

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO. 206 of 2015**

**Dated : 29<sup>th</sup> October, 2018**

**PRESENT: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER  
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

**IN THE MATTER OF :**

1. Damodar Valley Power Consumers' Association  
Ideal Centre, 4<sup>th</sup> Floor,  
9 AJC Bose Road,  
Kolkata – 700 017.

2. Shree Ambey Ispat Pvt. Ltd.  
Room No.90, 5<sup>th</sup> Floor,  
Stephen House,  
4, B.B.D. Bagh (E),  
Kolkata -700 001. .

..APPELLANTS

Versus

1. West Bengal Electricity Regulatory Commission  
Poura Bhavan, (3<sup>rd</sup> Floor) Block-FD,  
415-A, Bidhannagar  
Kolkata-700106

2. Damodar Valley Corporation  
DVC Towers  
VIP Road  
Kolkata - 700 054.

...RESPONDENTS

Counsel for the Appellant(s) : Mr. Rajiv Yadav

Counsel for the Respondent(s) : Mr. Pratik Dhar, Sr. Adv.  
Mr. C.K. Rai  
Mr. Sachin Dubey for R-1  
Mr. M. G. Ramachandran  
Ms. Poorva Saigal  
Ms. Anushree Bardhan for R-2

## **J U D G M E N T**

### **PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER**

1. The Appellant, herein questioning the legality and validity of the impugned order dated 25.5.2015, passed by the West Bengal Electricity Regulatory Commission whereby the State Commission has determined the Annual Revenue Requirement (ARR) of Damodar Valley Corporation (DVC) for MYT Period FY 2014-15, 2015-16 and 2016-17 and retail tariff for FY 2014-15 and 2015-16 for supply of power within West Bengal has presented this Appeal.

#### **2. Brief Facts of the Case :-**

2.1 The Appellant No. 1 is an association as incorporated entity representing the interest of its members who are HT consumers of DVC. The Appellant No. 2 is a company incorporated under the provisions of the Companies Act, 1956, and is principally engaged in manufacture of ferro-alloys. The Appellant No.2

is an HT consumer of DVC, and is also a member of the Association / Appellant No. 1.

2.2 Respondent No. 1, West Bengal Electricity Regulatory Commission, is a statutory body under Section 82 of the Electricity Act, 2003. The State Commission is entrusted, *inter alia*, with the function of determination of tariff for retail supply of tariff within the State of West Bengal.

2.3 Respondent No. 2, Damodar Valley Corporation, is a statutory corporation owned and controlled by the Government of India, Government of Jharkhand and Government of West Bengal. DVC was constituted pursuant to the Damodar Valley Corporation Act, 1948 and qualifies as a "State" within Article 12 of the Constitution of India with all its attendant obligations of reasonableness and propriety in conduct of its affairs. DVC is engaged in generation, transmission, bulk-supply and distribution of electricity, and performs diverse functions relating to irrigation, flood control, afforestation, soil conservation etc. in accordance with the provisions of the DVC Act.

2.4 The power distribution activity of DVC is confined to industrial HT consumers, receiving power at 33 KV and above in its command area. At present, DVC is directly supplying electricity to more than 250 HT consumers

in Damodar Valley area, including the Appellants. DVC also sells electricity to licensees outside the command area on bilateral terms, as well as on the power exchange.

2.5 DVC's generation and transmission functions are spread over two States, and therefore, its generation and transmission tariff is determined by the Central Electricity Regulatory Commission under Section 79 (1) (b) of the Electricity Act, 2003.

2.6 DVC owns and operates the following generation assets:

| Name of the Station           | Installed Capacity (MW) | COD of the Station/ system                           |
|-------------------------------|-------------------------|--|
| Bokaro TPS                    | 630                     | August 1993  |
| Chandrapur TPS                | 390                     | March 1979   |
| Durgapur TPS                  | 350                     | September 1982                                       |
| Mejia TPS Unit 1 to 3         | 630                     | September 1999                                       |
| Mejia TPS Unit 4              | 210                     | 13.02.2005   |
| Maithon Hydel                 | 60                      | December 1958  |
| Panchet Hydel                 | 40                      | March 1991   |
| Tilaiya Hydel                 | 4                       | August 1953  |
| Mejia TPS Unit 5 & 6          | 500                     | U#1 on<br>29.02<br>.2008<br>U#2 on<br>24.09<br>.2008 |
| Mejia TPS Phase II Unit 7 & 8 | 1,000                   | U#1 on<br>02.08<br>.2011<br>U#2 on                   |

| Name of the Station        | Installed Capacity (MW) | COD of the Station/ system                           |
|----------------------------|-------------------------|--|
|                            |                         | 16.08<br>.2012                                       |
| Chandrapura TPS Unit 7 & 8 | 500                     | U#1 on<br>02.11<br>.2011<br>U#2 on<br>15.07<br>.2011 |
| Durgapur Steel TPS Unit 1  | 500                     | 15.05.2012   |
| Durgapur Steel TPS Unit 2  | 500                     | 05.03.2013   |
| Koderma TPS Unit 1         | 500                     | 18.07.2013   |
| Koderma TPS Unit 2         | 500                     | 14.06.2014   |

- 2.7 Prior to the enactment of Electricity Act, 2003, DVC was authorised to determine its own tariff pursuant to Section 20 of the DVC Act, 1948. The relevant extract from Section 20 of the DVC.
- 2.8 Upon enactment of the Electricity Act, 2003, the above noted dispensation under Section 20 of DVC Act underwent a significant change. The 2003 Act, being a consolidating Act, prevailed over such provisions of the DVC Act as were inconsistent with its own provisions.
- 2.9 In light of the statutory scheme under the Electricity Act, 2003, the CERC, initiated *suo motu* proceedings (Petition No. 168 of 2004) with respect to DVC's tariff determination. Vide its order dated 29.3.2005, the CERC directed DVC to file an application for determination of its tariff.

- 2.10 In response to CERCs direction, DVC filed Petition No. 66 of 2005 on 8.6.2005 before the CERC, seeking tariff determination for MYT period 1.4.2004 to 31.3.2009.
- 2.11 After a detailed exercise, the CERC, vide tariff order dated 3.10.2006 determined DVC's generation and transmission tariff and made the same applicable from 2006-09. In other words, DVC was granted a two years' moratorium from 1.4.2004 to 31.3.2006 during which it could continue to levy and recover its own tariff. In other words, the tariff fixed by CERC became applicable from 1.4.2006.
- 2.12 In its tariff order dated 3.10.2006, the CERC specifically pointed out that it has confined itself to determination of generation and transmission tariff of DVC, and that distribution tariff has to be determined by the concerned State Commission.
- 2.13 The tariff order dated 3.10.2006 was challenged by DVC and certain HT consumers in separate appeals filed before this Tribunal (Appeal Nos. 271, 272, 273, 275 of 2007 and 8 of 2007). This Tribunal, vide Judgment 23.11.2007, partly allowed Appeal No. 273 of 2006 filed by DVC, and remanded the matter to Central Commission *"for de novo consideration of the Tariff Order dated 3rd October, 2006 in terms of our findings and*

*observations made hereinabove and according to the law."* Specifically, the matter was remanded for consideration on the following specific issues:

- Additional Capitalisation for the period 2004-05 and 2005-06.
- Pension and Gratuity Contribution.
- Revenue to be allowed to DVC under the DVC Act
- Operation and Maintenance expenses.
- Debt- Equity Ratio.

2.14 This Tribunal's Judgment dated 23.11.2007 has been challenged by M/s Bhaskar Shrachi Alloys Limited in Civil Appeal Nos. 971-973 of 2008 before the Hon'ble Supreme Court, which is pending disposal.

2.15 Following remand by this Hon'ble Tribunal, tariff determination proceedings were revived before CERC in Petition No. 66/2005. A revised tariff order dated 6.8.2009 came to be passed by the CERC.

2.16 The revised tariff order dated 6.8.2009 was unsuccessfully challenged by DVC before this Tribunal in Appeal No. 146 of 2009.

2.17 DVC preferred an appeal from this Tribunal's Judgment dated 10.5.2010 before the Hon'ble Supreme Court (Civil Appeal No. 4881/ 2010). The Hon'ble Supreme Court, vide order dated 9.7.2010, stayed refund of the excess amount collected by DVC. However, the Hon'ble Supreme Court did

not stay the operation of the Judgment dated 10.5.2010. The said civil appeal is still pending before the Hon'ble Supreme Court.

2.18 For MYT period 1.4. 2014 to 31.3.2019, DVC filed petitions in the month of September, 2014 for determination of generation tariff before CERC, and the same are pending adjudication. Since CERC is yet to determine DVC's tariff for the period 2014-2019, the input cost for determination of retail tariff by the State Commission is not yet available.

2.19 The CERC (Terms and Conditions of Tariff) Regulations, 2014 notified for MYT period 2014-2019 came into force on 1.4.2014, and the generation tariff for DVC's units is required to be determined in accordance with the said Regulations (hereinafter referred as to “**2014 Regulations**”).

2.20 On 15.1.2014, DVC filed a petition before the State Commission for approval of ARR for MYT period FY 2013-14 to FY 2015-16 and determination of retail tariff for supply in Damodar Valley area falling within the State of West Bengal. Subsequently, additional information was furnished by DVC on 11.4.2014 and 13.6.2014.

2.21 For MYT period 1.4.2009 to 31.3.2014, the CERC has issued final tariff orders in respect of the following generation and transmission assets of DVC:

| <b>Sl. No.</b> | <b>Particulars</b>            | <b>Date of issue</b> |
|----------------|-------------------------------|----------------------|
| 1.             | Mejia TPS Unit 1 to 3         | 9.7.2013             |
| 2.             | Mejia TPS Unit 4              | 9.7.2013             |
| 3.             | Bokaro TPS Unit 1 to 3        | 29.7.2013            |
| 4.             | Chadrapur TPS Unit 1 to 3     | 7.8.2013             |
| 5.             | Durgapur TPS Unit 3 & 4       | 7.8.2013             |
| 6.             | Maithan HPS                   | 7.8.2013             |
| 7.             | Panchet HPS                   | 7.8.2013             |
| 8.             | Tilaiya HPS                   | 7.8.2013             |
| 9.             | Transmission & Distribution   | 27.9.2013            |
| 10.            | Mejia TPS Unit 5 & 6          | 23.1.2015            |
| 11.            | Chandrapura TPS Unit 7 & 8    | 12.3.2015            |
| 12.            | Mejia TPS Unit 7 & 8          | 20.3.2015            |
| 13.            | Durgapur Steel TPS Unit 1 & 2 | 20.4.2015            |

2.22 In the proceedings before State Commission, the Appellant No. 2 filed detailed objections in response to DVC's tariff petition. However, no opportunity of being heard was given by the State Commission to Appellant No. 2 or any other stakeholder/ objector.

2.23 The Appellant No. 1 filed a writ petition [W. P. 24413 (W) 2014] before the Hon'ble Calcutta High Court, seeking a mandamus for declaring the admission of the subject tariff petition as being in violation of the Electricity Act, 2003. The Hon'ble High Court, vide order dated 3.12.2014 was pleased

to dismiss the said writ petition. Following the dismissal of the writ petition, the Appellant No. 1 was not able to file its objections in the subject tariff petition, as the date for filing the same had expired on 3.9.2014.

2.24 The State Commission, vide impugned tariff order dated 25.5.2015, approved the ARR and retail distribution tariff of DVC for supply of power in Damodar valley area within the State of West Bengal. Being aggrieved that the impugned tariff order has been passed by the State Commission without exercise of adequate prudence check and giving of adequate opportunity to the stakeholders to present their views on ARR and retail tariff proposal submitted by DVC, the Appellants presented this Appeal.

**3. QUESTIONS OF LAW:-**

The present Appeal raises the following Questions of Law for adjudication by this Tribunal:

3.1 Whether the State Commission can omit to exercise requisite prudence while determining retail tariff on the ground that actual/normative costs can be considered subsequently at the stage of truing-up?

- 3.2 Whether the State Commission, mandated with the task of protecting consumer interest, was justified in front-loading of tariff at the consumers' expense?
- 3.3 Whether the State Commission was justified in postponing a critical scrutiny of DVC's costs to the stage of truing-up, even though DVC, itself, had claimed lower costs in its petition filed before CERC for determination of generation tariff for MYT Period 2014-19?
- 3.4 Whether the State Commission was justified in ignoring the normative dispensation under the extant CERC (Terms and Conditions of Tariff) Regulations, 2014?
- 3.5 Whether, by mechanically accepting the costs submitted by DVC, the State Commission has failed in discharge of its statutory mandate to independently and objectively verify the cost elements for the purpose of tariff determination?
- 3.6 Whether the State Commission was justified in omitting to consider the contents of DVC's petitions pending before the Ld. CERC for determination of generation tariff, wherein DVC, itself, has claimed lower generation costs for the relevant control period?

- 3.7 Whether the State Commission was justified in adopting the fixed charges approved by CERC for FY 2013-14 without appreciating that such fixed charges had several extraordinary and non-recurring cost elements which will not be incurred by DVC during the relevant control period?
- 3.8 Whether the State Commission has erred in adopting the estimated energy charges of DVC for FY 2012-13, without noticing the significantly lower energy charges claimed by DVC in its petitions filed before CERC for determination of generation tariff for MYT period 2014-19?
- 3.9 Whether the impugned order has been passed in violation of the principles of natural justice and/or is opposed to the statutory mandate enshrined in Section 86 (3) of the Electricity Act, 2003.

**4. Mr. Rajiv Yadav, learned counsel appearing for the Appellant has filed his written submissions as follows :-**

**TARIFF DETERMINATION WITHOUT TRUE-UP/ ANNUAL PERFORMANCE REVIEW**

- 4.1 The tariff determination scheme under the applicable WBERC (Terms and Conditions of Tariff) Regulations, 2011 mandate Annual Performance Review (true-up) for past period before undertaking tariff determination for a subsequent period. Such scheme has been completely disregarded by the

State Commission, as it has been determining tariff year after year without ever having undertaken true-up / APR for past years.

- 4.2 Consistent with Rule 8, Regulation 2.1.6 (b) of WBERC Tariff Regulation 2011 provides that *“the tariff determined by CERC for any generating station will be accepted by the Commission and no further re-determination will take place”*.
- 4.3 Regulations 2.5.1 (i) & (iii) read with Regulation 2.5.3 provide for tariff of a particular year to be fixed only after completion of Annual Performance Review/true-up for the previous year. This is even more clearly established by Regulation 2.5.6.2.
- 4.4 The requirement of past period APR as a necessary condition precedent for fixation of tariff for the 2<sup>nd</sup> ensuing year is clearly borne out from the language of Regulation 2.5.6.2 (iii), which provides that *“for framing of tariff of the second ensuing year and onwards of the control period”* the ARR determined in the composite MYT application (at the beginning of control period) shall be subject to ‘adjustments’, *inter alia*, on account of APR, and only after such adjustments, *“the Commission shall.....make amendment of the tariff which is in vogue from the last tariff order”*.

- 4.5 Given the above noted dispensation under the 2011 Regulations, the State Commission has committed a jurisdictional error by undertaking tariff determination for FY 2014-17, without first undertaking APR/true-up for the previous control period FY 2009-14. It is an admitted position that the State Commission has not undertaken any APR.
- 4.6 It is well settled principle that the State Commission is bound by its own Regulations. [**para 13, 14, 18, 19 & 23 of *Maruti Suzuki v. HERC 2013 ELR (APTEL) 1***]
- 4.7 When the law provides for a thing to be done in a particular manner it must be done in that manner alone. [**para 35 of *GUVNL v. Essar Power (2008) 4 SCC 755***]
- 4.8 The State Commission's omission to undertake APR/ true-up is also against the directions of this Tribunal, issued under Section 121 of the Act. [**para 2, 5, 10, 11, 12, 15, 21, 22, 23, 34, 35, 41, 43 - 50, 55 – 60, 65 & 66 of *Tariff Revision (Suo motu action on the letter received from Ministry of Power) 2011 ELR (APTEL) 1742***]

#### **EXCESSIVE ALLOWANCE OF FIXED CHARGES**

- 4.9 Regulation 5.18.1 defines Annual Fixed Charges as follows:

*“The Annual fixed charges consist of Return on equity, Depreciation, Advance Against Depreciation, Financing Cost, Interest on Working*

*Capital, Operation and Maintenance Expenses, metering charges, Employee Cost, Bad and Doubtful Debt, Reserve for Unforeseen Exigencies, Foreign Exchange Rate Variation, Income Tax, other taxes, water cess, duties, amortization of intangible assets and insurance. The list is illustrative but not exhaustive.”*

- 4.10 The mechanical adoption of FY 2013-14 fixed charges shows that the State Commission has not examined DVC’s “*expected behaviour of the various operational and financial variables*” as envisaged under Regulation 2.5.1 (ii). Instead, the State Commission has deemed fit to only “*consider and assume*” fixed charges and energy charges determined by CERC for FY 2013-14 for the subject control period as well.
- 4.11 There is, admittedly, no sanction under the Act or the Regulations to mechanically adopt fixed charges determined by CERC for an earlier financial year. Now that we have the benefit of CERC’s generation tariff orders for FY 2014-19, it is clear that DVC has been allowed excessive fixed charges to the tune of **Rs. 8556 crore**.
- 4.12 Apart from lack of prudence check on the part of State Commission, the above noted excessive allowance of fixed charges also shows that DVC had made unreasonably high fixed charge projections in its tariff petitions in a manner *de hors* the requirements of Regulation 2.5.1 (ii). DVC’s fixed charge projections in its retail tariff petition (before WBERC) are

significantly higher than its projections in the generation tariff petitions filed in September, 2014 (before CERC).

- 4.13 Since DVC had filed its generation tariff petitions more than 8 months before the passing of the impugned order, DVC ought to have submitted to the State Commission, the details of fixed charges being claimed by it before CERC. Such information could also have been sought by the State Commission in discharge of its mandate to undertake requisite prudence check.

Further, since there was a time gap of only about two and half months between the date of filing of additional documents and forms (before WBERC) and filing of generation tariff petitions (before CERC), DVC ought to have submitted consistent fixed charge projections.

Given the short time gap between the filings before WBERC and CERC, it is quite evident that DVC deliberately inflated its fixed charge projections before the State Commission in order to obtain a higher tariff than was permissible.

- 4.14 In addition to the above, the requirement of prudence check (inherent in an examination of *expected behavior of operational and financial variables*)

also mandated the State Commission to factor in the ‘extraordinary and non-recurring cost elements’ that were unique to the previous tariff period 2009-14 (including FY 2013-14) and were not likely to be incurred by DVC in the subject control period (FY 2014-17). Such extraordinary cost elements included an enhanced contribution of Rs. 250 crore made by DVC to Pension & Gratuity Fund in FY 2013-14 on account of the implementation of 6<sup>th</sup> Pay Commission Report.

4.15 The mechanical adoption of 2013-14 fixed charges has resulted in allowance of ‘sinking fund contribution’ from the fixed charges for FY 2014-17, even though DVC has not claimed such sinking fund contribution in the generation tariff petitions for FY 2014-19 for old plants.

4.16 The above noted enhanced contribution of Rs. 250 crore pertained to FY 2006-09. The said Rs. 250 crore represented 40% of the P&G Fund contribution for FY 2006-09, which was permitted to DVC vide CERC’s tariff order dated 6.8.2009, passed in petition no. 66/ 2005 and approved by this Tribunal vide judgment dated 10.5.2010, passed in Appeal No 146/ 2009.

4.18 Furthermore, DVC has not been allowed contribution to P & G Fund for FY 2009-14 and FY 2014-19. It may be pointed out that the contribution to P &

G fund allowed by CERC in the generation tariff orders for FY 2009-14 pertain to FY 2006-09 only.

**WBERC's stand in its reply to the appeal:**

4.19 In its reply to the present appeal, the State Commission has not disputed the appellant's contention that DVC has been allowed higher RE charges than what was claimed by it in its tariff petitions filed before CERC for FY 2014-19. Instead, the State Commission has tried to justify the adoption of 2013-14 fixed charges by citing the following:

- a) Judgment dated 3.12.2014, passed by Hon'ble Calcutta High Court in Writ Petition No. 24413 (W) 2014, titled *Damodar Valley Consumers' Association v. West Bengal Electricity Regulatory Commission*.
- b) The adoption of 2013-14 fixed charges was subject to a future true-up, as stated in paragraph 4.1.5.10 of the impugned order.

(a) **High Court's Judgment dated 3.12.2014**

4.20 The State Commission's reliance upon the Hon'ble High Court's judgment of 3.12.2014 is misplaced for the following reasons:

The subject writ petition had been filed by the Appellant to impugn the State Commission's decision to admit DVC's retail tariff petition for FY 2014-17, without the 'input tariff' – comprising of generation and transmission tariff – having been determined by CERC for the said period. The writ petitioner's stand before the Hon'ble High Court has been succinctly recorded in the Judgment dated 3.12.2014 as follows:

*“According to the petitioner, since the generation and/or transmission tariff are treated as input costs for the purpose of retail tariff unless it is determined by the Central Electricity Regulatory Commission, the said commission cannot assume the jurisdiction or proceed to determine the retail tariff.”*

- 4.21 The exercise to determine retail tariff was sought to be challenged as being without jurisdiction on the ground that without the input generation tariff of CERC being available, the State Commission could not proceed with determination of retail tariff.
- 4.22 The limited issue before the Hon'ble High Court was whether, in the absence of CERC determined generation (input) tariff, the State Commission could undertake a retail tariff determination exercise. Being conscious of the limited nature of controversy, the Hon'ble High Court pertinently observed as follows:

*“Bearing in mind that a challenge is made at a stage of receiving an application by West Bengal Electricity Regulatory Commission, this Court does not intend to go the intricacies of the factual disputes and do not delve to go deeper into it. This Court is basically concerned with the initiation of the proceedings and receiving of an application by the West Bengal Electricity Regulatory Commission...”. (emphasis added)*

- 4.23 While upholding the admission of petition by the State Commission, the Hon’ble High Court neither sanctioned a mechanical adoption of 2013-14 fixed charges nor ousted mandatory prudence check in terms of Section 61 (d) of the 2003 Act and Regulation 2.5.1 (ii) of the 2011 Regulations.
- 4.24 The State Commission is belatedly justifying the lack of prudence check by quoting certain observations of the Hon’ble High Court *de hors* the context in which they were made. There is nothing in the High Court’s judgment of 3.12.2014 to suggest that the CERC determined 2013-14 costs were to be mechanically applied to the subject control period (FY 2014-17) without undertaking statutorily mandated prudence check.
- 4.25 The State Commission’s reliance upon the High Court’s judgment of 3.12.2014 is clearly an afterthought, as the judgment has not even been cited in the impugned order as the reason for mechanical adoption of 2013-14 fixed charges. In fact, in paragraph 1.14 of the impugned order, the State Commission has expressly declared that *“the order is in accordance with*

*Section 61, 62 and 64 of the Electricity Act, 2003 and provisions of Tariff Regulations.”*

4.26 The belated reliance upon the High Court’s judgment cannot be countenanced in law in view of the settled legal position, namely that an order’s validity must be judged on the basis of reasons mentioned therein, and not by referring to fresh reasons that are subsequently furnished by way of affidavits or otherwise. *[Para 64 of Dipak Babaria v. State of Gujarat 2014 3 SCC 502].*

**(b) Subsequent true-up cannot be a substitute for prudence check:**

4.27 The State Commission’s contention that the 2013-14 fixed charges adopted for FY 2014-17 shall be adjusted *in the truing up exercise* cannot be a justification for omission to undertake prudence check on the basis of material available and in accordance with applicable Regulations.

4.28 Postponement of prudence check to the stage of truing-up is a violation of Regulations 2.7.6 and 2.5.1 (ii), as well as the following principles laid down by this Tribunal in *BSES Rajdhani v. Delhi Electricity Regulatory Commission (2009) ELR 880*:

*“....all projections and assessments have to be made as accurately as possible.....simply because the truing up exercise will be made on*

*some day in future the Commission cannot take a casual approach in making its projections.”*

- 4.29 Needless to add, if the State Commission was only required to mechanically adopt the last generation tariff determined by CERC, without undertaking independent prudence check, there was no need to undertake an elaborate tariff determination exercise, comprising, *inter-alia*, of filing a detailed tariff petition as per Regulation 2.5.2.1, giving of public notice on Commission’s website in at least 4 newspapers (Regulation 2.5.2.5), inviting objections/suggestions from stakeholders, considering such objections/suggestions and passing a detailed tariff order.
- 4.30 The fact that prudence check has to be mandatorily undertaken by the State Commission is further evident from the detailed information - pertaining to previous years, base year and ensuing years - *that is required to be furnished by the licensee for calculating aggregate revenue requirement to be met from tariff* in terms of Regulation 2.5.2.12.

### **NON-CONSIDRATION OF AVAILABILITY NORMS**

- 4.31 The State Commission has not even undertaken the minimal prudence check of taking into account the Normative Annual Plant Availability Factor ((hereinafter referred to as “**Normative Availability**”) under the CERC Tariff Regulations, 2014. WBERC Regulations, 2011 stipulate that “*the generating stations of a generating company will be presently under*

*availability based tariff*". [Regulation 6.1.1]. Under availability based tariff, the recovery of fixed charges is dependent upon the normative availability specified under the Regulations.

- 4.32 The State Commission has not factored in the more stringent availability norms under the CERC Regulations 2014 for recovery of fixed charges, and has proceeded solely on the basis of norms under the since repealed 2009 Regulations. The State Commission has unjustifiably considered a normative availability of 82% in case of Mejia TPS Unit 1 to 4 and 60% in case of Chandrapura TPS Unit 1 to 3 inspite of the fact that the norm prescribed by the CERC Regulations 2014 in respect of such stations is 85% and 75% respectively. [Regulations 36].
- 4.33 The lack of prudence check is further exemplified by the fact that the impugned order has allowed more than 100% recovery of fixed charges in case of certain generating stations. Specifically, in case of Durgapur TPS Units-III & IV (350 MW), DVC has declared availability of 75.75 % as against the normative availability of 74 %, and has been allowed Rs. 28087.90 lakh as fixed charges for FY 2014-15 as against 2013-14 fixed charges of Rs. 27439.00 lakh

### **EXCESSIVE ALLOWANCE OF ENERGY CHARGES**

4.34 The State Commission, without any discernible prudence check, has allowed energy charges on the basis of estimated figures furnished by DVC for FY 2012-13 whereas DVC, itself, had claimed significantly lower energy charges in its tariff petitions filed before CERC for FY 2014-19.

4.35 Despite noticing the decline in coal prices in para 4.5.6, 4.5.7 & 4.5.8 of the impugned order, the State Commission has inexplicably not passed on the benefit thereof to consumers by reducing the energy charges. The State Commission has also not considered the more stringent normative norms under the 2014 Regulations for recovery of energy charges.

### **NON-TARIFF INCOME**

4.36 Non-tariff income is liable to be reduced from the gross ARR determined by the State Commission [Clause 2.1 of Schedule-5]. Therefore, higher the non-tariff income, lower would be the ARR and consumer tariff.

In para-4.11 of the impugned order, the State Commission has considered non-tariff income projected by DVC without undertaking any independent prudence check. The State Commission has considered meagre non-tariff income in the range of Rs. 12 to 14 crore when the actual non-tariff income

generated by DVC during the last 8 financial years has been in the range of Rs. 135.33 crore to Rs. 465.65 crore.

### **UNDER-ESTIMATION OF GENERATION OUTPUT**

4.37 The State Commission has admitted projected energy generation by DVC, without even examining that such projections did not match with the projected plant availability declared by DVC. After factoring in 'plant availability' declared by DVC and the normative auxiliary consumption under the 2014 Regulations, DVC's generation output would be at least 5119.77 MUs, 2598.93 MUs and 1908.07 MUs higher than its projected generation during FYs 2014-15, 2015-16 and 2016-17 respectively.

4.38 In view of acceptance of low projected generation, the State Commission has allowed power purchase to the tune of 3399.04 MUs, 3581.36 MUs and 3689.99 MUs for FYs 2014-15, 2015-17 & 2016-17. Had DVC's own generation output been considered as per plant availability projected by it, it would have been power surplus in FY 2014-15 and would have required significantly lesser power from other sources in FY 2015-16 & 2016-17.

### **SEPARATE ACCOUNTS**

4.39 DVC is a statutory body with multifarious functions including (i) power generation, transmission and distribution (ii) flood control and (iii)

irrigation. DVC is also engaged in other activities relating to soil conservation, health, afforestation etc.

4.40 Sections 41 and 51 of the Electricity Act, 2003 mandate DVC to maintain separate accounts for each of its business undertakings. However, the State Commission has been determining DVC's tariff without directing it to prepare separate accounts for its distribution activity.

4.41 Given the statutory mandate and the necessity of having segregated accounts for ascertainment of cost of supply in a reasonable manner, it is imperative that DVC should be directed to maintain such accounts, without which its tariff should not be determined in future.

5. **Mr. C.K. Rai, the learned Counsel appearing for the Respondent No.1 , West Bengal Electricity Regulatory Commission has filed the written submissions as under:-**

A. **Tariff Fixation under the Electricity Act, 2003 requires no hearing**

5.1 Under the Electricity Act, 2003 the Commission has different roles in respect of different areas of functions. In respect of some functions, the role of the Commission is of legislative in character and in respect of some other functions the role of the Commission is of quasi judicial character. In different provisions of the Electricity Act, 2003 the Parliament has

specifically included the scope of hearing whereas in respect of some other provisions like Section 64, the scope of hearing of the consumers has been excluded. In view of such contrast, it can be found that in respect of determination of tariff under Section 64(3), no hearing is prescribed to the consumers.

5.2 Under the Electricity Regulatory Commissions Act, 1998 there was no similar provisions like Section 64. In fact, under the 2003 Act, tariff fixation can also be done by bidding process (under Section 63) which requires no hearing. In the similar manner the detailed procedure has been prescribed in Section 64 which does not include a right of hearing to the consumers. This proposition of law i.e. right of hearing is not contemplated in determination of tariff has already been held by The Hon'ble Division Bench of Calcutta High Court comprising of The Hon'ble Mrs. Manjula Chellur, Chief Justice and The Hon'ble Justice Joymalya Bagchi by a judgment and order dated 29.04.2015.

5.3 This judgment of The Hon'ble Division Bench has not been challenged by the appellants. In fact, the appellants herein is the Damodar Valley Power

Consumers Association and The Hon'ble Division Bench of Calcutta High Court passed the said judgment in a matter wherein one of its members was the respondent in the appeal namely Impex Ferro Tech Ltd. Moreover this position of law that hearing is not contemplated in determination of tariff, under Section 64 of the Electricity Act, 2003 was also held by The Hon'ble High Court, Calcutta by earlier two orders one by The Hon'ble Single Judge in W.P. No.16166 (W) of 2004 by order dated 04.10.2004 and another by an order dated 25.02.2005 in MAT 596 of 2005 (Rohit Ferro Tech Ltd. & Ors. –Vs- West Bengal Electricity Regulatory Commission & Ors.).

5.4 The appellants tried to show some similarity between Electricity Regulatory Commissions Act, 1998 and the Electricity Act, 2003 and accordingly tried to make an interpretation that what was the decision of The Hon'ble Supreme Court in (2002) 8 SCC 715 (West Bengal Electricity Regulatory Commission –Vs- CESC Ltd. ) is applicable in the present case . This submission of the appellant is not correct as such hearing was mandated under the 1998 Act in view of a specific rule namely West Bengal Electricity Regulatory Commission (Appointment of Chairperson and Members,

Functions, Budget and Annual Report) Rules, 1999, particularly the Rule 4(1)(c).

**B. Price Fixation is basically a legislative function.**

5.5 In **Shri Sitaram Sugar Company Limited** and Another –Vs- Union of India and Others case, reported in **(1990) 3 SCC 223**, The Hon'ble Supreme Court clearly defined that what is the nature of price fixation. It is submitted that fixation of price like determination of tariff is not a lis between two parties. In other words, this is not a matter which is decided by the regulator and which is applicable only for two parties. It is a determination of tariff which affects all the consumers. In other words, similar to the legislative function and/or character, determination of tariff is having more character of legislative in nature. However, despite the same being legislative in nature, the Electricity Act, 2003 has made little deviation by way of giving some right to the consumers to give objection and suggestions under Section 64. In the present case, such objections and suggestions were allowed on the basis of newspaper publications and all were duly considered. However, there is

no right of hearing for determination of tariff under the Electricity Act, 2003.

5.6 Followings are the citations on this point that price fixation is primarily legislative functions:-

- (i) **(1990) 3 SCC 223 (Shri Sitaram Sugar Company Limited and Another –Vs- Union of India & Ors.)**---Pr. 34, 37, 40, 45.
- (ii) **(1987) 2 SCC 720 (Union of India and Another –Vs- Cynamide India Ltd. and Another )** ----Pr. 7 & 27.
- (iii) **(2016) 11 SCC 1 –(Essar Steel Limited –Vs- Union of India and Others.)**—Pr. 58 & 59.
- (iv) **(2010) 4 SCC 603 –(PTC India Ltd. –Vs- Central Electricity Regulatory Commission) ( Pr. 50, 77 & 78).**

5.7 The appellants heavily relied on PTC India (2010) 4 SCC 603 judgment. The same judgment was relied on by The Hon’ble Division Bench, High Court, Calcutta in West Bengal Electricity Regulatory Commission –Vs.- Impex Ferro Tech. Ltd. & Ors. ) wherein The Hon’ble Division Bench after considering the several judgments including judgment of PTC held :-

*“...We are of the opinion that the scheme of the legislation in the instant case gives rise to an irresistible inference that the objection of consumers and other members of the public before the State Commission under section 64 of the Act are to be made in written form only and no right of oral hearing is reserved in their favour...”*

**C. Jurisdiction of West Bengal Electricity Regulatory Commission in determination of tariff of Damodar Valley Corporation (DVC).**

5.8 In the present case the licensee is Damodar Valley Corporation (DVC) over which the Commission (WBERC) does not have exclusive jurisdiction. DVC is spread over to two States being West Bengal and Jharkhand. It is an admitted fact and law that the generation and transmission tariff of DVC are determined by the Central Electricity Regulatory Commission (CERC) over which WBERC does not have any jurisdiction at all. Once such determination is done on the basis of those being an input cost, WBERC can determine the retail tariff of DVC. In this regard, the fundamental point which was brought out by the appellants was that Commission (WBERC) having taken the input cost of 2013-2014 for the purpose of determination of tariff for the years 2014-15, 2015-16 and 2016-17 illegality was done by the Commission. However, such submissions of the appellants are not legally and factually sustainable in view of the fact that on a similar point a writ petition was filed by the same appellant i.e. Damodar Valley Power Consumer Association before The Hon'ble High Court, Calcutta. In the said writ petition in fact the main contention of the appellants was that without there being any determination of tariff for the years 2014-15, 2015-16 and 2016-17 by the CERC for generation and transmission, the Commission i.e

WBERC has got no jurisdiction to determine tariff. In other words, before The Hon'ble High Court, Calcutta, the same appellants wanted that first determination of tariff by the CERC should be done for the years 2014-15, 2015-16 and 2016-17 and only thereafter Commission can take up the determination of retail tariff for those years. However, such submission of the present appellants (who was the writ petitioner before The Hon'ble High Court, Calcutta) was negated by The Hon'ble High Court, Calcutta and The Hon'ble High Court, Calcutta specifically directed that the tariff which was already determined by the CERC for the years 2009-2014 can be taken as an input cost.

5.9 The above quoted judgment and order dated 03.12.2014 was not challenged by the present appellants. In fact the present appellants was the same writ petitioner and the WBERC was the respondent. Without filing an appeal challenging the aforesaid judgment and order dated 03.12.2014 the present appellants cannot seek this Tribunal to revisit the same issue which was held by The Hon'ble High Court, Calcutta against the appellants. The real point involved here is that whether Commission can at all take the facts and

figures which are there only in the petition filed by the DVC before the CERC or the Commission is bound to take the approved tariff and the figures which were already done by the CERC for the previous years. In view of the specific judgment in this regard by The Hon'ble High Court, Calcutta which has been reproduced above, the Commission **followed the same and taken the input cost from the determined tariff of the previous years.** Moreover, even without the aforesaid judgment the relevant provisions of the West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2011 also mandates that Commission should determine the **tariff of ensuing year on the basis of tariff of the base year.**

- 5.10 Therefore, from the definitions of the ensuing year under the Regulations, it is clearly found that the **tariff for ensuing year should be made following the base year.** The base year is found in regulation (xviii) which means **financial year immediately preceding the first year of the control period.** Therefore, the very definition of the base year along with the ensuing year and regulation 2.5.1 gives a clear statutory mandate that Commission is

required to take the fact and figures from the base year being the year preceding the first control period.

**D. Tariff determination and truing up.**

5.11 The appellants have questioned the determination of tariff dated 25.05.2015 which was for the years 2014-15, 2015-16 and 2016-17 inter alia on the ground that such determination could not have been done without doing APR (i.e. truing up ) of the previous years. It is submitted that the contention of the appellants is that without doing the APR of the previous years the Commission could not have determined the tariff under challenge for the years 2014-15, 2015-16 and 2016-17. It is one thing to submit that if APR is available the same is required to be taken into consideration whereas it is completely a different thing to state that in absence of the APR no further determination of tariff for the subsequent years can be done. In this regard, the regulations 2.5.3 (i) of the West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2011 is reproduced below :-

*2.5.3(i) Any adjustable amount based on the results of the APR or FPPCA of any or number of previous year(s), as available may be adjusted with the ARR of any ensuing year of a control period.”*

5.12 The words ‘as available’ clearly demonstrate that such contention of the appellants is correct only when there is existence of an APR order. In the present case in fact the APR of the previous years were not done for which even an O.P. 03 of 2017 was filed by the DVC before this Tribunal. It is very pertinent to state that in such O.P. 03 of 2017, WBERC elaborately demonstrated the justified reasons of not doing the APR of those years. **In fact, no interim order was passed by this Tribunal in that O.P. 03 of 2017 and the said O.P. 03 of 2017 is pending for adjudication.** The present appellants cannot seek that the subject matter of the O.P.03 of 2017 which is already pending before this Tribunal, be decided in the present appeal. The present appeal is confined to the tariff order dated 25.05.2015 which is for the years 2014-15, 2015-16 and 2016-17.

**E. Excessive Allowance of Fixed Charges**

5.13 The appellants have not taken note of the unique distinguishing feature of DVC in the present case. Unlike other distribution licensees, WBERC does

not have exclusive jurisdiction over DVC. It has to depend on the determination of generation and transmission tariff by the CERC over which WBERC does not have any jurisdiction at all. In fact in view of the judgment and order dated 03.12.2014 (Damodar Valley Power Consumers Association & Another –Vs- West Bengal Electricity Regulatory Commission & Ors.) passed in W.P. 24413 (W) of 2014 the appellants cannot re-agitate the same issue before this Tribunal when The Hon'ble High Court, Calcutta has already decided that the input cost of the determined tariff done by the CERC of the previous years should be taken by the WBERC. The interpretation of “excessive allowance” is a result of complete incorrect interpretation sought to be made by the appellants. The appellants are trying to make a contrast between what was submitted by the DVC before the CERC and the petition filed by the DVC before WBERC. This was made ignoring the basic fact that a petition filed before the CERC cannot be subject matter and/or jurisdictions of the WBERC. Therefore, WBERC cannot take note of those. WBERC can only take note of what has already been determined and such was done.

5.14 The allegation to the effect that the judgment of The Hon'ble High Court, Calcutta was not referred in the impugned order under appeal, is not correct in view of the fact that the judgment of The Hon'ble High Court, Calcutta was the very much referred in the paragraph 1.13 of the impugned tariff order dated 25.05.2015.

**F. Non consideration of availability norms :-**

5.15 While determining the distribution tariff of DVC for the year 2014-15, 2015-16 and 2016-17 the Commission relied on the parameters of CERC's determination of generation and transmission tariff for DVC for the year 2009-14. Accordingly, Commission did not go beyond the parameters which was relied on by the CERC. It is further submitted that what would be input cost was already decided by The Hon'ble High Court at the instance of the writ petitioner/the present appellants. In that circumstances, it is not permissible on the part of the Commission to take some other factors other than what was relied and/or taken by the CERC for the similar period i.e. 2009-14. Further, what would be the normative availability of plant, is an exclusive domain of CERC and on the basis of such exclusive parameters,

CERC ultimately determined the generation & transmission tariff of DVC for the year 2009-14. Therefore, once Commission considers the same as an input for determination of distribution tariff, it is not permissible for the Commission to suddenly take into consideration any other parameters other than what was done and/or followed by CERC for the said years.

- 5.16 It is stated that in petition No.277 of 2010, CERC by its order dated 30.09.2013 inter alia directed DVC to file application for determination of retail tariff before the respective State Commissions for the period 2009-14. This is pertinent to mention that in the said order a chart was referred showing the determination of tariff station-wise and their respective date of order. For an example, determination of tariff of Mejia T.P.S. [Unit I, II & III] was made by order dated 09.07.2013 and for Chandrapura T.P.S. by order dated 07.08.2013.
- 5.17 The specified norms as referred in Regulation 21(1) can be found in Chapter 4 under the heading “Norms of Operation” wherein under clause (d) , a statutory table is found :

5.18 The above statutory norms and/or the orders have not been challenged by the appellant. Accordingly, the appellant is estopped to challenge the same in the present proceedings. It is further submitted that it is not permissible on the part of the appellant to challenge the old orders passed by the CERC dated 09.07.2013 and 07.08.2013 in disguise in the present appeal. Therefore, the points taken by the appellant in this regard is not sustainable either in fact or in law.

5.19 The allegations in respect of alleged inadmissible excessive fixed cost claimed by DVC on account of pension and gratuity contribution are not sustainable in law in view of the fact that those components form part of determination of tariff for transmission & generation being the exclusive domain of CERC. It is not understood why the appellant has questioned the method of determination relatable to generation & transmission tariff (which is to be done by the CERC only) while challenging the retail tariff determination by WBERC. Moreover, the hypothetical amount referred by the appellant being Rs.91128 .30 lakh for 2014-15 does not have any basis at all.

**G. Excessive Allowance of Energy Charges**

5.20 The interpretation which has been made by the appellants is not a correct interpretation of law. The appellants have completely ignored the fundamental fact that the WBERC does not have any jurisdiction to determine the generation and transmission tariff of DVC. Therefore, the Commission cannot look into the petition of DVC filed before CERC. Commission can only take facts and figures which have been already determined by the CERC. This point was also decided by The Hon'ble High Court, Calcutta in the judgment and order dated 03.12.2014.

5.21 While determining the distribution tariff of DVC for the year 2014-15, 2015-16 and 2016-17 the Commission relied on the parameters of CERC's determination of generation and transmission tariff for DVC for the year 2009-14. Accordingly, Commission did not go beyond the parameters which was relied on by the CERC. It is further submitted that there exists cogent reason in this regard in view of the fact that ultimately truing up exercise shall be done wherein such determination could be adjusted on the basis of subsequent generation and transmission tariff order passed by the CERC.

**HI Non-tariff income.**

5.22 The contention of the appellants in this regard is not correct. The tariff is determined based on projections subject to subsequent truing up which is called as APR. This fundamental principle has not been taken note of by the appellants. The Commission has applied due prudence check. All adjustments including the benefit earned from business of power trading, if any, are done at the time of APR.

**J. Under Estimation of Generation Output.**

5.23 The allegation of under estimation is basically based on the incorrect understating by the appellants in respect of role of the WBERC in the retail tariff determination of DVC. The appellants have completely ignored that WBERC does not have any jurisdiction to enter into the domain of generation and transmission tariff of DVC. The jurisdictions of the WBERC is confined to determination of retail tariff. Moreover, like the previous issues, this issue has also been built up on the point of which parameters are applicable. If the input was made on the basis of the previous years

parameters was used which was relevant for the same year. The contention of the appellants to look into the facts and figures of the subsequent years are not sustainable in law.

5.24 The appellants have indirectly questioned the methodology in the similar manner which has been questioned for the previous issues. The chart given by the appellants is based on no detailed calculation and/or basis. For an example, the chart at page 35 contains that for the financial year 2014-15 there has been additional generation of 5119.77 MUs. It is not understood where from such figure could be arrived at.

**K. Separate Accounts**

5.25 CERC while determining generation tariff already took note of different business of DVC and considered the proportionate cost relatable to electricity. Truing up of such generation and inter-state transmission tariff are also done by the CERC. So far as the State Regulatory Commission is concerned, it has not taken into account the independent components behind the generation tariff. In fact, in distribution part, this question hardly arises

since additionally, it only involves Power Purchase Cost, Interest on Security Deposit payable to the consumers in West Bengal, Interest on Working Capital on Power Purchase Cost and statutory fees to be submitted before State Commission.

5.26 In view of the aforesaid submissions on fact and law, the appeal may be dismissed by this Tribunal.

6. **Mr. M.G. Ramachandran, the learned Counsel appearing for the Respondent No.2, Damodar Valley Corporation has filed the written submissions as under:-**

**A. TARIFF DETERMINATION WITHOUT TRUE UP/ANNUAL PERFORMANCE REVIEW**

6.1 The issue raised is that the State Commission has not undertaken the annual performance review of the control period 2009-14 prior to the tariff determination for the period 2014-19. DVC submits that in accordance with the WBERC-Tariff Regulations,2011 DVC has duly filed on 1.12.2015, a petition for Annual Performance Review for 2009-14. Additionally on 23.2.2016, DVC filed a petition for Annual Performance Review for the period 2014-15. These two petitions are presently pending before the State Commission.

- 6.2 DVC has also filed an Original Petition being no. 3 of 2017 before the Tribunal praying for a direction to the State Commission to decide the above two petitions namely Petition for Annual Performance Review for 2009-14 filed on 1.12.2015 and Petition for Annual Performance Review for the period 2014-15 filed on 23.2.2016. This Original Petition being no. 3 of 2017 is pending before the Tribunal.
- 6.3 There has been no delay on the part of DVC in submitting the petitions for the annual performance review for the control period 2009-14 as mentioned above. DVC too is pursuing the remedy of direction of this Tribunal, through Original Petition no. 3 of 2017 under Section 121, to the State Commission for immediate disposal of the above petitions in para 12 above.
- 6.4 The State Commission is required to undertake the necessary true up in time. However, the existing Tariff admissible to DVC could not be affected by any direction to be given to the State Commission.

**B. EXCESSIVE ALLOWANCE OF FIXED CHARGES**

- 6.5 The State Commission has allowed fixed charges in accordance to what has been allowed by the Central Commission-for FY 2013-14 in the previous tariff period i.e.2009-14.

6.6 The State Commission has relied upon Regulation 7 (8) (i) of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 as the tariff for the period 2014-19 was yet to be determined by the Central Commission at the time when the impugned order was passed.

6.7 Regulation 7 of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 reads as under:

*“ 7. Application for determination of tariff:*

.....  
*(8) In case of the existing projects, the generating company or the transmission licensee, as the case may be, may be allowed tariff by the Commission based on the admitted capital cost as on 1.4.2014 and projected additional capital expenditure for the respective years of the tariff period 2014-15 to 2018-19 in accordance with the Regulation 6: Provided that:*

*(i) the generating company or the transmission licensee, as the case may be, shall continue to bill the beneficiaries or the transmission customers / DICs at the tariff approved by the Commission and applicable as on 31.3.2014 for the period starting from 1.4.2014 till approval of tariff by the Commission in accordance with these regulations:*

.....”.

6.8 The contention of the Appellants that the State Commission ought to have given lower fixed charges on account of the claim made by DVC in the petitions before the Central Commission for the period 2014-19 is incorrect. The State Commission has no jurisdiction for determination of generation /

transmission tariff of DVC. The State Commission could not have suo moto assumed fixed costs for the period 2014-19 in the absence of determination of fixed costs by the Central Commission.

- 6.9 In terms of Tariff Regulations, 2014 and Rule 8 of the Electricity Rules, 2005 and Regulation 2.1.6 of WBERC (Terms and Conditions of Tariff) Regulations, 2011, the State Commission has no jurisdiction to re-determine the aspect already determined by Central Commission. Accordingly, the State Commission is required to take the tariff determined by the Central Commission (for FY 2013-14) in regard to generating stations and Transmission system of DVC as well as the generating stations of others from whom the electricity is purchased by DVC and the interstate Transmission system used by DVC for the conveyance of such electricity as the final input cost.
- 6.10 It is not the case of the Appellants that the State Commission has given more than what has been permitted by the Central commission for the period 2013-14. The State Commission in view of Rule 8 has to merely take the tariff determined by Central Commission as it is and that it doesn't have any power to alter or modify any part thereof. As per MYT principle the tariff determined on projection basis will be further firmed up at the time of the

truing up of expenditure as per audited book of accounts and over /under recovery will be adjusted accordingly(**Ref:- National Tariff Policy.**

6.11 The contention of the Appellants that the fixed charge projections of DVC in its retail tariff petition before the State Commission are significantly higher than its projections in the generation tariff petitions before the Central Commission and that DVC ought to have submitted its details in the retail tariff petition as claimed before the Central Commission is without any merit. It is reiterated that in the absence of determined fixed costs for the period 2014-19 by the Central Commission, the State Commission could not have gone beyond what was approved in the previous control period by the Central commission as an input cost.

6.12 The Appellants ought to have approached the Central Commission if it had any issue pertaining to the tariff determined by it (which in turn is the input cost for the State Commission).

6.13 The State Commission had given adequate opportunity to each and every stake holders to put their objections / suggestions during the tariff determination process. In this context para-1.9 of the impugned order of State Commission dated 25.5.2015 reads as under:-

“ 1.9 ----- *The gist was, accordingly, published simultaneously on 23.07.2014 in ‘Ananda Bazar Patrika’, ‘Bartaman’ ‘Times of India’ and ‘Sanmarg’. The gist along with the copy of the tariff petition was*

*also posted in the website of DVC. The published gist invited the attention of all interested parties, stake holders and the members of the public to the petition for determination of tariff of DVC for the fourth control period and requested for submission of objections, comments etc., if any, on the tariff petition to the Commission by 20.08.2014 at the latest. Opportunities were also afforded to all to inspect the tariff application and take copies thereof.”*

- 6.14 The Hon’ble High Court dismissed a writ petition being no. 24413(W) of 2014 filed by the appellants on similar issue i.e. that the State Commission has no jurisdiction to determine the retail tariff or determination of ARR in the absence of the input cost(generation cost of DVC) which is yet to be finalised by the Central Commission for the period from 2014 -15 to 2016-2017 vide order dated 03.12.2014. The above legal position has been clarified in para 1.13 of tariff order dated 25.05.2015 passed by State Commission.
- 6.15 DVC had clarified its position before the State Commission while submitting the MYT petition dated 15.01.2014 on the issue of projected generation tariff of DVC stations for the tariff period 2014-19.
- 6.16 DVC has in a transparent manner placed before the State Commission and the Central Commission all the documents with supporting data to substantiate its claims. These proceedings were public in nature and adequate opportunity had been given to each and every stake holders to put their objections / suggestions during the tariff determination process.

6.17 The State Commission has rightly adopted the fixed cost determined for the FY 2013-14 by the Central commission in the absence of determination of the fixed cost for the FY 2014-19. The State Commission has acted in accordance with the Electricity Act, the Rules and Regulations framed therein as mentioned above.

**Provident fund and gratuity contribution**

6.18 The admissibility of expenditure towards P&G contribution in the tariff was settled by the Tribunal in its order dated 23.11.2007 reported at 2007 ELR (APTEL)1677 and the Central Commission accordingly determined the fixed charge of generating stations of DVC to that effect for the FY 2009-14. The State Commission has, therefore, rightly considered the P & G contribution being the integral part of fixed cost as determined by Central Commission while finalising input cost of the retail tariff for FY 2014-19 taking the fixed cost of FY 2013-14 determined by the Central Commission as input cost. The retail tariff and annual revenue requirements of DVC is subject to truing up process.

**C. NON CONSIDERATION OF AVAILABILITY NORMS**

6.19 The State Commission in the absence of the fixed cost by the Central Commission for the period 2014-19 was required to adopt the tariff including the norms based on which the tariff was determined by Central Commission for different generating stations and T&D system of DVC for the tariff period 2009-14. Thus, it is incorrect on the part of the Appellants to contend that even in the absence of the determined fixed cost for the control period 2014-19, the State Commission ought to have applied the norms of Central Commission's Tariff Regulations, 2014. The Appellant is time and again raising contentions which are completely against Rule 8 of the Electricity Rules, 2005 and Regulation 7 (8) of Central Commission's Tariff Regulations, 2014.

**D. PRUDENCE CHECK BY THE STATE COMMISSION AND EXCESSIVE ALLOWANCE OF ENERGY CHARGES**

6.20 The State Commission has decided the issues raised by the Appellant after detailed prudence check. As per the national tariff policy clause 5.3(h), the MYT petitions can be filed on projected basis subject to true up. In view of the above, there is no merit in the submissions of the Appellants that the State Commission hasn't exercised sufficient prudence check or that subsequent trueing up of tariff is not enough safeguard. It is submitted that

the public notice was issued through paper publication by DVC on 23.07.2014 as per the direction of the State Commission regarding written submission of objections / suggestions by the stake holders. This clearly brings out that more than adequate opportunity was given by the State Commission to the Appellants and others to represent their views. The State Commission has passed the impugned after considering all the relevant materials given by DVC and also after considering various objections raised by the Appellant and other Objectors.

6.21 Hon'ble Calcutta High Court vide its order dated 29.4.2015 also has taken note of the fact that all the interested stake holders and objectors were given an opportunity to present their comments before the State Commission in F.M.A no. 4319 of 2014 filed against the order dated 31.7.2014 passed in R.V.W. 33 of 2014.

6.22 Regulation 7 of the Central Commission's Tariff Regulations 2014, states that till the determination of tariff by the Central Commission for the period 2014-19, the tariff for the period 2009-14 will continue. In view of the above the State Commission has rightly allowed the energy charges as per the earlier orders of the Central Commission. The State Commission has, in fact, no power to revisit the tariff determined by the Central commission in terms of Rule 8 of the electricity Rules, 2005. The State commission has

rightly accepted the cost elements determined by the Central Commission for the previous period in the absence of the tariff as per the Central Commission's Tariff Regulations, 2014. It is wrong on the part of the Appellant to allege that the State Commission has purposely not passed on the benefit of decline in coal prices in FY 2014-19 by reducing the energy charges.

6.23 The decision in Federation of Karnataka Chamber of Commerce and Industry v. KERC (2013) ELR 363, relied on by the Appellant has no relevance in the present case. It is not the case of the Appellant that the Central Commission's orders for fixed cost for FY 2014-19 was available at the time of filing of the petition before the State Commission by DVC and that the State Commission has purposely not taken into account the input cost of FY 2014-19. In view of the above, the contention of the Appellant that the Regulations of the State Commission have been disregarded or that the State commission has not complied with any prudence check is baseless and frivolous.

**E. NON- TARIFF INCOME**

6.24 The State Commission after prudence check has allowed the projected non-tariff income. However, it is subject to truing up based on the figures as per

the audited annual accounts.(**Ref para 4.11 of the impugned order**). The Appellant is making baseless allegation against the conduct of the State Commission without showing any conclusive proof that the State Commission has unduly allowed any part of the non tariff income which isn't admissible to DVC.

**F. UNDER ESTIMATION OF GENERATION OUTPUT**

6.25 The contention of the Appellant that DVC has under estimated its generation during the period of dispute is baseless and without any documentary support. The generation projection was done based on normative parameters / availability & other factors.In any event generation tariff are subject to determination by the Central Commission in a comprehensive manner. DVC has to make adequate arrangement to meet the needs of the consumer in the DVC area. The quantum of power purchases, merit order procurement, the capacity charges payable etc are all well settled principles in Electricity Industry. The Appellant is making reckless allegations without considering such principles.

**G. SEPARATE ACCOUNTS**

6.26 With regard to separation of all the expenditure or cost element considered under tariff applications for distribution function and generation function of DVC it is submitted that DVC is a vertically integrated utility. The physical

assets (besides head office / regional office buildings etc. and similar such facilities which are comparatively negligible and are commonly used for various purposes) are entirely either generation or transmission assets.

6.27 In the order dated 03.10.2006 passed by the Central Commission and order dated 23.11.2007 passed by the Appellate Tribunal, these aspects have been duly considered. It was held in these orders that there are no identifiable distribution assets as all are part of integrated transmission assets. Similarly, there are no separate assets (other than the common assets) identifiable to the supply activities.

6.28 There are no physical asset and corresponding value which could be considered separately for distribution / retail supply activities. The physical assets and their value has been taken into account by the Central Commission while deciding the input cost. In this regard reference is craved to para 25, 49 & 96 the order of Central Commission dated 27.9.2013 determining the tariff for the period 2009-14.

6.29 In view of the above submissions there is no merit in the submissions of the Appellant and the appeal is liable to be dismissed with cost on the Appellants’.

**7. We have heard learned Counsel appearing for the Appellants and the learned Counsel appearing for the Respondents at consideration length of time and we have gone through the written submissions carefully and**

**evaluated the entire relevant material available on record. The following main issues emerge out of Appeal for our consideration:**

**Issue No.1:** Whether the impugned order has been passed by the State Commission in violation of the principle of natural justice and / or is opposed to the statutory mandate enshrined under Section 86 (3) of the Electricity Act.

**Issue No.2:** Whether the State Commission is justified in adopting the fixed charges approved by CERC for FY 2013-14 for the control period FY 2014-17.

**Issue No.3:** Whether the State Commission has exercised requisite prudence check in determining retail tariff which has resulted into excessive allowance of fixed charges / energy charges, non-consideration of availability norms / non-tariff income, under estimation of generation output etc..

**Issue No.4:** Whether DVC, being a statutory body with multifarious functions, should be directed to maintain separate accounts for its distribution activity.

**Our findings & analysis:**

**7.1 Issue No.1:-**

The learned counsel for the Appellant submitted that for MYT period 01.04.2009 to 31.03.2014, CERC had issued final tariff orders in respect of the various generation and transmission assets of DVC and subsequently, the State Commission took up the exercise for determination of retail tariff . In the proceedings before State Commission, while the second Appellant filed objections in response to DVC's tariff petitions but no opportunity of being heard was given by the State Commission either to the Appellant or any other stake holder / objector. The first Appellant filed a writ petition before the Hon'ble Calcutta High Court seeking *mandamus* for declaring the admission of the subject tariff petition has been in violation of the Electricity Act. The Hon'ble High Court vide order dated 02.12.2014 dismissed the said writ petition.

7.2 The learned counsel further contended that the grant of an opportunity of being heard is not being given by the State Commission with a primary contention of the tariff determination being a legislative exercise and this does not require the grant of hearing to the stake holders. The learned counsel was quick to point out that this attitude of the Commission is

contrary to the ratio of the Constitution Bench judgment in “PTC India Ltd. Vs. CERC (2010) 4 SCC 603. In addition to the above, he also highlighted Section 64(3) of the Electricity Act, 2003 quoting which the State Commission has tried to derive the mandate of not granting hearing in case of the tariff, except in case of its rejection. He vehemently submitted that the said contention of the State Commission is contrary to the interpretations of this section adopted by this Tribunal as well as the settled position of law with respect to the requirement of granting hearing.

7.3 *Per contra*, learned counsel for the State Commission contended that under the Act, the Commission has different roles in respect of different areas of functions among which, some are legislative in character and others being quasi-judicial character. Accordingly, in different provisions of the Act, the Parliament has specifically included the scope of hearing whereas in some other provisions the scope of hearing has been excluded. He, further submitted that, in respect of determination of tariff, no hearing is prescribed to the consumers. He was quick to indicate that this proposition of law has already been held by the Hon’ble Division Bench of the Calcutta High Court by the judgment and order dated 29.04.2015. In fact, the Appellants herein were the petitioners in the said petition before Hon’ble Calcutta High Court and have not challenged the said judgment and as such it has attained

finality. The learned counsel vehemently submitted that the price fixation is basically a legislative function. The tariff determination is not a matter which is decided by the Commission is applicable only for two parties but it affects all the consumers. Thus, determination of tariff is having no character of legislative in nature. The Act has, however, provided some right to the consumers to give objections and suggestions under Section 64. He further submitted that, in the present case, such objections and suggestions were allowed on the basis of newspaper publications and all were duly considered. He further submitted that tariff/price fixation is primarily a legislative function as held by various Authorities and cited the following judgments/orders:-

- i) **(1990) 3 SCC 223 (Shri Sitaram Sugar Company Limited and Another –Vs- Union of India & Ors.)---**Pr. 34, 37, 40, 45.
- (ii) **(1987) 2 SCC 720 (Union of India and Another –Vs- Cynamide India Ltd. and Another ) ----**Pr. 7 & 27.
- (iii) **(2016) 11 SCC 1 –(Essar Steel Limited –Vs- Union of India and Others.)—**Pr. 58 & 59.
- (iv) **(2010) 4 SCC 603 –(PTC India Ltd. –Vs- Central Electricity Regulatory Commission) ( Pr. 50, 77 & 78).**

### **Our findings & analysis:-**

7.4 We have analysed the contentions of the learned counsel for the Appellants and the Respondent Commission and also took note of findings and various

judgments of the Apex Court as well as this Tribunal. The main contention of the Appellants is that the State Commission is deciding the tariff matters without hearing the stakeholders/objectors. On the other hand, the State Commission contends to have followed the provisions of the Act in letter & spirit and adopted transparent process of tariff fixation by inviting objections and suggestions from the stakeholders on the basis of newspaper publications. The objections / suggestions received in response of such publications are analysed and considered appropriately in the tariff orders. Further, there is no right of hearing for determination of tariff under the Electricity Act, 2003. After perusal of the various provisions of the Act, Regulations of the State Commission and decisions of various judgments, we are of the considered view that the State Commission has in no way violated the provisions of the Act in determination of tariff as far as principles of natural justice is concerned.

**8. Issue No.2:-**

8.1 The learned counsel for the Appellant contended that as per the State Commission Regulations' 2011, APR/True-up of the past period needs to be accomplished before undertaking the tariff determination for the subsequent period. In contrast, the State Commission has completely disregarded such scheme envisaged under the Regulations. The counsel further pointed out

that the State Commission has committed a judicial error by undertaking tariff determination of FY 2014-17 without first undertaking APR/True-up for the previous control period FY 2009-14. He further submitted that, as per well-settled principle, the State Commission is bound by its own regulations as held by this Tribunal in *Maruti Suzuki vs. HERC 2013 ELR, APTEL(1)*. The learned counsel further contended that when a law provides for a thing to be done in a particular manner, it must be done in that manner alone, as held in the judgment of Hon'ble Supreme Court in *GUVNL Vs. Essar Power (2008) 4 SCC 755*. He pointed out that the State Commission's omissions to undertake APR/True-up is also against the direction of this Tribunal issued under Section 121 of the Act, 2011 ELR (APTEL) 1742. The learned counsel submitted that the mechanical adoption of FY 2013-14 fixed charges shows that the State Commission has not examined DVC's "*expected behaviour of the various operational and financial variables*" as envisaged under its Regulation 2.5.1 (ii).

- 8.2 The learned counsel pointed out that adoption of FY 2013-14 fixed charges has resulted in allowance of sinking fund contribution from the fixed charges for FY 2014-17 even though DVC has not claimed such contribution in the generation tariff petitions for FY 2014-19 for old plants.

8.2 *Per contra*, the learned counsel for the State Commission has justified the adoption of 2013-14 fixed charges by citing the judgment dated 03.12.2014 passed by Hon'ble Calcutta High Court wherein it was specifically directed that the tariff which was already determined by the CERC for the years 2009-14 can be taken as input cost for determination of retail tariff. Besides the adoption of 2013-14 fixed charges was subject to a future true-up. Regarding the contentions of the Appellants that without doing the APR of the previous year, the Commission could not have determined the tariff for the years 2014-17, the learned counsel referred to the Commission's Regulation 2.5.3(i) which provides that any adjustable amounts based on the results of the ARR of any or number of previous years as available may be adjusted with the APR of any ensuing year of a control period. In the present case, in fact, the APR of the previous years were not done for which even an O.P.No.3 of 2017 was filed by DVC before this Tribunal which is pending adjudication.

8.4 The learned counsel for the DVC submitted that petitions for APR for 2009-14 as well as for 2014-15 have already been filed by them before the State Commission and are yet to be disposed of. He further submitted that DVC is also pursuing the remedy of direction of this Tribunal through O.P.No.3 of

2017 under Section 121 to the State Commission for early disposal of the above petitions.

**Our findings & analysis:-**

8.5 After thorough critical evaluation of the submissions of the learned counsel for the Appellants as well as Respondent and perusal the relevant Regulations of the State Commission and also decision of this Tribunal in a number of cases. Ideally, the true up of past period should be completed before undertaking tariff determination for a subsequent period, however, due to one or the other reason, the same has not happened in actual. Pending such true up does not prohibit to take up the Commission activities relating to tariff determination for the future period which is essential for charging the tariff from the various categories of consumers by the distribution licensee. DVC, being a unique organization for which generation and transmission tariff is fixed by the Central Commission based on which the retail tariff is decided by the State Commissions of West Bengal and Jharkhand. As the generation and transmission tariff fixation by CERC, takes some time and pending the finalization of such tariff, DVC adopts the finalized tariff of the previous year in processing its determination of retail tariff. It is relevant to note that while undertaking the tariff determination for the period 2014-17, only finalized figures of fixed charges of 2013-14

were available with the State Commission based on which it has computed the retail tariff for the reference control period. The matter for adopting the approved figure of 2013-14 came up for adjudication before the Hon'ble High Court, Calcutta which held that pending finalization of tariff of future period by CERC, there is nothing wrong in adopting the finalized figure of previous year for computations to be carried out by the State Commission for ensuing years. Moreover, the adoption of such fixed charges pertaining to previous year is subject to future true up. In view of these facts, we do not find any legal infirmity or illegality in the impugned order passed by the State Commission.

**Issue No.3:-**

9. The learned counsel for the Appellant submitted that instead of examining expected behavior of various operational and financial variables of DVC, as envisaged under the Regulations, the State Commission has deemed fit to only consider and assume fixed charges and energy charges determined by CERC for FY 2013-14 for the subject control period as well.

The itemwise deliberations are as under:-

**a) Excessive allowance of fixed charges and energy charges**

The learned counsel at the Appellant contended that due to lack of prudence check on the part of State Commission, DVC has made unreasonably high fixed charges in its tariff petitions in a manner de hors the requirement of regulation 2.5.1(ii). He further contended that DVC has filed its generation tariff petition more than 8 months before the passing of impugned order. Thus, DVC ought to have submitted to the State Commission the details of fixed charges being claimed by it before CERC. Such information could also have been sought by the State Commission in discharge of its mandate to undertake requisite prudence checks. The counsel highlighted that due to failure of the State Commission to apply requisite prudence check, DVC has been allowed excessive fixed charges to the tune of Rs.8556 crores. Therefore, he submitted that order impugned passed by the first Respondent, the State Commission may kindly be set aside.

9.1 *Per contra*, the learned counsel for the State Commission submitted that from the definitions of the ensuing year under the Regulations, it is clearly stipulated that the **tariff for ensuing year should be made following the base year**. **The base year is found in regulation (xviii) which means**

**financial year immediately preceding the first year of the control period.**

Therefore, the very definition of the base year along with the ensuing year and regulation 2.5.1 gives a clear statutory mandate that Commission is required to take the fact and figures from the base year being the year preceding the first year of the control period.

9.2 The learned counsel further submitted that, as such, the assessment of higher allowance is a result of incorrect interpretation sought to be made by the Appellants. He further contended that the Appellants are completely in ignorance of the basic fact that petitions filed before CERC cannot be subject matter and / or jurisdiction of the State Commission and, therefore, the State Commission cannot take note of those.

9.3 The learned counsel for DVC submitted that the contention of the Appellants regarding allowance of lower fixed charges on account of the claim made by DVC in its petition before CERC for the period 2014-19 is without rationale as the State Commission has no jurisdiction for determination of generation and transmission tariff of DVC. The assumptions of the Appellants that the State Commission has given much more than what has been permitted by

CERC for the period 2013-14 is beyond comprehension. He further submitted that as per MYT principle, the tariff determined on projection basis will be trued up as per audited accounts and any over / under recovery will be adjusted, accordingly, in line with provisions of the National Tariff Policy. The learned counsel further brought out that the Appellants ought to have approached the Central Commission if they had any issue pertaining to tariff determination by it.

9.4 After due consideration of the submissions and contentions of the Appellants as well as Respondents, we observe no ambiguity in the analysis and findings of the State Commission as far as allowance of fixed charges is concerned.

**b) Availability Norms:-**

9.5 The learned counsel for the Appellant alleged that the State Commission has not even undertaken the minimal prudence check while taking into account the normative availability under CERC Tariff Regulations, 2015. He further submitted that the State Commission has not factored in more stringent availability norms for recovery of fixed charges and has proceeded

merely on the basis of norms considered by the CERC under repealed 2009 Regulations. The counsel further pointed out that the lack of prudence check could be noted from the fact that the impugned order has allowed more than 100% recovery of fixed charges in case of certain generating stations namely Durgapur TPS.

9.6 *Per contra*, learned counsel for the State Commission contended that the State Commission while determining the distribution tariff of DVC for the period 2014-17 has relied on the normative parameters of CERC in determination of generation and transmission tariff in the year 2009-14. He further submitted that what would be the normative availability of plants is an exclusive domain of CERC and the State Commission only adopts such norms determined by CERC as an input for determination of distribution tariff. The specified norms as referred in Regulation 21(1) under the heading 'norms' of operation have not been challenged by the Appellants and accordingly, they are estopped to challenge the same in the present proceedings.

9.7 The learned counsel for the DVC contended that it is incorrect on the part of the Appellants to contend that even in the absence of the determination of the fixed cost for the control period 2014-19, the State Commission ought to

have applied the norms of Central Commission's Tariff Regulations, 2014. Such contentions of the Appellants are completely against Rule 8 of the Electricity Rule, 2005 and Regulation 7(8) of Central Commission Tariff Regulation, 2014.

9.7 After due evaluation of the contentions of both the parties, we opine that as provided under the Electricity Rules, 2005 as well as CERC Tariff Regulations, 2014, the State Commission is bound to adopt the generation and transmission tariff of DVC decided by the Central Commission including the normative parameters considered therein. Thus, we do not find any infirmity in the findings of the State Commission on this issue.

**c) Non-Tariff Income:-**

9.8 The learned counsel for the Appellant has alleged that the State Commission has considered non-tariff income projected by DVC without undertaking any prudence check and as a result, the non-tariff income has been admitted to be a meager amount as compared to the non-tariff income generated by DVC during the last 8 Financial Years. Due to non-consideration of higher non-tariff income, the ARR has not been reduced which has bearing on consumer tariff.

9.9 *Per contra*, learned counsel for the State Commission pointed out that as the tariff is determined based on the projections subject to subsequent truing up, the contentions of the Appellants in this regard is not correct. All adjustments including the benefit earned from business of power trading, if any are done at the time of APR.

9.10 The learned counsel for the Respondent No.2 / DVC submitted that the Appellant is making baseless allegation against conduct of the State Commission without showing any conclusive proof of its contentions that it has unduly allowed any part of non-tariff income which is not admissible to DVC. Moreover, all the projected figures are subject to truing up based on audited accounts.

9.11 While noting and analysing the contentions of both the parties, we are of the considered view that based on the material available before the State Commission, it has allowed the non-tariff income only after the requisite prudence check. As such, no interference of this Tribunal is called for on this issue.

d) **Under-Estimation of Generation Output**

9.12 The learned counsel for the Appellant submitted that the State Commission has considered projected energy generation output by DVC without even

examining that such projections did not match with the plant availability declared by DVC. He further contended that such consideration of plant availability and normative auxiliary consumptions declared by DVC under the 2014 Regulations, the generation output from the DVC plants could have been much higher and in turn, the power purchase from external sources could have been lower considerably. This exercise requiring adequate prudence check by the State Commission, might have reduced the ultimate burden on the consumers.

9.13 *Per contra*, learned counsel for the State Commission contended that the allegation of under estimation of generation output is basically based on the incorrect understanding by the Appellants in respect of role of the State Commission in the retail tariff determination of DVC. He pointed out that the Appellants have completely ignored the fact that the State Commission does not have any jurisdiction to enter into the domain of generation and transmission tariff of DVC. He vehemently submitted that the jurisdiction of the State Commission is confined to determination of only retail tariff. Further, the additional generation projected by the Appellants is not supported by detailed calculations and basis thereof.

9.14 The learned counsel for Respondent NO.2 (DVC) submitted that the generation projection by DVC was done based on the normative parameters / availability and other factors decided by the Central Commission. He further contended that DVC has to make adequate arrangement to meet the power requirement of the consumers in its area and the quantum of power purchase, merit order procurement, capacity charges payable etc. are all well settled principles in Electricity Industry. The Appellant is making reckless allegations without considering such principles.

**Our findings & analysis:-**

9.15 While considering rival contentions of the Appellants & Respondents, we opine that the generation projections from the DVC plants are decided by the Central Commission in due consideration of normative parameters. The State Commission has statutorily adopted these figures in determination of retail tariff and quantum of power purchase from the alternate sources so as to meet to power requirement of consumers in DVC area. We, accordingly hold that the State Commission has decided this issue as per its Regulations and settled principles without any perversity.

10. **Issue No.4:-**

**Separate Accounts**

10.1 Learned counsel for the Appellant contended that DVC, being a statutory body with multifarious functions including (i) power generation, transmission and distribution (ii) flood control and (iii) irrigation & others should maintain separate accounts for each of its business undertakings for proper assessment of cost of power supply in a reasonable manner. He further highlighted that Sections 41 and 51 of the Electricity Act, 2003 mandate DVC to maintain separate accounts for each of its business undertakings but the State Commission has been determining its tariff without directing DVC to maintain separate accounts for distribution activity.

10.2 *Per contra*, learned counsel for the State Commission indicated that while determining generation tariff, the Central Commission takes note of different activities of DVC and considers the proportionate cost relating to the electricity. Further, truing up of such generation & transmission tariff is also done by the Central Commission. As far as the State Regulatory Commission is concerned, it has not taken into account the independent

components besides the generation tariff. He further submitted that in fact, in distribution part, this question hardly arises since additionally, it only involves Power Purchase Cost, Interest on Security Deposit payable to the consumers, Interest on Working Capital and statutory fees etc.

- 10.3 The learned counsel for Respondent No.2 (DVC) contended that DVC is a vertically integrated utility and all the physical assets are entirely either generation or transmission assets. To advance his arguments he cited the order dated 03.10.2006 of the Central Commission and the judgment dated 23.11.2007 passed by this Tribunal wherein these aspects have been duly considered and it has been held that there are no identifiable distribution assets other than the common assets.

**Our findings & analysis:-**

- 10.4 After due critical evaluation of the submissions of the learned counsel appearing for both the parties, we are of the considered view that as far as determination of retail tariff is concerned, there is no distinctive distribution assets with DVC as also held by the cited order of the Central Commission and judgment of this Tribunal. By and large, all the physical assets of DVC are entirely either generation or transmission asset which are taken into account by the Central Commission while deciding the input

cost for determination of retail tariff. Hence, we do not observe any ambiguity in the order of the State Commission relating to the retail tariff.

**Summary of our findings:-**

11. In view of the foregoing deliberations and analysis thereon, we are of the considered view that the State Commission has followed well settled law laid down by various judgments of this Tribunal as well as the Calcutta High Court relating to the issues raised by the Appellants in the present Appeal. Accordingly, we do not find any legal infirmity nor irregularity in the impugned order passed by the first Respondent. Further, the first Respondent State Commission, by assigning valid and cogent reasons and applying judicious approach has passed the order. Hence, the issues raised in the present Appeal does not have any substance nor merits and consequentially, the Appeal is liable for dismissal.

**ORDER**

For the forgoing reasons, as stated above, we are of the considered view that the issues raised in the present appeal being Appeal No.206 of 2015 are devoid of merits.

Hence the Appeal filed by the Appellants is dismissed.

The impugned order passed by West Bengal Electricity Regulatory Commission dated 25.05.2015 is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this 29<sup>th</sup> day of October, 2018.

**(S.D. Dubey)**  
**Technical Member**

**(Justice N.K. Patil)**  
**Judicial Member**

**REPORTABLE / ~~NON-REPORTABLE~~**

Pr