjab State Power Corporation Limited (PSPCL) for failure to demonstrate declared capacity.
- The Judgment clarifies the regulatory framework governing scheduling and despatch under the Punjab State Grid Code, 2013 (State Grid Code) and distinguishes between 'failure to demonstrate declared capacity' and 'gaming', holding that a failure to demonstrate declared capacity attracts strict liability without any requirement to prove intent.¹
- TSPL operates a 1,980 MW (3 × 660 MW) State Generating Station at Mansa District, Punjab, supplying power to PSPCL under a 2008 long-term Power Purchase Agreement (PPA). Under the PPA and the State Grid Code, TSPL is required to declare its generation capability in MW for each day and PSPCL pays fixed capacity charges on the basis of that declared capacity, even where actual drawal is lower, the shortfall being treated as deemed generation.
- In December 2016, the Punjab State Load Dispatch Centre (PSLDC) detected a persistent pattern of under-injection by TSPL relative to its declared capacity, with TSPL failing to deliver the requisite generation in 387 out of 459 time blocks examined and subsequently issued notices to TSPL to demonstrate its declared capacity. As TSPL failed to demonstrate its declared capacity on each occasion, PSLDC imposed a penalty of approximately INR 162 crores on TSPL.

¹ Regulations 11.3.10, 11.3.12 and 11.3.13 of the Punjab State Grid Code, 2013 provide as follows: -

'11.3.10 The SGS shall make an advance declaration of ex- power plant MW and MWh capabilities foreseen for the next day, i.e., from 0000 hrs to 2400 hrs. During fuel shortage condition, in case of thermal stations, they may specify minimum MW, maximum MW, MWh capability and declaration of fuel shortage. The generating stations shall also declare the possible ramping up / ramping down in a block. In case of a gas turbine generating station or a combined cycle generating station, the generating station shall declare the capacity for units and modules on APM (Administered Pricing Mechanism) gas, RLNG (Regasified Liquefied Natural Gas) and liquid fuel separately, and these shall be scheduled separately.'

'11.3.12 It shall be incumbent upon the SGS to declare the plant capabilities faithfully, i.e., according to their best assessment. In case, it is suspected that they have deliberately over/under declared the plant capability contemplating to deviate from the schedules given on the basis of their capability declarations (and thus make money either as undue capacity charge or as the charge for deviations from schedule), the SLDC may serve the **notice of gaming** and ask the SGS to explain the situation with necessary backup data."

"11.3.13 The SGS shall be required to demonstrate the declared capabilities of its generating station as and when asked by the SLDC. In the event of the SGS **failing to demonstrate the declared capability**, the capacity charges due to the generator shall be reduced as a measure of penalty. The quantum of penalty for the first mis-declaration for any duration/block in a day shall be the charges corresponding to two days fixed charges. For the second mis-declaration the penalty shall be equivalent to fixed charges for four days and for subsequent mis- declarations, the penalty shall be multiplied in the geometrical progression over a period of a month.'

- At TSPL's instance, the matter was referred successively to the Commercial and Metering Committee, the State Grid Code Review Committee, and thereafter on directions of the High Court, to the PSERC which upheld the penalty. TSPL appealed to the APTEL, which reversed the PSERC's findings and set aside the penalty. PSPCL then appealed to the Supreme Court, which restored the penalty with modifications to certain findings of the PSERC.

Findings and Ratio

A. Failure to demonstrate declared capacity is distinct from gaming and attracts strict liability

- (i) The Supreme Court held that failure to demonstrate declared capacity and gaming are two distinct concepts.
- (ii) Gaming requires two mandatory ingredients viz. (a) intentional misdeclaration of a parameter related to a commercial mechanism and (b) undue commercial gain. Neither is a pre-requisite for a finding of failure to demonstrate declared capacity.
- (iii) The failure to demonstrate declared capacity upon notice from the State Load Dispatch Centre (SLDC) attracts a penalty which is embedded within the provision itself (Regulation 11.3.13) and is automatic upon demonstration failure and no proof of intent, motive or *mens rea* is required. The Supreme Court relied on well-established principles to interpret Regulation 11.3.13 as a provision which imposes strict liability and held that where a penalty arises from breach of a civil obligation, the absence of *mens rea* is of no consequence.
- (iv) Gaming, by contrast, requires: (a) a formal notice to the generating station; (b) a full inquiry affording the generating station a reasonable opportunity to explain its conduct; and (c) compliance with the principles of natural justice, none of which are required for proceedings under Regulation 11.3.13 of the State Grid Code.

B. Deviation, failure to demonstrate declared capacity, and gaming differentiated

- (i) The Supreme Court clarified the hierarchical relationship between three distinct regulatory concepts that had previously been conflated:
 - (a) Deviation is the difference between total actual injection and total scheduled generation in a time block, for a seller, and between total actual drawal and total scheduled drawal, for a buyer. It is the broadest of the three concepts, attracting no inquiry into intent or conduct, and is governed by the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) Regulations, 2014.
 - (b) Failure to demonstrate declared capacity arises when a generating station fails to achieve its declared capacity within the fourth time block from receipt of a demonstration notice issued by the SLDC, treating the time block of receipt as the first one. It constitutes a civil liability and attracts penalty automatically under Regulation 11.3.13 of the State Grid Code.
 - (c) Gaming is the intentional misdeclaration of a parameter related to a commercial mechanism in order to make an undue commercial gain. It is the most serious of the three concepts, requiring proof of intent and illegal enrichment and compliance with principles of natural justice.
- (ii) A deviation simpliciter constitutes neither gaming nor a failure to demonstrate declared capacity. However, a failure to demonstrate declared capacity, and gaming, will each necessarily constitute a deviation.

C. The applicable time frame for demonstration of declared capacity

- (i) The Supreme Court rejected APTEL's finding that Regulation 11.3.13 of the State Grid Code specifies no time limit for demonstration of declared capacity. The Supreme Court held that Regulation 11.5(xi) of the State Grid Code governs the time frame within which demonstration must be achieved and provides that a revised schedule issued by the SLDC in the interest of better system operation becomes effective from the fourth time block, counting the time block of issuance as the first one.

- (ii) The alacrity and expedition with which a generating station responds to a demonstration notice is the hallmark of the integrity of its declaration.
- (iii) The Supreme Court also rejected APTEL's reliance on the CERC's order dated 29.11.2023 in Petition No. 199/MP/2019: Tata Power Delhi Distribution Limited v Pragati Power Corporation Limited to hold that misdeclaration of declared capability can only be established in cases of inadequate coal stock or plant shutdown. The Supreme Court held that these observations were merely descriptive of typical grounds for declaration and were not an exhaustive definition of the circumstances in which misdeclaration can be found.

D. Correction of PSERC's finding on gaming ingredients

While restoring the PSERC's penalty order, the Supreme Court corrected two specific errors in the PSERC's reasoning. First, the PSERC had characterised demonstration failure as requiring proof of '*deliberate intention and motive to make money*' i.e., the ingredients of gaming. Second, the PSERC had held that Regulation 11.3.13 provides the procedure for dealing with gaming under Regulations 11.3.4 and 11.3.12. The Supreme Court held both findings to be wrong.

Outcome And Directions

The Supreme Court held, inter alia, that: (i) failure to demonstrate declared capacity under Regulation 11.3.13 of the State Grid Code attracts a penalty and is a provision in the nature of strict liability (ii) gaming is a distinct and more serious misconduct requiring a finding of intentional misdeclaration, undue commercial gain and compliance with principles of natural justice through a full inquiry; and (iii) deviation, failure to demonstrate declared capacity and gaming are distinct concepts.

Based on the aforesaid conclusions, the Supreme Court set aside the judgment of APTEL and restored the order of the PSERC imposing penalty of approximately INR 162 crores on TSPL, subject to modification of the PSERC's findings as set out above.

Comments

The Judgment is an important decision for the power sector as the Court has interpreted the provision in the State Grid Code which imposes penalty for failure to demonstrate declared capacity as a provision which imposes strict liability and does not require a finding of *mens rea* or illegal profiteering which is an important element of gaming. By distinguishing between deviation, failure to demonstrate declared capacity, and gaming the Court has sought to provide guidance to both regulators and generating stations.

The Judgment nevertheless leaves certain issues open. Gaming requires proof of intentional misdeclaration of a parameter related to a commercial mechanism and undue commercial gain, whereas failure to demonstrate declared capacity attracts automatic penalty without establishing either intention or gain. As in the present facts, a situation issue may arise which could be perceived by a regulator as both gaming and a failure to demonstrate declared capacity. In the circumstances, it will be left to the discretion of an SLDC to determine whether to initiate proceedings against a power generation company for gaming or for failure to demonstrate declared capacity.

This issue is compounded by the practical difficulty of establishing intent. Gaming requires proof of intentional misdeclaration, which is rarely susceptible to direct evidence. A pattern of persistent over-declaration followed by systematic under-injection may be the only available indicator, yet that pattern is equally consistent with technical failure or commercial miscalculation. Where a demonstration notice is issued, intent is not examined at all, and the issue is decided relying on well-established principles of strict liability as per the mandate of Regulation 11.3.13.

The determination of 'undue commercial gain' in gaming presents another related issue as a generator that over-declares its capacity earns higher fixed charges on that basis. Whether this financial benefit, earned prior to the issuance of a demonstration notice, would constitute 'undue commercial gain' remains to be seen.

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