

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No.184 of 2013

AND

Appeal No.305 of 2013

Dated: 19th February 2016

**Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER**

Appeal No. 184 of 2013

In the Matter of:

**Bhaskar Shrachi Alloys Limited
8/1, Middletown Row, 3rd Floor,
Kolkata-700 071**

... Appellant

Versus

- 1) Central Electricity Regulatory Commission
3rd and 4th Floor,
Chanderlok Building, 36, Janpath
New Delhi-110 001**
- 2) Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata-710 054**
- 3) Department of Power
Government of West Bengal
Through Joint Secretary
New Secretariat Building
7th Floor, 1, Kiran Sankar Road,
Kolkata-700 001**

- 4) **Department of Power
Government of Jharkhand
Through Principal Secretary (Energy),
Nepal House,
Doranda, Pin 834 002, Ranchi**
- 5) **West Bengal State Electricity Distribution Co. Ltd.,
Vidyut Bhavan,
Bidhan Nagar,
Kolkata-700 091**
- 6) **Jharkhand State Electricity Board,
Engineering Building
HEC Dhurwa
Ranchi-834 004**
- 7) **Ministry of Power
Government of India
Through Additional Secretary
Shram Shakti Bhavan,
New Delhi-110 001**
- 8) **Jai Balaji Industries Limited
5, Bentinck Street
Kolkata-700 001**
- 9) **Shyam Ferro Alloys Limited
Vishwakarma
86-C, Topsia Road,
2nd Floor, Kolkata-700 071**
- 10) **Cosmic Ferro Alloys Limited
4/1, Middleton street
4th Floor, Kolkata-700 001**
- 11) **BDG Metal and Power Limited
4, Fairlie Place,
5th Floor, Kolkata-700 001**

12) Lalwani Ferro Alloys Limited
32, Jawaharlal Nehru Road,
Kolkata-700 017

13) Howrah Gases Limited
1, Crooked Lane
Kolkata-700 069

... Respondent(s)

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

Counsel for the Respondent(s): Mr. K S Dhingra for R-1
Mr. M G Ramachandran
Ms. Poorvba Saigal
Mr. Shubham Arya for R-2

Appeal No.305 of 2013

In the Matter of:
Steel Authority of India Limited.,
Ispat Bhawan, Lodhi Road,
New Delhi

... Appellant

Versus

1) **Central Electricity Regulatory Commission**
3rd and 4th Floor,
Chanderlok Building, 36, Janpath
New Delhi-110 001

2) **Damodar Valley Corporation**
DVC Towers, VIP Road,
Kolkata-710 054

- 3) Department of Power
Government of West Bengal
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New Secretariat Building
7th Floor, 1, Kiran Sankar Road,
Kolkata-700 001**
- 4) Department of Power
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Nepal House,
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- 5) West Bengal State Electricity Distribution Co. Ltd.,
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Kolkata-700 091**
- 6) Jharkhand State Electricity Board,
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Ranchi-834 004**
- 7) Ministry of Power
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- 11) **BDG Metal and Power Limited**
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5th Floor, Kolkata-700 001
- 12) **Lalwani Ferro Alloys Limited**
32, Jawaharlal Nehru Road,
Kolkata-700 017
- 13) **Howrah Gases Limited**
1, Crooked Lane
Kolkata-700 069

... Respondent(s)

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

Counsel for the Respondent(s): Mr. M G Ramachandran
Ms. Swagatika Sahoo
Mr. Arvind Kumar Dubey for R-1
Mr. Saurabh Mishra for R-6

J U D G M E N T

PER HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

1. These Appeals have been filed u/s 111 of the Electricity Act, 2003 by the Appellant against **the Impugned Order dated 22.04.2013** passed by the Central Electricity Regulatory Commission (hereinafter referred to as Central Commission) in Petition No.279 of 2010 in the matter of determination of tariff of Mejia Thermal Power Station Unit 4

(210 MW) of Respondent No.2 (DVC) for the period from 13.2.2005 to 31.3.2009. The Central Commission while determining the tariff for the Mejia Thermal Power station Unit-4 has disallowed the following:

- (a) The Central Commission has allowed the recovery of Rs.169.90 Crores towards Pension and Gratuity Contribution attributable to Mejia Thermal Unit IV without accounting for the interest earned on investments of the Pension and Gratuity Fund by the Central Commission.
- (b) The Central Commission erroneously allowed the entire Pay Revision for the period from 1.1.2006 to 31.3.2009 as additional Operation and Maintenance Charges.
- (c) The Central Commission erred in computing the additional capitalisation towards deferred liabilities as per Tariff Regulation 18(1), (2) and (3) after the Commercial Date of Operation.
- (d) The Central Commission failed to account for liquidated damages payable to R-2, DVC by the EPC Contractor for delay in commissioning of the Mejia Unit-4.

2. The Appellant/Petitioner **Bhaskar Sharchi Alloys, the Appellant in Appeal No.184 of 2013**, is a Limited company incorporated under the Companies Act, 1956 , primarily engaged in ferro-alloy and/or iron and steel industry and is a High Tension Consumer of the Respondent No.2 i.e. Damodar Valley Corporation.

3. **Steel Authority of India Limited, the Appellant in Appeal No.305 of 2013**, is also a High Tension Consumer of the Respondent No.2 i.e. Damodar Valley Corporation (R-2). Respondent No.1 in both these Appeals is Central Electricity Regulatory Commission while Damodar Valley Corporation is Respondent No.2 in these Appeals.
4. Respondent No.3 and 4 are Department of Power, Government of West Bengal and Jharkhand respectively and Respondent Nos. 5 and 6 are Distribution Companies of West Bengal and Jharkhand. Respondent No.7 is Ministry of Power, Government of India. Respondents Nos. 8 to 13 are HT Consumers of Respondent No.2, DVC.
5. Damodar Valley Corporation (R-2) filed Petition No.279 of 2010 for determination of tariff of Mejia TPS Unit-4 for the period from 13.02.2005 to 31.03.2009 based on the Central Electricity Regulatory Commission (Terms and Conditions for determination of Tariff Regulations, 2004 (herein after referred to as 2004 Tariff Regulations) with a prayer to determine and approve the generation tariff for Mejia Unit-4.
6. **Brief facts of the** case that lead to filing of these Appeals are as under:
 - (a) The Central Commission initiated suo-moto proceedings being Petition No.168 of 2004 against Respondent No.2 (DVC) and directed to file an Application for determination of Tariff.

(b) The Respondent No.2 (DVC) filed Tariff Petition No.66 of 2005 on 8.6.2005 before the Central Commission seeking tariff determination for MYT period from 1.4.2006 to 31.3.2009 notwithstanding that the Mejia Unit No.4 for which the present Appeal has been filed, had been commissioned on 13.2.2005. In the Tariff Petition No.66, the Respondent had not included determination of tariff for Majea Unit No.4.

(c) On 3.10.2006, the Central Commission disposed the Petition No.66 of 2005 determining the Tariff applicable for the period 1.4.2006 to 31.3.2009 (without including the Mejia Unit No.4).

(d) Aggrieved by the order of the Central Commission dated 3.10.2006, the Respondent No.2 (DVC) and other consumers filed Appeals being Appeal Nos. 271, 272 and 273 of 2006 before this Tribunal on various issues including that the Central Commission had not taken into consideration the additional capital expenditure incurred from 2004 onwards for the purpose of tariff.

(e) This Tribunal passed judgment dated 23.11.2007 in Appeal Nos. 271, 272 and 273 of 2006 and Appeal No.8 of 2007 against the order passed by the Central Commission dated 3.10.2006 on various issues and remanded to the Central Commission "*for de novo consideration of the Tariff Order dated 3rd October, 2006 in terms of its findings and*

observations made therein according to the law". The Central Commission by the order dated 6.8.2009 decided the de novo Tariff for Damodar Valley Corporation in regard to the period 1.4.2006 to 31.3.2009.

(f) Aggrieved by the order of the Central Commission dated 6.8.2009, the Respondent No.2 (DVC) filed an Appeal being Appeal No.146 of 2009 before this Tribunal. This Tribunal decided the Appeal and passed a judgment on 10.5.2010 in regard to the disallowance of the additional capitalization including the capital cost of Mejia Unit No.4.

(g) Aggrieved by the Order of this Tribunal dated 10.5.2010, DVC filed second Appeal being No.4881 of 2010 before the Hon'ble Supreme Court. However, Hon'ble Supreme Court did not stay the operation of the judgment of this Tribunal dated 10.5.2010 regarding the decision on additional capitalisation including the conclusion of Capital Cost of Mejia Unit No.4.

(h) DVC (R-2) filed a Petition No.279 of 2010 on 25.10.2010 before the Central Commission seeking determination of the Capital Cost and Tariff specifically for the Mejia Unit No. IV comprising of one Unit of 210 MW with effect from 1.10.2006 to 31.03.2009.

(i) The Central Commission passed an order dated 22.4.2013 (Impugned Order) determining the tariff for Mejia Thermal Power Generating Station Unit 4 of DVC.

(j) Aggrieved by the Impugned Order dated 22.4.2013, the Petitioners/Appellants filed these Appeals i.e. Appeal No.184 of 2013 and Appeal No.305 of 2013 and prayed for the following reliefs:

(i) Quash the findings of the Central Commission on interest income from investments from the Pension & Gratuity Fund and,

(ii) Direct the Central Commission to conduct a prudence check with respect to the utilisation of interest income earned on the Pension & Gratuity Fund and quantify the amount accordingly.

(iii) Direct the Commission to determine the station wise amounts towards Pension and Gratuity attributable to Mejia Unit-4 and allow the same as capacity charges and quantify the contribution towards pension and gratuity fund accordingly.

7. We have heard Mr. Rajiv Yadav, learned Counsel for the Appellant and Mr M G Ramachandran, learned Counsel for the Respondent No.2 and Mr. K S Dhingra, learned Counsel for the Respondent No1, Central Commission.

8. After going through the material on record including Written Submissions filed by the contesting parties and the Impugned Order dated 22.04.2013, the following questions would arise for our consideration:

Issue No.1: Whether the Central Commission has erred in not accounting the interest earned on investments of Pension and Gratuity Fund and allowed only 169.90 Crore towards Pension and Gratuity (P&G) Contribution while working out the determination of Tariff of Mejia Unit-4 ?

Issue No.2: Whether the Central Commission failed to establish the quantum of pay revision or even segregate it station wise and erroneously allowed the entire pay revision for the period 1.1.2006 to 31.3.2009 as additional O&M expenses?

Issue No.3 Whether the Central commission erred in allowing additional capitalisation entirely towards deferred liabilities while considering the capitalisation of assets to Mejia Unit-4 of the DVC (R-2) after the date of Commercial Operation?

Issue No.4: Whether the Central Commission failed to account for the liquidated damages payable to DVC (R-2) by EPC Contractor BHEL for the delay in commissioning of

the Mejia Unit 4 while establishing the capital cost for determination of tariff?

9. Issue No.1: Whether the Central Commission has erred in not accounting the interest earned on investments of Pension and Gratuity Fund and allowed only 169.90 Crore towards P&G Contribution while working out the determination of Tariff of Mejia Unit-4 ?

9.1 The following **submissions have been made by the learned Counsel on behalf of the Appellants.**

9.2 that the Central Commission has not accounted for the interest earned on DVC's investments from its Pension and Gratuity either by reducing the annual provision for such Fund by the amount of interest earned or by reducing the Annual Revenue Requirement of DVC. The CERC has mechanically accepted DVC's contention that the income on investments from Pension and Gratuity Fund is used on the welfare activities of the employees.

9.3 That the Central Commission has averred that the *interest accrued on the investments was fully considered by the Actuary while arriving at the liability for annual contribution towards pension and gratuity, along with other factors.*” Significantly, there is no such disclosure in the actuarial report and the said averment is, therefore, without any basis.

9.4 That the Central Commission has been taking inconsistent stands with respect to treatment of income accrued on investments made out of Pension and Gratuity Fund.

9.5 That the Central Commission stated that the investments made by the Trust and not DVC is inconsistent with the following footnote to DVC's audited accounts for the FY 2008-09:

“6. Interest on investment and securities for 2008-09 pertaining to PF/PG fund investment has been taken into account on realization basis after considering tax deducted at source.”

9.6 That the Central Commission has failed to exercise adequate prudence check in accepting the pension and gratuity liability projected by DVC instead of undertaking a critical examination of the data furnished by the DVC, the actuarial is stated to have subjected the data to sustain co-relation test. The results of this have not been disclosed in the report.

9.7 That it may be noted that a large number of employees involved in setting up of new units of Chandrapur TPS, Koderma TPS, Mejia TPS, Durgapur Steel TPS etc., have been factored in while determining DVC's Pension and Gratuity liability recoverable from command area consumers. Therefore, the Pension and Gratuity liability of employees engaged in Generating Stations not envisaged for the command area cannot be recovered as part of tariff applicable to command area consumers.

9.8 That the Central Commission ought to have directed DVC to submit details of employees in each of its specific activities. Furthermore, the DVC ought to have been required to furnish details of employees engaged in assets servicing the command area and those in respect whereof DVC has signed PPAs with licensees outside the command area.

10. Per contra, the Counsel for the Respondent No.2 strongly refuted the submissions of the Appellant and submits as follows:

10.1 That the total aggregate Pension and Gratuity Fund contribution allowed by the Central Commission for Damodar Valley Corporation in respect of the generating units, transmission systems, common offices etc is Rs 3200.94 Crs. as per the actuarial valuation as on 31.03.2009 out of which an amount of Rs.169.90 Crs. have been apportioned to MTPS U # 4 during the period 2006-09 based on the methodology adopted by the Central Commission as per the order of this Tribunal. Accordingly, there has been no payment for Pension and Gratuity Fund in excess of what has been actually contributed by the Damodar Valley Corporation to the relevant Trust.

10.2 That the matter relating to Mejia Unit No. IV was specifically deferred for consideration by the Central Commission both in the Orders dated 03.10.2006 and 06.08.2009 as well as is not a part of the Order dated 8.5.2013 passed in respect of other units of Damodar Valley Corporation. It is stated that the interest accruing due on the amount funded belongs to the Pension and Provident Fund Trust. The

interest accruing on the fund reduces overall future contribution to be made and is always taken into account while undertaking the actuarial valuation of the contribution to be made from time to time.

10.3 That in regard to this, the employees which are subject to Pension and Gratuity Fund Trust, the contribution is being made to the Trust, an Independent body. The money upon contribution belongs to the Trust. The Trust makes investments in the approved securities. The income accruing from such investments is accumulated in the Trust. Damodar Valley Corporation does not get any revenue from such investments in its books. All payment of pension to both the retired employees and persons who will retire in future are to be made from the Pension Trust.

10.4 That the contributory Provident Fund for those employees who are not covered by the pension scheme, Damodar Valley Corporation makes its share of contribution every month to the fund maintained by Damodar Valley Corporation. Such fund is segregated from the revenue of Damodar Valley Corporation. Damodar Valley Corporation makes investments of such fund in approved securities. Damodar Valley Corporation is obliged to credit the interest on capital of such funds at a specified rate approved by the Government of India. The interest accruing on the investments made is adjusted to the above interest liability of Damodar Valley Corporation. If there is any shortfall in the interest accrued as compared to the interest rate approved by the Government of India, Damodar Valley Corporation

has to pay the same as revenue expenditure. In the above scheme, Damodar Valley Corporation is not a net beneficiary of interest earned on the investments made out of the Contributory Provident Fund.

10.5 That in case of General Provident Fund (**GPF**), applicable to those persons who are covered by the pension scheme and not applicable to persons covered by Contributory Provident Fund Scheme, Damodar Valley Corporation maintains the employees' contribution to the fund deducted from the salary in a separate fund. As in the case of Contributory Provident Fund, the amount available is invested in the approved securities, with Damodar Valley Corporation having a liability to pay interest at the specified rate approved by the Government of India subject to adjustment of interest earned on the investments made. As in the case of Contributory Provident Fund, Damodar Valley Corporation does not derive any revenue out of the above fund maintained for General Provident Fund contribution by the employees.

10.6 That the allegation that the interest income from the funds have not been taken into account is without any merit. In so far as the annual income on pension fund is concerned, the same does not figure anywhere in the books of accounts of Damodar Valley Corporation as such fund belongs to and maintained by an independent Trust. In so far as the CPF and GPF are concerned, Schedule XVIII of the Annual Report of Damodar Valley Corporation, each year, would indicate the

adjustment for the interest income and more particularly the fact that Damodar Valley Corporation does not derive any income to be appropriated by Damodar Valley Corporation.

10.7 That the Respondent No.2, Damodar Valley Corporation had duly made available all the relevant documents in regard to the actuarial valuation related to the pension and gratuity contribution. The Actuary has given the detailed report on the valuation as the pension and gratuity fund contribution. The Central Commission was right in relying on the Actuary Certificate of an expert in the field and in the absence any prima facie evidence Except for making bald and unfounded allegations, none of the Objectors were able to point out anything wrong in the methodology for violation or otherwise in the decision of the quantum of the amount. In view of the above submissions and the orders passed by the Central Commission and this Tribunal the Central Commission has rightly decided the issue.

11. The following are the counter submissions made by the learned counsel on behalf of the CERC (R-1).

11.1 That in accordance with the actuarial report dated 31.5.2006, the interest accrued on investments was duly considered by the Actuary while arriving at the liability for annual contribution towards Pension and Gratuity along with other factors. Thus, the interest accrued is accounted for in the requirement work report.

11.2 That as stated by the Appellant, the foot note to the audited accounts of DVC pertaining to the Year 2008-2009 regarding interest earned on investments of securities out of P&G Fund is created to the fund itself and is not flown back to the DVC. The question of its adjustment against the ARR of DVC cannot arise.

12. Our Consideration on this issue.

12.1 The contention of the Petitioner/Appellant is that the Central Commission, while allowing P&G Fund of Rs.169.90 Crore did not consider the interest accrued on the investment of P&G Fund in the approved securities. Further, the Central Commission determined the Tariff without going through the actual number of employees assigned to the power business of DVC and without prudence check on the details of the report submitted by the Actuary.

12.2 The main contention of the Petitioner is that the Central Commission failed to take the interest accrued from the P&G deposits made by the Trust in the approved securities.

12.3 Normally, the Trust will administer the P&G funds in a judicial manner. The Trust will work out the yearly contributions required for the liability of Pensioners and accordingly works out and informed to the organisations towards amount of contribution per year. Further, the Trust also invests the fund available with them in approved securities and the interest amount earned from these investments will be taken into consideration for annual subscription/contribution.

12.4 Thus, the interest accruing on the investments made is accumulated in the Trust and the Trust will workout the subsequent years contributions to be made by the DVC. The Respondent No.2, DVC does not get any revenue from such investments and the interest earned on P&G funds does not belong to the R-2, DVC.

12.5 Let us discuss various types of funds maintained for the Terminal benefits of the retired employees and the existing employees working with the organisation for the Terminal benefits:

- (a) Pension and Gratuity Fund
- (b) General Provident Fund (GPF)
- (c) Contributory Provident Fund (CPF)

12.6 For those employees, for whom Pension & Gratuity Fund applies, the CPF does not apply and vice versa. The instant Appeal of the Petitioner is with respect to the consideration of interest accrued towards investment of P&G Fund in the approved securities. The Central Commission failed to consider the interest accrued on P&G fund investment.

12.7 The Respondent No.2, Damodar Valley Corporation established a Trust called Pension & Gratuity Trust for payment of Pension of the retired employees and existing employees for the period after the retirement that come under the Scheme. The main objective of the Trust is to protect the welfare of the employees towards timely payment of Pension and calculation of annual contribution to be

made by DVC. The total administration of the Fund management is done by the Trust.

12.8 In order to assess the contributions required to be made for the discharge of the Pension liabilities and also to arrive at future fund contributions, DVC appointed a reputed Actuary for actuarial valuation, Shri Behudev Chatterjee a reputed Actuary. The Actuary worked out the actuarial valuation for the period on 31.3.2006 and also submitted the report considering the 6th Pay Commission as on 31.3.2009. A report was submitted towards Actuary valuation as on 1.4.2009.

12.9 This Tribunal in its judgment dated 23.11.2007 in Appeal No. 271 of 2006 in the case of M/s Demodar Valley Corporation vs. Central Electricity Regulatory Commission (CERC) & Ors., observed as under. The relevant paragraphs are quoted below:

“D.1 DVC has submitted that based on the actuarial valuation, entire funds need to create the Pension and Gratuity Contribution Fund should be allowed to be recovered through the process of determination of tariff. The Central Commission in its Order has worked out that a sum of Rs. 1534.49 crore is required to create such a fund. The Commission has held that entire burden for creation of the fund should not be passed on to the consumers and accordingly directed that 60% be recovered through the tariff from the consumers and 40% be contributed by the DVC. We find that this decision is not backed by any justification given in the order. We feel the claim of the Appellant to recover the entire cost for creation of the fund through tariff is justified provided the recovery is staggered in a manner that it does not create tariff-shock to consumers.”

D.2 The huge liability for the fund has arisen as earlier DVC was adopting the policy of "pay as you go". A major part of the liability pertains to previous years.

71. It is noticed that the Appellate Tribunal while agreeing with the order of the Commission allowing transition period for two years to the petitioner, has, however rejected the non-allowance of 40% of the pension contribution and observed that the petitioner is entitled to recover the entire amount of pension fund from its consumers, provided that such recovery was staggered and do not create tariff shock to the consumers.

72. It could be observed from the books of accounts of the petitioner that the petitioner had generated a surplus amount of Rs 79487 lakh during the year 2004-05 and Rs. 188634 lakh during the year 2005-06. After adjustments on account of taxes and prior period, the surplus amount was Rs. 69044 lakh for year 2004-05 and Rs.108282 lakh for the year 2005-06. Considering the equity worked out in terms of the direction of the Appellate Tribunal and the additional capitalization allowed, the Return on equity at the rate of interest @ 14% works out to Rs.17700 lakh for 2004-05 and Rs.18000 lakh for 2005-06.

73. Accordingly, in compliance with the directions contained in the judgment of the Appellate Tribunal, it has been decided to stagger the balance 40% of the pension fund over a period of five years during the tariff period 2009-14, without any revision in the pension fund allocated in tariff for the period 2006-09. Based on the above, calculations have been made and the amount to be recovered in five installments during the tariff period 2009-14 is Rs. 61379.60 lakh, with an annual installment of Rs. 12275.92 lakh.

12.10 Further this Tribunal's judgment dated 10.5.2010 in Appeal No.146 of 2009 in the case of M/s Demodar Valley Corporation vs. Central Electricity Regulatory Commission (CERC) & Ors. had decided on the Pension & Gratuity Contribution as under:

“105(6) In regard to the Pension and Gratuity Fund, the specific direction had been issued by the Tribunal in the Remand Order to consider the same after giving a finding that the claim of the Appellant to recover the entire cost of creation of the fund through the tariff is justified. However, under this direction, the Central Commission has to ensure that the recovery is staggered in a manner that it does not give tariff shock to the consumers. Accordingly, the Central Commission has considered this direction and passed the order staggering over a specific period. Though the liability of the Appellant to pay the pension and gratuity fund is to be staggered over a period of 13 years from 2006 to 2019, the Central Commission has staggered the liability only up to the year 2014 in order to avoid tariff shock. This staggering is in consonance with the directions of this Tribunal.”

12.11 After going through the submissions, we have noticed the P&G claim as follows:

- (a) Total Pension & Gratuity Liability as per Actuarial Valuation dated 31.03.2006 **=Rs.169,015 Lakhs**
- (b) Total Pension & Gratuity Liability for the period 2006-09 as per Actuarial Valuation dated 31.03.2009 **=Rs.320,094 Lakhs**

The Central Commission allowed recovery of the Pension Liability from the consumers as computed below. The relevant part of the Impugned Order dated 22.4.2013 in Petition No.279 of 2010 is quoted below:

(Rs.in Lakh)

	Amount
<i>Pension liability allocated to power business</i>	169015.00
<i>Less liability to Distribution system</i>	614.00
<i>Less Liability pertaining to 4th unit of MTPS</i>	14952.00
<i>Net amount</i>	153449.00
<i>Less 40% to be borne by the utility</i>	61380.00

<i>Balance 60% recoverable from consumers</i>	<i>92069.00</i>
<i>Amount of each instalment (total 3 instalments)</i>	<i>30690.00</i>

“59. For the purpose of the present Petition, we allow the Petitioner to recover an amount of Rs.8971 lakh, being 60% of Rs.14952 lakh towards Pension and Gratuity Fund in respect of the Generating Station along with tariff for the period 2006-09. The remaining 40% that is, Rs.5981 lakh shall be recovered in five equal yearly instalments along with the tariff for the period 2009-14 in line with the Commission’s order dated 6.8.2009 in Petition No.66/2005. However, the increase in actual liability on account of revision of pay consequent to implementations of recommendations of the 6th Pay Commission in respect of the Generating Station during the period from 1.1.2006 to 31.3.2009 is recoverable by the Petitioner to the extent of 60% during 2006-09 and the balance 40% shall be recovered during the period 2009-14 along with the P&G liability to be re covered during the period 2009-14, in line with the decision of the Tribunal.

12.12 We are of the opinion that the Central Commission has correctly considered the adjustment of P&G/Terminal benefits while determining the O&M expenditure tariff.

12.13 Further, the Petitioner contended that the Commission accepted the plea of the Respondent that the income accrued is used on the welfare activities of the employees without going into the details of the adjustment of interest earned from P&G fund. In our opinion, the funds are administered by the Trust and the Trust will take care of the welfare of the retired employees towards timely payment and calculation of yearly contribution to be made by the Damodar Valley Corporation. The Commission took the Actuary Report while working out the Pension & Gratuity Fund during the determination of the tariff

for Mejia Unit No.4. We agree with the submission of the Counsel representing Central Commission regarding the Foot Note to the audited accounts that the interest earned on investment of securities out of P&G Fund is created to the fund itself and is not flown back to the accounts of DVC.

12.14 Another plea of the Petitioner is that the Central Commission has not properly accounted regarding number of employees who are actually working with the power business and the apportionment of Head Office & general expenses towards power business.

12.15 We do not agree with this. The Central Commission while working out the Tariff determination have gone through the report submitted by the Actuary towards total contributions required for pension and gratuity towards generation, transmission and distribution and the Commission deducted the liability of Distribution Organisations (The Distribution Tariff is determined by the respective State Commission) and considered the contribution for the employees of generation and transmission.

12.16 We have noticed from the submissions of the Counsel for the Respondent No.2, DVC that the interest amount on P&G fund is not figured in the books of accounts of Damodar Valley Corporation. The relevant extract of the details of interest on the Pension Fund provided by the Counsel is as under:

II. Miscellaneous

(a) Interest on new Pension	- 19,179,946
(b) Interest on CPF	- 9,169,540
(c) Interest on CPF	-539,552,383
(d) Bonus on GPF	
Deduct: Interest recoverable on interest	- (370,246,449)
Total: C(II) Other Charges	197,655,420
Total: Other Charges	197,667,411
Total: Overhead Charges	879,816,786

12.17 Thus, it clearly shows that the interest on P&G fund does not figure in the books of the Respondent No.2, DVC.

12.18 Thus, we do not find any perversity or infirmity in the Central Commission's Order on this issue. The Central Commission while arriving at the figures had rightly not considered the interest accrued from the investment of the P&G fund as the accrued interest amount is not the revenue of the Respondent No.2, DVC.

12.19 Thus, **this issue is decided against the Petitioner/Appellant.**

13. Issue No.2: Whether the Central Commission failed to establish the quantum of pay revision or even segregate it station wise and erroneously allowed the entire pay revision for the period 1.1.2006 to 31.3.2009 as additional O&M expenses?

13.1 The following contentions have been made on behalf of the **Appellants on the above issue.**

13.2 That the Central Commission failed to conduct a prudence check before permitting the recovery in the annual increase in employees'

cost for the period 1.1.2006 to 31.3.2009 on account of pay revision as additional O&M charges which is contrary to the tariff regulations and the settled prayers of law.

13.3 That the Central Commission wrongly allowed the claim of the R-2 toward pay revision as a result of pay hike after recommendations of the 6th Pay Commission without quantifying the amount qua the amount recoverable to the extent of 60% during the period 2006-2009 as provided in the Impugned Order. The Central Commission has erroneously allowed the amount claimed by the DVC without conducting the prudence check on the amount so claimed despite the objections raised by the Appellant in this regard.

13.4 That the impact due to wage revision is essentially O&M expenses which is part of the capacity charges under Regulation 21(1) (iv) of the Tariff Regulations. The scheme of the Tariff Regulations requires the capacity charges to be approved for each generating station as their recovery is linked with the achievement of station wise plant availability factor attributable to Mejia Unit 4.

13.5 That the Central Commission allowed the enhanced O&M expenses on account of alleged pay revision without conducting a prudence check of the actual station wise costs towards employees attributable to Mejia Unit-4 without apportioning the head office expenses into power, irrigation and flood control.

14. Per contra, the Counsel for the Respondent No.2 has made the following submissions on this issue:

14.1 That the pay revision related to Mejia Unit No. IV are necessary expenditure to be allowed in terms of the decision of the Hon'ble Supreme Court in the case of West Bengal Electricity Regulatory Commission v CESC Limited (2002) 8 SCC 715. The pay and allowances relating to Mejia Unit No. IV has been appropriately considered including in regard to apportionment of pension and Gratuity fund contribution as well as common office expenses. The allegation of the Appellant that there is no prudent check on the part of the Central Commission, is devoid of any merit.

14.2 That this Tribunal vide it's recent order dated 24.3.2015 in the Batch matter of Appeal No. 55 of 2013 was pleased to uphold the decision of the Central Commission with regard to the additional costs towards pay revision.

14.3 That the contention of the Appellant is misconceived and is contrary to the scheme for determination of tariff provided in the Tariff Regulations. The O&M expenses including pension and gratuity contribution as well as pay revision are parts of tariff elements to compute the capacity charges to be allowed to DVC. It is, therefore, wrong on the part of the Appellant to urge that the adjustments of capacity charges including O&M charges have not been done in accordance with the Regulations.

15. Our Consideration and Conclusion on this issue.

15.1 The contention of the Petitioner/Appellant is that the Central Commission has allowed 60% of pay revision in the Impugned Order even though only 40% pay revision was paid by DVC to its employees during 2008-2009 and contested that DVC itself has disclosed that “as per the terms of pay revision, 40% arrears is payable in 2009-10”.

15.2 Let us examine the Central Commission’s Tariff Regulations, 2004, normative Operation and Maintenance expenses shall be as follows:

Coal based Generating Stations of Capacity 210 MW (Mejia Unit-4 is 210 MW).

The normative O&M expenses specified as follows:

<u>Year</u>	<u>200/210/250 MW sets</u>
2004-05	10.40 levels/MW
2005-06	10.82 levels/MW
2006-07	11.25 -do-
2007-08	11.70 -do-
2008-09	12.17 -do-

The Respondent DVC in the Tariff Petitions filed had prayed for relaxation of O&M norms and prayed for the actual O&M expenses incurred by it. Further, the Regulation specifies that the O&M expenses for the base year 2003-04 shall be escalated further at the rate of 4% per annum to arrive at permissible O&M expenses for the relevant year.

15.3 This Tribunal has relied on the judgment of Hon'ble Supreme Court in the case of West Bengal Electricity Regulatory commission Vs CESC Limited while passing the judgment in Appeal No.55 of 2013 dated 24.3.2015. The relevant part of this Tribunal's judgment in Appeal No.55 of 2013 dated 24.3.2015 in the case of BSES Yamuna Power Ltd., vs. Central Electricity Regulatory Commission (CERC), is as under:

“18.6. We have gone through the proposition of law settled by the Hon'ble Supreme Court of India in West Bengal Electricity Regulatory Commission Vs.CESC Limited (2002) 8 SCC 715 in which the Hon'ble Apex Court had observed that the employees cost prudently incurred needs to be reimbursed to the Utility. The Hon'ble Supreme Court expressing agreement with the finding of the High Court held that since it is not disputed that the payments made to the employees are governed by the terms of the settlement form which it will not be possible for the Company to wriggle out during the existence of the settlement, therefore, the actual amounts spent by the Company as employees' costs will have to be allowed. In these matters in hand, after careful and deep scrutiny of the rival submissions made by the parties, we do not find any force in the submissions/contentions made on behalf of the appellants. Rather, the submissions of the respondent power generators/corporations have legal force to which we agree.

18.7. The 'power to remove difficulties' and the 'power to relax' provided in the 2004 Tariff Regulations supplement each other to deal with the situations which may arise from time to time. In the present matters, the learned Central Commission has exercised these powers correctly, properly and legally in allowing the impact of the 6th Pay Commission's Recommendations regarding increase in employees cost including increase in salaries of the

employees and wages of the workmen. Apart from it, from the Regulations 12 and 13 conferring 'Power to remove difficulties' and 'Power to relax' upon the Central Commission in 2004 Tariff Regulations, the Central Commission has retained the powers such as savings of inherent powers of the Commission (Regulations 111, 113, 114) & power to remove difficulties (Regulation 115).

18.13. We are further of the view that in view of the subsequent developments of implementation of 6th Pay Commission's Recommendations, the actual employees cost was not fully factored in Regulation 21 (iv) of 2004 Tariff Regulations and the situation clearly warranted the exercise of 'Power to remove difficulties' and 'Power to relax' conferred upon the Central Commission. The Central Commission has committed no illegality in passing the impugned orders and allowing the increase in the employees cost subject to prudence check. We further note that the learned Central Commission, in the impugned orders, has cited sufficient reasons for exercising such powers and also exercised the said powers in its judicial discretion because non-exercise of judicial discretion by the Central Commission would cause hardship and injustice to the respondent Corporations or would lead to unjust result. The respondent Corporations like NTPC had successfully established that the circumstances were not created due to the act or omission attributable to them while claiming such relaxation and seeking exercise of 'powers to remove difficulties' or 'powers to relax' as provided in 2004 Tariff Regulations. We find that in the instant matters, there were justified causes and reasons before the Central Commission to exercise such discretion and to relax the norms in the head of O & M expenses. We further note that 2004 Tariff Regulations were notified based on the circumstances which existed at the time of notification of 2004 Tariff Regulations. In case of O & M expenses for the period 2004-09, it was determined based on previous years O & M expenses. The O & M expenses in respect of 2004 Tariff Regulations did not

cover the increase in the employees' cost. Therefore, the cash outflow in the head of increase in the employees' cost was not included in the O & M expenses under 2004 Tariff Regulations. 18.14. We hold that the Central Commission has rightly exercised its 'power to remove difficulties' or 'power to relax' to give effect to the subsequent developments, namely, directing reimbursement of the increase in employees' cost by the beneficiaries".

- 15.4 The O&M expenditure means, the expenditure incurred on operation and maintenance of the Generating Stations, including part thereof, which includes the expenditure on manpower, repairs, spares, consumables etc.,
- 15.5 The expenditure on manpower related to their salaries, expenditure towards P&G fund of retired employees. Similarly, the pay revision is also expenditure towards manpower. It is the legitimate right that the employees have to be supported in their wages regarding inflation index etc. The expenditure on the employees has to be figured in the ARR and it is to be recovered from the beneficiaries. The Apex Court also opined that the expenditure regarding pay revision etc., needs to be reimbursed to the utility.
- 15.6 Further, the expenditure of the employees of Head Office, regional offices etc., are to be apportioned proportionately as per the capacity of generation and length of transmission lines, sub-stations bays etc towards the business of generation and transmission of the Respondent No.2, Damodar Valley Corporation.

15.7 The Central Commission has to consider the actual expenditure incurred with respect to employees wage revision, considered the prayer of the Respondent regarding relaxation of the tariff Regulations, 2004 as the tariff Regulations did not cover the employees pay revision.

15.8 The contention of the Petitioner is that the Respondent himself submitted to the Commission the actual pay revision amount paid during the control period 2006-09 and rest in the control period 2009-14. We feel the consumers may get the benefit of lesser tariff temporarily but in the subsequent period, they are burdened with higher tariff. This Tribunal also felt that adjusting the total pay revision arrears in one time is better. Accordingly, the Central Commission adjusted the total revision arrears in one time along with the O&M expenditure arrived as Tariff Regulations, 2004.

Further, we feel that the Central Commission has rightly utilised the power to relax while dealing with O&M expenditure.

15.9 Thus, in our opinion, the Central Commission has correctly and legally considered pay revision arrears including in regard to apportionment of Pension & Gratuity Fund Contribution as well as common office expenses etc while computing the O&M expenses of Mejia TPS-4.

15.10 Thus, **this issue is also decided against the Petitioner/Appellant** and the order of the Commission is affirmed.

16. Issue No.3 Whether the Central commission erred in allowing additional capitalisation entirely towards deferred liabilities while considering the capitalisation of assets to Mejia Unit-4 of the DVC (R-2) after the date of Commercial Operation ?

16.1 The following contentions have been made on behalf of the Appellants on Issue No.3:

16.2 That the DVC had claimed a sum of Rs. 11.71 crore and Rs. 11.80 crore as Additional Capitalisation up to the *cut-off date* (31.3.2006) and for the period thereafter (1.4.2007 to 31.3.2009) respectively. The CERC has omitted to examine the nature of capital expenditure, and summarily allowed the same by observing that such expenditure *mainly* pertains to deferred liabilities against EPC contracts and non-EPC contracts.

16.3 That the Impugned Order contains no justification for including, after the cut –off date, "*other assets*" (such as office furniture, computers, air-conditioners etc.) of the value of about Rs. 1 crore in additional capitalisation for FY 2006-07.

16.4 That the Central Commission has mechanically endorsed a sum of Rs. 6.85 crore and Rs. 1.10 crore for FY 2004-05 and FY 2005-06 respectively, as additional capitalisation comprising of other assets *essential to improve working conditions in the plant*. In the absence of any scrutiny of the nature of capital expenditure claimed by DVC demonstrates the lack of prudence check on the part of CERC.

17. Per contra, the Counsel for the Respondent No.2 strongly refuted the submissions of the Appellant and submits as follows:

17.1 That the Central Commission has correctly considered the capital cost of Mejia Unit Nos. I to IV including additional capitalisation in respect of the period from 1.4.2006 to 31.3.2009,

17.2 That the Additional capitalisation mainly involves deferred liabilities of balance payment against EPC contracts awarded after the commercial operation but within the scope of the original works, including procurement of initial spares. The capitalisation of such expenditure is covered under Clause 1 (1) and (2) of the Regulation 18 of Tariff Regulations 2004.

17.3 That the Central Commission while allowing additional capitalisation has considered the submissions of the Appellants and other beneficiaries and has made careful examination of works for which additional capitalisation was claimed. Therefore, there is no merit in any of the contention of the Appellant that the Central Commission has not conducted prudence check.

18. Our Consideration on this issue.

18.1 **Additional Capitalisation:** The Appellant/Petitioner contested that the Central Commission summarily allowed the additional capitalisation submitted by the DVC a sum of Rs.11.71 Crore and Rs.11.80 Crore as additional capitalisation upto cut off date (31.3.2006) and for the period thereafter (1.4.2007 to 31.3.2009).

18.2 Let us examine the Regulation 18 of the Central Commission's Tariff Regulations, 2004 regarding additional capitalisation for determination of Capital Cost of the project:

“18. Additional capitalisation: (1) The following capital expenditure within the original scope of work actually incurred after the date of commercial operation and up to the cut off date may be admitted by the Commission, subject to prudence check:

- (i) Deferred liabilities;
- (ii) Works deferred for execution;
- (iii) Procurement of initial capital spares in the original scope of work, subject to ceiling specified in regulation 17;
- (iv) Liabilities to meet award of arbitration or for compliance of the order or decree of a court; and
- (iv) On account of change in law.

Provided that original scope of work along with estimates of expenditure shall be submitted along with the application for provisional tariff.

Provided further that a list of the deferred liabilities and works deferred for execution shall be submitted along with the application for final tariff after the date of commercial operation of the generating station.

(2) Subject to the provisions of clause (3) of this regulation, the capital expenditure of the following nature actually incurred after the cut off date may be admitted by the Commission, subject to prudence check:

- (i) Deferred liabilities relating to works/services within the original scope of work;

- (ii) Liabilities to meet award of arbitration or for compliance of the order or decree of a court;
- (i) On account of change in law;
- (iv) Any additional works/services which have become necessary for efficient and successful operation of the generating station, but not included in the original project cost; and
- (v) Deferred works relating to ash pond or ash handling system in the original scope of work.

(3) Any expenditure on minor items/assets like normal tools and tackles, personal computers, furniture, air-conditioners, voltage stabilizers, refrigerators, fans, coolers, TV, washing machines, heat-convectors, carpets, mattresses etc. brought after the cut off date shall not be considered for additional capitalisation for determination of tariff with effect from 1.4.2004.

Note

The list of items is illustrative and not exhaustive.

(4) Impact of additional capitalisation in tariff revision may be considered by the Commission twice in a tariff period, including revision of tariff after the cut off date.

Note 1

Any expenditure admitted on account of committed liabilities within the original scope of work and the expenditure deferred on techno-economic grounds but falling within the original scope of work shall be serviced in the normative debt-equity ratio specified in regulation 20.

Note 2

Any expenditure on replacement of old assets shall be considered after writing off the gross value of the original assets

from the original project cost, except such items as are listed in clause (3) of this regulation.

Note 3

Any expenditure admitted by the Commission for determination of tariff on account of new works not in the original scope of work shall be serviced in the normative debt-equity ratio specified in regulation 20.

Note 4

Any expenditure admitted by the Commission for determination of tariff on renovation and modernization and life extension shall be serviced on normative debt equity ratio specified in regulation 20 after writing off the original amount of the replaced assets from the original project cost.

18.3 The Mejia Unit 4 of DVC was commissioned on 13.2.2005 and accordingly the cut off date i.e. one year after date of commercial operation of the unit i.e. 31.3.2006 as per Regulations.

18.4 We have gone through the submissions made by the Respondent, DVC for tariff determination of Mejia Unit-4. The EPC contract was awarded to BHEL. As per the data submitted in Form 9 (Statement of additional capitalisation after CoD and upto cut off date i.e. from 13.2.2005 to 31.3.2006 during the Financial Years 2004-05 to 2005-06).

18.5 The actual capital cost of the Generating Station on the date of Commercial Operation i.e. on 13.2.2005 and as per the audited accounts duly certified by Comptroller and Auditor General is 70051.16 lakhs (700.5116 Crores) and the expenditure pertains to

additional capitalisation for the years 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09 are as under as per the submissions under Regulation (1)(2) of the Central Commissions' Tariff Regulations, 2004::

Year	Additional Capital Expenditure (Rs.in Lakhs)	Capital Cost (Rs. In lakhs)
As on 13.2.2005/31.3.2005 (COD)	-	70051.06
2005-06	1171.14	71222.20
2006-07	441.64	71663.84
2007-08	622.33	72286.17
2008-09	116.50	72402.68

All the expenditure were met by the R-2, DVC for the Generation Project Mejia TPS 4 and accordingly, the Central Commission arrived at the Capital Cost including additional capitalisation up to 31.3.2009 as Rs.72402.68 lakhs.

18.6 We have gone through the statements submitted in Form 9 regarding additional capitalisation works related to original scope of the work. After scrutinising the same, we find that the Petitioner/Appellant has included an expenditure of Rs.10005916.00 (Rs.1.0 Crores) towards other assets (office furniture, air conditioners, library books) during 2006-07.

18.7 As per Clause 18 (3) of the Tariff Regulations, 2004, any expenditure on minor items specified in this Clause brought after the cut-off date

i.e. 31.3.2006 shall not be considered for additional capitalisation for determining tariff with effect from 1.4.2004. Accordingly, the investment of Rs.1.0 Crore on other assets during FY 2006-07 should not be taken under the capital expenditure. We remand the matter to Central Commission to scrutinise all the additional capital expenditures submitted by the Respondent No.2, DVC and if any expenditure is noticed under Regulation 18(3) of Tariff Regulations like the expenditure noticed in FY 2006-07, the same has to be deducted from the Capital Expenditure.

18.8 Thus, this issue is remanded back to Central Commission to scrutinise the additional capitalisation expenditure as per Clause 18(3) of Tariff Regulations, 2004 and accordingly, the expenditure, if any has to be considered under additional capitalisation.

18.9 Thus, this issue is decided in favour of the Appellant.

19. Issue No.4: Whether the Central Commission failed to account for the liquidated damages payable to DVC (R-2) by EPC Contractor BHEL for the delay in commissioning of the Mejia Unit 4 while establishing the capital cost for determination of tariff?

19.1 The following **contentions have been made on behalf of the Appellants on Issue No.4:**

19.2 The Central Commission has failed to provide any justification for non-recovery of liquidated damages by DVC in terms of the EPC

contract signed with BHEL for setting up of Mejia TPS Unit-4. It is an admitted position that the EPC contract provided that in the event of delay in completion of the project beyond 33 months from the date of LOA/LOI, DVC was entitled to claim liquidated damages @ 0.25% of the contract cost per week. Since there was, admittedly, a delay of six to seven weeks in completing the project, DVC became entitled to recover damages to the tune of Rs. 12.25 crore from BHEL.

19.3 That the DVC's contractual right to claim liquidated damages from BHEL was independent of capital cost of the subject project. The amount of liquidated damages payable by BHEL ought to have been reduced from the capital cost approved by DVC. However, by omitting to claim liquidated damages, DVC has extended an undue favour to BHEL at the expense of the consumers.

19.4 That the Central Commission's decision to approve DVC's omission to claim liquidated damages on the ground that DVC's capital cost (Rs. 3.33 crore/ MW) was lower than that of Suratgarh TPS (RS. 3.99 crore/ MW) is not supported by the Tariff Regulations, 2004. There is nothing under the said Regulations which allows a generating company to waive its entitlements to liquidated damages - in a manner prejudicial to consumer interest - merely because its capital cost/ MW is lower than that of an unrelated project. Needless to add, as custodian of consumer interests, it was incumbent upon the CERC to ensure that capital cost of a project is kept to the minimal by exercise of requisite prudence check.

20. Per contra, the Counsel for the Respondent No.2 strongly refuted the submissions of the Appellant and submits as follows:

20.1 That the Central Commission in Para-19 of the impugned Order has accepted the clarification given by the Damodar Valley Corporation that the delay was not attributable to the EPC Contractor and the delay was on account of non-completion of certain non-EPC work for various reasons. It was also clarified that there was any recovery of liquidated damages. The Appellant is mixing up the issue of non-recovery of liquidated damages with the amount of revenue derived from the sale of infirm power.

20.2 That the Allegations of the Appellant that the liquidated damages payable by BHEL to Damodar Valley Corporation for delay on the part of BHEL in execution of the EPC contract should be deducted from the capital cost of the project. It is stated that the delay was on account of the '*Non-supply of some balance, Non-completion of some balance Erection & Commissioning and Delay in completion of Non-EPC works*'. This clearly indicates that the delay has nothing to do with BHEL. The various miscellaneous works get delayed on account of varied reasons and, therefore, there was a delay of one month and 18 days. Accordingly, Damoder Valley Corporation has not claimed any remedy for delay for such various works. Further there is no cost over-run due to the delay as the EPC contract with BHEL, was a turnkey contract. Therefore the allegation of the Appellant regarding

financial load on the consumers due to financial overrun is wrong and denied.

21. Our Consideration on this issue.

21.1 Liquidated Damages

21.2 The contention of the Appellant is that the Central Commission considered the delay in completion of the project duly accepting the clarification given by the Respondent DVC i.e due to non completion of certain non EPC works, the commissioning of the project got delayed.

21.3 It is true that the project was awarded under EPC (Engineering Procurement and Construction Contract) to BHEL (a Public Ltd undertaking Company). As per the Agreement, in the event of delay in completion of the project beyond 33 months from the date of LoA/Lol, DVC was entitled to claim liquidated damages @ 0.25% of Contract Cost per week.

21.4 As per the Agreement, the scheduled commercial operation date is 26.12.2004. The project was declared commercially operative on 13.2.2005. Thus, there was delay of 1 month and 17 days or 7 weeks from SCOD of 26.12.2004 and hence, DVC can claim 0.25% of Contract Cost per week.

21.5 The Respondent, DVC did not claim any LD charges and the Counsel of the Respondent No.2, DVC submitted the following reasons for the delay in commissioning of the Plant occurred.

(a) Due to delay in completion of certain non EPC works for various reasons

(b) DVC was interested to get the work completed at that stage, so that there is no further delay.

Further, the Counsel submitted the work was allotted under EPC contract with BHEL as Turnkey basis and hence there is no extra financial obligations and thereby the consumers are not under financial load.

21.6 According to Tariff Regulations, the Respondent DVC at the time of finalising Tariff Application has to submit Form 5B i.e. break up of Capital Cost for coal/lignite based projects. The table/Form 5B clearly indicates the break down i.e. expected time of completion of each work and date of actual completion and variations and reasons for variations.

The Respondent stated in Form 5B, the reasons for variations as under:

“(1) Non supply of some balance, non completion of some balance Erection & commissioning and delay in completion of non EPC works etc.

21.7 It is true that the contract is a Turnkey project and thereby the cost of the project will not vary due to delay in commissioning as per the Schedule. The following are the consequences due to delay in commissioning of the project apart from reduction of capital cost due

to claiming of liquidated damages (capital Cost-LDs=Capital cost of the project):

- (i) There is a loss of generation for eight weeks.
- (ii) There is an increase in interest burden on the loans.
- (iii) The cost of infirm power injected into the Grid prior up to the COD may vary and thereby the Capital Cost might have been reduced.

Thus, the consumers are burdened with extra financial obligations.

21.8 We have gone through the Impugned Order. It is stated that the Respondent No.2 DVC has not capitalised the IDC for the delay period i.e. 26.12.2004 to 12.2.2005. Further, the contention of the Petitioner is that the capital cost as on the date of commercial operation i.e. 31.3.2005 as per the audited account duly certified by the Comptroller & Auditor General is 70051.16 lakhs and accordingly, the cost/MW works out to Rs.3.33 Crores which is less than per MW cost of similar project i.e. Suratgarh TPC, Rajasthan which works out Rs.3.99 Crores.

But, the Respondent did not consider the additional capitalization after COD and upto cut off date and after cut off date which works out to a total cost of 72402.68 lakhs and not 70051.16 lakhs. The cost/MW works out 3.45 Crores.

21.9 We are not convinced with the arguments of the Counsel for the Respondent No.2 hence we deem it proper to remand the matter to Central Commission and direct the Respondent No.2 to claim the LD from the EPC contractor. It is the duty of the EPC contractor to coordinate and plan with the non EPC contractors to complete the works specified in time so that the project has to be commissioned in scheduled time.

21.10 Accordingly, this issue is decided in favour of the Appellant and the matter is remanded back to Central Commission directing Respondent No.2, DVC to claim liquidated damages from the EPC Contractor and accordingly, the capital cost of the project has to be arrived at for determination of tariff of Mejia 4 unit.

ORDER

22. Both the Appeals being Appeal No.184 of 2013 and Appeal No.305 of 2013 are hereby partly allowed. Issue No.1 and 2 are decided against the Appellant while issue No.3 and 4 are decided in favour of the Appellant and these issues are remanded back to Central Commission and accordingly, the Central Commission is directed to scrutinise the additional capitalisation expenditure as per Clause 18(3) of Tariff Regulations and Capital Cost of the project has to be arrived at for determination of tariff for Mejea Unit-4.

23. No order as to cost.

24. Pronounced in the Open Court on this day of 19th February 2016.

(T Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

Dated, the 19th February 2016.



REPORTABLE / ~~NON-REPORTABLE~~