

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)
Appeal Nos. 271, 272, 273, 275 of 2006 & 8 of 2007**

Dated: 23rd November, 2007.

Present: **Hon'ble Mr. Justice Anil Dev Singh, Chairperson**
Hon'ble Mr. A.A. Khan, Technical Member

Appeal No.273 of 2006
and I.A nos. 59 and 60 of 2007

Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata-700054.

-Appellant(s)

V/s.

1. Central Electricity Regulatory Commission,
Core 3, Floor-6, Scope Complex,
Lodhi Road, New Delhi-110003.
2. State of West Bengal,
Deptt. Of Energy, Secretariat,
Kolkata.
3. State of Jharkhand,
Deptt. Of Energy , Secretariat,
Ranchi, Jharkhand.
4. West Bengal State Electricity Board,
Bidyut Bhawan, Bidhan Nagar,
Block- DJ, Sector-II,
Salt Lake City, Kolkata.
5. Jharkhand State Electricity Board,
Energy Building, HEC,
Dhurwa, Ranchi-834 004.
6. Union of India,
Ministry of Power, Shram Shakti Bhawan,
Rafi Marg, New Delhi-1.
7. Bhaskar Shrachi Alloys Ltd,
8/1, Middleton Row,
Kolkata-700 071.
8. Bihar Foundary and Castings Limited,
Main Road, Ranchi-834 001.

-Respondent(s)

Counsel for the Appellant(s) : Mr. M.G. Ramachandran ,
Mr. Anand K. Ganeshan & Ms Swapna Seshadri, Adocate

Counsel for the Respondent(s) : Mr. S.B. Upadhyay, Sr. Adv, Mr. R.R. Dubey ,
Mr. S.M. Sharma & Mr. Santosh Mishra , Advocate for JSEB
Mr. Sudarshan Srivastava & Mr. A.K. Mehta, Secy for JSERC.
Mr. Suchit Mohanty, & Mr. Jaydip Kar Advocate for WBSEB.
Mr. Sitesh Mukherjee, & Mr. Rajiv Yadav, Advocate
for State of Jharkhand.
Mr. Sakya Singh Chaudhari &
Mr. Sapan Kumar Mishra
Mr. C.S. Vaidyanathan, Sr. Advocate
Mr. Sanujit Mishra, Mr. Shyamal Sarkar,
Mr. Gautam Shroff
and Mr. K.P. Ray for Maithan Alloys & Bhaskar Shrichi.
Mr. T. Rout, Jt. Chief (L), CERC.

Appeal No. 271 of 2006

1. Maithan Alloys Ltd.
3 F, India House, 20, British India Street,
Kolkata.
2. Anjaney Ferro Alloys Ltd,
3 F, India House, 20, British India Street,
Kolkata
3. Dayal Steel Ltd.
Bhartiya Palace, Bander Bagicha,
Fraser Road, Patna-800 001.
4. Castron Technologies Ltd,
8 Waterloo Street, Kolkata-700 069.

-Appellant(s)

V/s.

1. Central Electricity Regulatory Commission,
Core 3, Floor-6, Scope Complex,
Lodhi Road, New Delhi-110003.
2. Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata-700054.
3. State of West Bengal,
Deptt. Of Energy, Secretariat,
Kolkata.
4. State of Jharkhand,
Deptt. Of Energy , Secretariat,
Ranchi, Jharkhand.
5. West Bengal State Electricity Board,
Bidyut Bhawan, Bidhan Nagar,
Block- DJ, Sector-II,

Salt Lake City, Kolkata.

6. Jharkhand State Electricity Board,
Energy Building, HEC,
Dhurwa, Ranchi-834 004.
7. Union of India,
Ministry of Power, Shram Shakti Bhawan,
Rafi Marg, New Delhi-1.

..... Respondent(s)

Counsel for the Appellant(s) : Mr. C.S. Vaidyanathan, Sr. Advocate
Mr. Shymal Sarkar, Mr. Gautam Shroff &
Mr. D.P. Mohanty & Mr. K.P. Ray
Counsel for the Respondent(s) : Mr. M.G. Ramachandran and Mr. Anand K. Ganeshan
Ms. Swapna Seshadri for DVC
Mr. R.R. Dubey & Mr. Santosh Mishra for JSEB.
Mr. Jaydip Kar & Mr. Suchit Mohanty for
State of West Bengal
Mr. Sudarshan Srivastava for JSERC.
Mr. A.K. Mehta, Secy, JSERC.
Mr. Sitesh Mukherjee & Mr. Sakya Singh Chaudhari

Appeal No. 272 of 2006

1. Bhaskar Shrachi Alloys Ltd.,
8/1, Middle Ton Row, Kolkata
2. Impex Ferro Tech Ltd.
35, Chitranjan Avnue, Kolkata
3. Shyam Ferro Alloys Ltd.
23-A, N.S. Road Room No. 22, Kolkata

V/s.

-Appellant(s)

1. Central Electricity Regulatory Commission,
Core 3, Floor-6, Scope Complex,
Lodhi Road, New Delhi-110003.
2. Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata-700054.
3. State of West Bengal,
Deptt. Of Energy, Secretariat,
Kolkata.
4. State of Jharkhand,
Deptt. Of Energy , Secretariat,
Ranchi, Jharkhand.
5. West Bengal State Electricity Board,
Bidyut Bhawan, Bidhan Nagar,

Block- DJ, Sector-II,
Salt Lake City, Kolkata.

6. Jharkhand State Electricity Board,
Energy Building, HEC,
Dhurwa, Ranchi-834 004.
7. Union of India,
Ministry of Power, Shram Shakti Bhawan,
Rafi Marg, New Delhi-1.

-Respondent(s)

Counsel for the Appellant(s) : Mr. C.S. Vaidyanathan, Sr. Advocate
Mr. Shymal Sarkar, Mr. Gautam Shroff &
Mr. D.P. Mohanty & Mr. K.P. Ray

Counsel for the Respondent(s) : Mr. M.G. Ramachandran and Mr. Anand K. Ganeshan
Ms. Swapna Seshadri for DVC
Mr. R.R. Dubey & Mr. Santosh Mishra for JSEB.
Mr. Jaydip Kar & Mr. Suchit Mohanty for
State of West Bengal
Mr. Sudarshan Srivastava for JSERC.
Mr. A.K. Mehta, Secy, JSERC.
Mr. Sitesh Mukherjee & Mr. Sakya Singh Chaudhari

Appeal No. 275 of 2006

State of Jharkhand
Through the Secretary
Department of Energy
Secretariat, Ranchi

-Appellant(s)

V/s.

1. Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata-700054.
2. Central Electricity Regulatory Commission,
Core 3, Floor-6, Scope Complex,
Lodhi Road, New Delhi-110003.
3. State of West Bengal,
Deptt. Of Energy, Secretariat,
Kolkata.
4. West Bengal State Electricity Board,
Bidyut Bhawan, Bidhan Nagar,
Block- DJ, Sector-II,
Salt Lake City, Kolkata.
5. Jharkhand State Electricity Board,
Energy Building, HEC,
Dhurwa, Ranchi-834 004.

...Respondent

Counsel for the Appellant(s) : Mr. Sakya Singha Chaudhuri, Mr. Sitiesh Mukherjee,
MR. Rajiv Yadav,

Counsel for the Respondent(s) : Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. S.B. Upadhyay, Sr. Adv, Mr. R.R. Dubey and
Mr. S.M. Sharma, Mr. Santosh Mishra for JSEB
Mr. M.G. Ramachandran and Mr. Anand K. Ganeshan,
Ms. Swapna Seshadri, Mr. Shyam Sarkar
Mr. Sanujit Mishra and Mr. K.P. Rai
Mr. Mr. Jaydip Kar with Mr. Suchit Mohanty for State of
West Bengal

Appeal No.08 of 2007 & I.A. Nos. 57, 58 and 116 of 2007

1. West Bengal Electricity Regulatory Commission,
FD-415A, Paura Bhawan,
3rd Floor, Sector-III,
Bidhannagar,
Kolkata-700 106.

-Appellant(s)

V/s.

1. Central Electricity Regulatory Commission,
Core 3, Floor-6, Scope Complex,
Lodhi Road, New Delhi-110003.

2. Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata-700054.

3. State of West Bengal,
Deptt. Of Energy, Secretariat,
Kolkata.

4. State of Jharkhand,
Deptt. Of Energy , Secretariat,
Ranchi, Jharkhand.

5. West Bengal State Electricity Board,
Bidyut Bhawan, Bidhan Nagar,
Block- DJ, Sector-II,
Salt Lake City, Kolkata.
6. Jharkhand State Electricity Board,
Energy Building, HEC,
Dhurwa, Ranchi-834 004.
7. Union of India,
Ministry of Power, Shram Shakti Bhawan,
Rafi Marg, New Delhi-1.

-Respondent(s)

Counsel for the Appellant(s) : Mr. Pratik Dhar and Mr. C.K. Rai
Mr. Sakya Singh Chaudhuri.
Counsel for the Respondent(s) : Mr. S.B. Upadhyay, Sr. Adv, Mr. R.R. Dubey and
Mr. S.M. Sharma, Mr. Santosh Mishra for JSEB
Mr. M.G. Ramachandran and Mr. Anand K. Ganeshan,
Ms. Swapna Seshadri, Mr. Shyam Sarkar
Mr. Sanujit Mishra and Mr. K.P. Rai
Mr. Jaydip Kar with Mr. Suchit Mohanty
for State of West Bengal
Mr. T. Rout, Jt. Chief (L) &
Mr. B. Sreekumar, Astt. Chief (L).
Mr. P.K. Awasti, Dy. Chief (F).
Mr. S. Ramalingam, Dy. Chief (L)

Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson

I have had the advantage of going through the judgment in draft of my learned brother, Mr. A.A. Khan, Technical Member. I respectfully agree with the conclusions arrived at by him. I would, however, like to say a few words of my own with regard to the impact of the fourth proviso to Section 14 and effect of Sections 61, 62 and the relevant provisions of the Electricity Act, 2003 (for short Act of 2003) on the provisions of the DVC Act, 1948 having a

bearing on the tariff, particularly Part-IV of the DVC Act. In this context, it will be necessary to set out Section 14 of the Electricity Act, 2003:

14. Grant of Licence- *The Appropriate Commission may, on an application made to it under section 15, grant any person licence to any person –*

- a. to transmit electricity as a transmission licensee; or*
- b. to distribute electricity as a distribution licensee; or*
- c. to undertake trading in electricity as an electricity trader,*
in any area which may be specified in the licence:

Provided that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the Appropriate Commission and thereafter the provisions of this Act shall apply to such business:

Provided further that the Central Transmission Utility or the State Transmission Utility shall be deemed to be a transmission licensee under this Act:

Provided also that in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after the commencement of this Act, such Government shall be deemed to be a licensee under this Act, but shall not be required to obtain a licence under this Act:

Provided also that the Damodar Valley Corporation, established under sub-section (1) of section 3 of the Damodar Valley Corporation Act, 1948, (14 of 1948), shall be deemed to be a licensee under this Act but shall not be required to obtain a licence under this Act and the provisions of the Damodar Valley Corporation Act, 1948, in so far as they are not inconsistent with the provisions of this Act, shall continue to apply to that Corporation:

Provided also that the Government company or the company referred to in sub-section (2) of section 131 of this Act and the company or companies created in pursuance of the Acts specified in the Schedule, shall be deemed to be a licensee under this Act:

Provided also that the Appropriate Commission may grant a licence to two or more persons for distribution of electricity through their own distribution system within the same area, subject to the conditions that the applicant for grant of licence within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements (relating to the capital adequacy, credit-worthiness, or code of conduct) as may be prescribed by the Central Government, and no such applicant who complies with all the requirements for grant of licence, shall be refused grant of licence on the ground that there already exists a licensee in the same area for the same purpose:

Provided also that in a case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate licence from the concerned State Commission and such distribution licensee shall be responsible for distribution of electricity in his area of supply:

Provided also that where a person intends to generate and distribute electricity in a rural area to be notified by the State Government, such person shall not require any licence for such

generation and distribution of electricity, but he shall comply with the measures which may be specified by the Authority under section 53:

Provided also that a distribution licensee shall not require a licence to undertake trading in electricity.

2. Thus, it is clear from the fourth proviso to Section 14 of the Act of 2003 that DVC (the appellant in Appeal No. 273/06), after coming into operation of the Act of 2003, is deemed to be a licensee. This being so, it is not required to obtain licence for transmission of electricity. At the same time, fourth proviso to Section 14 keeps those provisions of the DVC Act alive insofar as they are not inconsistent with the provisions of the Act of 2003. In other words, such of the provisions of the DVC Act which are not on collision course with the Electricity Act have been left untouched and they continue to apply. Only those provisions of the DVC Act which are inconsistent with the provisions of the Act of 2003, have been put out of operation. Section 20 of the DVC Act is one such provision.

3. Section 20 of the DVC Act provides that the corporation shall fix the schedule of charges for the supply of electrical energy, including their rates for bulk supply and retail distribution. It also requires the DVC to specify the manner of recovery of such charges. This provision is inconsistent with Section 62(1) of the Act of 2003. As per Section 62 of the Act of 2003, the tariff is to be determined by the appropriate Commission. Sub-section (1) of Section 62 of the Act of 2003 reads as under:-

62. Determination of Tariff – (1) The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity.

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

4. According to the above said provision, it is the appropriate Commission, which is required to determine tariff. Section 20 of the DVC Act providing for determination of tariff by the DVC being incompatible with Section 62 of the Act of 2003, cannot apply. Reading fourth proviso to Section 14 alongwith Section 62, leaves no manner of doubt that the appropriate Commission shall determine tariff in accordance with the provisions of the Act of 2003, which includes the provisions of the DVC Act that are not inconsistent with the provisions of the Act of 2003.

5. Thus, it must be held that under Section 62 of the Act of 2003, it is the appropriate Commission, which is required to determine the tariff and the contrary provision contained in Section 20 of the DVC Act, which empowers

the DVC to fix the schedule of charges is not applicable as per fourth proviso to Section 14 of the Act of 2003. But the Act of 2003 read in the light of the fourth proviso to Section 14 has not given a go-by to such of the provisions of the DVC Act which may be dealing with any of the facets of tariff in case they are not contrary to the Act of 2003.

6. Fourth proviso to Section 14 of the Act of 2003 has also not given any over-riding effect to the Rules and Regulations framed under the Act of 2003 over the statutory provisions of the DVC Act. It does not contemplate that the Rules and Regulations framed under the Electricity Act shall also have a over-riding effect in case of any inconsistency between the DVC Act and the rules and Regulations framed under the Act of 2003.

7. The provisions of the DVC Act which are consistent and inconsistent with the provisions of the Act of 2003 have been brought out in the Judgment of my learned Brother. Therefore, in this regard, it is not necessary for me to undertake an extensive survey. Suffice it to say that the provisions of the DVC Act that are inconsistent with the Act of 2003 have been rendered inoperative and the provisions which are not inconsistent with the DVC Act have to be given their full sway.

8. The CERC framed Regulations called Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 and notified the same on March 26, 2004. The Regulations, *inter alia*, provide for debt-equity ratio, interest on loan capital, depreciation, return on equity etc. In so far as debt equity ratio and return on equity is concerned, there is no provision in the DVC Act for computing the same for the purposes of determination of

tariff. But in so far as depreciation and interest on capital provided by each participating State is concerned, the DVC Act contains specific provisions.

9. Section 40 of the DVC Act makes a provision for depreciation and reserve and other funds. Section 40 reads as under:-

“ 40. Provision for depreciation and reserve and other funds:-

- (1) The Corporation shall make provision for depreciation and for reserve and other funds at such rates and on such terms as may be specified by the Auditor General of India in consultation with the Central Government.
- (2) The net profit for the purposes of section 37 shall be determined after such provision has been made”.

10. In view of the aforesaid provision, DVC has been authorized to make provision for depreciation and for reserve and other funds at such rates as fixed by the Auditor General of India in consultation with the Central Government. It needs to be noted that in the Act of 2003, there is no provision relating to depreciation. Therefore, Section 40 is not inconsistent with the Act of 2003. As per Section 62 of the Act of 2003 read with fourth proviso to Section 14 thereof, the appropriate Commission is required to determine tariff in accordance with the provisions of the Act of 2003, which includes the provisions of the DVC Act that are not inconsistent therewith (Act of 2003). The CERC however, by framing Regulations created a conflict between Section 40 of the DVC Act and the Regulation 21(ii) of the Regulations. Regulation 21(ii) reads as follows:-

“21. (ii) *Depreciation, including Advance against Depreciation*

(a) **Depreciation**

For the purpose of tariff, depreciation shall be computed in the following manner, namely:

- (i) *The value base for the purpose of depreciation shall be the historical cost of the asset;*
- (ii) *Depreciation shall be calculated annually, based on straight line method over the useful life of the asset and at the rates prescribed in Appendix II to these Regulations.*

The residual life of the asset shall be considered as 10% and depreciation shall be allowed up to maximum of 90% of the historical capital cost of the asset. Land is not a depreciable asset and its cost shall be excluded from the capital cost while computing 90% of the historical cost of the asset. The historical capital cost of the asset shall include additional capitalization on account of Foreign Exchange Rate Variation up to 31.3.2004 already allowed by the Central Government/Commission.

- (iii) *On repayment of entire loan, the remaining depreciable value shall be spread over the balance useful life of the asset.*
- (iv) *Depreciation shall be chargeable from the first year of operation. In case of operation of the asset for part of the year, depreciation shall be charged on pre rata basis.*

(b) **Advance Against Depreciation**

In addition to allowable depreciation, the generating company shall be entitled to Advance Against Depreciation, computed in the manner given hereunder:-

AAD= *Loan repayment amount as per Regulation 21(i) subject to a ceiling of 1/10th of loan amount as per Regulation 20 minus depreciation as per schedule*

Provided that Advance Against Depreciation shall be permitted only if the cumulative repayment up to a particular year exceeds the cumulative depreciation up to that year;

Provided further that Advance Against Depreciation in a year shall be restricted to the extent of difference between cumulative repayment and cumulative depreciation up to that year”.

A perusal of Regulation 21(ii) of the Regulations and Section 40 of the DVC Act, clearly reveal the inconsistencies between these two provisions.

11. In case the Parliament, while enacting the Act of 2003, wanted the Rules and Regulations framed thereunder to prevail over provisions of the DVC Act which were inconsistent therewith, it would have expressly stated so. That's, however, is not the case. The Parliament did not confer such a privilege to the Rules and Regulations framed under the Act of 2003 so as to nullify the statutory provisions of the DVC Act. The operation of Section 40 and other provisions cannot be curtailed by Regulations framed by the CERC. Such of the Regulations which are restricting the operation of the provisions of the DVC Act that are not inconsistent with the provisions of the Act of 2003 must be ignored as the Regulations or Rules cannot prevail over the legislation.

12. The learned counsel for the respondent (hereinafter called the respondent in Appeal No. 273/06) submitted that Regulations framed by the CERC have a statutory flavour and they have a force of a statute and such provisions of the DVC Act that are contrary to the Regulations must yield and give way to the Regulations. We cannot countenance this argument. The fourth proviso to Section 14 clearly implies that only such of the provisions of the DVC Act

which are inconsistent with the Electricity Act shall not apply. The inconsistency envisaged is between the provisions of the DVC Act and the provisions of the Electricity Act and not between the provisions of the DVC Act and the rules and the Regulations framed under the Electricity Act. The CERC cannot frame Regulations for determination of tariff of DVC which are inconsistent with the provisions of the DVC Act that do not collide with the Electricity Act.

13. The Supreme Court In the case of Kerala Samasthana Chetu Thozhilali Union Vs. State of Kerala (2006) 4 SCC 327 para 17 at page 337, held that a rule is not only required to be made in conformity with the provisions of the Act, whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any legislation made by the Parliament or the State Legislature.

14. In saying that the Regulations cannot be framed in violation of the statute, we are not holding them to be ultra-virus of the DVC Act but we are ignoring such of the Regulations which are contrary to the DVC Act as DVC Act being a legislation made by the Parliament must operate in so far as its provisions are not contrary to the provisions of the Act of 2003.

15. In Bharathidasan University vs. All India Council for Technical Education, (2001) 8 SCC 676, the Supreme Court held that the courts are bound to ignore the Rules or Regulations which are not in conformity with the statutory provisions. In this regard it was observed as follows:-

” The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make Regulations is

confined to certain limits and made to flow in a well-defined canal within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party is sufferance is a respondent to the lis or proceedings cannot confer any further sanctity or authority and validity which it is shown and found to obviously and patently lack. It would, therefore, be a myth to state that Regulations made under Section 23 of the Act have “constitutional” and legal status, even unmindful of the fact that any one or more of them are found to be not consistent with specific provisions of the Act itself. Thus, the Regulations in question which AICTE could not have made so as to bind universities/UGC within the confines of the powers conferred upon it, cannot be enforced against or bind a university in the matter of any necessity to seek prior approval to commence a new department or course and programme in technical education in any university or any of its departments and constituent institutions (para 14)”.

16. In view of dicta laid down by the Supreme Court in the above decision, Regulation 21(ii) of the Regulations will have to be ignored, being contrary to Section 40 of the DVC Act. On parity of reasoning, Sections 38 and 39 of the DVC Act that deal with payment of interest and interest charges and other expenses to be added to and receipts taken for reduction of capital cost respectively not being contrary to any of the provisions of the Act of 2003, need to be given effect to. Similarly the following relevant Sections other than Sections 38, 39 & 40 dealing with various subjects mentioned below are not inconsistent with the Act of 2003:

<u>Section of the DVC</u>	<u>Dealing with subject</u>
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Section 32	Expenditure on objects other than irrigation, Power and flood control.
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Section 33	Allocation of expenditure chargeable to project
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on main objects, namely irrigation, power and flood control.

Section 34 Capital allocated to irrigation

Section 36 Capital allocated to flood control

Section 37 Disposal of profits and deficits

17. These provisions contained in Part-IV of the DVC Act can be read with the Act of 2003 as there is no conflict between the two. Therefore, the existence of these provisions and their application are not in any manner endangered or affected by the Act of 2003. Therefore, the force of these provisions cannot be curbed by any Regulations or Rules framed under the Act of 2003. In the event of any inconsistency between the Regulations and the above said provisions of the DVC Act, the latter provisions cannot be said to be falling foul of the fourth proviso to Section 14 of the Act of 2003. It appears to us that the Parliament, while enacting the Act of 2003, was conscious of the special responsibilities of the DVC, conferred on it by the DVC Act.

18. The preamble to the DVC Act reflects that the Act was enacted to provide for the establishment and regulation of DVC for the development of the Damodar Valley consisting of certain provinces of Bihar (presently Jharkhand) and West Bengal. The provisions of the DVC Act impose various obligations on the DVC in respect of Damodar Valley and in the area of its operation.

These are:-

- (a) the promotion and operation of schemes for irrigation, water supply and drainage;

- (b) the promotion and operation of schemes for the generation, transmission and distribution of electrical energy, both hydro-electric and thermal;
- (c) the promotion and operation of schemes for flood control in the Damodar river and its tributaries and the channels, excavated by the DVC in connection with the scheme and for the improvement of flow conditions in the Hooghly river;
- (d) the promotion and control of navigation in the Damodar river and its tributaries and channels;
- e) the promotion of afforestation and control of soil erosion; and
- f) the promotion of public health and the agricultural, industrial, economic and general well-being.

19. The DVC is also required to perform the following activities as per Section 21 of the DVC Act:-

1. It may establish, maintain and operate laboratories, experimental and research stations and farms for conducting experiments and research for following purposes-

- (a) utilizing water, electrical energy and other resources in the most economical manner for the development of the Damodar Valley;
- (b) determining the effect of its operations on the flow conditions in the Hooghly river;

- (c) making improvements in navigation conditions in the port of Calcutta, and
- (d) carrying out any other function specified under Section 12.

Besides, it is authorized to own plan, design, construct and operate agencies, or make arrangements therefor with the participating Governments, local authorities, educational and research institutions or any person carrying on the business of an architect, an engineer or a contractor.

20. In a nutshell the DVC is concerned with generation of electricity, irrigation, water supply, electrical energy, flood control, navigation, afforestation, soil erosion, use of lands, and resettlement of displaced population, sanitation and public health measures and economic and social welfare of the people in the Damodar Valley and in the area of its operation.

21. It appears that in view of the peculiar nature of duties and obligations of the DVC, the Parliament through fourth proviso to Section 14 clearly mandated that the provisions of the DVC Act that are not inconsistent with the Act of 2003 shall continue to apply to the DVC so that multifarious activities assigned to it under the DVC Act are not affected. The provisions of the DVC Act that are not in conflict with the Act of 2003, particularly Sections 38, 39 and 40 of the former Act which have tariff implications, were not repealed by the Act of 2003. Nothing prevented the Parliament from specifically and directly providing the repeal of Sections 38, 39 and 40 of the DVC Act. Again nothing prevented the Parliament from giving over-riding effect to the Regulations over these provisions. On the contrary the Parliament left these sections intact and

only such provisions were affected which were contrary to the provisions of the Act of 2003.

22. Though the participating State Governments have been made responsible for bearing the cost of activities entrusted to the DVC, it is a hard reality that initially, after the seed money contributed by them, nothing has come from the States. At the same time, it is also true that the profits of the DVC and the interest on the amount of capital provided by the participating Governments is being adjusted in the accounts of the DVC and nothing has been made over to the States.

23. Undoubtedly under Section 37(1) of the DVC Act, the DVC is required to credit its net profit to the participating Governments in proportion of their respective shares in the total capital cost attributable to the main objects of the DVC. This can be done by the following two methods:-

- (i) Actual dispersal of the share to each of the participating Governments; or
- (ii) Adjustment of the shares in the accounts of the DVC as the contribution of the participating States.

24. Section 40(2) of the DVC Act makes provision for determination of net profit after making provision for depreciation and for reserve and other funds. Such like benefits may not be available to other transmission utilities under the Regulations framed under the Act of 2003 but DVC stands on a separate footing as none of the transmission companies are discharging obligations of the nature that are being discharged by the DVC. Some surplus or profit on account of operation of these provisions of the DVC Act are helpful in meeting the

expenses incurred by it for discharging its statutory social obligations that it is still required to perform under the DVC Act. In view of the special nature of the DVC Act, sections 37(1), 38, 39, 40 etc. have been left unscathed by the Act of 2003.

25. It was submitted in opposition on behalf of the respondents in appeal no. 273 of 2006 that Regulations are part and parcel of the Act of 2003 as having been framed under Section 178(1)(u) read with Section 62(5) thereof. As a sequitur, it was contended that depreciation being one of the elements for calculating expected revenue stand covered by the Regulations. It was urged that this being so, Regulations would prevail, being part and parcel of the Act of 2003, over Section 40 of the DVC Act. On the parity of reasoning, it was argued that the other elements for calculating expected revenue covered by Sections 38 and 39 of the DVC Act would also have to be ignored being repugnant to the Regulations.

26. The arguments though attractive, are devoid of merit. As already pointed out, Regulations should be in conformity not only with the provisions of the Act under which they are made but the same must be in conformity with the provisions of any other Act which is not repealed. Rules or Regulations cannot be elevated to a level higher than an enactment as a sub-ordinate legislation must remain subordinate to the legislation made by the Parliament or a State legislature.

27. It was also argued for the respondents in appeal no. 273/06 that according to Section 64 of the Act of 2003, an application for determination of tariff under Section 62 is required to be made by a generating company or a licensee in such

a manner as may be specified by Regulations including the Regulations relating to depreciation etc. The argument loses sight of the fact that Section 64 envisages Regulations that are in conformity with the Statute and does not conceive of Regulations that are repugnant to the statutory provisions.

28. It was canvassed on behalf of Maithan Alloys & Bhaskar Shrichi that part-IV of the DVC Act deals with finance, accounts and audit and does not deal with determination of tariff. Therefore, Regulations framed under the Act of 2003 are only provisions for determination of tariff. The argument appears to be based on heading of Part-IV. It is well-settled that Headings and head notes do not control the width of the provisions. Sections 38, 39 and 40 of the DVC Act specifically deal with elements of tariff. Their strength and vigor is not whittled down or diminished by the heading of Part-IV of the DVC Act.

29. In view of the aforesaid discussion, it must be held that the Act of 2003 does not rob Sections 38, 39 and 40 of the DVC Act and the provisions thereof dealing with social obligations and activities of the DVC of their force and efficacy.

30. It was argued on behalf of the respondents in Appeal no. 273 of 2006 that under Section 61 of the Act of 2003, tariff Regulations are required to be framed by seeking guidance from the principles specified in clauses (a) to (i) of Section 61 of the Act of 2003. According to the respondents, the principles specified in Section 61 exclude other factors or activities for being taken into consideration for determining the tariff. It was canvassed that clauses (d) and (g) of Section 61 envisage that Regulations should be framed in such a manner so that the interests of the consumers are safeguarded and at the same time

recovery of the cost of electricity in a reasonable manner is effected and the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission. Therefore, it was concluded by the learned counsel for the respondents that the Tariff Regulations under Section 61 of the Act of 2003 expressly exclude factors or activities of the utilities which are not connected with electricity. Learned counsel pointed out that sub-Regulation (3) of Regulation 4 which, *inter alia*, provides that in relation to multi purpose hydro project with irrigation, flood control and power components, the capital cost chargeable to the power component shall be only considered for determination of tariff. Our attention was also invited to other clauses of Section 61 of the Act of 2003 for raising the same arguments and for pointing out that the factors to be considered for determination of tariff have to be inconsonance with the National Electricity Policy and Tariff Policy. It was also pointed out that there is no mention in the Act of 2003 that the tariff will be determined in accordance with the DVC Act.

31. The submissions over-look the fact that Section 61 of the Act of 2003 empowers the Commission to specify the terms and conditions for determination of tariff subject to its provisions. One cannot lose sight of the fact that fourth proviso to Section 14 of the Act of 2003 only knocks off the operation of such of the provisions of the DVC Act that are inconsistent with the provisions of the Act of 2003. Therefore, the words ‘subject to the provisions of this Act’ occurring in Section 61 of the Act of 2003 are very significant, when viewed in the context of fourth proviso to Section 14 thereof. As already pointed out fourth proviso to Section 14 allows the operation of the provisions of the DVC Act which are not inconsistent with the provisions of the Act of 2003. Such of the factors or activities envisaged in the DVC Act that are

not excluded by the Act of 2003 are relevant and cannot be ignored. While framing Regulations under the Act of 2003, the appropriate Commission cannot over-look the statutory provisions of the DVC Act which are not inconsistent with the provisions of the Act of 2003. We do not find that the applicable provisions of the DVC Act allow recovery cost of electricity in an unreasonable manner or they do not safeguard the interest of the consumers. Cost of electricity would also include actual cost of supply of electricity plus reasonable profit of the utility, since as per the principle enshrined in clause (b) of Section 61, the generation, transmission, distribution and supply of electricity are to be conducted on commercial principles. In case generation, transmission, distribution and supply of electricity are not to be conducted on commercial principles, no one would invest in electricity sector, which will not be in the national interest. Without an element of reasonable profit, no business can run. But this does not mean that the interest of the consumers have not to be taken into consideration. A right equilibrium has to be maintained between the interests of the consumers and the interests of the entrepreneurs so that the entrepreneurs are not deterred from making investment in the electricity sector and at the same time the consumers get electricity at a reasonable price. It needs to be pointed out that DVC does not seek enhancement of tariff and is satisfied with the tariff that was prevailing before the impugned determination of tariff by the CERC. The tariff of the West Bengal Electricity Board and the Jharkhand Electricity Board are admittedly higher than the tariff of the DVC.

32. The respondents also pressed into service the provisions of Sections 173, 174 and 175 of the Act of 2003 in support of their contention that the Regulations prevail over the statutory provisions of the DVC Act, which have

an impact on tariff determination particularly Sections 38, 39 and 40 of the DVC Act. The contention is devoid of any force.

33. Section 173 of the Act of 2003 declares that nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act or the Railways Act, 1989. In other words, Section 173 specifically allows Consumer Protection Act, Atomic Energy Act and the Railways Act to prevail over the provisions of the Act of 2003 and the Rules and Regulations framed thereunder. At the same time it does not provide that the Act of 2003 or Rules or Regulations framed therein shall prevail over any other enactment. It cannot be deduced from Section 173 that the provisions of the DVC Act are to give way to Rules and Regulations framed under the Act of 2003. In case of inconsistency between the provisions of the Act of 2003 and the DVC Act, there is no doubt that the provisions of the Act of 2003 shall prevail, as envisaged by the fourth proviso to Section 14 of the Act of 2003. But there is nothing to suggest that the Rules and Regulations framed under the Act of 2003 shall be given precedence over the statutory provisions of the Act of 2003. Section 174 also does not advance the case of the respondent. It only gives over-riding effect to the provisions of the Act of 2003. Even Section 175 does not help the respondents. It declares the provisions of the Act of 2003 to be in addition to and not in derogation of other laws for the time being in force.

34. The other important aspect of the matter which needs to be tackled relates to the question as to which Regulatory Commission is empowered to determine the generation and transmission tariffs of the DVC.

35. In connection with the aforesaid question, it is relevant to look at Section 79 of the Act of 2003. Section 79 of the Act of 2003, *inter alia*, provides that the Central Commission will regulate tariff of generating companies owned or controlled by the Central Government.

36. The control of the Central Government over the DVC is manifest from various provisions of the DVC Act.

37. Section 3 of the DVC Act deals with incorporation of the DVC. Clause (1) of Section 3 provides that with effect from such date as the Central Government may, by notification in the official Gazette, appoint in this behalf, there shall be established a Corporation by the name of the Damodar Valley Corporation. There is no doubt that the DVC was established by a notification issued by the Central Government in consonance with Section 3 of the DVC Act.

38. As per Section 4 of the DVC Act, the Corporation shall consist of a Chairman and two other members appointed by the Central Government after consultation with the two Provincial Governments of West Bengal and Jharkhand (earlier State of Bihar before creation of State of Jharkhand).

39. According to Section 6, appointment of Secretary and the Financial Adviser of the Corporation is to be made by the Central Government.

40. Section 11 provides for the limits of Damodar Valley and area of operation of the DVC. Again it is the Central Government, which is required to specify the limits of Damodar Valley. The functions and powers of the DVC

are also required to be specified by the Central Government in accordance with clause (3) of Section 11.

41. Section 27 deals with expenditure until the establishment of the DVC. It, *inter alia*, provides that all expenditure incurred by the Central Government upto the date of establishment of the DVC is to be treated as capital provided by the Central Government to the Corporation and such capital is required to be adjusted by the participating Governments in accordance with the provisions of Sections 30 to 36.

42. Section 29, *inter alia*, requires that all monies belonging to the fund shall be deposited in the Reserve Bank of India or the Agents of the Reserve Bank of India or invested in such securities as may be approved by the Central Government.

43. Thus, the Central Government is assigned a role even in the approval of securities in which the DVC may invest. Section 47 provides for audit of the accounts of the DVC. The accounts of the DVC are to be maintained and audited in such manner as may, in consultation with the Auditor General of India, be prescribed by rules made by the Central Government.

44. Section 48 mandates that in discharge of its functions, the Corporation shall be guided by such instructions on questions of policy as may be given to it by the Central Government.

45. Section 51 confers power on the Central Government to remove from the Corporation any member for the reasons specified therein. The Central

Government is also competent to suspend any member pending an enquiry against him. Besides, the Central Government has the power to declare void any transaction in connection with which a member has been removed. That apart, Central Government has been empowered to remove the Chairman and the members of the Corporation and appoint a Chairman and Members in their places, where Corporation fails to carry out its functions, or follow the directions issued by the Central Government under the DVC Act.

46. By virtue of Section 59, the Central Government has the power to make rules to provide for all or any of the following matters:-

- i) the salaries and allowances and conditions of service of members, the secretary and the financial adviser;
- ii) the functions and duties of the financial adviser;
- iii) the dams or other works or the installations which may be constructed without the approval of the Corporation;
- iv) the forms of the budget, the annual report and the annual financial statements and the dates by which copies of the annual financial statements shall be made available to the participating Governments;
- v) the manner in which the accounts of the Corporation shall be maintained and audited;

- vi) the appointment of an Advisory Committee; and
- vii) the punishment for breach of any rule made under this Act.

47. Section 60 makes provision for framing of Regulations. The Corporation can frame Regulations but only with the previous sanction of the Central Government.

48. Thus, there is no doubt that the DVC, which is a generating company, was established by the Central Government and it is the Central Government which has pervasive control over the DVC. This being so, under Section 79, the Central Commission is required to regulate tariff of the DVC as it is controlled by the Central Government. The mere fact that it is also a transmission licensee does not detract from the fact that it is basically a generating company controlled by the Central Government. Thus, neither the West Bengal State Electricity Regulatory Commission nor the Jharkhand State Electricity Regulatory Commission has the power to regulate tariff of the DVC. My learned brother has also held that it is only the Central Electricity Regulatory Commission which has the jurisdiction to regulate tariff of the DVC as a generating company. I also endorse the reasoning of my learned brother whereby he has concluded that it is the Central Electricity Regulatory Commission which has the jurisdiction to regulate the tariff of the DVC relating to transmission of electricity.

Per Hon'ble Mr. A.A. Khan, Technical Member

49. The above appeals have been preferred against the final order dated October 3, 2006 passed by the Central Electricity Regulatory Commission (hereinafter referred to as CERC/Central Commission) in Petition No. 66 of 2005 filed by the Damodar Valley Corporation (hereinafter referred to as 'DVC' or the 'Corporation') wherein the Central Commission has determined the tariff relating to generation and transmission activities applicable with effect from April 1, 2006. While Appeal No. 273 of 2006 and I.A. No. 59 and 60 of 2007 have been filed by DVC, Appeal Nos. 271, 272, 273 and 275 of 2006 and Appeal No. 08 of 2007 and I.A. No. 57, 58 and 116 of 2007 have been filed by the beneficiaries of the power generation and distribution functions of the DVC. Since the issues raised in all the aforesaid appeals are of common nature emanating from the impugned order of the Central Commission, we have taken Appeal No. 273 of 2006 as the lead appeal to address the various disputes raised by these appeals.

BACKGROUND

Major issues of Grievances

50. Appellant, DVC, is a statutory body constituted under the provisions of the Damodar Valley Corporation Act, 1948 passed by the Parliament with the object of the development of the Damodar Valley geographically situated in the territories of West Bengal and Jharkhand. DVC, in terms of the Damodar Valley Corporation Act, 1948 (DVC Act), has been promoted and established with equal participation of the Central Government, State Governments of West Bengal and Jharkhand (prior to re-organization of the State of Bihar, the erstwhile State of Bihar was the promoter) and the aforesaid States are the

principal beneficiaries of the DVC. DVC is functioning under the administrative control of Respondent NO.6, Government of India (hereinafter referred to as the 'GOI') and, Respondent Nos. 2 and 3 namely States of West Bengal and Jharkhand, each having representation in the DVC Board for managing its operations. The Respondent No. 1 is the Central Electricity Regulatory Commission (to be called as Central Commission) constituted under the Electricity Act 2003 (hereinafter referred to as 'the Act') and is mandated with the functions, *inter-alia*, as provided in Sections 61, 62, 64 and 79 of the Act. The Respondent Nos. 4 and 5 are the State Electricity Boards of West Bengal and Jharkhand respectively. The Respondent Nos. 2 and 3 are the consumers of DVC who along with other Respondents had participated in the proceedings before the Central Commission. Respondent Nos. 7 & 8 are the HT- consumers who seem to have grievances against the impugned order.

51. The functions of DVC have been mandated under section 12 of the DVC Act. Its major functions are in the areas of promotion and operation of schemes for irrigation, water supply, drainage, electricity generation, transmission and distribution and flood control. The Appellant has submitted that it had been operating in line with the provisions of the DVC Act read with applicable provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 and was not regulated by the Electricity Regulatory Commissions Act, 1998. With the enactment of the Electricity Regulatory Commissions Act, 1998, the tariff determination powers of the Governments (Central Government in the case of CPSUs and State Governments in the case of SEBs) stood vested with the appropriate commissions. However, the Appellant has submitted that it continued to determine tariff for supply of electricity on its own and was not subjected to determination of tariff by the Commission.

52. With the enactment of the Act, which came into force with effect from June 10, 2003, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and The Electricity Regulatory Commission Act, 1998 have been repealed. The Appellant has claimed that even after the Act coming into effect, the operation of the DVC should continue to be governed by the provisions of the DVC Act provided they are not inconsistent to the provisions of the Act.

53. Section 12 of the DVC Act lays down the functions of the Corporation as extracted hereunder :

“12. Functions of the Corporation:

The functions of the Corporation shall be-

(a) the promotion and operation of schemes for irrigation, water supply and drainage,

(b) the promotion and operation of schemes for the generation, transmission and distribution of electrical energy, both hydroelectric and thermal,

(c) the promotion and operation of schemes for flood control in the Damodar river and its tributaries and the channels, if any, excavated by the Corporation in connection with the schemes and for the improvement of flow conditions in the Hooghly river.

(d) The promotion and control of navigation in the Damodar river and its tributaries and channels, if any,

(e) The promotion of afforestation and control of soil erosion in the Damodar Valley, and

(f) *The promotion of public health and the agricultural, industrial, economic and general well-being in the Damodar Valley and its area of operation”*

54. As seen from the para 53 above the DVC is mandated to perform multifarious functions which, apart from the generation, transmission and sale/supply of electricity, also include the activities for the promotion and operation of schemes for irrigation; water supply; drainage; flood control and improvement of flow conditions in the Hoogly river; navigation in Damodar river and its tributaries and channels; afforestation and control of soil erosion in Damodar Valley; promotion of public health; agriculture; industrial and economic and general well being in the Damodar Valley under its area of operation. It is also observed that the number of activities such as drainage, flood control, improvement in the flow conditions, navigations, afforestations, control of soil erosion or the promotion of public health are primarily state's functions and are not commercial in nature. The main earning activities of the DVC is the generation and supply of electricity. In terms of the provisions of the DVC Act, the participating Governments had contributed a total sum of Rs. 214.72 crores as capital up to the year 1968-69. Thereafter, DVC, instead of distributing the surplus revenue to the participating Governments, has been ploughing it back into the operations.

55. Section 14 of the DVC Act provides that the Corporation may, after consultation with the Provincial Government concerned, ***determine and levy rates for the bulk supply of water to the participating State Governments for irrigation***, and fix the minimum quantity of water, which shall be made available for such purpose. Similarly section 20 of the DVC Act empowers

DVC to fix the tariff for supply of electricity. Before the enactment of the Act, tariff determination pertaining to generation and supply of electricity by DVC was regulated in terms of the provisions of section 20 of the DVC Act, which provided that DVC **shall fix the schedule of charges for the supply of electrical energy**, including the rates for bulk supply and retail distribution, and specify the manner of recovery of such charges. The DVC has been operating under the aforesaid provisions of the DVC Act. However, after coming into force of the Act, the tariff related matters are to be governed by the Act subject to the Fourth proviso of Section 14 of the Act.

56. Fourth proviso of Section 14 of the Act reads as :

*‘Provided also that the Damodar Valley Corporation, established under sub-section (1) of section 3 of the Damodar Valley Corporation Act, 1948 shall be deemed to be a licensee under this Act but shall not be required to obtain a license under this Act **and the provisions of the Damodar Valley Corporation Act, 1948, in so far as they are not inconsistent with the provisions of this Act, shall continue to apply to that Corporation.**’* (Emphasis supplied)

57. In June 2005 DVC filed the Petition No. 66 of 2005 before the Central Commission for determination of tariff for its generation and inter-state transmission of electricity. The Central Commission finally decided the tariff for the period April 1, 2004 to March 31, 2009 in respect of the said Petition by an order dated October 3, 2006. It is observed that the tariff so determined was lower than the tariff proposed by the Petitioner and also lesser than the tariff prevailing prior to April 1, 2004. The Appellant has also averred that the prevailing tariff of DVC is also lower than the tariff of West Bengal Electricity

Board; CESC Ltd. a private utility located in West Bengal and Jharkhand State Electricity Board. However, a strict comparison cannot be made between the tariffs of these entities due to different consumer load profile amongst other things.

58. Aggrieved by the order of the Central Commission on various counts DVC has approached this Tribunal seeking to set aside the order dated October 3, 2006 of the Central Commission.

Details

59. The Appellant has submitted that in terms of Section 20 of the DVC Act, the DVC had been fixing the schedule of tariff for supply of power including the rates of bulk supply and retail distribution. It has submitted in paragraph XXV of the Appeal that the *“tariff structure of DVC was all along on cost plus basis based on budgetary norms, which as far as practicable is aimed at incentivising the efficiency. The tariff determined by DVC in September 2000 has been continued without revision except fuel surcharges for five years till 2004-05.”*

60. It is further submitted by the Appellant that the tariffs were not determined based on any standard norms of operation. The Appellant in Paragraph XXXI has submitted that unique position of DVC requires that the tariff and other regulations framed by the Central Commission for the other Central Electricity Utilities or the manner of determination of tariff adopted for such other utilities cannot *ipso facto* be applied to DVC. The Appellant submits that the Central Commission should determine electricity tariff for DVC by

reading down the provisions of Part-IV (Finance, Accounts and Audit) of the DVC Act as these are not inconsistent with the provisions of the Act.

61. The Appellant also highlights the distinguishing features of operations of DVC in contrast to other Central Power Utilities, wherein DVC is mandated to carryout certain functions such as flood control, irrigation, social integration project, soil conservation activities, multi-purpose dams, afforestation, etc. which normally are the functions of the States of Jharkhand and West Bengal.

62. The Appellant has also raised the following specific grounds of appeal while challenging the impugned order:

- A.** Debt Equity ratio
- B.** Disallowance of additional capitalization for the period 2004-2009
- C.** Higher Return on Equity
- D.** Pension and Gratuity Contribution
- E.** Revenues to be allowed to DVC under the DVC Act
- F.** Depreciation Rate
- G.** Re-setting of operating norms at variance from the operating norms prescribed in the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (hereinafter referred to as 'Regulations, 2004').
- H.** O&M Expenses
- I.** Return on capital Investment on Head Office, Regional Offices, Administrative and other Technical centers, etc.
- J.** Generation Projects presently not operating

63. Before taking up the aforesaid grounds of appeal we will first examine the legal validity of the claim of the Appellant that, in spite of the enactment of the Act, the provisions of Part-IV (Finance, Account and Audit) of the DVC Act shall continue to apply for determination of both bulk supply and retail supply of tariff for DVC.

64. The main provisions of the DVC Act, under Part IV, which we feel are relevant for better appreciation of the issues under consideration, are reproduced below:

“SECTION 30: Liabilities of participating Governments to provide Capital to the Corporation:

The Participating Government shall, as hereinafter specified, provide the entire capital required by the Corporation for the completion of any project undertaken by it.

SECTION 31: Payment by participating Government on specified date:

Each Participating Government shall provide its share of the capital on the dates specified by the Corporation and if any Government fails to provide such share on such dates the Corporation may raise loan to make up the deficit at the cost of the Government concerned.

SECTION 32: Expenditure on objects other than irrigation, power and flood control:

The Corporation shall have power to spend such sums as it thinks fit on objects authorized under this Act other than irrigation, power and flood control and such sums shall be treated as

common expenditure payable out of the Fund of the Corporation before allocation under Section 33

SECTION 33: *Allocation of expenditure chargeable to project on main objects:*

The total expenditure chargeable to a project shall be allocated between the three main objects, namely, irrigation, power and flood control as follows, namely:

- i. Expenditure solely attributable to any of these objects, including a proportionate share of overhead and general charges, shall be charged to that object, and*
- ii. Expenditure common to two or more of the said objects, including a proportionate share of overhead and general charges, shall be allocated to each of such objects in proportion to the expenditure which, according to the estimate of the corporation, would have been incurred in constructing a separate structure solely for that objects less any amount determined under clause (1) in respect of that object.*

SECTION 34: *Capital allocated to irrigation:*

The total amount of capital allocated to irrigation shall be shared between the Provincial Governments as follows, namely:

- i. *The Government concerned shall be responsible for the capital cost of the works constructed exclusively for irrigation in its Province; and*
- ii. *The balance of capital cost under irrigation for both the Provinces of Bihar and West Bengal shall be shared by the Provincial Governments in the proportion to their guaranteed annual off-takes of water for agricultural purposes:*

Provided that the divisible capital cost under this clause shall be provisionally shared between them in accordance with their previously declared intentions regarding their respective guaranteed off-takes and any payments made accordingly shall be adjusted after the determination of the guaranteed off-takes.

SECTION 35: Capital allocated to power:

The total amount of capital allocated to power shall be shared equally between the three Participating Governments.

SECTION 36. Capital Allocated to flood control:

The total amount of capital up to fourteen crores of rupees allocated to flood control shall be shared equally between the Central Government and the Government of West Bengal and any amount in excess thereof shall be the liability of the Government of West Bengal.”

SECTION 37: *Disposal of profits and deficits:*

(1) Subject to the provision of sub-section (2) of Section 40, the net profit, if any, attributable to each of the three main objects, namely, irrigation, power and flood control, shall be credited to the participating Governments in proportion to their respective shares in the total capital cost attributed to that object.

(2) The net deficit, if any, in respect of any of the objects shall be made good by the Governments concerned in the proportion specified in sub-section(1):

Provided that the net deficit in respect of flood control shall be made good entirely by the Government of West Bengal and the Central Government shall have no share in such deficit.

SECTION 38: *Payment of interest:*

The Corporation shall pay interest on the amount of the capital provided by each Participating Government at such rate as may, from time to time, be fixed by the Central government and such interest shall be deem to be part of the expenditure of the Corporation.

SECTION 40: *Provision for depreciation and reserve and other funds:*

(1) The Corporation shall make provision for depreciation and for reserve and other funds at such rates and on such terms as may be specified by the Auditor General of India in consultation with the Central Government.

(2) The net profit for the purpose of section 37 shall be determined after such provision has been made.

LEGAL ISSUES AND ANALYSIS

Extent of Applicability of DVC Act

65. The Respondents have contended that insofar as the electricity related matters are concerned, the provisions of the DVC Act being inconsistent with the provisions of the Act, the former stands repealed by the Act and, therefore, cannot be invoked by the DVC while dealing with the tariff determination for generation and supply of electricity by the Central Commission. In the nutshell, the primary legal issue to be resolved is whether or not the tariff for the DVC is to be determined by the Central Commission according to the Act and the Regulations, 2004, framed under it without giving any regard to the provisions of the DVC Act not inconsistent with the Act. The Appellant has advanced the argument that if the inconsistency between any rule and regulations framed under the Act and the DVC Act would have also been the ground for non-application of the DVC Act, the Parliament would have expressly and specially provided for the same, both in Fourth Proviso in Section 14 and Section 174 of the Act. In support of this line of argument, the Appellant has cited several Acts enacted by the Parliament where such specific provisions have been made

for giving overriding supremacy to Rules and Regulations framed under the Act over the provisions of other legislations. The Acts quoted by the Appellant are:

- (a) Section 173 of Electricity Act, 2003.
- (b) Section 32 of the Sick Industrial Companies (special Provisions) Act, 1995,
- (c) Section 24 of the Environment Protection Act, 1986.
- (d) Section 14 of the Payment of Gratuity Act, 1972
- (e) Section 25 of the Terrorists and Disruptive Activities (Protection) Act, 1987.

66. The Appellant has reasoned that the Parliament consciously allowed, pre-existing DVC Act relating to electricity to continue to apply while at the same time gave powers to Central Commission to frame regulations under Section 61 and 178 of the Act. It has averred that the Central Commission by framing regulations, subsequently, should not have made Para IV of the DVC Act, insofar as it related to power-object of the Corporation, non-applicable by making regulations inconsistent to the DVC Act. The Appellant further submitted that regulation-making power of Section 61 of the Act vested in the Central Commission is subject to the provisions of the Electricity Act 2003 and does not mention that it can frame overriding regulations, notwithstanding the provisions of other Acts. The Appellant, in support of that, has cited Section 29 of the Electricity Regulatory Commissions Act, 1998 and Section 11(2) of the Telecom Regulatory Authority of India Act, 1997, which contain non-obstante clauses for overriding the provisions of any other Acts. The Appellant argues that in the absence of any reference to 'Rules and Regulations' in Fourth Proviso of Section 14 and Section 178 of the Act, the Parliament has made it

clear that it did not wish to give supremacy to Regulations, 2004, of the Central Commission over other plenary legislations including the provisions of DVC Act and on the other hand Fourth Proviso of Section 14 specifically provided for **continued application of the provisions which are not inconsistent to the provisions of the Act.**

67. The Appellant has additionally submitted that it is a well settled principle that a delegated legislation or subordinate legislation should not only be consistent with the provisions of the parent Act but also with the provisions of other Acts, to whom the same is applied. In the case of **Kerala Samasthana Chetu Thozhilali Union Vs. State of Kerala (2006) 4 SCC 327 para 17 at page 337**, the Hon'ble Supreme Court dealing with Subordinate Legislation (Rule) under an Act being contrary to Industrial Disputes Act, 1947 has held thus:

“17. A rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot violate of any plenary legislation made by the Parliament or the State Legislature.”

68. The Appellant accordingly states that the Central Commission cannot make or enforce any tariff regulation (implying Tariff Regulations, 2004) inconsistent to those provisions of DVC Act (i.e. provision of Part IV of the DVC Act.) that are not inconsistent with the provisions of the Act. Appellant, therefore, proposes that the Tariff Regulations, 2004, under the circumstances, are required to be read down and effect to the provisions of Part IV of the DVC

Act be given. To re-inforce the proposition, the Appellant has made reference to a judgment delivered by the Hon'ble Supreme Court in the Case of **Bharathidasan University Vs. All India Council for Technical Education, (2001) 8 SCC 678**, holding as under :

“The fact that Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make regulations is confined to certain limits and made to flow in a well-defined canon within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party in sufferance is a Respondent to the lis or proceeding cannot confer any further sanctity or authority and validity when it is shown and found to obviously and patently lack”

69. In order to establish the relevance of Part IV of the DVC Act for tariff determination of generation and supply of electricity, we have examined the provisions made in Part IV. The said Part IV specifies the capital structure; source of fund; cost of capital by levy of interest; depreciation reserve; redemption reserve etc. beside rule for allocation of expenditure to various objects of the Corporation, recovery of charges through power tariff from the beneficiaries and distribution of profit out of the surplus amongst the participating governments. The Part IV of the DVC Act does not loose the

legitimacy for sourcing essential information required for tariff-setting just because it also contains instructions regarding preparation of budget, accounts and its audit. The Books of Accounts essentially are the legal source of the basic parameters on which the accounts of an entity are kept and maintained. The Respondents, before us, have themselves, extensively relied on the audited accounts and balance sheet of the Corporation, in their attempts to demolish the appropriateness of the claims of the Appellant regarding aforesaid financial parameters used in tariff. We find that the aforesaid financial parameters are essentially required in formulation of power tariff regardless of who undertakes it. As a matter of fact, the Regulations, 2004, notified under the Act lay down some of these parameters beside operational norms for determining the tariff for generation and transmission projects.

70. Prior to coming into effect of the Act, DVC was using these provisions in Part IV of the DVC Act in the process of determination of the power-tariff authorized by Section 20 in Part-III. Thus, the action under Section 20 in Part III of the DVC Act is a function of the provisions of Part IV and is dependent on them. The stand taken by the Respondents that the provisions of Part IV of the DVC Act merely deal with the preparation of budget, Accounts and Audit and are distinct and independent of Part III and are not needed for determination of power-tariff is found to be not sustainable and is rejected.

71. We have now to examine the validity of the demand made by the Appellant that the Central Commission ought to have given effect to the provisions in Part IV of DVC Act in the Regulations, 2004, for determination of tariff under the Act.

72. The Respondent(s) in their submissions and oral arguments presented before us have vehemently argued that the Regulations framed by the Central Commission being in the nature of subordinate legislations are statutory in character and shall have the same force as the Act; that the Regulations framed by the Central Commission under the provisions of the Act (Sections 173 and 174 read with Sections 61, 62, 79, 178, etc.) will have supremacy over the provisions of Part IV of the DVC Act; that the provisions of the Part IV of the DVC Act cannot be assumed to have been incorporated in the Act as Section 14 does not use the expression such as ‘incorporated’, ‘deemed to be incorporated’, ‘as if they have been enacted’ as contained in some other statutes and the regulations notified by the Central Commissions are to be uniformly applied to all utilities including DVC.

Analysis

73. For convenience, we will consider all the aforesaid points, made by the Appellant and Respondents in written submissions alongwith their oral arguments, together.

74. At the outset, we would like to make it clear that this Tribunal in its judgement passed on November 9, 2005, in the case of **Nayveli Lignite Corporation Ltd. Vs Tamil Nadu Electricity Board and Ors**, has held that the regulations framed under Sections 61 and 178 of the Act are in the nature of subordinate legislation and this Tribunal has no jurisdiction to examine the validity of the Regulations in exercise of its appellate jurisdiction under Section 111 of the Act. The Appellant, has also submitted that it is not challenging the vires of the regulations but is aggrieved that the Central Commission ought to

have given effect to the provisions of Part IV of the DVC Act to the extent it related to electricity matters either during framing of the Regulations, 2004 or by exercising residuary power vested in it by the regulations itself.

75. It appears to us that the Electricity Act 2003, as stated in the Fourth Proviso of Section 14, is only impacting those provisions of the DVC Act which are not compatible with it. We will notice the impact of the Electricity Act, 2003 on such of the provisions of the DVC Act which have a bearing with the controversy in question. Sections 3 to 11, 12(a), (c) to (f), 13 to 17, 21 to 26, 27 to 29, 34, 36, 41, 43 to 47, 49 to 57 and 59 of the DVC Act having no implications, therefore, being ignored. The relevant provisions of the DVC Act can be clarified into two sets of provisions, one being the provisions which are inconsistent with provisions of the Act and the second being those, which are not inconsistent with the provisions of the Act and shall continue to apply. The aforesaid determination is to be made on the basis of well-settled principles of interpretation of statutes.

76. One of the basic principles of interpretation of statutes is, that all the sections in an Act should be harmoniously construed. The following observations at pages 354-355 of N.S. Bindra's Commentary on Interpretation of statutes would be relevant.

“It is settled rule of interpretation that all the provisions would be read together harmoniously so as to give effect to all the provisions as a consistent whole, rendering no part of the provisions as surplus usages. Otherwise, by process of interpretation a part of the provisions or a Clause would be

rendered otiose. Any other view would defeat the object of the Act. The well-known principle of harmonious construction is that, effects shall be given to all the provisions and for that any provision of the statute should be construed with reference to the other provisions so as to make it workable. A particular provision cannot be picked up and interpreted to defeat another provision made in that behalf under the statute. It is the duty of the court, whenever it is possible to do so to construe provisions which appear to conflict so that they harmonize. It is equally well-settled that if two constructions are possible, the court must adopt that which will implement and which ensures that smooth and harmonious working of the Act or the Rule, and reject the other that stultifies the apparent intention and therefore, eschew that which leads to absurdity or gives rise to practical inconvenience or makes well-established provisions of law nugatory. Where there are two provisions in an enactment and one cannot be reconciled with the other, they should be so interpreted that if possible, effect could be given to both. This is what is known as the rule of harmonious construction.'

77. In view of the above principles of interpretation, the provision of an Act can be said to be inconsistent with the provisions of another Act only, if they are in collision with each other and cannot be harmonized at all. Further every effort should be made to harmonize the provisions of the two Acts and only if the effect of the collision cannot be harmonized at all, the provisions of the one Act need to be read down, in preference to the provision of the another Act.

78. In light of the above, we set out to examine the conformance of the provisions of DVC Act with the provisions of the Act insofar as they are related to electricity. The Section 20 contained in Part –III of the DVC Act provides for fixation of the Schedule of charges for the supply of electrical energy by the DVC, which reads as under:

“20. Charges for supply of electrical energy:

The Corporation shall fix the schedule of charges for the supply of electrical energy, including rates for bulk supply and the retail distribution and specify the manner of recovery of such charges;

Provided that the Corporation may in any contract for bulk supply of electrical energy impose such terms and conditions including retail rate schedule as it may deem necessary or desirable to encourage the use of electrical energy”

79. On enforcement of the Act with effect from June 10, 2003, DVC became a deemed licensee under Fourth Proviso of Section 14 of the Act and the tariff is required to be determined in accordance with the Act by the Central Commission. This is not disputed by the parties. However, the dispute is as to what extent the Act and Regulations, 2004, thereunder shall apply for determination of tariff for DVC. For ease of reference the Fourth Proviso of Section 14 is reproduced below:

“Fourth Provision of Section 14

*Provided also that the DVC, established under sub-Section (1) of the Section 3 of the DVC Act 1948, shall be deemed licensee under this Act but shall not be required to obtain license under this Act and the provisions of the DVC Act 1948 insofar as they are not inconsistent with the provisions of the Act **shall continue to apply to that Corporation**”. (Emphasis supplied)*

80. One set of the provisions of the DVC Act, referred to above, which are in direct collision with the provisions of the Act and are inconsistent and cannot be harmonized are, the Sections 18, 19, 20, 32 and 60(2)(c) of the DVC Act, which, for being given effect to, have to yield to the appropriate Sections of the Act, as stated hereunder:

S. No.	Provisions of DVC Act	Provisions of the Act
1	Section 18: DVC has exclusive powers to distribute or transmit electricity in Damodar Valley at 30 KV or more	Sections 12, 14 and others: Authorizes the appropriate commission to grant a license to any for distribution in an area.
2	Section 19: Deals with the effect of the existing licensee as in 1 above	Sections 12, 14 and others: Authorizes the appropriate commission to grant a license to any for distribution in an area.
3	Section 20: Power to fix charge for supply of electricity by the DVC	Sections 61, 62, 64 and 79 : Power to determine tariff is vested in the Appropriate Commission
4	Section 60(2)(c): Provides Power to DVC to make regulations in regard to the rates and charges for electricity	Sections 61 and 178: The Appropriate Commission to determine the tariff and to frame regulations
5	Section 32: Revenue to be allowed to DVC under the DVC Act for expenditure on objects other than irrigation, power and flood control.	Sections 41 & 51: Other business of Transmission and Distribution licensees are allowed only with prior intimation of the Appropriate Commission with the conditions that separate accounts shall be maintained for each business and a proportion of the revenues accrued be utilized for reducing charges for transmission and wheeling.

81. Additionally, it needs to be mentioned here that the provision in Section 32 of the DVC Act allowing revenue to DVC for incurring expenditure on objects other than main objects of irrigation, power and flood control being repugnant to provisions of Sections 41 and 51 of the plenary Act has to yield to the later. The aforesaid, however, does not apply to the business of power generation by DVC. In any event the aforesaid objects on which the DVC Act is authorizing the expenditure are non-commercial in nature and accrue little or no revenue and is not likely to sub serve the objectives of Section 41 and 51 of the Act.

82. The Second set of the provisions namely Sections 12(b), 30, 31, 34, 35, 37 to 42 and 44 of the DVC Act, referred to before are the ones which can be read along with the Act without being inconsistent and repugnant to the Act and both can be given effect to. The Sections 30, 31, 34, 35, 37 to 42 and 44 are contained in Part IV of the DVC Act and are plenary in nature and not subject to framing of any rule or regulation by any authority except by the legislature.

83. It may be recalled here that the DVC Act was unaffected by the ERC Act 1998 and DVC was continuing to determine tariff of electricity supply by itself till coming into effect of the Electricity Act, 2003 on June 10, 2003. It appears to us that Central Commission while formulating Regulations, 2004, did not perhaps consider the implications of the specific provisions of Fourth Proviso in Section 14 of the Act relating to DVC. The aforesaid is deduced from the fact that the Central Commission floated the 'consultation paper' for Regulations 2004, on June 12, 2003, i.e. two days after the Act was enforced, implying that the consultation paper was prepared during the period prior to the enforcement of the Act when the DVC Act remained unaffected even by the ERC Act 1998.

84. Moreover, even after enforcement of the Act, the confusion regarding the continued application of DVC Act appears to have lingered on in the mind of DVC for a substantial period. After following the due process of law, Central Commission notified the Central Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 on March 26, 2004. In para 2 of a press release issued on behalf of the Central Commission, June 12, 2003 is confirmed as the date on which the consultation paper was floated and para 4 of the release conveys that in the process of formulation of Regulations, 2004, its applicability on DVC was not considered. The extract of para 4 is reproduced below:

“4. The Terms and Conditions finalized by the Commission now will apply to all inter-state Generating and Transmission Utilities including NTPC, NHPC, Powergrid, NEEPCO, Neyveli Lignite Corporation, Satluj Jal Vidyut Nigam and the relevant IPPs’.”

85. Damodar Valley Corporation is omitted from the above list. It gives an impression that in the process of framing of Tariff Regulations, 2004 the Central Commission did not envisage that the activities of DVC were to be regulated by the Central Commission.

86. After DVC filed its petition before the Central Commission for determination of tariff in June 2005, the Central Commission set up a Single Member Bench to look into various issues arising in the process. It is observed that the Single Member Bench order dated May 5, 2006 also in para 10 states as under:

“10. The Terms and Conditions for determination of Tariff..... The norms for O&M expenses and the operational norms contained in the 2004 Regulations were notified after study of the data of the utilities under the regulatory jurisdiction of the Commission. However, at the time of framing of the 2004 Regulations, the data relating to the petitioner Corporation was not available before the Commission.”:

87. The emphatic assertion made by the Appellant for continued application of the provisions of the Act, relating to electricity object of DVC, which are not inconsistent with the provisions of the Act, therefore, becomes **central to issues** raised. Section 79 of the Act, empowered the Central Commission to determine the tariff for DVC in terms of Section 62 of the Act. Also Section 61 of the Act provides that the appropriate Commission shall, subject to the provisions of the Act, specify the terms and conditions for determination of tariff and in doing so shall be guided by, inter-alia, the principles and methodologies specified by the ‘Central Commission.’ Section 178 of the Act provides for the Central Commission to make regulations consistent with the Act and Sub-Section 2(s), in particular, mandates the Central Commission to frame terms and conditions, for the determination of tariff under Section 61 of the Act. In other words the regulations framed by the Central Commission under Section 61 of the Act is designed to guide the process for determination of the tariff.

88. We further observe that the Sections 173 & 174 of the Act read together provide that the **Act and any Rules and Regulations** made therein shall be overriding other provisions of law not inconsistent with the Act, except in case

of the Consumers Protection Act, Atomic Energy Act and Railway Act. The DVC Act, 1948, does not figure in the exemption clause of Section 173 implying that any Rule and Regulation made under the Act shall override the DVC Act only when they are inconsistent with the provisions of the Act. It is also observed that like Sections 173 & 174 of the Act, the Fourth proviso of Section 14 does not make any reference to **inconsistency with any Rule or Regulation** framed under the Act but only refers to the inconsistency with the provisions of the Act, meaning plenary Act, 2003. It seems to us that the Parliament intended not to apply *ipso facto*, the Rule and Regulation framed under the Act to the special legislation of DVC Act, 1948 under which the DVC was constituted, perhaps giving due regard to duties cast upon DVC to perform varied functions, some of which being in the nature of State obligations and are to be financed mainly out of the revenue from power operations and are not common to functions assigned to other Central Electricity Utilities.

89. From the aforesaid, it could be viewed that Legislature, expected that the Central Commission while framing regulations under the plenary Act will take care of such provisions of the DVC Act not inconsistent with the Act. As pointed out earlier, the provisions of the DVC Act which are not inconsistent with the Act but inconsistent with the regulation made thereunder **shall continue to apply**. This interpretation appears to be in harmony with the Fourth proviso of Section 14 i.e. the provisions of the DVC Act which are inconsistent with the provisions of the Act shall stand repealed and the provisions which are not inconsistent with the plenary Act but inconsistent with the regulations made thereunder **shall continue to apply**. What remains is, therefore, to examine the applicability of the Fourth proviso of Section 14 of the

Act which is consistent with the other provisions of the plenary Act, but not with the regulations made thereunder.

90. We have already sustained the stand taken by the Appellant that the provisions provided in Part IV of the DVC Act particularly those related to capital structure; interest on capital; source of fund; depreciation; redemption reserve; rule for allocation of expenditure on various objects of the Corporation; recovery of charges through power tariff; distribution of profit out of the surplus etc. are necessary requirement in formulation of power tariff regardless of who undertakes it.

91. Having held that the provisions in Part IV of the DVC Act provide essential parameters for determination of tariff for DVC, and viewing it in conjunction with the provisions of the Section 175 of the Act we come to the conclusion that **the regulations under the Act are to be read in addition to and not in derogation of any other law (i.e. provisions of Part IV of DVC Act) for the time being in force.** This directly implies that the Regulations, 2004 formulated by the Central Commission need to be read along with the provisions of Part IV of DVC that relate to the power-object of DVC. We accordingly allow the contention of the Appellant on this count.

92. We will now take up the contention of the Respondents having legal implications, viz. that the Tariff Regulations, 2004 have to be applied uniformly to all the Central Utilities administered by the Central Government. In this regard the Appellant has submitted that the Tariff Regulations, 2004, itself provide for differential treatment for Tanda and Talchar Power Stations of NTPC and Neyveli Lignite Corporation. The said regulations also specify

different debt-equity ratio from that of 70:30 in certain cases and the same is justified under the provision of the Regulation 20 for being in the interest of general public. Also the Tariff Regulations, 2004, provides for relaxation and deviation that may be required to be made by the Central Government in case of need. The claim of the Respondents that the deviation in respect of Neyveli Lignite Corporation is not on account of any agreement, is not correct as the deviation was given to the Corporation based on the Power Purchase Agreement signed with the TNEB which was based on the Net Fixed Asset and not on Gross Fixed Asset specified by the Regulations 2004. The Appellant has also responded that if the deviation could be made on account of pre-existing agreement then why not the same be provided to DVC by virtue of its unique features and provisions of the pre-existing DVC Act. The aforesaid arguments of the Appellant sound convincing.

93. The Appellant has pointed out that the Tariff Regulations 2004 empowers the Central Commission to vary, alter and change the Regulations from time to time. The following provisions of Tariff Regulations 2004 notified by the Central Commission provides the powers to deviate from norms, to remove defects, to relax, etc. on the basis of rationale and in exercise of judicial discretion.

*“11. **Deviation from norms:** (1) Tariff for sale of electricity by a generating company may also be determined in **deviation of the norms** specified in these regulations subject to the conditions that:*

(a) The overall per unit tariff of electricity over the entire life of the asset, calculated on the basis of the norms in

deviation does not exceed the per unit tariff calculated on the basis of the norms specified in these regulations; and

(b) Any such deviation shall come into effect only after approval by the commission.

(2) In case of the existing generating stations, TPS-I and TPS-II (Stage I & II) of Nayveli Lignite Corporation Ltd., whose tariff was initially determined by following Net Fixed Assets approach based on mutual agreement, between Nayveli Lignite Corporation Ltd. and the beneficiaries tariff shall continue to be determined by adopting Net Fixed Assets approach.

*12. **Power to Remove Difficulties**: if any difficulty arises in giving effect to these regulations, the Commission may, of its own motion or otherwise, by an order and after giving a reasonable opportunity to those likely to be affected by such order, make such provisions, not inconsistent with these regulations, as may appear to be necessary for removing the difficulty.*

*13. **Power to Relax**: The Commission, for reasons to be recorded in writing, may vary any of the provisions of these regulations on its own motion or on an application made before it by an interested person.”*

.....

*20. **Debt-Equity Ratio**: (1)*

(2).....

Provided further that the Commission may in appropriate cases consider equity higher than 30% for the purpose of determination of tariff, where the generating company is able to establish to the satisfaction of the Commission that deployment of equity more than 30% was in the interest of general public;”
(Emphasis supplied)

94. In the rejoinder submitted by the Respondents it is argued that Part –IV of the DVC Act provides for finance, accounts and audit, as to how budget and accounts are to be prepared, audited, etc. and the same is neither incorporated in Section 20 of Para III of the DVC Act nor it is made applicable. They also reiterate that Fourth Proviso of Section 14 of the Act is to be incorporated to say that DVC Act will continue to apply for matter not provided in or covered by the Act e.g. the Constitution of DVC, its area of operation and its non-power activities and also for its financial reporting namely budget, accounts, audit, etc. relating to power and also for non-power activities. They vigorously argued that in the event of any conflict regarding any matter relating to electricity (including determination of tariff), the Act will prevail over DVC Act and to that extent DVC Act is repealed by the Act. They submit that the canons of interpretation, even if not illegal, do not allow the repealed portion of the DVC Act to be read harmoniously together with the Act. The Respondents have argued that the incorporation of one Act into another is to be declared by means of ‘specific words’. They have cited some judgments in support of this argument to which the Appellant, in its rejoinder submissions, has responded saying that none of the judgments referred to by the Respondents either expressly or by implication held that unless some ‘specific words’ have been used the incorporation cannot be presumed. The Appellant has stated that what

is essential is not the specific words used but the intention behind the expression used and has stated that the affirmative assertion of “**shall continue to apply**” in Fourth proviso of Section 14 of the Act conveys the intention.

95. The Appellant in its support has cited the judgement of the Hon’ble Supreme Court in **Maharashtra Road Transportation Corporation Vs. State of Maharashtra** (2003) 4 SCC 200 para 8 at page 207, which reads thus:

“It is here that there are two allied but qualitatively different concepts of statutory interpretation known as incorporation by reference and mere reference or citation of earlier statute in the later Act. In the former case, any change in the incorporated statute by way of amendment or repeal has no effect on the incorporation statute. In other words, the provision of the incorporated statute as they stood at the relevant time when incorporating statute was enacted will ever continue to be read into that later statute unless the legislature takes a positive step to amend the later statute in tune with the amendments. However, the legal effect is otherwise in the case of a statute which merely makes a reference to the provisions of an earlier statute. In that case, the modification of the statute from time to time, will have its impact on the statute in which it is referred to. The provisions in the earlier statute with their amendments will have to be read into the later enactment in which they are referred to unless any such subsequent amendment is inconsistent with a specific provision already in existence.”

96. We feel that in order to overcome the discontinuities in application of Regulations, 2004, the Central Commission could have considered to give effect to certain provisions of the DVC Act in Regulations, 2004 by resorting to power vested in it under Regulation 13. Regulation 13 empowers the Commission to vary provisions of the Regulations on its own motion or on an application made before it. This power has been conferred on the Commission to relax rigour of the Regulations in appropriate cases. The tariff determined for the period April 1, 2004 to March 31, 2009 given effect from April 1, 2006 to provide for a transition period, was perhaps given by the Commission under the said clause even though not mentioned in the impugned order.

Issue of Jurisdiction for Tariff Determination

97. DVC is a statutory body constituted under DVC Act, 1948 with multifarious functions for an integrated development of the Damodar Valley which are carved out within the territories of the two States namely West Bengal and Jharkhand who are also major beneficiaries. DVC is a body promoted by the Central Government in consultation with the State Governments of Jharkhand and West Bengal. The Central Government exercises the administrative control over the DVC and the representatives of the State Governments are on the Management Board of DVC.

98. The preamble to the DVC Act provides as under:

“An Act to provide for the establishment and regulation of a Corporation for the development of the Damodar Valley in the Provinces of Bihar and West Bengal.

*Whereas it is expedient to provide for the **establishment and regulation of a Corporation for the development of the Damodar Valley** in the provinces of Bihar and West Bengal.....”*

(Emphasis supplied)

99. In addition to the functions listed in para 4 above DVC is assigned with the ‘other activities’ as provided in Section 21 of the DVC Act, which are reproduced as under:

“21. Other activities of the Corporation’

(1) The Corporation may establish, maintain and operate laboratories, experimental and research stations and farms for conducting experiments and research for-

(a) utilizing the water, electrical energy and other resources in the most economical manner for the development of the Damodar Valley;

(b) determining the effect of its operations on the flow conditions in the Hooghly river;

(c) making improvements in navigation conditions on the flow of Calcutta, and

(d) carrying out any other function-specified under section 12.

(2) The Corporation may set up its own planning, designing, construction and operating agencies or make arrangements therefore, with the participating Governments, local authorities, educational and research institutions or any person carrying on the business of any architect, an engineer or a contractor.”

100. Also Section 45 of the DVC Act provides the following activities which are to be included in the Annual Report:

- (i) *irrigation;*
- (ii) *water supply;*
- (iii) *electrical energy;*
- (iv) *flood control;*
- (v) *navigation;*
- (vi) *afforestation;*
- (vii) *soil erosion;*
- (viii) *use of lands;*
- (ix) *resettlement of displaced population;*
- (x) *sanitation and public health measures; and*
- (xi) *economic and social welfare of the people.*

These activities need to be subsidized from the revenue mainly earned from the electricity operations of DVC. This is in conflict with the provisions of Sections 41 and 51(1) of the Act. We have dealt with it in paras 80 and 81 above.

101. The DVC Act envisions the integrated development of Damodar Valley and required the activities of significant public importance to be taken up in its implementation plan. Many of the above activities, which are in the nature of Sovereign or Welfare functions are neither commercial nor remunerative and are normally required to be performed by the State. These activities according to Section 32 of DVC Act, are required to be subsidized from the revenue mainly earned from the electricity operations of DVC as it was the main

revenue earning activity. The aforesaid functionally differentiate the unique status of DVC from that of other Central Electricity Utilities.

102. The Commission in the impugned order dated 03 Oct. 2006, at para 9 states that

“At this stage we make it clear that this Commission is concerned with determining tariff for generation and inter-state transmission of electricity undertaken by the petitioner Corporation we have not addressed the issue of distribution tariff since this matter falls within the jurisdiction of the State Commissions.”

103. Accordingly DVC, a deemed licensee in Damodar Valley under the Act, came under the purview of the Central Commission for regulation of the tariff of its generating stations and inter-state transmission of electricity under Section 79 of the Act and the jurisdiction to the respective Commissions of the States of West Bengal and Jharkhand is accorded under Section 86 of the Act for determination of tariff insofar as it concerns the intra-state transmission and distribution systems. It is pertinent to note here that DVC does not supply electricity to the domestic consumers in the Valley and has been supplying electricity directly to about 120 HT-Industrial consumers like Steel, Coal, Railways, etc. beside the bulk supply to main beneficiaries of State Electricity Boards of West Bengal and Jharkhand. The supply of electricity to certain industries outside the Valley and domestic consumers in the valley is being made by the concerned Electricity Boards.

104. The Appellant has submitted that its transmission system which is spread across the two states being integrated one, is to be considered as inter-State transmission and not intra-state transmission. The Appellant concurs that the State Commissions should have the jurisdiction over the distribution and determination of tariff for retail supply of electricity. The Respondents, Govt. of West Bengal and Jharkhand, have opposed the contention of the Appellant insofar as the intra-state transmission is concerned and have stated that the intra-state transmission and distribution systems are in the jurisdiction of the respective Commission of the States and not in the regulatory jurisdiction of Central Commission and their costs have to be segregated from the Inter-State transmission system to facilitate determination of retail tariff for consumers in the distribution areas. State Commission of West Bengal has, also in Appeal No. 8 of 2006, protested that the intra-state transmission, distribution network and determination of retail tariff and wheeling tariff of DVC pertaining to the territory of the State of West Bengal fall within its own jurisdiction. WBERC also contends that the recovery of unfunded liability from their retail consumers could only be decided by them and not by the Central Commission.

105. The Appellant, DVC, banking on unique status of DVC, being controlled by the Central Government, and having functionally integrated generation, transmission and distribution activities, has submitted that the transmission assets and capital costs thereof, spread in two states of West Bengal and Jharkhand, are not amenable to segregation. The views of the Central Commission in regard to this aspect in the impugned order are of relevance as reproduced here under:

“25. The capital cost of transmission and distribution systems is not available separately in the books of accounts. DVC has submitted that a precise separation of transmission and distribution system is not possible. However, for the purpose of tariff capital cost of transmission system and distribution has been considered in the ratio of 87:13. For this purpose, 220/132 kV sub-stations, power transformers and associated lines have been considered as part of transmission system whereas similar infrastructure at 33 kv has been treated as part of distribution systems. The Commission observed that line length in Transmission System (220kv and 132kv) is 4538 ckt kms. against 1056 ckt. Kms. in distribution system (33kv). In view of around 23% line-length of distribution system compared to transmission system, the bifurcation of capital costs between transmission and distribution system in the ratio of 87:13 ratio has been accepted by the Commission for the purpose of tariff.’

106. It may be pertinent to mention that Central Commission while discussing the applicable capital costs for the purpose of tariff in para 24 of the impugned order has recorded that the beneficiaries had no objection to take the costs as per books of account for the year 2003-04.

107. On this aspect the impugned order passed on 03.10.2006 states in para 23 as under:

“23. The sharing of capital cost between transmission and distribution business of line length of the two system is of no

relevance. Further it is not possible to segregate between intra-state and inter-state transmission costs, since the transmission system owned by the petitioner Corporation is an integrated one. Even State government has not given any details of costs of two systems separately.”

108. In order to further analyze the nature of the DVC’s transmission system, we need to consider, the following provisions of the Act :

“Section 2(36)

‘Inter-transmission system’ includes:-

- (i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;*
- (ii) The conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;*
- (iii) the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by a Central Transmission Utility.*

Section 2(37) *‘inter-State transmission system’ means any system for transmission of electricity other than an inter-State transmission system;*

Section 2(72) *‘transmission lines’ means all high pressure cables and overhead lines (not being an essential part of the distribution*

system of a licensee) transmitting electricity from a generating station to another generating station on or a sub-station, together with any step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such building or part thereof as may be required to accommodate such transformers, switch-gear and other works;

Section 2(16) *‘Dedicated Transmission Lines’ means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines of electric plants of a captive generating plant referred to in section 19 or generating station referred to in section 10 to any transmission lines or sub-stations or generating stations or the load centre, as the case may be.*

109. It may be mentioned that the definitions of ‘inter-State transmission system’ and ‘intra-State transmission system’ as given in Section 2(3) are identical to Section 2(gb) of Indian Electricity Act, 1910, Section 2(e) of Electricity Regulatory Commission Act, 1998 and Section 2(gc) of Indian Electricity Act, 1910 respectively. The term ‘transmission lines’ as defined in Section 2(72) of the Act is *para-materia* to the definition of “Main transmission lines” provided in Section 2(7) of The Electricity (Supply) Act, 1948.

110. Taking an integrated view of the above provisions and applying them to the instant case, it is clear that any ‘transmission line’ i.e. high pressure (HT) Cables and overhead lines (HT), excluding the lines which are essential part of

distribution system of a licensee (WBSEB and JSEB as the case may be), used for the conveyance of electricity from a generating station owned by DVC and located in the territory of one State (either State of West Bengal or Jharkhand) to generating station or a sub-Station located in the territory of another State (either in the State of Jharkhand or West Bengal) together with any step-up and step down transformer, switch gear and other works necessary to and used for the control of such cables or overhead lines and such building or part thereof as may be required to accommodate such transformers, switch-gear and other works shall constitute the “Inter-State Transmission system” of DVC. Further, the transmission segments from the generating Stations to HT Consumers located in the same territory of a State are deemed ‘dedicated transmission lines’ and are to be maintained and operated by DVC.

111. DVC has been supplying power from its generating stations to West Bengal Electricity Board and Jharkhand Electricity Board along with nearly 120 HT-Consumers either through inter-state transmission lines or through the point-to-point ‘dedicated transmission lines’. We, therefore, conclude that all transmission systems of DVC be considered as unified deemed inter-state transmission system, insofar as the determination of tariff is concerned and as such regulatory power for the same be exercised by the Central Commission.

Other Grounds of Appeal

112. Keeping in view the above findings we shall now take up other grounds of appeal as described in para 62 above.

A. Debt Equity ratio

A.1 The Appellant has submitted that actual Debt-Equity Ratio of 15:85 prevailing as on March 31, 2004 has to be considered keeping in view its special status as a statutory body with multifarious social and other activities. DVC has submitted that as on 31 Mar. 2004 gross fixed assets are of Rs. 3543.65 crores funded by contribution of Rs. 1105.43 crores provided by the participating governments beside, reserves amounting to Rs. 1759.17 crores. DVC has sought higher return as compared to the return available to other 'commercial entities'.

A.2 The One-Member Bench of the Central Commission in its report at para 37 stated that **"it is also stated that since DVC is operating for about six decades it is not possible to ascertain the project-wise debt-equity structure on the date of commercial operation. However, the projects of DVC have not been structured with a definite percentage of debt-equity ratio."** The Central Commission, rejecting the claim of DVC to adopt Debt Equity Ratio of 15:85 and the counter-claim of objectors to adopt Debt Equity Ratio of 95:5 has adopted the Debt Equity Ratio of 70:30 as recommended by the One-Member Bench of the Central Commission.

A.3 As per Tariff Regulations, 2004 notified by the Central Commission (explanation to Clauses 21 and 30), *'the premium raised by the generating company while issuing share capital and investment of internal resources created out of free reserve of the*

generating company, if any, for the funding of the project, shall also be reckoned as paid up capital for the purpose of computing return on equity, provided such premium amount and internal resources are actually utilized for meeting the capital expenditure of the generating stations and forms part of the approved financial package’.

A-4. The reasoning given by the One-Member Bench to calculate the Debt Equity Ratio by excluding the General Reserves from the purview of the equity capital, does not appear to be correct, as the Tariff Regulations, 2004 clearly provide for consideration of internal resources for the purpose of ROE **provided such internal resources are actually utilized for meeting the capital expenditure of the generating station** and forms part of the approved financial package.

A-5. Further, the Tariff Regulations provides that in case of generating stations or transmission projects where the tariff for the period ending March 31, 2004 has not been determined by the Central Commission, Debt Equity ratio shall be as may be decided by the Commission (para 52 of the impugned order). In the past, the Commission has also dealt with determination of applicable Debt Equity Ratio in the case of Central Power Sector Undertakings (CPSUs) such as NTPC, NHPC, PGCIL etc. where the actual equity deployed in the assets created prior to formulation of Tariff Regulations, was much higher than the equity calculated considering a normative DE ratio of 70:30. These CPSUs were

allowed a normative DE ratio of 50:50 for the purpose of determination of tariff, in respect of their old assets.

A-6. We observe that most of the projects of DVC are analogous to projects of NTPC commissioned prior to 1992 in which the capital investments was largely raised through budgetary support of Government of India and were not based on the concept of project specific debt-equity-ratio. While determining the tariff for such projects of NTPC, etc. under Regulations, 2001, the Central Commission provided special dispensation to these projects of NTPC in terms of normative debt-equity-ratio of 50:50. The same dispensation is allowed to continue under Regulation 20 of Regulations 2004 applicable for the period from April 1, 2004 to March 31, 2009. Regulation 20 extracted below will make it abundantly clear:

“20. Debt-Equity Ratio: (1) in case of the existing generating stations, debt-equity-ratio considered by the Commission for the period ending 31.03.2004 shall be considered for determination of tariff with effect from 01.04.2004.

Provided that in cases where the tariff for the period ending 31.03.2004 has not been determined by the Commission, debt-equity-ratio shall be as may be decided by the Commission.”

A-7 This approach we feel helped in smoother transition so that the financial position of the licensee/generating company is not adversely affected and their investment plans are not suddenly disturbed due to change in the methodology of determination of tariff.

A-8. The DVC Act is silent about adopting any specific Debt Equity Ratio for financing of projects. We, therefore, in the interest of equity and fairness feel that all old projects of DVC commissioned prior to 1992 be assigned normative debt-equity-ratio of 50:50 and the recent projects such as Mejia to be aligned with 70:30 capital structure specified in the regulations.

A-9 The Appellant has contended that DVC having been created with the functions of deemed state to support the state's social functions of West Bengal and Jharkhand, it serves public interest at large and, therefore, by statute equity has been primary source of capital. It has further added that business risks, financials risks, etc. are largely, therefore, carried by the owner Governments who, therefore, by fundamental principles of risk and return are entitled to return on their entire share of capital investment.

A-10 It is true that the owners take upon themselves business related risks and are entitled for return on their share of capital investment. But the return is to be governed by the scheme of determination of tariff for supply of electricity as mandated by the law in place. The scheme provides for an assured ROE, as

permissible under the Tariff Regulations, at the rate of 14%, on the equity deployed for the purpose of supplying electricity. The scheme does not permit return on investments made on projects other than supply of electricity, to be recovered through tariff for supply of electricity.

A-11 Here we can draw attention to Clause 4 of the Tariff Regulations, 2004, which is reproduced below:

“For the purpose of tariff the capital cost of the project shall be broken up into stages and by distinct units forming part of the project. Where the stage-wise, unit-wise, line-wise or sub-station-wise break up of the capital cost of the project is not available and in case of the on-going projects, the common facilities shall be apportioned on the basis of the installed capacity of the units and lines or sub-stations. In relation to the multi-purpose hydro-electric projects, with irrigation, flood control and power components, the capital cost chargeable to the power component of the project only shall be considered for determination of tariff.

A-12 In view of the above, for the purpose of determination of tariff for supply of electricity, submissions made by DVC that it serves public interest and in the absence of revenue earning

sources of taxes and duties it depends only on profit margin from sale of power are of no relevance.

A-13 Some of the Respondents have submitted that *“combined reading of Sections 30, 31 and 38 of the DVC Act clearly indicates that the entire capital invested on the projects as per the DVC Act is the loan capital and interest is a part of the expenditure. There is no provision of any equity capital under the DVC Act.”*

A-14 The DVC Act provides for infusion of capital by the participating Governments and for payment of interest thereon. The DVC Act does not categorize such capital as borrowings and there is no reference about repayment of such capital to the participating Governments. It is difficult to assume a commercial organization running solely on borrowed funds. Lenders invariably prescribe for a margin money to be invested by the borrower also. In our opinion the capital infused by the participating Governments is in the nature of equity capital and for the purpose of determination of tariff, same would be eligible for return on equity, as may be permitted by the Tariff Regulations 2004.

A-15 It is to be noted that DVC provides interest on capital contributed by the participating Governments. The accrued interest has been allowed to be retained by DVC and is ploughed back into capital with the tacit consent of the participating

Governments. This has to be provided to DVC as per the provisions of Section 38 of the DVC Act.

A-16 It is observed that the DVC Act envisages the projects to be built only on capital contributed by the participating Governments and any deficit in the capital amount is to be made good by taking loan on behalf of the participating Government. The debt taken will obviously attract interest. The average interest rate of repayment payable during the tariff year is to be applied on 50:50 normative debt capital for tariff purposes. This would mean that out of aggregate equity including reserves, equity considering a normative Debt Equity Ratio of 50:50 would be eligible for ROE at the rates prescribed in the Tariff Regulations and excess of equity if any over the equity earning ROE @14% shall be considered as interest bearing debt. For example, if the actual Debt Equity Ratio comes to 40:60, ROE would be available on 50% portion of the equity and interest would be available on 10% portion of equity and 40% loan, as reduced by repayments.

B. Disallowance of additional capitalization for the period 2004-2009

The Central Commission at para 50 of the impugned order has observed that the *“the petitioner corporation has not claimed any additional capitalization for the period 2004-2009.”* However the records submitted by the Appellant show that a sum of Rs. 767.45 crores and Rs. 181.14 crores have been shown to be capitalized

during 2004-05 and 2005-06 respectively. In order to get the relief on this account, the Appellant may bring out the above omission to the notice of the Central Commission who may appropriately dispose of the matter in terms of law. The appeal is accordingly allowed on this count.

C. Higher Return on Equity

The Appellant has asked for higher return on equity primarily on the ground of it taking higher risks in servicing the public with minimum borrowings. It is not clear to us as to what public purpose would be served if the public is required to pay higher cost of funds in the form of equity, particularly when such funds can alternatively be sourced at lower costs in the form of borrowings. On the contrary the said equity be used for generating larger pool of resources to augment operating assets. We, therefore, find no justification in permitting higher “Return on Equity.” The return on equity has been prescribed in the Tariff Regulations, 2004, which we feel is applicable to the Appellant. The appeal accordingly fails on this count.

D. Pension and Gratuity Contribution

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.

D.3 As a general rule, once the Commission, after prudence check, has agreed with the need for funding the Pension and Gratuity Contribution funds, DVC should have been allowed to recover entire amount from the consumers through the tariff. Asking DVC to contribute out of its own resources would tantamount to denying it the return on equity as assured in terms of Tariff Regulations. However, if we look at it from the point of view of the consumers, the consumers, particularly the industrial and commercial ones, have now no option to adjust their sale price to take into consideration the need for meeting the accumulated liability. It is, therefore, an accepted fact that due to postponing of

the creation of such fund, the consumers were enjoying lesser tariff than the legitimate tariff otherwise applicable to them.

D.4 Some of the Respondents have contended that Accounting Standard AS –15 is not applicable to the Appellant. As a prudent accounting practice, whether AS-15 is applicable to DVC or not, an adequate provision is required to be made for employees related liabilities by DVC. Postponing creation of such funds would again lead to non-determination of appropriate cost of supply of electricity.

D.5 In view of the above we find it unreasonable to allocate 40% of the burden on DVC. We are of the opinion that entire expenditure, as determined after prudence check by the Commission, is to be borne by the consumers.

D.6 Some of the Respondents in the matter have questioned the very basis of working out the quantum of funds of Rs. 1534.49 crores.

D.7 The Respondent No. 4, the State of West Bengal has, in the context of Central Commission's directive that 60% of the unfunded liability relating to generation and transmission functions are to be paid by the consumers, contended that Central Commission has no jurisdiction to determine tariff of the distribution segment and has averred that such directions of

payment by the consumers is encroachment in the jurisdiction of the State Electricity Regulatory Commission and is illegal.

D.8 In our opinion recovery of costs incurred by DVC in respect of generation and transmission functions falls squarely in the jurisdiction of the Central Commission. Tariff so determined by the CERC shall form the basis for determining the tariff at the retail end of the distribution segment.

D.9 Government of West Bengal has drawn our attention to Annual Report of DVC for 2002-03 where *“an amount of Rs. 66 crore have been charged towards Pension and Gratuity Fund and a further amount of Rs. 23 crore have been charged as relief paid to the pensioners.It is not uncommon for Government organizations to divert its funds created for staff welfare to meet other non-planned expenditure. It appears in the present case also that DVC had diverted its funds earmarked for pension fund for which an enquiry was required to be made by CERC, unfortunately the same was not done.”*

D.10 It is possible, if the amount charged to the profit and loss account of a particular year is revenue in nature, the same would not be reflected in the balance sheet. The allegations levelled by the Government of West Bengal are serious in nature and if true, would reflect very poorly on the Appellant. The Central Commission is directed to satisfy itself about provisions already made towards Pension and Gratuity Fund and the amount already

collected by DVC be adjusted in this regard. We are of the firm view that the Government of West Bengal being a part owner of DVC and represented on the Board for managing the affairs of DVC, ought to have taken appropriate steps to rectify the matter when the matter came to its knowledge

E. Revenues to be allowed to DVC under the DVC Act

E.1 We have gone through the submissions made by the Appellant and the Respondent and have patiently heard the arguments presented by the learned counsel for the parties. The Appellant has sought to make a case before us that tariff and terms and conditions for generation, transmission, distribution and sale of electrical energy by DVC, unlike other electricity utilities, need to be considered in the background of the functions with which DVC is charged as per section 12 and other provisions of the DVC Act. It has been further submitted that the tariffs determined by DVC in September 2000 were not factored with any standard norms and that another distinguishing feature of DVC in contrast to the Central Power Sector Utilities is that DVC by mandate of the DVC Act, 1948 is required to carry out certain functions which are otherwise the functions of the States of Jharkhand, erstwhile Bihar, and West Bengal viz. Flood control, Irrigation, Social Integration Projects, Soil Conservation activities, Multi-purpose Dams, Afforestation, etc. without dilution in its non-power statutory functions.

E.2 We may agree with the contention of the Appellant that earlier the tariff for electricity supply by DVC were not specifically linked to achievement of operating norms. However, after the enactment of the Act, laws relating to determination of tariff and the process to be adopted in this regards, stands changed substantially.

E.3 Proviso 4 of section 14 of the Act reads as under:

*“Provided also that the Damodar Valley Corporation, established under sub-section (1) of section 3 of the Damodar Valley Corporation Act, 1948, **shall be deemed to be a licensee under this Act**) but shall not be required to obtain a license under this Act and the provisions of the Damodar Valley Corporation Act, 1948, in so far as they are not inconsistent with the provisions of this Act, shall continue to apply to that Corporation”. (emphasis supplied)*

E.4 From the above provisions of section 14 of the Act, it is clear that DVC shall be deemed to be a licensee under the Act and, therefore, provisions applicable to a licensees as per the Act would become applicable to DVC due to its status as a deemed licensee. Section 62 of the Act, produced below makes it clear that tariff of a licensee should be determined by the Appropriate Commission:

“62. (1) The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for :-

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

- (b) transmission of electricity ;*
- (c) wheeling of electricity;*
- (d) retail sale of electricity.*

*.....
.....
.....”*

E.5 Section 61 of the Act, under the heading ‘Tariff Regulations’, lays down the principles for determination of tariff, which we reproduce below for reference:

'61. The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy’.

(emphasis supplied)

E.6 The Appellants have submitted that fourth proviso of Section 14 of the Act envisages exclusion of the application of the provisions of the DVC Act only if they are inconsistent with the provisions of the Act and that the said provision does not speak of inconsistency with any rule or regulations notified under the Act. DVC has submitted that section 20 of the DVC Act falls in a category wherein the provisions which are in direct conflict with the provisions of section 61, 62, 64, 79 and 86 of the Act and cannot be harmonized at all. Hence, in such cases provisions of the Act shall prevail.

E.7 Section 61 of the Act clearly recognizes the authority of the principles and methodologies specified by the Central commission for determination of tariff applicable to generating companies and transmission licensees. In our opinion, if there arises any inconsistency between the provisions of the DVC Act and the

Regulations made under the Act with regard to determination of tariff for electricity they may be harmonized in such a manner that it satisfies both the DVC Act as well as the Regulations made under the Act. This has been elaborately dealt with in our findings earlier.

E.8 In order to have better clarity of the issues under consideration, we may also refer to the provisions of section 41 and 51 of the Act. Relevant extracts of these sections are reproduced below:

Section 41. A transmission licensee may, with prior intimation to the Appropriate Commission, engage in any business for optimum utilization of its assets:

Provided that a proportion of the revenues derived from such business shall, as may be specified by the Appropriate Commission, be utilized for reducing its charges for transmission and wheeling:

Provided further that the transmission licensee shall maintain separate accounts for each such business undertaking to ensure that transmission business neither subsidies in any way such business undertaking nor encumbers its transmission assets in any way to support such business:(Emphasis supplied)

.....

“51. (1) A distribution licensee may, with prior intimation to the Appropriate Commission, engage in any other business for optimum utilization of its assets:

Provided that a proportion of the revenues derived from such business shall, as may be specified by the concerned State Commission, be utilised for reducing its charges for wheeling:

Provided further that the distribution licensee shall maintain separate accounts for each such business undertaking to ensure that distribution business neither subsidies in any way such business undertaking nor encumbers its distribution assets in any way to support such business.....”

(Emphasis supplied).

E.9 From the above provisions, we are of the opinion that the tariffs for supply of electricity by DVC are to be determined by the Appropriate Commission in terms of the provisions of the Act. The provisions of the Act clearly stipulate that any other business carried on by the licensee is not to be subsidized by the transmission/distribution business of the licensee. There are no

such prohibition in respect of generation business carried on by a deemed licensee like DVC, which is having integrated operations.

E.11 Section 32 of the DVC Act provides that DVC can make expenditure on objects other than irrigation, power and flood control. Section 33 of the DVC Act, under the heading “*Allocation of expenditure chargeable to project on main objects*” provides for allocation of total capital expenditure chargeable to a project between the three main objects namely, irrigation, power and flood control.

E. 12. In view of the above provisions of the DVC Act, we feel that expenditure incurred by DVC on objects other than irrigation, power and flood control be allocated to these three heads as per section 32 and 33 of DVC Act and expenditure so allocated to power object, should be allowed to be recovered through the electricity tariff. The above would be in line with Fourth Proviso of Section 14 of the Act which provides that provisions of DVC Act to the extent not inconsistent with the Act shall remain in force.

E.13 As regards the liability arising under section 38 of the DVC Act on account of interest on capital provided by each of the participating Governments, we have to keep in mind that the total capital to be serviced has to be equal to the value of operating assets when they are first put to commercial use. Subsequently, the loan component gets reduced on account of repayments while

equity amount remain static. As per the scheme of the determination of tariff as per Tariff Regulations 2004, the recovery is in two forms; either by way of ROE or by way of interest on loans. We direct the Central Commission to ensure that capital deployed in financing operating assets is getting fully serviced either through Return on Equity or interest on loan (including on the equity portion not covered as part of equity eligible for Return of Equity).

E.14 The Appellant has submitted that certain provisions of the DVC Act, particularly under Part IV dealing with Finance, accounts and Audit can always be read harmoniously with the provisions of the Act and both can be given effect to without there being any inconsistency or repugnancy.

E.15 As regards sinking funds which is established with the approval of Comptroller and Accountant General of India vide letter dated December 29, 1992 under the provision of Section 40 of the DVC Act is to be taken as an item of expenditure to be recovered through tariff, as brought out in para 82 earlier.

F. Depreciation Rate

F.1 Section 40 of DVC Act provides for the Comptroller and Auditor General of India (C&AG) to prescribe depreciation, reserve and other funds in consultation with the Central

Government. The aforesaid provision neither quantifies nor limit the rate of depreciation to be allowed.

F2. The Appellant has claimed depreciation at rate prescribed by the C&AG and submits that all along till the Electricity Act, 2003 came into effect, it has been factoring the prescribed depreciation rate in formulating the tariff. It is relevant to point out that the Act does not make any provision for factoring rate of depreciation in tariff determination. Thus, in our opinion, the DVC Act insofar as the depreciation is concerned is not inconsistent with the Act and shall continue to apply to the corporation.

F3. The depreciation, in respect of useful life of a substantial portion of generation capacity of DVC being aged out and redeemed, leaves little or no impact on the tariff of such plants. However, the impact of depreciation rate on the tariff of the balance generation capacity shall be significant as the rate of depreciation prescribed by the C&AG is higher than what is fixed by the Regulations, 2004. For the aforesaid reason, it is essential for the Central Commission to carryout reasonable assessment of the capital cost of each power plant individually at COD (if the authentication of approved cost is not available/traceable) and apply the prescribed rate of depreciation for each successive year since then to arrive at adjusted fixed cost for each plant for consideration in tariff determination. The depreciation is to be allowed and computed only on aggregate sum of gross capital asset

of each plant qualifying for the depreciation and not regardless of it.

F4. We, therefore, direct the Central Commission to adopt rate of depreciation as prescribed by C&AG for computation of tariff for the asset based on the principle outlined above while keeping in view our remarks in respect of Dept-Equity ratio in para 112(A) above.

GH. OPERATING NORMS AND O & M EXPENSES

GH.1 It is observed from the order of the CERC the Commission has adopted different benchmarks, which are liberal than the Tariff Regulations of 2004 issued by the CERC, while determining the tariff of the Appellant. In this regard, paras 10 and 34-39 of the CERC order, giving the reasoning for such a dispensation is given below:

*“10. The terms and conditions for determination of tariff for the period from 1.4.2004 to 31.3.2009 are notified in terms of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2004 (hereinafter referred to as “the 2004 regulations”) under Section 61 read with Section 178 of the 2003 Act. **The norms for O&M***

expenses and the operational norms, contained in the 2004 regulations were notified after study of the data of the utilities under the regulatory jurisdiction of this Commission. However, at the time of framing of the 2004 regulations, the data relating to the petitioner Corporation was not available before this Commission. Therefore, by virtue of powers under the 2004 regulations, the Commission is considering norms for O&M expenses and the operational norms specific to the generating stations and the transmission assets owned by the petitioner Corporation.’ (Emphasis supplied)

34. Before proceeding to determine tariff, we wish to clarify that we are conscious of the special factors pertaining to the petitioner Corporation viz. its statutory status, multifarious responsibilities, the tariff fixation procedure hitherto followed, and the past financial and other commitments with the legitimate expectations borne out of the earlier procedures for tariff fixation. We would like to deal with these aspects before we tackle the issue of tariff fixation.’

35. The petitioner Corporation in its affidavit dated 28.7.2006 has submitted that in the past, it was

allowed to determine tariff, in an integrated manner on cost plus basis covering generation, transmission, distribution and subsidiary activities. On the contrary, the petitioner Corporation is now required to carry out its activities related to generation, transmission and distribution of electricity as independent activities. Based on the past practice, it has initiated the following proposals involving heavy investment and has made substantial financial commitments.

.....

.....

.....

(e) A Financial Plan has also been firmed up to ensure adequate fund comfort for the XI Plan Projects considering that the existing Tariff fixed in September, 2000 will continue at least till the year 2007-08.

36. Accordingly, the petitioner Corporation has prayed that without prejudice to other contentions, a transition period may be allowed to enable the petitioner Corporation to get into the new dispensation. The petitioner Corporation has requested for continuation of the existing Tariff till the year 2007-08. The petitioner Corporation has further prayed that the Plant Operational Norms for the year

2004-05 and 2005-06 as fixed by the one-member bench of the Commission for the existing units be made applicable from the years 2007-08 and 2008-09 respectively and onwards. According to the petitioner, requisite improvement will be possible only from the year 2007-08, after the augmentation and improvement of the existing thermal units which has been initiated during the current year 2006-07.

37. We appreciate the need for such a transition period. In the past, the Commission had recognized the need for such transition for Central Sector Utilities such as NTPC Limited, NHPC, Power Grid Corporation Limited for the period till 31.3.2001. Though this Commission was established in 1998 and started exercising jurisdiction, the norms as earlier applied by the Central Government was continued to be applied. It is also noteworthy that the above mentioned companies were commercial entities and were not carrying any social and other activities as is the case with the petitioner Corporation in the instant case.

38. We are also seized of the matter that the petitioner Corporation requires an overall Extension & Improvement of the old generating station. Under this

situation, adoption of tariff based on the 2004 regulations since 1.4.2004 will unsettle the position already settled. We are therefore, convinced that the petitioner Corporation should be allowed to continue with the existing tariff for a reasonable period to readjust itself with the tariff norms before enforcement of generation and inter-State transmission tariff under the prevailing norms. In the absence of such a special dispensation, the petitioner Corporation is likely to suffer substantial loss and this is not considered to be in public interest, especially in the light of the socio-economic activities entrusted to the petitioner Corporation.

39. We have given our thoughtful consideration to the issue. We find some merit in the contentions of the petitioner. Firstly, we are in agreement that it would not be possible for the petitioner Corporation to rationalize O&M expenses from the back date or to improve norms from the back date. These are possible only prospectively. Further, in the light of the sudden change in the approach and methodology of tariff setting by applying the Commission's Regulations, with effect from 1.4.2004, it would not be possible for the petitioner Corporation to make amends for the loss in revenue if any, by cutting costs. However, we

are not convinced that the prevailing tariff should be allowed to continue till 2007-08. As early as in June 2005, the petitioner Corporation was aware that it would be regulated by Commission so far as its generating stations and transmission system are concerned. The norms applicable, being contents of public documents, were also known. We also observe that the petitioner Corporation has already initiated steps to bring about improvements in operational norms. This is evident by the improvement in norms suggested by it in its own submission which were considered by the one-member Bench. In view of above, we allow the petitioner Corporation to continue the prevailing tariff till 2005-06. The tariff with effect from 1.4.2006 shall be determined based on the terms and conditions duly taking into account the deliberations before and the recommendations in the one-member Bench Order dated 5.5.2006.”

GH.2 It is evident from the above that the Appellant has been allowed a transition period to switch over to the Tariff Regulations applicable in this regard. Hence, we feel that the Appellant’s views about its special features did not escape the attention of the CERC.

GH.3 One of the Respondents, namely Govt. of Jharkhand, has submitted that *‘the current level of efficiency of the Appellant is*

*abysmally low when compared to other central and state generation stations. This is the obvious result of the lack of financial and operational discipline in the functioning of the Appellant due to its monopolistic position in terms of high voltage supply within the command area and also the unfettered discretion infixing tariff. These issues can be addressed effectively only by resorting to stringent and strict measures to improve the efficiency of the Appellant in line with the guidelines under the Electricity Act.’ **We feel that improvement in the efficiency of the Appellant would require effective monitoring from the participating Governments also.***

GH.4 As mentioned earlier, we find that the CERC has given a transition period and has sought to progressively raise the standard of efficiency keeping in view the operating conditions of the Appellant. Similarly, the O&M expenses have been allowed after a prudence check by the CERC.

GH.5 As regards not allowing any increase in the O&M expenses, we find no reason given in the CERC order. The Tariff Regulations, 2004 notified by the Commission generally provide for a 4% increase annually. We think the same be adopted in the case of DVC also to offset additional burden on the Appellant due to inflationary measures

I. Return on capital Investment on Head Office, Regional Offices, Administrative and other Technical Centres, etc.

I.1 Appellant has requested for inclusion of capital investment made in respect of Head Office, Regional Offices, Administrative and other Technical Centres, etc. for the purpose of determination of capital base and consequently for availability of return on equity. The CERC in its order at para 43 and 44 has observed that *'none of the parties has raised any objection on the approach and recommendations of the one-member bench regarding the capacity not in use and the capital cost to be considered for the purpose of tariff for the capacity in use in case of generating stations.* Accordingly, the Commission accepted and adopted the approach and recommendations of the One Member Bench regarding the capital cost.

I.2 The One Member Bench in its recommendations at para 31 and 32 provides that cost of servicing of capital investment on these offices should be booked to O&M expenses duly apportioned to different generating stations and transmission and distribution system and accordingly, the allocated costs of director office, other offices, central offices and subsidiary activities have been excluded from the capital cost claimed by DVC for the purpose of generating and transmission tariff.

I.3 With the above process, it is true that the cost of operating and maintaining the above facilities would be recovered but the recovery of capital cost in the form of depreciation and return on

corresponding equity, interest on loans, if any, would be missed out without any justification.

I.4 We feel that once the Commission has agreed to treat these assets as part of the generating and transmission activities of the Appellant by permitting recovery of their O&M cost, these assets, after due prudence check, should also be included in the capital cost and consequential effect be given through determination of tariff.

J. Generation Projects presently not operating

J.1 The Appellant has submitted that the CERC ought to have allowed expenses incurred by DVC on generation projects presently not operating as these projects have not been closed down and that DVC is proceeding with repair, renovation and modernization of these projects.

J.2 Keeping in view the scheme of the Act including the Tariff Regulations notified under the Act, we feel that the consumer can not be burdened with costs of maintaining non-productive assets. The Tariff Regulations ensure that before the expiry of useful life of the assets, entire cost incurred in their establishment, operation and maintenance are recovered through the tariff. Expenditure incurred on repair, renovation and modernization aimed at extending the useful life of the assets would be eligible, subject to

prudence check, for capitalization and would be eligible for recovery through tariff once the assets are again put to use.

J.3 Further, the general direction is for determining tariff linked to availability of generating capacity. The National Electricity Policy notified by the Central Government states that *‘the ABT regime introduced by CERC at the national level has had a positive impact. It has also enabled a credible settlement mechanism for intra-day power transfers from licensees with surpluses to licensees experiencing deficits. SERCs are advised to introduce the ABT regime at the State level within one year’*. The Tariff Policy further emphasizes (at para 6.2) that *‘a two-part tariff structure should be adopted for all long term contracts to facilitate Merit Order dispatch. According to National Electricity Policy, the Availability Based Tariff (ABT) is to be introduced at State level by April 2006. This framework would be extended to generating stations (including grid connected captive plants of capacities as determined by the SERC)’*.

J.4 Implementation of ABT rests on the premise that the tariff is to be linked to availability of generating capacity for the benefit of consumers and recovery of capacity (fixed) charges below the level of target availability shall be on pro rata basis. The Tariff Regulations, 2004 provide that ***at zero availability, no capacity charges shall be payable.***

J.5 DVC has also submitted following grounds to press for inclusion of such expenditure in the capital cost for recovery through tariff:

- The tariff being charged ought not to be reduced
- Entire revenue being ploughed back
- No private interest involved in the revenues earned by DVC
- Retail supply tariffs in the state of Jharkhand and West Bengal being much higher than those prevalent in DVC area

J.6 We find that neither the scheme of determination of tariff as laid down in the Act and the Tariff Regulations nor the DVC Act specify any weightage to above contentions.

K. Other Issues

K.1 One of the Respondents (GoWB) has challenged the capital base adopted by the CERC while determining the tariff. GoWB has contended that certain assets should have been treated as part of the distribution network and hence should have been taken out of the purview of tariff determined by the CERC. While the impact of the above would be revenue neutral on DVC as assets forming part of the distribution network would be eligible for tariff determination at the retail end. However, it would impact the power purchase bills of the beneficiary states. We feel that when the process of tariff determination for distribution segment of DVC takes place, the appropriate Commission would also determine the distribution network capital base. At that time DVC may approach

the CERC again for adjustment of its revenue requirement and corresponding tariff.

K.2 GoWB has contended that the CERC should also have determined the tariff for the period from 10 June 2003 to 2005-06.

K.3 While it is true that with the establishment of the Appropriate Commissions, the powers to determine tariff for sale of electricity by licensees have been vested with the Appropriate Commissions. The CERC in their order (para 37) have observed that *'we appreciate need for such a transition period. In the past, the Commission had recognized the need for such transition for Central Sector Utilities...'*

K.4 We feel that recognizing various issues involved with the change in the applicable laws the CERC had agreed to provide a transition period to DVC also, which we would not like to disturb. However, this view can not be taken as precedent.

L. Fuel Price Adjustment

As regards applicability of fuel price adjustment, GoWB has contended that the same is in the jurisdiction of State Commissions. We find no substance in this argument as the applicable fuel price adjustment is to be decided by the Commission determining the applicable generation tariff.

113 In view of the above the subject Appeal No. 273 of 2006 against the impugned order of Central Commission passed on October 3, 2006 is allowed to the extent described in this judgment and we remand the matter to Central Commission for *denovo* consideration of the tariff order dated October 3, 2006 in terms of our findings and observations made hereinabove and according to the law. Appeal No. 271, 272 and 275 of 2006 and No. 08 of 2007 are also disposed of, accordingly.

114. With the above order appeals are disposed of but with no order as to costs.

(A. A. Khan)
Technical Member

(Justice Anil Dev Singh)
Chairperson

Dated : 23rd November, 2007.