

**In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)**

Appeal no. 284 of 2013

Dated: 20th November, 2015

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of

**Raj West Power Limited
Office No. 2 & 3, 7th Floor
Man Upasana Plaza
C-44, Sardar Patel Marg, C-Scheme
Jaipur – 302 001**

... Appellant (s)

Versus

- 1. Rajasthan Electricity Regulatory
Commission
Vidyut Viniyamak Bhawan
New State Motor Garage
Sahakar Marg, Jaipur – 302 005** **...Respondent No. 1**
- 2. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Janpath,
Jaipur – 302 005** **...Respondent No. 2**
- 3. Ajmer Vidyut Vitran Nigam Limited
Old Power House, Hathi Bhata
Ajmer – 305 001, Rajasthan** **...Respondent No. 3**
- 4. Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Estate
Jodhpur – 342 003, Rajasthan** **...Respondent No. 4**

5. **Principal Secretary (Energy)
Government of Rajasthan
Secretariat, Jaipur – 302 005
Rajasthan** ...Respondent No. 5
6. **Rajasthan State Mines and Minerals
Limited
4, Meera Marg, Udaipur – 303 001
Rajasthan** ...Respondent No. 6
7. **Rajasthan Rajya Vidyut Utpadan Nigam
Jyoti Nagar, Vidyut Bhawan
Jaipur – 302 005
Rajasthan** ...Respondent No. 7
8. **Barmer Lignite Mining Company Limited
Office No. 2 & 3, 7th Floor
Man Upasana Plaza
C-44, Sardar Patel Marg, C-Scheme
Jaipur – 302 001** ...Respondent No. 8

Counsel for the Appellant(s):

**Mr. M.G. Ramachandran
Ms. Poorva Saigal
Ms. Ranjitha Ramachandran
Ms. Swagatika Sahoo
Ms. Anushree Bardan
Mr. Shubham Arya
Mr. Avinash Menon**

Counsel for the Respondent(s):

**Mr. R.K. Mehta
Mr. Abhishek Upadhyay ,
Ms. Himanshi Andley,
Mr. Elangbam P.S. and
Ms. Ishita C. Dasgupta for R-1

Mr. P.N. Bhandari for R-2, 3 & 4**

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

The present Appeal is filed under Section 111 of the Electricity Act, 2003 by M/s Raj West Power Limited, a company incorporated under the Companies Act, 1956 and having their power project of 1080 MW (135 MW x 8 units) situated at Village Bhadresh in the Barmer District in Rajasthan.

2. The Appeal is against the impugned order dated 30.08.2013 passed by the Rajasthan Electricity Regulatory Commission, the Respondent no.1 (**“State Commission”**) in Petition no. 311 and 340 of 2012 filed by M/s. Raj West Power Limited for approval of provisional tariff for Units 1 to 8 of 135 MW each of its power project for the FY 2012-13.
3. Facts of the Appeal.
 - a) The Appellant has established and commissioned a lignite based generating station with the aggregate capacity of 1080 MW (8 units

of 135 MW each) at District Barmer, Rajasthan. All the 8 units are 135 MW each and are under commercial operation.

- b) The Kapurdi and Jalipa lignite mines at Barmer were identified for supply of lignite for generation of power at its generating station.
- c) M/s. Barmer Lignite Mining Company Ltd. is the Respondent no.8 and is a joint venture company of M/s. Rajasthan State Mines and Minerals Limited (Respondent no.6) and the Appellant established for the purpose of development, mining and making available lignite to the generating station of the Appellant from Kapurdi and Jalipa mines in the State of Rajasthan. Respondent no.2 to 4 are the State Discoms of the Rajasthan (**“Distribution Licensees”**) and the power generated by the Appellant is being supplied to these Distribution Licensees under Power Purchase Agreement (**“PPA”**).

Rajasthan Rajya Vidyut Utpadan Nigam (**“Respondent no.7”**) is the generating company of the State of Rajasthan.

- d) Respondent no.5 is the Government of Rajasthan which has executed an Implementation Agreement dated 29.05.2006 with the Appellant for establishment, development and operation of the

project consisting of the generating station with lignite as fuel from the Kapurdi and Jalipa mines.

- e) Thereafter, The Appellant sought before the State Commission for inprinciple determination of the capital cost of the generating station and transfer price of lignite from the Kapurdi and Jalipa mines through their Petition no. 110 of 2006 on 28.07.2006 under Section 62 of the Electricity Act, 2003.
- f) The State Commission vide its order i.e. 19.10.2006 accorded inprinciple approval for the capital cost and thereafter, a Power Purchase Agreement (“**PPA**”) dated 26.10.2006 was executed between the Appellant and Distribution Licensees for the generation and supply of Electricity from the generating station of the Appellant as per the by State Commission’s order dated 19.10.2006, as amended on 26.10.2006 indicating therein the in-principle capital cost of the generating station with a capacity of 1000 MW to the tune of Rs. 4804.49 crores based on the then existing prices.
- g) M/s. Barmer Lignite Mining Company Limited (Respondent no.8) was incorporated on 27.12.2006 between the Appellant and M/s.

Rajasthan State Mines and Minerals Limited (Respondent no.6) in regard to the management and conduct of the operation of Barmer Lignite Mining Company Limited with 51% shares being owned by M/s. Rajasthan State Mines and Minerals Limited and the remaining shares 49% being owned by the Appellant and this was in accordance with the Implementation Agreement dated 29.05.2006.

- h) The State Commission notified the Rajasthan Electricity Regulatory Commission (Terms and Conditions for determination of tariff) Regulations, 2009 (**“Tariff Regulations”**) on 23.01.2009. The Tariff Regulations interalia provided for the norms and parameters to be applicable for generation of electricity by generating companies.
- i) The Appellant filed Petition Nos. 311 of 2012 on 22.02.2012 and 340 of 2012 on 24.08.2012 under Section 62 of the Electricity Act, 2003 before the State Commission for determination of provisional tariffs of Units 1 to 4 of 135 MW each out of 1080 MW lignite based thermal power plant based on lignite from Kapurdi mine for FY 2012-13 and for determination of provisional tariff for units 5 to 8 of 135 MW each out of the same 1080 MW lignite based thermal

power plant. The Respondent no.8 filed petition nos. 312 and 341 of 2012 under Section 62 of the Electricity Act, 2009 before the State Commission for assessment of provisional transfer price lignite from Kapurdi mine for supply of lignite to Unit 1 to 4 of the generating station of the Appellant for FY 2012-13 and for assessment of provisional transfer price of lignite from Kapurdi mine for supply of lignite to Unit 5 to 6 of the same generating station of the Appellant for the same FY 2012-13.

- j) By impugned order dated 30.08.2013, the State Commission decided the above mentioned petitions namely the Petition no. 311 and 340 of 2012 filed on 22.02.2012 and 24.08.2012 respectively. By this order the State Commission determined the provisional tariff for Unit 1 to 8 for the FY 2012-13 and also directed the Appellant to file a separate petition for determination of final cost and tariff for FY 2012-13.
- k) The relevant extracts of the said impugned order passed by the State Commission relevant for the present Appeal read as under:-

“Land Cost for Power Plant

4.7 The Commission while approving the in-principle Capital Cost had considered the total land area of 1066.50 acre for the entire

project. MoEF clearance stipulates the total land for the entire project as 1156.03 acres. RWPL has acquired the land area for the entire project as 1231.30 acre (including power plant area of 1190.90 acre). The sole reason submitted by RWPL for acquiring the additional land is on account of the compulsion of Khasra holdings and undulation in the land. Further, RWPL had not taken any subsequent approval from any governing authority for increase in total land. Considering the above aspects, the Commission has allowed the land area for the power plant as approved in-principle Capital Cost approval order i.e. 1000 acres as against the actual land area of 1190.90 acre submitted by RWPL, thus resulting in land cost for the power plant as Rs. 7.54 crores.

Land Cost for Pumping Station

4.8 As regard the land for Pumping Station, the Commission in the in-principle Capital Cost approval has allowed 4 acre area. RWPL has acquired the land area for the pumping station as 13.80 acre. As discussed above the Commission has allowed the land area for the pumping station as approved in the in-principle Capital Cost approval order i.e. 4 acres amounting to Rs. 0.02 crore.

.....

“Land Cost for BSD Weigh Bridge

4.13 RWPL has also included a cost of Rs. 0.40 crores for BSD Weigh Bridge. It has been observed that the Commission in its order had not approved any extra land area for such purpose. Further, in absence of any justification for the above cost the Commission has not allowed the land cost for the BSD Weigh Bridge separately.”

.....

“4.15 Based on the above, the summary of the Land Cost as provisionally allowed by the Commission is as shown in the Table below:

Table 15: Summary of the Land Cost as provisionally allowed by the Commission

Particular	Actual Area (Acre)	"In-Principle" Approved Area (Acre)	Area as per MOEF Clearance* (Acre)	Area Considered by Commission	Actual Rate (Rs./Acre)	Rate approved in "In-principle" order (Rs./Acre)	RWPL (Rs. crore)	Provisionally Allowed in this order (Rs. crore)
Power Plant	1190.90	1000.00	1116.53	1000.00	75,389	20,000	8.978	7.54
R&R Colony							5.850	5.85
Colony	26.00	62.50	26.00	26.00	2134822	75000	5.551	5.55
BSD Weigh bridge	0.60		0.56	0.00	698359		0.042	0.00
Pumping Station	13.80	4.00	12.94	4.00	50,674	2,000	0.070	0.02
Sub Total	1231.30		1156.03	1030.00			20.490	18.96
Additional Land for PMGSY	4.84		4.84	4.84	1848097		0.895	0.895
Total	1236.14		1160.87	1034.84			21.39	9.855
Less: Expected cost to be incurred after 30.09.2012								1.00
Net Total	1236.14		1160.87	1034.84			21.39	18.85

* Apportioned to various heads and considering extra land area for PMGSY road”

.....”

“k) Erection, Testing and Commissioning:”

.....

“4.164 Further, the Commission has observed that RWPL has considered the cost of Rs. 42.00 crore as start-up expenses under the head of Erection, Testing and Commissioning. RWPL in its submissions dated 08.03.2012 has submitted that such expenses has been considered as pre-operative expenses in its accounts of RWPL. In view of the same, the Commission has also considered the start-up expenses as a part of Pre-operative expenses and has excluded this amount from E.T.C. head.

4.165 Thus, the Commission in view of the above has provisionally considered the cost of Rs.212.41 crore for Erection, Testing and Commissioning as against Rs.272 crore (excluding Rs.42 crore of Start-up expenses) submitted by RWPL. The summary of the provisional cost as considered by the Commission for Erection, Testing and Commissioning is as shown in the Table below:

Table 44: Summary of Erection, Testing and Commissioning as provisionally allowed by the Commission (Rs. crore)

Particulars	In-principle approved cost (1000 MW)	RWPL Claim	Provisionally allowed by the Commission
Erection Testing & Commissioning		314.00	314.00
Less: Start up Expenses		-42.00	-42.00
Less: PMC allocation			-33.19
Less: 20% of Misc. Supplies & Services and Steel & Cement			-0.40
Less: Expected cost to be incurred after 30.09.2012			-26.00
Total	234.88	272.00	212.41

”

.....
 “I) Overheads including Project Management Cost.”

“4.188 As has come out, the claim of RWPL of Rs. 661.96 Cr. under overheads is excessive, and the amount of Rs. 500 Cr. paid to JSWE along-with Rs. 58.42 Cr. taxes and duties included in this as PMC has no valid justification. The petitioner has not acted in conformity with the direction of the Commission in 2006 order to adopt competitive bidding. When a payment relates to ‘holding company’ by its subsidiary, conflict of interest is inherent in a situation where the entire payment is sought to be passed on to power procurer. As against total cost of Rs. 500 Cr. given to JSW Energy Ltd., the sub contracts furnished by JSWE amount to around Rs. 65.00 Cr., as mentioned earlier. Considering the position discussed above, Commission finds the claim of Rs. 500 Cr. as PMC

cost and taxes and duties of Rs. 58.42 Cr. thereon, as totally unacceptable.

4.190 The Commission is of the considered view that an amount equal to 5% of the hard cost would be a fair and reasonable amount to be allowed for overheads considering the facts and circumstances of the project as against the 3.88% arrived at for 2006 order. Accordingly, an amount of Rs. 228.84 crore on overhead have been allowed as against claimed amount of Rs. 661.96 crores.

.....
6. Analysis of Interest During Construction (IDC) and Finance Charges (FC):

a) Interest During Construction (IDC):

6.29 RWPL cannot take the stand that they are under 'no obligation' to take measures to contain increase in cost of power even if using lignite for Units # 5 to 8 from Kapurdi mines emerged as a feasible measure.

6.30 Considering the typical situation and inordinate delay as has occurred in respect of Jalipa mine and keeping in view the fact that Units 5–8 were idling after having been synchronised, the prudent course of action would obviously have been to revise mining plan of Kapurdi mines and ramp up lignite extraction from that so as to procure lignite for these units and thereby enhance power availability on the one hand and reduce IDC of the idling units on the other, more so as the mineable reserve of Kapurdi mines is 129.79 Million Metric Ton which is adequate to accommodate the additional requirement of lignite of units 5 to 8 for many years.

6.33 As regard the delay in execution of the project, a relevant extract from the Hon'ble APTEL's Judgment in Appeal No. 72 of 2010 dated 27.04.2011 has been reproduced below,

“7.4. The delay in execution of a generating project could occur due to following reasons:

- i) due to factors entirely attributable to the generating company, e.g., imprudence in selecting the contractors/suppliers and in executing contractual agreements including terms and conditions of the contracts, delay in award of contracts, delay in providing inputs like making land available to the contractors, delay in payments to contractors/suppliers as per the terms of contract, mismanagement of finances, slackness in project management like improper co-ordination between the various contractors, etc.*
- ii) due to factors beyond the control of the generating company e.g. delay caused due to force majeure like natural calamity or any other reasons which clearly establish, beyond any doubt, that there has been no imprudence on the part of the generating company in executing the project.*
- iii) situation not covered by (i) & (ii) above*

In our opinion in the first case the entire cost due to time over run has to be borne by the generating company. However, the Liquidated Damages (LDs) and insurance proceeds on account of delay, if any, received by the generating company could be retained by the generating company. In the second case the generating company could be given benefit of the additional cost incurred due to time over-run. However, the consumers should get full benefit of the LDs recovered from the contractors/suppliers of the generating company and the insurance proceeds, if any, to reduce the capital cost. In the third case the additional cost due to time overrun including the LDs and insurance proceeds could be shared between the generating company and the consumer. It would also be prudent to consider the delay with respect to some benchmarks rather than depending on the provisions of the contract between the generating company and its contractors/suppliers. If the time schedule is taken as per the terms of the contract, this may result in imprudent time schedule not in accordance with good industry practices.”[Emphasis added]

6.34 *Considering the situation as has emerged in the matter, the Commission, is of the view that having known all the circumstances the entire delay beyond the COD dates indicated by RWPL in its petition No. 340/12 dated 24.08.2012 is due to the factors entirely attributable to the generating company. Accordingly, in view of the principle laid down in the Hon'ble APTEL Judgment dated 27.04.2011, the Commission has disallowed the excess IDC due to time over run for Unit 5 to Unit 8 and the entire cost due to time over run has to be borne by the generating company.*

.....
6.37 *The Commission has re-computed the IDC of the project under the actual case, based on the actual phasing of the expenditure and the hard cost as on COD provisionally allowed in this order. The Commission has also computed the IDC under the case when project would have come as per COD reckoned by the Commission for the purpose of IDC computation. The Commission has computed the IDC, by shifting the phasing of expenditure as per the reckoned COD of each Unit shown in the above Table and considering the actual interest rates applicable in each quarter."*

.....
(d) *Operation & Maintenance Expenses:*

10.11 *As regard the O&M Expenses, Regulation 48 and 25 of RERC Tariff Regulations, 2009 specifies as follows:*

48. *Operation and maintenance expenses*

...

(b) *For lignite based generating stations: Rs 16.00 Lakh per MW for FY 2009-10*

...

Provided that in case the process water is required to be transported over a distance of more than 50 km, then appropriate special O&M expenses, subject to the prudent check by the Commission, shall be allowed, in addition to the above O&M expenses. It shall include O&M expenses related to pipe line beyond 50 km and water pumping station operation cost, and additional power consumption for such Stations."

25. Operation & Maintenance expenses

...

(4) Normative O&M expenses allowed at the commencement of the Control Period (i.e. FY2009-10) under these Regulations shall be escalated at the rate of 5.72% per annum. Further, the same shall be subject to revision on account of annual escalation linked to WPI in the subsequent years for the purpose of true-up.”

10.16 The Commission will consider the O&M Expenses for the pipeline beyond 50 km and operation cost of pumping station based on actual expenses incurred at the time of truing up of tariff for FY 2012-13 subject to prudence check.

(f) Insurance Charges:

10.21 In accordance with Regulation 27 of RERC Tariff Regulations, 2009 the Commission has computed the Insurance Charges for FY 2012-13 based on the actual Insurance charges incurred by RWPL. RWPL in its Petition has submitted the details of the actual insurance charges of Rs. 5.02 crore only for Unit 1 to Unit 4, thus considering the same, the Insurance charges as provisionally allowed by the Commission are as shown in the Table below:

“Table 66: Insurance Charges as provisionally allowed by the Commission for FY 2012-13

Particulars	Unit	FY 2012-13								Total
		Unit 1	Unit 2	Unit 3	Unit 4	Unit 5	Unit 6	Unit 7	Unit 8	
Insurance Charges for full year based on Insurance paid of Unit 1 to 4	Rs. crore	1.26	1.26	1.26	1.26	0.00	0.00	0.00	0.00	5.02
No. of Days of Operation	Days	365	365	365	365	55	29	16	32	
Insurance Charges for FY 2012-13	Rs. crore	1.26	1.26	1.26	1.26	0.00	0.00	0.00	0.00	5.02

”

.....

4. The Appellant is aggrieved by the impugned order dated 30.08.2013 and has broadly brought out the following for our consideration;
- (a) Cost of land - the land area of the entire power project considered as 1030 acres as against 1231.30 acres claimed by the Appellant.
 - (b) Start up expenses to the extent of Rs. 42 crores as claimed by the Appellant not considered as a part of the Erection, Testing and Commissioning but only as part of the overhead expenses with an overall cap of 5% of the approved hard cost only.
 - (c) Disallowance of the Appellant's claim of Rs. 500 crores under the Project Management Cost (PMC) along with tax and duties of Rs. 58.42 crores totaling to Rs. 558.24 crores.
 - (d) Disallowance of Interest During Construction (IDC) to the extent of Rs. 452.25 crores by not considering the delay in the actual COD dates for units 5 to 8 as compared to the schedule COD.

- (e) Disallowance of various Operation and Maintenance charges in respect of electricity consumption of the pumping station of the Water System.
 - (f) Disallowance of the Insurance charges in respect of unit 5 to 8 for the FY 2012-13.
5. The Appellant through Learned Counsel Shri M G Ramachandran and Respondents through Learned Counsel Shri R.K. Mehta and Shri P.N. Bhandari have put forth their arguments and filed written submissions in support of their respective contentions on all the above mentioned issues. The relevant extracts from the impugned order, the submissions/arguments of the Appellant and the Respondents in respect of each of the above issues are being considered by this Tribunal to conclude the various issues as brought out in the present Appeal.
- 6) **Cost of land allowed for 1030 acres only against claim of 1231.30 acres**

- a) The State Commission in the impugned order considered total land area of 1066.50 acres only for the entire project and disallowed the remaining land claimed by the Appellant for determination of the capital cost of the project and the relevant extract is as under:-

“4.7 The State Commission while approving the in-principle Capital Cost had considered the total land area of 1066.50 acre for the entire project. MoEF clearance stipulates the total land for the entire project as 1156.03 acres. The Appellant has acquired the land area for the entire project as 1231.30 acre (including power plant area of 1190.90 acre). The sole reason submitted by the Appellant for acquiring the additional land is on account of the compulsion of Khasra holdings and undulation in the land. Further, the Appellant had not taken any subsequent approval from any governing authority for increase in total land. Considering the above aspects, the Commission has allowed the land area for the power plant as approved in-principle Capital Cost approval order i.e. 1000 acres as against the actual land area of 1190.90 acre submitted by the Appellant, thus resulting in land cost for the power plant as Rs. 7.54 crores.”

- b) The Appellant has challenged the above decision on the grounds that the expenditure on land considered in the Detailed Project Report (DPR) and in the order dated 19.10.2006 granting in principle approval to the capital cost (before implementation of the project) was an assessment and cannot be considered as completed cost of land. The actual expenditure of land upon

completion of the project, in the opinion of the Appellant, should be subjected to prudence check and be allowed.

c) As per the Appellant, the State Commission has ignored the following:

i) the Ministry of Environment and Forest, while considering the environmental clearances, considered the land area of 1156.03 acres.

ii) The plot plan which was finalized at the time of environmental approval, considered a land area of 1156.03 acres.

iii) That during the actual acquisition of land, it was impossible for the Appellant to restrict itself to exactly 1156.03 acres due to compulsion of Khasra holdings.

d) The Appellant has also stated that the State Commission, while submitting that the Appellant has acquired 13.80 acres of land for the pumping stations, i.e. considered only 4 acres of land on the

ground that the Appellant itself had considered 4 acres in the in-principle order. The claims of the Appellant for consideration of 1231.30 acres which is higher than the land considered by the Ministry of Environment have been due to compulsion of Khasra holdings and highly undulating of nature of land.

- e) In response to the above submissions/arguments of the Appellant, the Learned Counsel for the Respondent 2 to 4 have argued that the Appellant had itself demarked 1000 acres when it approached the State Commission for in-principle approval and the Appellant has exceeded the above and has gone ahead acquiring land including helipad. All such additional land were acquired when the in-principle approval of the State Commission and the DPR estimated 1000 acres of land. There is nothing shown to establish as to why there should be an increase in the land. The Appellant unilaterally increased the area of land without any jurisdiction. The Ministry of Environment sanction letter itself states that the land to the aggregate of 1156.03 acres considered for environment clearance and that too, at the request of the Appellant. As per the Respondent, there is no justification for increasing the extent of land either for the power plant or for pumping station. The State

Commission in their impugned order has also submitted that the Appellant had not justified the additional requirements of land over the in-principle approved one.

- f) After considering the submissions of the Appellant and the Respondents, we don't see much merit in the issue raised by the Appellant as the DPR does give the details of the land required to be acquired for the power plant inclusive of all auxiliaries such as pumping stations etc. and the Appellant is power generator and must have taken into account issues such as Khasra compulsion, undulations etc. after detailed land survey while finalizing the DPR and variation in the land acquisition on a higher side as compared to what was initially planned in the DPR could have been avoided or even if it became essential from environmental clearance point of view or for other reasons stated above, the same should have been done after due approval of the State Commission so as to ensure that the additional cost on account of the same would be allowed by the State Commission to be capitalized for determination of tariff at an appropriate time.

- g) The Appellant had been given this power project based on its DPR and in-principle cost approved by the State Commission. Any revision in the land cost arising out of this additional acquisition unilaterally done by the Appellant would tent amount to increasing the tariff, hence, not agreed to by the State Commission and the fact that the State Commission was not even approached at any stage before acquisition of this additional land does show that the Appellant was not serious for the price implication on account of the same and very rightly the State Commission in the impugned order restricted the land cost to 1030 acres for consideration in the capital cost.

7. Disallowance of the Start-up expenses of Rs. 42 crores

- a) In the impugned order, the State Commission has rejected the claim by giving the following reasons “

“4.164 Further, the Commission has observed that RWPL has considered the cost of Rs. 42.00 crore as start-up expenses under the head of Erection, Testing and Commissioning. RWPL in its submissions dated 08.03.2012 has submitted that such expenses has been considered as preoperative expenses in its accounts of RWPL. In view of the same, the Commission has also considered the start-up expenses as a part of Preoperative expenses and has excluded this amount from E.T.C. head”.

- b) The Appellant has contended that the State Commission has erroneously deducted the start-up expenses from being considered as a part of the erection, testing and commissioning expenses to be allowed and considered the amount of Rs. 42 crores as overhead expenses only for the reason that such start-up fuel expenses have been accounted for in the account books as pre operative expenses. The Appellant's explanation for doing so has been that the accounts books are maintained as per the Companies Act, 1956 and in the Accounting Standards, there is no head of account for erection, testing and commissioning. The Appellant has placed reliance on the Central Commission's order dated 04.06.2012 wherein they have given detailed guidelines on the benchmark capital cost for thermal power stations with coal as fuel, placing the start up fuel as forming part of "Construction and Pre-Commissioning expenses" and not overhead expenses.
- c) The Respondents have urged that the Appellant had always included the start-up expenses as part of overhead expenses only and never claimed it as part of erection, commissioning and testing expenses and claims made in the proceedings are afterthoughts

and falsely disowning the books of account of the Appellant. The State Commission has also stated that the Appellant itself had categorized the start-up expenses as an overhead expenses.

- d) Admittedly, the Appellant has classified the above expenditure as per pre-operative expenses. The Appellant did not consider it to give any other classification to the said expenditure. The major part of erection, commissioning and testing expenditure have been classified under different heads in the books of account duly audited and filed with the State Commission. If the startup expenses related exclusively to erection, commissioning and testing, the same should have been included under the applicable heads where the construction expenses has been a part. The Appellant has itself described in the books of account the expenses under pre-operative expenses, it is not open to the Appellant to claim the same under expenditure of erection, commissioning and testing etc. at a later stage. In our opinion, the claim of the Appellant on this account has been rightly disallowed by the State Commission as per the Impugned Order.

8. Project Management Cost

- a) In the Impugned Order, the State Commission has disallowed the entire amount of Rs. 500 cores claimed by the Appellant under the head Project Management Cost (PMC) holding as under:

“4.188 As has come out, the claim of RWPL of Rs. 661.96 Cr. under overheads is excessive, and the amount of Rs. 500 Cr. paid to JSWE along-with Rs. 58.42 Cr. taxes and duties included in this as PMC has no valid justification. The petitioner has not acted in conformity with the direction of the Commission in 2006 order to adopt competitive bidding. When a payment relates to ‘holding company’ by its subsidiary, conflict of interest is inherent in a situation where the entire payment is sought to be passed on to power procurer. As against total cost of Rs. 500 Cr. given to JSW Energy Ltd., the sub contracts furnished by JSWE amount to around Rs. 65.00 Cr., as mentioned earlier. Considering the position discussed above, Commission finds the claim of Rs. 500 Cr. as PMC cost and taxes and duties of Rs. 58.42 Cr. thereon, as totally unacceptable.

4.189 Commission has taken note of the fact that in addition to the said amount of Rs. 500.00 Cr. under PMC along-with Rs.58.42 crores of taxes and duties, the petitioner has claimed an expenditure of Rs. 114 Cr. under pre-operative, establishment, audit & accounts as against Rs. 62.40 Cr. allowed in 2006 order under this sub-head of overheads and an additional expenditure as of Rs. 42.00 Cr. project start up expenses has also been claimed. Units 3 to 8 of the project commissioned on lignite have also been delayed considerably due to lignite availability; part of this delay is not attributable to petitioner as clarified elsewhere in this order and such delay could lead to increase in pre-operative expenses.

4.190 The Commission is of the considered view that an amount equal to 5% of the hard cost would be a fair and reasonable amount to be allowed for overheads considering the facts and circumstances of the project as against the 3.88% arrived at for

2006 order. Accordingly, an amount of Rs. 228.84 crore on overhead have been allowed as against claimed amount of Rs. 661.96 crores.”

- b) The Appellant has submitted that the only reason given for such disallowance is that the amount of Rs. 500 crores has been paid to the holding company of the Appellant namely JSW Energy Ltd and there is a conflict of interest and further, there is an absence of competitive bidding. According to the Appellant, the State Commission has not taken into consideration that the project had been awarded to the Appellant by the Government of Rajasthan on the basis that the Project Management will be undertaken by JSW Energy Ltd and that this fact has also been recognized and recorded by the State Commission in its earlier order dated 19.10.2006 (in-principle approval) and as such there cannot be any objection to getting project management contract executed by JSW Energy Ltd. and issue of any conflict of interest being raised does not hold any ground. The Appellant had also submitted that the holding company of the Appellant i.e. JSW Energy Ltd. has substantial expertise in the power generation and the consortium of JSW Energy Ltd, and South West Mining Ltd. was approved by the Government of Rajasthan vide letter dated 07.03.2006 based on

the technical qualification and proven expertise of JSW Energy Ltd. in executing power project. A reference has also been made by the Appellant to the State Commission order dated 19.10.2006 wherein it had been stated as under:-

“.....they have stated that as provided in the Consortium Agreement, project management upto COD will be carried out by JSW Energy Ltd. having expertise in power field, for a consideration which has been included in the overall cost”.

- c) The scope of work undertaken by the JSW Energy Ltd. has been listed by the Appellant, interalia, including the land acquisition assistance, project monitoring, statutory clearances, financing, accounting, coordination with various agencies, certification for payments, controlling quality etc.
- d) In response to the above claims of the Appellant, the Respondent no. 2 to 4 have contended that the project management cost was never projected before and while the payment of Rs. 500 crores is claimed to have been made to the holding company, the work has been sub-contracted by the holding company to another agency for just Rs. 65 crores. In addition, the equipment supplier Dongfeng has included the supervision, erection, testing activities in its scope of work. The Respondent no.2 to 4 have also referred to the following

paras of the Impugned Order (besides the operative part quoted above) to support its submissions that the Appellant is wrongly and falsely claiming the amount of Rs. 500 crores as project management cost payment to the holding company:-

“4.169 However, as discussed earlier and as observed by the Commission from the submitted detailed reconciliation statements for each package, RWPL has allocated the total Project Management cost of Rs. 500 crores (excluding Taxes & Duties on PMC) under various packages which has been paid to its holding company JSWE Ltd. Further, such details were not submitted by RWPL in its initial submissions and had been brought out only with the detailed analysis of Annual accounts of RWPL and JSWE Ltd.

4.170 As the Project Management cost was not reflecting anywhere in the comparative statement of total capital expenditure submitted by RWPL, the Commission in its data gaps asked RWPL to submit the necessary clarification as to under which head, the expenditure of Project Management cost has been included in the submitted Capital Cost. RWPL in its reply submitted the following allocation of Project Management cost under each package:”

Table 46: Allocation of Project Management cost as submitted by RWPL (Rs. crore)

Sr. No.	Particulars	Amount
1	<i>Plant & Equipment Steam Turbine Generator</i>	<i>252.98</i>
2	<i>BoP- Mechanical</i>	<i>72.93</i>
3	<i>BoP-Electrical</i>	<i>20.15</i>
4	<i>Civil Works</i>	<i>70.09</i>
5	<i>External Water supply System</i>	<i>39.14</i>
6	<i>Colony</i>	<i>2.47</i>
7	<i>Construction and Pre-commissioning Expenses</i>	<i>33.19</i>
8	<i>Overheads- Design Engineering</i>	<i>9.04</i>
9	<i>Taxes & Duties</i>	<i>58.43</i>
10	<i>Total</i>	<i>558.42</i>

4.171 As per DPR, the Project Management Cost has been estimated as a part of the total overheads cost including Design, Engineering, construction supervision, inspection and expediting, Project Management and pre-operative expenses at around 4.50% of the total direct/indirect cost and contingencies. The Commission while according 'in principle' approval of capital cost vide order dated 19.10.2006 approved overall cost of overheads of Rs. 167.97crore as under: Overheads Preoperative, estt., audit & accts. Rs. 62.40 Design Engineering Rs. 63.97 Contingency Rs. 41.60 Total Rs.167.97.

4.172 In the said order, the Commission had approved the capital cost of Rs. 4330.55 crores (capital cost excluding IDC and FC). Thus the amount allowed for overheads works out to Rs. 3.88% of the approved hard capital cost (excluding IDC & FC).

4.173 It may be noted that Rs. 63.97 Cr. allowed under the head design engineering in the overheads is also inclusive of construction supervision charges, as could be seen from para 54 of the said 'in principle' order. This para makes it clear that the petitioner had sought approval of Rs. 63.97 Cr. for design engineering as well as construction supervision, etc. and the same amount stood allowed under overheads against design engineering.

4.174 It is, thus, obvious that the amount of Rs. 167.97 Cr. allowed in 2006 order for overheads is also inclusive of construction supervision. It would be worth noting here that no separate amount as Project Management Cost (PMC) has been allowed in the 2006 order though the petitioner RWPL had stated that project management upto COD will be carried out by JSW Energy Ltd., as mentioned in para 60 of the said order.

4.175 In the light of the above backdrop, the Commission would now like to examine the admissibility of a huge amount of Rs. 500 Cr. claimed by the petitioner as Project Management Cost, which

had been paid to the parent company for project management along with tax and duties of Rs. 58.42 Cr., totalling to Rs. 558.42 Cr.

4.176 As mentioned earlier, no separate amount has been allowed by the Commission in its 2006 order for project management nor any separate amount for project management was sought by the petitioner in the said matter.

4.177 Let us now have a look as the scope of services included in the order for project management assigned to JSW Energy Ltd. The scope of work broadly cover the works relating to assisting in Land Acquisition, selection of supplier/contractor, project monitoring, fulfilment of statutory obligations, legal compliance, stores & accounts, coordination with various agencies and construction supervision etc. It may be observed that the entire work of supervision project monitoring etc., was sub-contracted by JSW Energy Ltd., to JSW Techno Projects Management Ltd., and Chengdu Dongsi Power Technology Consultancy Company.

4.178 All the above mentioned items of works stand included within the ambit of pre-operative, establishment and construction supervision, related expenses, which in turn stand included in the overheads charges allowed by the Commission in 2006 order.

4.179 In view of the above, the Commission is of the considered opinion that reckoning of Project Management Cost as an integral part of overheads, considered earlier by the Commission in 2006 order needs to be followed in this order also.

4.180 As mentioned earlier, the total amount claimed by RWPL under overheads (including PMC) is a huge amount of Rs. 661.96 crores, as against Rs. 167.97 crores allowed in 2006 order. This amount of Rs. 661.96 crores claimed by the petitioner comes to 11.65% of the hard cost of Rs. 5683.91 crores (without IDC & FC).

4.181 The Commission has noted with concern that an amount of Rs. 500 Cr. plus Rs.58.42 Cr. for taxes have been paid to the parent company JSW Energy Ltd. without inviting tenders. As mentioned earlier, RWPL in 2006 proceedings had stated that project management upto COD would be carried out by JSW Energy Ltd,

the holding company of RWPL. In view of this, it was contended that they do not need the association of procurers in the said mechanism. It would be worthwhile to quote para 60 of the order dated 19.10.2006 in respect of the said argument of RWPL”

- e) The State Commission in the Impugned Order stated that the details on project management cost were not submitted by the Appellant initially and on inquiries made, the Appellant had contended that the project management cost of Rs. 500 crores has been paid to the holding company as per the agreement with the holding company. The State Commission further stated that when asked for the break up, the Appellant had allocated the project management cost of Rs. 500 crores amongst various capital expenditure heads/packages. In the impugned order, the State Commission had allowed the overhead cost of 5% and the project management cost was covered as a part of overhead expenses of Rs. 305.54 crores included in the overall project cost considered for in-principle approval. The State Commission further stated that RS. 65 crores has been allowed to be paid as part of the management cost and no further amount need to be allowed.
- f) Though, it has been clarified by the Appellant that the amount of Rs. 65 crores paid to another agency is only in regard to the review of

the design and the engineering and not in regard to the activities listed above as part of the project management cost and the entire project management cost is covered under consolidated consideration of Rs. 500 crores plus taxes of Rs. 58.42 crores to be paid by the Appellant to the Holding company as per their agreement entered into and there is no break-up of the project management cost. We have considered the matter and observed that at the time of obtaining in-principle approval from the State Commission in the initial stages, due care should have taken by the Appellant in providing cost heads containing various activities required to be executed for the power plant envisaged under the present case and project management cost could have been included in that as a separate cost head. No doubt in holding that project management plays predominantly an important part in overall execution and commissioning of the power plant of this magnitude and it would have at a cost also for performing various activities but at the same time, we should not have an oversight of the overall expenditure required to be done which would be capitalised on commercial operation declaration of the various units in the power plant which would define the fixed cost and as per the

details furnished by the Appellant as well as Respondents, the in-principle capital cost envisaged in the initial stage of the project has already been revised upward significantly. Now question comes on how to account for this project management cost as claimed by the Appellant which is far in excess of what has been allowed by the State Commission and would have a serious implication in upward revision of the tariffs. In our opinion, the State Commission's decision to restrict it to Rs. 65 crores and observing that this is justifiable based on the details furnished by the Appellant, looks appropriate more so in light of the fact that the final capital cost is yet to be worked out and the State Commission while finalising the final completed cost would definitely look into all the elements of cost vis-à-vis expenditure incurred by the Appellant since the inception of the project till COD of the power plant.

- g) Even while truing up exercise yet to be undertaken by the State Commission, the Appellant has ample opportunity to put forth their claims on various accounts before the State Commission for their consideration.

9. Interest During Construction

- a) The State Commission in the Impugned Order dated 30.08.2013 has decided as under in regard to the delay in commissioning of units 5 to 8:-

“6.25 As mentioned earlier, Units 5 to 8 were planned to get commissioned on lignite from Jalipa mines. While land acquisition for Kapurdi mines took place in year 2009, the land acquisition for Jalipa mines is not yet final. The mining lease of Jalipa mine is said to be also getting delayed as diversion of forest land is involved and added issue leading to delay relates to diversion of National Highway.

6.26 In the above background, the comment given by Sh. G.L.Sharma in his written submission at para 6.5.13 and response thereto of RWPL needs to be now looked at. The said comment of Sh. G.L.Sharma is as under:

“6.5.13 further again when the petitioner has been in know that land for Jalipa will not be available very soon, they should have approached the concerned authorities timely for increasing the capacity for extraction of lignite from Kapurdi mines. Not doing so, indicates that the petitioner has not been taking keen interest for timely completion of the project and has thus increased the incidence of I.D.C.”

6.27 The response of RWPL on that is as under: “As regards the comments of the Objector in para 6.5.13, it is stated that the petitioner had no way of predicting the timelines for the acquisition of land for Jalipa which was the sole responsibility of the GoR. It may also be highlighted that the petitioner is under no obligation to make efforts for enhancing the production of Kapurdi and is doing so voluntarily with the intent of containing the incidence of IDC.

6.28 *The Commission finds that the said response of the petitioner is not satisfactory. Commission doesn't subscribe to the stand of RWPL that it is under no obligation to make efforts to enhance production of Kapurdi and it is being done voluntarily.*

6.29 *RWPL cannot take the stand that they are under 'no obligation' to take measures to contain increase in cost of power even if using lignite for Units # 5 to 8 from Kapurdi mines emerged as a feasible measure.*

6.30 *Considering the typical situation and inordinate delay as has occurred in respect of Jalipa mine and keeping in view the fact that Units 5–8 were idling after having been synchronised, the prudent course of action would obviously have been to revise mining plan of Kapurdi mines and ramp up lignite extraction from that so as to procure lignite for these units and thereby enhance power availability on the one hand and reduce IDC of the idling units on the other, more so as the mineable reserve of Kapurdi mines is 129.79 Million Metric Ton which is adequate to accommodate the additional requirement of lignite of units 5 to 8 for many years.*

6.31 *The said exercise was indeed undertaken by RWPL and BLMCL, which resulted in petition No. 341/12, dated 24.08.2012 of BLMCL and petition no. 340/12 dated 24.08.2012 of RWPL. The COD of these units as indicated in the petition were as under:*

Table 52: Indicated COD for Unit 5 to 8 as submitted by RWPL in its Petition No. 340/12

<i>Units</i>	<i>COD</i>
<i>Unit 5</i>	<i>01.10.2012</i>
<i>Unit 6</i>	<i>01.11.2012</i>
<i>Unit 7</i>	<i>01.12.2012</i>
<i>Unit 8</i>	<i>01.12.2012</i>

6.32 *It should have been possible to take requisite actions in time to achieve the COD on the dates indicated in preceding Para. However, the actual COD went beyond that, which were achieved on dates as under:*

Table 53: Actual COD for Unit 5 to 8

<i>Units</i>	<i>COD</i>
<i>Unit 5</i>	<i>05.02.2013</i>
<i>Unit 6</i>	<i>03.03.2013</i>
<i>Unit 7</i>	<i>16.03.2013</i>
<i>Unit 8</i>	<i>28.02.2013</i>

6.34 Considering the situation as has emerged in the matter, the Commission, is of the view that having known all the circumstances the entire delay beyond the COD dates indicated by RWPL in its petition No. 340/12 dated 24.08.2012 is due to the factors entirely attributable to the generating company. Accordingly, in view of the principle laid down in the Hon'ble APTEL Judgment dated 27.04.2011, the Commission has disallowed the excess IDC due to time over run for Unit 5 to Unit 8 and the entire cost due to time over run has to be borne by the generating company."

- b) The Appellant has challenged the above decision of the State Commission by stating while disallowing Interest During Construction, the State Commission has concluded that the Appellant has taken the stand that it is not legal obligation of approaching the concerned authorities for a timely enhancement in the capacity for extraction of lignite from Kapurdi mines which is not acceptable at all, more so, units 5 to 8 of the Appellant were idling for want of fuel. As such the Appellant is not entitled to claim the Interest During Construction for delay in commercial operation of units 5 to 8 of the power plant.
- c) According to the Appellant, the State Commission has mistaken the obligations of Respondent no. 8 i.e. - Barmer Lignite Mining

Company Ltd. with that of the Appellant for making efforts for enhancement of mining in Kapurdi mines on account of delay in availability of Jalipa mines. The Appellant further stated that M/s. Barmer Lignite Mining Company Ltd., a government company, is responsible for development and operation of the mines with the support of Respondent no. 6 i.e. - Rajasthan State Mines and Minerals Limited and can make efforts for enhancing the capacity of Kapurdi mines and the Appellant should not be penalized for the same. The Appellant has given the reasons for delay in availability of the lignite from Kapurdi mines for unit 5 to 8 thereby delaying the COD of these units as under:-

- i) The delay was not on the completion of the power project but was on account of availability of lignite from Jalipa coal mines and the approval was not available at that point of time for using the Kapurdi mines to meet the requirements of the units 5 to 8.
- ii) Mining related matters of Barmer Lignite Mining Company Ltd. including the extraction of lignite from Kapudi mines for use in unit 5 to 8 etc. were all under the control of this

Respondent and Rajasthan State Mines and Minerals Limited without any control by the Appellant.

- iii) Despite the above, the Appellant had made all efforts within its power to get the necessary approval for using lignite from Kapurdi mines for units 5 to 8.
 - iv) It was for the Government of Rajasthan to actively pursue the matter with the Government of India to obtain such approval.
- d) The Appellant has also urged that when the Appellant realised that the Jalipa mines would not be available in time before they proposed commissioning of unit 5 to 8 during October to December, 2012, the Appellant had then requested Respondent no. 8 - M/s. Barmer Lignite Mining Company Ltd. to take immediate steps to try and increase the capacity of Kapurdi mines and the approval by Ministry of Coal, Government of India is not under the control of the Appellant or the mining company.
- e) As opined by the State Commission in the impugned order, the delay in operation of units 5 to 8 is due to the factors entirely attributable to the generating company i.e. the Appellant by not taking the requisite action well in advance of the commercial operation of unit 5 to 8, otherwise, they would have been able to

obtain all the approvals for use of lignite from Kapurdi mines in view of the non-availability of the Jalipa mines in time, we tend to agree with the State Commission's view. When the pre commissioning activities were on for units 5 to 8 of the power plant, it was very much known to the Appellant that the commercial operation of these units could not be done till the adequate supply of lignite for sustainable operation of these units is in place and the fact that the Jalipa mine is not getting operationalised was very much known to the Appellant.

- f) The Appellant's contention of putting the entire delay on account of receipt of approval from the Government of India for using lignite from Kapurdi coal mines for units 5 to 8, is not acceptable. More so, the Appellant by the time unit 1 to 4 came in commercial operation had a fairly good assessment of lignite required for the additional units i.e. units 5 to 8 which were in the various stages of erection/pre-commissioning etc. and the capacity of Kapurdi coal mines as well as the non supply of lignite from the Jalipa coal mines was very much known to the Appellant at that point of time. Appropriate steps should have been made by the Appellant in following with the State/GOI concerned departments so as to ensure

supply of lignite on long term basis for the units 5 to 8. Had these steps been taken, the delays in COD of these units could have been avoided.

- g) We observe that there had been reference made by the Appellant to the decision of this Tribunal in Appeal no. 72 of 2010 decided on 27.04.2011 in Maharashtra State Power Generation Company Ltd. Vs MERC. After examining the same, we find no relevance of the same for the present under our consideration.
- h) We strongly feel that in power plant where one is required to commission 8 units in series, he is certainly expected to know the requirement of fuel for sustainable COD of these units. The Appellant was in a better position to make use of different resources even by taking up the matter with all concerned authorities which would have salvaged the situation in the manner it happened. Subsequently, by relying on the supplies from Kapurdi coal mines for these additional units 5 to 8, the Appellant's claim on account of Interest During Construction for the delayed period in achieving COD of unit 5 to 8 is not tenable since these delays could have been avoided by taking timely measures/actions by the Appellant.

10. Special Operation and Maintenance expenses

- a) The State Commission has not granted Special Operation and Maintenance expenses as claimed by the Appellant on the ground that the Appellant has not given the details of actual expenses on the pipelines beyond 50 kms. The Appellant has challenged the said disallowance. However, in the Impugned Order, the State Commission has held that the O&M expenses subject to prudence check can be considered at the time of truing up based on the actual expenditure incurred.
- b) Accordingly, without going into the rival contentions of the parties since all the aspects of Special Operation and Maintenance expenses claimed by the Appellant can be a part of the claim at the time of the truing up, this issue is not being considered in this Appeal. On such claim being made by the Appellant with supporting documents and justification, the State Commission can look into the same at the time of truing up.

11. Insurance charges

- a) The State Commission has disallowed the insurance charges in respect of units 5 to 8 for the FY 2012-13 on the grounds that since

the details of the actual insurance charges paid are yet to be furnished by the Appellant and the same cannot be given on anticipatory basis. We are not considering this issue since the Appellant is yet to submit the requisite details supported with documentary evidence before the State Commission. The actual insurance charges to be allowed may also be considered at the time of truing up based on the documents to be filed by the Appellant and prudence check to be applied by the State Commission.

12. We fully agree and approve the findings recorded by the State Commission in the Impugned Order. The issue is consequently decided against the Appellant and the present Appeal, being devoid of merits, is dismissed. There shall be no order as to costs.
13. Pronounced in the Open Court on this **20th day of November, 2015.**

(I.J. Kapoor)
Technical Member

(Justice Surendra Kumar)
Judicial Member

√
REPORTABLE/NON-REPORTABLE
mk