

**Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 73 of 2013 & I.A. No. 116 of 2013**

**Dated: 26<sup>th</sup> February, 2014**

**Present: Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

**In the matter of:**

**Assam Power Distribution Company Ltd.,  
Through its Chairman-cum Managing Director,  
Bijulee Bhawan, Paltanbazar,  
Guwahati-781 001**

**... Appellant (s)**

**Versus**

- 1. Central Electricity Regulatory Commission,  
Through its Secretary,  
3<sup>rd</sup> & 4<sup>th</sup> Floor, Chanderlok Building,  
36, Janpath, New Delhi-110 001**
- 2. North Eastern Electric Power Corpn. Ltd., Shillong,  
Through its General Manager,  
Brookland Compound,  
Lower New Colony Shillong,  
Meghalaya-793 003**
- 3. Tripura State Electricity Corporation Ltd.,  
Through its CMD, Bidyut Bhawan,  
Government of Tripura,  
Agartala-799 001.**
- 4. Meghalaya State Electricity Board,  
Through its Chairman,  
Lanjingshai, Short Round Board,  
Shillong-793 001**

**...Respondent(s)**

Counsel for the Appellant(s): Mr. Buddy A. Ranganadhan  
Ms. Sakie Jakhari, Ms. Richa Bhardwaj  
Mr. H.M. Sharma, Mr. M.K. Adhikary  
Mr. P.K. Sharma, Mr. K. Goswami,

Counsel for the Respondent(s): Mr. M.G. Ramachandran  
Ms. Swagatika Sahoo,  
Mr. Avinash Menon for R-2

## **JUDGMENT**

### **RAKESH NATH, TECHNICAL MEMBER**

This appeal has been filed by Assam Power Distribution Company Ltd. against the order dated 24.12.2012 further rectified by order dated 8.2.2013 passed by the Central Electricity Regulatory Commission (“Central Commission”) determining the tariff of Doyang Hydroelectric Project of NEEPCO for the period 1.4.2009 to 31.3.2014.

2. Assam Power Distribution Company Ltd., a distribution licensee operating in the State of Assam is the appellant. The Central Commission is the 1<sup>st</sup> respondent. North Eastern Electric Power Corporation Ltd. (“NEEPCO”), a central generating company, is the 2<sup>nd</sup> respondent. Tripura State Electricity Corporation Ltd. and Meghalaya State Electricity Board are the 3<sup>rd</sup> and the 4<sup>th</sup> respondent respectively.

3. The brief facts of the case are as under:

(A) Doyang Hydroelectric Project has been set up by NEEPCO, the second respondent, power from which is supplied to the appellant and other states in the North-Eastern Region. The Project achieved commercial operation on 8.7.2000.

(B) In 2002 NEEPCO filed a petition bearing no. 91 of 2002 for fixation of tariff from Doyang Project for the period 10.7.2000 to 31.3.2004 before the Central Commission. On 17.4.2003 the Central Commission disposed of the Petition fixing tariff provisionally at Rs. 2 per unit on the date of commercial operation of the Project with escalation @ 5% per annum in accordance with the guidelines of the Ministry of Power, Govt. of India contained in letter dated 22.1.2003, until financial package of Doyang Project

was finalized and approved by the Central Government.

(C) On 6.10.2003, the Central Commission passed order in IA no. 52 of 2003 in Petition no. 91 of 2002 by way of which NEEPCO sought extension of time upto 31.3.2004 to file requisite information for determination of tariff. The Central Commission determined a two part tariff for the project based on the provisional single part tariff determined earlier subject to adjustment on final determination of tariff.

(D) On 4.4.2005 Petition no. 91 of 2002 for determination of tariff from 10.7.2000 to 31.3.2004 was disposed by the Central Commission and the provisional two part tariff decided on 6.10.2003 was confirmed. The tariff claimed by NEEPCO was more than Rs. 7 per unit but since the details essential for

fixation of tariff were not filed by NEEPCO, the Central Commission proceeded to confirm the provisional tariff decided in the order dated 6.10.2003.

(E) On 3.6.2005, Petition bearing no. 62 of 2005 for fixation of tariff for the period 1.4.2004 to 31.3.2009 for Doyang Project was filed by NEEPCO. On 31.10.2005, this Petition was disposed of by the Central Commission on a notional basis, accepting the single part tariff in terms of Ministry of Power letter dated 22.1.2003 for the period upto 31.3.2006 only. The Central Commission impressed the necessity of the Central Government to finalize the approval of the revised financial package at an early date so that tariff could be considered in terms of the Regulations. NEEPCO was granted the liberty to make a fresh application for approval of tariff for the period

1.4.2006 to 31.3.2009 in light of the decision of the competent authority on the revised financial package.

(F) On 10.7.2007 NEEPCO filed a petition bearing no. 88 of 2007 for approval of tariff for the period 1.4.2004 to 31.3.2009. On 1.10.2007, the Central Commission disposed of the Petition no. 88 of 2007 observing that NEEPCO was directed to furnish some additional documents and information which it failed to comply with and therefore, the Central Commission proceeded to dispose of the Petition on the basis of available information. The Central Commission determined tariff for the period 2006-07 to 2008-09. It was further held that other related aspects including revenue shortfall upto 31.3.2009 was to be looked into by the Central Commission while determining the tariff for the project with effect from the year 2009.

(G) On 19.1.2009, the Central Commission notified the Tariff Regulations, 2009 for the control period 2009-14.

(H) A petition bearing no. 63 of 2011 was filed by NEEPCO for approval of tariff of Doyang Project for the period 1.4.2009 to 31.3.2014 based on Tariff Regulations, 2009. In the said petition NEEPCO claimed compensation for a shortfall of Rs. 284.31 crores for the period from 2004 to 2009 based on Tariff Regulations, 2004.

(I) On 21.4.2011, NEEPCO by way of an affidavit sought revision of its entire claim that was earlier filed in Petition no. 63 of 2010.

(J) On 26.8.2011, NEEPCO filed an additional affidavit claiming additional capital expenditure for the period 8.7.2000 to 31.3.2014.

(K) The Central Commission passed the impugned order dated 24.12.2012 considering the shortfall for the period 2004-09 and additional capitalization claimed by NEEPCO and determined the tariff for the period 2009-14.

(L) The Central Commission passed order dated 8.2.2013 undertaking corrections of inadvertent clerical mistakes in order dated 24.12.2012.

(M) Aggrieved by the impugned order dated 24.12.2012 read with order dated 8.2.2013 of the Central Commission, the appellant has filed this appeal.

4. The appellant has made the following submissions:

(A) During the period 2000-2004 the Central Commission fixed the provisional tariff as NEEPCO

failed to provide information required to determine the tariff. For the period 2004-06 also as the necessary inputs were not placed on record by NEEPCO, the Central Commission determined the tariff by order dated 31.10.2005 by notionally accepting the tariff in terms of Ministry of Power letter dated 22.1.2003 for the period upto 2006. NEEPCO was granted liberty to make fresh application for approval of tariff for the period 2006-09. For the period 2006-09 the Central Commission vide order dated 1.10.2007 again determined the tariff on the basis of letter of Ministry of Power dated 22.1.2003 as NEEPCO submitted that financial package had not been approved yet. The Central Commission also decided that other related aspects including revenue shortfall upto 31.3.2009 would be looked into while determining the tariff w.e.f. 1.04.2009. For the period 2009-14 NEEPCO further

sought re-opening of the tariff for the period 2004-06 that stood confirmed by the Central Commission vide order dated 31.10.2005 thereby incorrectly seeking refund of shortfall for the period 2004-06. However, the Central Commission has also gone ahead and re-determined tariff for the period 2004-09 overlooking the fact that the tariff for the period 2004-06 was already determined by its order dated 31.10.2005. Further, in the course of determination of tariff the Central Commission has determined capital cost of Doyang Project ignoring the findings of the Standing Committee which had held NEEPCO responsible for cost overrun. The Standing Committee allowed cost overrun under the item Addition/Deletion and Underestimation, the responsibility for which was entirely imputed on NEEPCO.

(B) Reopening/revisiting of the tariff for the period 2004-09 was not permissible. The said claim of NEEPCO for revenue gap for the period 2004-09 is not supported by any details of documents or computation. Such re-determination retrospectively ought not to have been done at all. Without prejudice to the same, even assuming that the revenue shortfall was to be recovered, in terms of earlier orders dated 31.10.2005 and 1.10.2007 of the Central Commission, the Central Commission could have re-determined the tariff only for the period 1.4.2006 to 31.3.2009. In terms of the order dated 31.10.2005, the Central Commission had made it clear that the tariff determination till 31.3.2006 was not to be re-opened but the shortfall after 1.4.2006 upto 31.3.2009 could be considered. Contrary to its earlier orders dated 31.10.2005 and 1.10.2007, the Central Commission has re-determined the tariff from 1.4.2004

to 31.3.2009 whereas it could have, if at all, re-determined the tariff from 1.4.2006 to 31.3.2009. If re-determination had been done for the period 1.4.2006 to 31.3.2009 there would be no revenue shortfall at all but on the other hand there would be a revenue surplus in the hands of NEEPCO and such revenue surplus would then have reduced the annual fixed charges for the period 2009-14.

(C) The capital cost of the project as on 8.7.2000 determined by the Central Commission is arbitrary and has been made by ignoring the findings of the Standing Committee on time and cost overrun. Doyang Project was originally approved by the Central Government during March 1985 at a cost of Rs. 166.65 crores with completion date as December 1995. The cost of the project was revised to Rs. 384.75 crores (Revised Cost Estimates-I) in 1995

(including IDC component of Rs. 53.16 crores) at March 1993 price level with scheduled date of completion as July 1997. Thereafter, Revised Cost Estimates (RCE-II) was approved during May 2001 at an estimated cost of Rs. 758.70 crores (including IDC of Rs. 88.13 crores) at February, 2000 price level with the commissioning schedule as June, 2000. In view of the proposed revision of the cost estimates to Rs. 758.70 crores and revised commissioning schedule indicating time overrun of 36 months, a Standing Committee was constituted by Ministry of Home Affairs as per the directions of Cabinet Committee on Economic Affairs (CCEA) to look into the factors responsible for the time and cost overrun and fix responsibility for the same. The Standing Committee after detailed analysis gave findings under various items in the report holding NEEPCO responsible for

time and cost overrun. However, the Central Commission in the impugned order has determined the capital cost of the project as on 7.8.2000 (COD) ignoring the findings of the Standing Committee and allowed the increase in capital cost due to time and cost overrun which was exclusively due to fault of the generating company.

(D) Despite the observation of the Standing Committee that the generating company is responsible for the cost overrun on account of (i) addition/deletion in design (ii) under estimation of the provision, the Central Commission has incorrectly allowed the costs on these two accounts in violation of the principle of law laid down by this Tribunal in the judgment dated 27.4.2011 in Appeal no. 72 of 2010 titled Maharashtra State Power Generating Company Ltd. vs. MERC & Ors.

(E) Ministry of Power on the basis of the model proposed by NEEPCO and in terms of the Ministry of

Finance letter dated 13.2.2006, approved the financial restructuring of the Doyang Project vide memo dated 4.8.2008. Ministry of Power worked out the sacrifices to be made by the Government of India, NEEPCO and notional sacrifice of the cost overrun to be made by the beneficiaries through higher tariff. According to this memo dated 4.8.2008 NEEPCO had to share Rs. 136.21 crores, Govt. of India Rs. 90.21 crores (by way of waiver of accumulated interest upto 7.2.2006 alongwith penal interest and pre-payment charges) and beneficiaries had to share 105.57 crores. The Central Commission overlooked the burden sharing formula of cost overrun decided by Government of India.

(F) The representation of NEEPCO in Petition no. 62 of 2010 is fraught with discrepancies and inconsistencies and the Central Commission has

proceeded to pass the tariff order without carrying out any prudence check of the same. By order dated 7.1.2008 in a separate proceeding, the Central Commission sought information from NEEPCO to facilitate the process of finalizing the terms and conditions of tariff for the tariff period starting from 1.4.2009. The actual information regarding number of employees for the period 2002-03 to 2006-07 furnished by NEEPCO to the Central Commission is different from that furnished in the Petition no. 63 of 2005. In IA no. 33 of 2007 in Petition no. 88 of 2007 NEEPCO sought to revise the relevant information regarding Annual Fixed Charges without any valid reason. In Petition no. 63 of 2010, NEEPCO has sought Annual Fixed Charges for the period 2004-09 on the basis of submission made in Petition no. 88 of 2007 and the same were not subjected to any

prudence check by the Central Commission at the time of approval.

5. In reply to the above, the respondent no.2 (NEEPCO) has made following submissions:

(A) In petition no. 62 of 2005 filed by NEEPCO for determination of tariff for the period 1.4.2004 to 31.3.2009, the Central Commission did not finally determine the tariff as per the applicable Tariff Regulations 2004 as the financial package of NEEPCO for Doyang Project was pending before the Government of India. In the order dated 30.10.2005, the Central Commission had impressed upon the Central Government for early approval of revised financial package. The tariff determined by the State Commission by orders dated 31.10.2005 and 1.10.2007 were not final determination.

(B) The re-visit of the tariff for the period 2004-09 (including 2004-06) to decide the tariff in accordance with the Tariff Regulations, 2004 is consistent with the decision of this Tribunal in the judgment dated 13.10.2006 in Appeal no. 17 of 2006. It is also a settled principle that revisiting the tariff by way of truing up and deciding on the shortfall is in accordance with the law and does not amount to retrospective operation.

(C) The Government of India made significant sacrifices in favour of the beneficiaries which have the effect of considerable reduction in tariff. The beneficiaries having taken the advantage of reduction in tariff cannot be allowed to challenge the determination of shortfall for the period 2004-09.

(D) Regarding time and cost overrun, the Central Commission has specifically referred to and dealt with

the Standing Committee's report before coming to the conclusion that NEEPCO could not be made responsible on account of the major law and order and other problems involved in execution of the Project. The details of the factors affecting the project given in the impugned order clearly and unequivocally establish the external factors affecting the implementation of the Project, the principal one being the major law and order and insurgency.

(E) In the impugned order the Central Commission has dealt with the Standing Committee Report and correctly allowed an increase of cost of Rs. 42.56 crores claimed by NEEPCO towards addition/deletion to meet the technical requirements holding that these items were necessary for commissioning of the generating station and would

have formed part of the capital cost, if envisaged earlier.

(F) The Standing Committee in its report with regard to increase due to under estimation observed that there has been an increase of Rs. 52.13 crores due to under estimation. NEEPCO had placed before the Central Commission the justification for the same. These works are not unusual phenomena in hydro projects. At the time of preparation of Detailed Project Report it is just not possible to estimate accurately the works that will be necessary during the execution of the Project. The Central Commission after considering the Standing Committee Report and submissions of NEEPCO correctly allowed increase of Rs. 52.13 crores and held that these works were necessary for the commissioning of the Project and would have formed part of the capital cost if envisaged earlier.

(G) Each of the aspect of capital expenditure has been subject to prudent check by the Central Commission.

(H) There is no financial effect on tariff due to the mismatch in number of employees since the normative O&M expenses are calculated on the basis of actual O&M expenses for the period 2003-08 as per Regulation 19(f) of Tariff Regulations, 2009. It is pertinent to mention that the O&M expenses for the period 2003-07 submitted before the Central Commission in both the cases are the same. The audited statement in support of actual O&M expenses for the FYs 2003-08 have been submitted before the Central Commission.

6. We have heard Mr. Buddy Ranganadhan, learned counsel for the appellant and Shri M.G. Ramachandran, learned counsel for the respondent

no. 2 on the above issues. They have also filed written submissions.

7. On the basis of the rival contentions of the parties, the following questions would arise for our consideration:

**i) Whether the Central Commission was correct in determining the shortfall in recovery for the past period 2004-09 while determining the tariff for the period 2009-14 in the impugned order dated 24.12.2012?**

**ii) Even if such retrospective re-determination of tariff was permissible, should the Central Commission have restricted to the shortfall for the period 2006-09 instead of covering the entire control period of 2004-09?**

**iii) Whether the capital cost of the power project has been decided arbitrarily by allowing the time and cost overrun without considering the Report of the Standing Committee constituted by the Ministry of Home Affairs on time & cost overrun and without any prudence check by the Central Commission?**

**iv) Whether the representation of NEEPCO before the Central Commission was fraught with discrepancies and inconsistencies which were ignored by the Central Commission?**

**8. The first two issues are interconnected and therefore, being dealt with together.**

9. Let us first examine the order dated 31.10.2005 of the Central Commission in Petition no. 62 of 2005.

10. We find that NEEPCO in its Petition had sought approval of annual fixed charges for the FYs 2004-05 to 2008-09 based on Ministry of Power's letter dated 22.1.2003 i.e. based on base rate of Rs. 2 per unit for FY 2000-01 with escalation of 5% per annum. It was represented by NEEPCO that the approval of financial package for Doyang HEP was still under consideration of the Central Government. However, the Central Commission was of the opinion that the tariff should be determined in terms of its notification for which the final approved financial package was a necessary input. As the financial package of the project was yet to be approved by the competent authority, the Central Commission disposed of the Petition by notionally accepting the tariff in terms of Ministry of Power letter dated 22.1.2003 for the period upto 31.3.2006 only. In this order the Central

Commission impressed upon the Central Government to approve the financial package at an early date.

11. The appellant is emphasizing on the following paragraphs of the Central Commission's order dated 31.10.2005 to argue that the tariff determined upto FY 2005-06 was the final tariff.

*“12. We take this opportunity to impress upon the Central Government that necessary approval of revised financial package may be finalized at an early date so that the tariff beyond 31.3.2006 can be considered in terms of the notification which governs the terms and conditions of tariff in all other cases. A copy of this order may be sent to the Secretary, Ministry of Power for his appropriate action. The petitioner shall also vigorously pursue the matter with the concerned authorities to ensure expeditious finalization of the revised financial package.*

*13. Accordingly, the petition No. 62/2005 stands disposed of. The petitioner is at liberty to make a fresh application for approval of tariff for the period 1.4.2006 to 31.3.2009 in the light of the decision of the competent authority on the revised financial package.”*

12. It is very clear that the Central Commission had not determined the tariff according to its Regulations in its order dated 31.10.2005 due to non-approval of the revised financial package by the Central Government. In the absence of the approved revised financial package, the Central Commission only disposed of the Petition of NEEPCO by notionally accepting the tariff in terms of Ministry of Power letter dated 22.1.2003. It will be necessary to also examine the paragraph 9 & 10 of the order dated 31.10.2005 in this regard which are reproduced below:

*“9. In case of hydro power generating stations it is generally noticed that while the tariff is higher*

*during the initial stages after commissioning of the generating station, it goes on successively reducing after the repayment of loans has started. However, in case of Doyang HEP, the situation will be reverse, in case the petitioner is allowed escalation @ 5% each year. The tariff will work out to about Rs.3/kWh by the end of current tariff period, that is, the year 2008-09 and by the same trend, the tariff may rise to Rs.11/kWh by the end of normal life of 35 years. This situation cannot be allowed to continue since it will not be in the consumer's interest. Therefore, tariff should be determined in terms of the notification for which, the final approved financial package is a necessary input, but has not been approved by the competent authority as yet.*

*10. As the necessary inputs for determination of tariff have not been placed on record by the petitioner, the process of actual determination thereof based the notification cannot be undertaken. We, therefore, dispose of the present petition by notionally accepting the single part tariff*

*in terms of Ministry of Power letter dated 22.1.2003 for a period up to 31.3.2006 only. The single part tariff accordingly works out to Rs. 2.431/kWh for the year 2004-05 and Rs. 2.552/kWh for the year 2005-06. Based on this single part tariff, the petitioner shall be entitled to annual fixed charges for these two years as under:*

<u>Year</u>	<u>Annual Saleable Design Energy</u>	<u>Annual Fixed Charges</u>
2004-05	197.97 MU	Rs.(197.97 x 2.431)/ 10 crore= Rs 48.13 crore
2005-06	197.97 MU	Rs.(197.97 x 2.552)/ 10 crore= Rs 50.52 crore”

13. Conjoint reading of the order dated 31.10.2005 indicates that the Central Commission had only disposed of the Petition by deciding the tariff provisionally for the period 2004-06 based on the letter dated 22.1.2003 as it was not able to determine the tariff as per its Tariff Regulations, 2004 in the absence of the approved revised financial package of the Project. Such notional tariff determination could not be considered as the final tariff which was required to

be determined only as per the prevailing Tariff Regulations, 2004. Nowhere in the order dated 31.10.2005 has the Central Commission indicated that the tariff adopted for 2004-06 as per Government's letter dated 22.1.2003 was final.

14. We shall now examine the Central Commission's order dated 1.10.2007 in Petition no. 88 of 2007.

15. In the Petition no. 88 of 2007, NEEPCO filed Petition for approval of tariff for the period 2004-09 in accordance with Tariff Regulations, 2004. However, the revised financial package was still not approved by the Government of India. In view of non-approval of the revised financial package, the Central Commission considered various options for determination of tariff based on tentative computation of tariff as per the 2004 Tariff Regulations, computation as per Ministry

of Power's letter dated 10.3.2006 with gradual increase in Return on Equity, computation as per the financial model submitted by NEEPCO to the Central Government and computation as per Ministry of Power's letter dated 22.1.2003 providing 5% escalation every year. The Central Commission found that the tentative computation of tariff as per the 2004 Tariff Regulations would result in a very high tariff. The last option i.e. tariff based on Central Government's letter dated 22.1.2003 was found to be the lowest of all the four options. Therefore, the Central Commission determined the tariff for FY 2006-07 to 2008-09 as per the Government of India's letter dated 22.1.2003, However, it was decided that "other related aspects including revenue short-fall upto 31.3.2009 shall be looked into by the Commission while determining tariff for the generating station with effect from 1.4.2009".

16. It is clear from the orders dated 31.10.2005 and 1.10.2007 that the Central Commission had provisionally adopted the tariff for the period 2004-09 as per Ministry of Power's letter dated 22.1.2003 with 5% escalation as continuation of the methodology adopted since 2000-01 since the revised financial package of the Project had not been approved by the Central Government. In the order dated 1.10.2007, it was decided that the revenue shortfall upto 31.3.2009 would be looked into by the Central Commission while determining the tariff with effect from 1.4.2009.

17. Thus, the Central Commission as per its previous orders dated 31.10.2005 and 1.10.2007 had to include the revenue shortfall as a result of final determination of tariff for the period 2004-09 as per its Tariff

Regulations, 2004 in the tariff for subsequent period with effect from 1.4.2009.

18. This Tribunal in its judgment dated 13.10.2006 in Appeal no. 17 of 2006 in the matter of North-Eastern Power Corporation Ltd. vs. Tripura State Electricity Power Corporation Ltd. & others held that the Central Commission has neither the authority nor jurisdiction to deviate from the binding Tariff Regulations. Further by an ad-hoc approach the statutory rule and tariff notification cannot be whittled down nor by such an approach, right of which has crystallized in favour of a party could be defeated or taken away. In this case the Central Commission has decided the tariff as per its Regulations and worked out the difference between the tariff determined as per the Regulations and the provisional tariff allowed earlier for the period 2004-09 as revenue shortfall to be recovered from the

beneficiaries. We do not find any infirmity in the approach of the Central Commission.

19. Thus, we are not convinced by the contention of the appellant that the shortfall for the period 2004-09 was not to be included in the tariff determined for the period 2009-14. Thus, the first two issues are answered as against the appellant.

20. Let us examine the third issue regarding the report dated 9.11.2000 of the Standing Committee constituted by the Ministry of Home Affairs on time and cost overrun and prudence check of the capital cost by the Central Commission.

21. We find that the Standing Committee was constituted by the Ministry of Home Affairs to look into the factors responsible for time and cost overruns in respect of Doyang Hydro Electric Power Project of

NEEPCO under the Chairmanship of Additional Secretary, Ministry of Home Affairs.

22. We find that the Standing Committee has made the following analysis of time and cost overrun.

*“ 6.2 Doyang Hydro Electric Project is directly affected by insurgency and other major law and order problems. Cases of threats, assaults intimidation, extortions etc. continued disrupting the implementation of the project. The prevalent local rules and regulations with regard to land laws have also been a deterrent factor to the progress of work in the project. Apart from this, following major factors were also responsible for delay in completion of the project after latest sanction:-*

*(i) Delay in acquisition of quarry.*

*(ii) Delay due to flooding.*

*(iii) Extensive damages- caused to the Power House work, establishment and equipment by submergence of Power House from August 1998 to September, 1999.*

*(iv) Attack on project chief demoralized all project officials.*

*(v) Poor performance of the major contractors.*

*(vi) Problems created by locals due to boundary dispute.*

*(vii) Poor response in bidding for contract works.*

**V. Analysis of Cost Overrun:**

*7. The project cost including IDC, as per RCE-II is Rs. 758.70 crores, which is an increase of Rs. 373.95 crores over the latest sanctioned cost of Rs. 384.75 crores. This increase is 97.19%. The RCE-I, which was based on February, 1993 price level, was sanctioned by the M.H.A. in August 1995. The increase in cost has been due to the following reasons:*

<i>Research increase/Decrease for</i>	<i>Amount (Rs. in crore)</i>	<i>% of total cost increase</i>	<i>% increase over RCE-I</i>
Increase due to increase in prices	244.29	65.33%	63.49%
Increase due to additions/deletions	42.56	11.38%	11.06%
Increase due to under estimation	52.13	13.94%	13.55%
Increase due to increase in IDC	34.97	9.35%	9.09%
<b>Total</b>	<b>373.95</b>	<b>100.00%</b>	<b>97.19%”</b>

23. Thus, the Standing Committee has held that the delay in commissioning of the project was due to insurgency/law and order problem, flooding, poor response in bidding from the contractor and delay in acquisition of quarry. The Committee also analysed the break up of cost overrun.

24. The learned counsel for the appellant has argued that increase due to additions/deletions and increase due to underestimation is attributable to NEEPCO and should not be passed on in the tariff.

25. We find that the Standing Committee has noted that to meet the technical requirement, some additional items had to be added like extra concreting works in diversion tunnel outlet, closer spacing of supports in water conductor system, RCC lining instead of PCC in diversion tunnel, etc. and these

additions were required based on the model study conducted at CWPRS, Pune and after reviewing the geological conditions at site. Thus, there is no dispute that these additions were required technically. The requirement of these additions were also established by a model study by an independent Central Institute i.e. CWPRS, Pune. However, these were not envisaged in the Detailed Project Report (DPR). The Standing Committee has held NEEPCO and CEA responsible for preparing poor/sub-standard DPR for not envisaging these additional works at the planning stage. The learned counsel for the appellant has argued that since NEEPCO is responsible for preparation of poor/substandard DPR, the expenses on additional works should not have been allowed by the Central Commission.

26. We are not in agreement with the above contention of learned counsel for the appellant. There is no dispute that the additions were required technically on reviewing the geological condition and the additional expenditure was not as a result of lapse on the part of NEEPCO. The Standing Committee has also accepted that these works were required to be carried out. The only concern of the Standing Committee was that these works were not envisaged in the DPR for which NEEPCO and CEA have been held responsible. It is also not stated by the Standing Committee that the additional expenditure was not prudent or was incurred unnecessarily. As rightly held by the Central Commission, even if these additional works were included in the DPR, the expenditure would have still been incurred on them. The only difference is that in that case these expenses

would have been included in the original estimates of the project.

27. Another issue raised by learned counsel for the appellant is that the expenditure due to inadequate provisions should not have been included in the capital cost of the project.

28. We find that the Standing Committee has explained the reason for increase in cost due to inadequate provisions, which were not provided for in the DPR. There was increase in the quantity of excavation in the approach channel and spill way to attain a stable slope. This caused increase in quantum of excavation and concrete. In this case also no imprudence in the expenditure incurred due to inadequate provisions has been indicated by the Standing Committee.

29. Learned counsel for the appellant has also brought to our notice the following findings of the Standing Committee stating that the Committee had held NEEPCO responsible for the enhancement in cost:

*(i) The Revised Cost Estimate-I of the project was prepared in February, 1993, which was approved in 1995 during which many changes in drawings were finalized. NEEPCO had opportunity to bring to the notice of the sanctioning authorities about changes in the drawings and related cost escalation. However, it was not done by NEEPCO, which resulted in 26% cost overrun. NEEPCO should have taken appropriate action in this regard. Responsibility for this lies with NEEPCO and NEC.*

*(ii) The replacement of PCC lining by RCC lining for diversion canal, adoption of flatter slopes than the one originally adopted at site in view of geographical conditions after the model study*

*conducted at CWPRS, Pune and other matters like provision for upstream draining valves and downstream drawing valve on both the plots have resulted in cost overrun. The Committee was of the view that a poor DPR has resulted in these cost overruns for which responsibility should be fixed with NEEPCO.”*

30. We find that the Committee has held NEEPCO responsible for the following:

i) Not bringing to the notice of the sanctioning authorities about change in the drawings and related cost escalation.

ii) Inadequate provisions made in the DPR.

31. The Committee has held NEEPCO responsible only for not bringing to the notice of the sanctioning authorities for cost of the project and not foreseeing certain works at the time of preparation of the DPR.

However, nowhere the Committee has held that these additional works were unwarranted or without these works the project could have been completed. The Committee casts aspersion on NEEPCO only for not anticipating certain works at the DPR stage and not bringing to the notice of sanctioning authority in Government of India in time regarding cost escalation due to changes made. Nowhere it has been held that these additional expenses were imprudent.

32. We find that the Central Commission in the impugned order has gone into the findings of the Standing Committee and after detailed analysis allowed the additional costs due to time and cost overruns in determining the capital cost of the project. The relevant findings of the Central Commission are as

under:

*“While holding that the petitioner was responsible for the said delay, the Standing Committee has observed that the project was directly affected by insurgency and other major law and order problems, cases of threats, intimidation, assaults, extortions etc. continued disrupting the implementation of the project. It has further observed that the prevalent local rules and regulations with regard to land laws have been a deterrent factor to the progress of the work in the project.”*

***“(b) Increase due to addition/deletions:*** *The Standing Committee in its report has observed that there has been an increase of Rs. 4256 lakh due to additions to meet technical requirements. It has been observed that some additional items had to be added like extra concreting works in diversion tunnel outlet, closer spacing of supports in water conductor system, RCC lining instead of PCC in*

*diversion tunnel, to meet the technical requirements. These additions were required based on the model study conducted at CWPRS, Pune and after reviewing geological conditions at site and the responsibility for preparing poor/sub-standard DPR lies with the petitioner /CEA. Despite the observations of the Standing Committee that the petitioner is responsible for cost overrun on account of addition /deletion in design, we allow the increase of Rs. 4256 lakh as claimed by the petitioner, since these items/works are necessary for commissioning of the generating station and would have formed part of the capital cost, if envisaged earlier.*

**(c) Increase due to under estimation:** *The Standing Committee in its report has observed that there has been an increase of Rs. 5213 lakh due to inadequate provisions. Significant rock fill quantity has increased due to introduction of flatter slope in revised drawing of the dam. In the approach channel and spillway, to attain a stable slope during excavation, the same had to be done*

*at some places beyond originally expected slope like resulting to increase in excavated quantity and subsequent increase in quantum of concrete. Increase in line thickness has resulted to increase in procurement and fabrication cost. Even though the Standing Committee has observed that the petitioner is responsible for cost overrun due to underestimation of the provisions, the increase of Rs. 5213 lakh is allowed, as these items/works are necessary for the commissioning of the generating station, and would have formed part of the capital cost, if envisaged earlier.”*

33. We have also considered the explanation given by NEEPCO for additional works and are in full agreement with the findings of the Central Commission.

34. We find that the Central Commission has examined the cost of various components of the project in details and determined the capital cost after

prudence check and according to its Tariff Regulations.

35. Learned counsel for the appellant has referred to judgment of this Tribunal dated 27.4.2011 in Appeal no. 72 of 2010 in the matter of Maharashtra State Power Generating Company Ltd. vs. MERC & Ors. to press that cost escalation due to delay wholly attributable to the generating company should be borne by the generating company. We feel that this finding of the Tribunal in Maharashtra State Power Generating Companies would not be applicable in this case as the Central Commission after detailed analysis has come to the conclusion that the delay was not attributable to NEEPCO and that the expenditure on the additional works was prudent.

36. We would also like to add that in hydro projects it is not always possible to anticipate certain unforeseen works and also accurately assess the quantum of work at the DPR stage and therefore, there are variations in cost on these accounts. The hydro projects are also susceptible to natural calamities like floods, landslides, etc. resulting in escalation in cost of the project.

37. The learned counsel for the appellant has also argued that the Ministry of Power had approved the financial restructuring of the Project vide office memorandum dated 4.8.2008. The Ministry of Power had worked the sacrifices to be made by the Government of India, NEEPCO and notional sacrifice of the cost overrun to be made by the beneficiaries through higher tariff. The same has not been considered by the Central Commission.

38. According to learned counsel for the NEEPCO, the Government of India has made significant sacrifices in favour of the beneficiaries which have the effect of considerable reduction in tariff.

39. We find that the financial restructuring of Doyang Project as indicated in the letter dated 4.8.2008 is only a proposal by the Ministry of Power. We find that the Ministry of Power vide letter dated 13.3.2009 has decided waiver of interest along with penal interest and pre-payment charges amounting to Rs. 90.2009 crores. NEEPCO has also been asked to approach the Central Commission for determination of tariff as per the Return on Equity of 10% which is much less than that admissible to them under the Tariff Regulations i.e. 14% as per 2004 Regulations and 15.5% as per 2009 Regulations. NEEPCO in its Petition before the Central Commission requested for

return on equity of 10% as per the letter dated 13.3.2009 of the Government of India.

40. The Central Commission has adopted the lower Return on Equity as per the request made by NEEPCO for the purpose of determination of tariff for the period 2004-09 and 2009-14. Thus, the reduction of tariff on account of lower Return on Equity than that permissible under the Tariff Regulations has been allowed by the Central Commission at the instance of NEEPCO. Thus, the beneficiaries have already been given the advantage of lower Return on Equity compared to that provided for in the Regulations in the Tariff and NEEPCO has made the sacrifice by claiming lower return on equity.

41. Thus, we reject the contention of the appellant on this account too.

42. The fourth issue is regarding discrepancies and inconsistencies in the proposal of NEEPCO in Petition no. 62 of 2010.

43. The discrepancies pointed out by the appellant are as under:

i) The number of employees indicated in the response of NEEPCO to order dated 7.1.2008 by the Central Commission in a separate proceeding was more than what is submitted in Petition No. 63 of 2005.

ii) By way of IA no. 33 of 2007 in Petition no. 88 of 2007 for determination of tariff for the period 2006-09, NEEPCO sought to revise certain forms of the petition without any valid reason and claimed revised annual fixed charges for 2004-09. In the petition no. 63 of 2010 NEEPCO has sought the Annual Fixed Charges for the period 2004-09 on the

basis of the submissions made in Petition no. 88 of 2007 and the same were not subjected to prudence check by the Central Commission.

44. Learned counsel for NEEPCO has explained the alleged discrepancies as under:-

i) Revision in the forms were filed from time to time on account of certain changes such as withdrawal of certain portions of the electricity charges and transmission charges, change in the normative O&M expenses and in regard to projected additional capital expenditure etc. The Central Commission has considered the aspects of the changes in O&M expenses claimed in the impugned order after considering the objections of the objectors. Each aspect of the capital expenditure has been subject to prudent check by the Central Commission.

ii) Variation in return on equity is due to inclusion of projected capital expenditure for the period 2009-14 pursuant to Central Commission's direction vide letter dated 5.5.2010 and 12.5.2010. NEEPCO has submitted the details vide affidavit 31.5.2010.

iii) Enhancement of capital cost due to projected additional capitalization has resulted in increase in normative working capital impacting the Annual Fixed charges.

iv) Variation in calculation of depreciation is due to inclusion of projected additional capital expenditure.

v) The mismatch in number of employees has been clarified by NEEPCO through affidavit dated 13.3.2012 in response to the query of the consumers

on the issue. There is no financial effect on the tariff due to said mismatch in number of employees since normative operation and maintenance expenses have been calculated based on actual O&M expenses for the period 2003-08 as per Regulation 19(f) of the Tariff Regulations, 2009. The total O&M expenses for the period 2003-07 submitted before the Central Commission are same in both the cases. The audited statement in support of such O&M expenses for the period 2003-07 have been submitted before the Central Commission.

45. We find that the Central Commission has considered all the objections of the objectors and have gone into each component of the tariff and then decided the tariff after prudence check. We do not find any infirmity in the same. Regarding O&M expenses, the Central Commission has considered the audited

accounts of NEEPCO and thereafter determined the O&M expenditure after prudence check and following its Regulations. We do not find any substance in the contentions of the appellant in this regard.

46. **Summary of our findings**

**(i) The Central Commission in the orders dated 31.10.2005 and 1.10.2007 had provisionally adopted the tariff for the period 2004-06 and 2006-09 respectively as per Ministry of Power's letter dated 22.1.2003 since the revised financial package of the Doyang Project had not been approved by the Central Government. In the order dated 1.10.2007, the Central Commission decided that the revenue shortfall upto 31.3.2009 would be looked into by the Central Commission while determining the tariff with effect from 1.4.2009.**

**In the impugned order the Central Commission has worked out the tariff for the period 2004-09 as per its Regulations and taking into account the prayer of the NEEPCO to allow a lower return on equity and correctly determined the revenue shortfall to be recovered from the beneficiaries for the period 2009-14.**

**ii) The Tariff Regulations are binding on the Central Commission. This Tribunal in Appeal no. 17 of 2006 has decided that by an ad-hoc approach the statutory rule and tariff notification cannot be whittled down nor by such an approach, right of which has crystallized in favour of a party would be defeated or taken away. Therefore, we do not find any infirmity in the approach of the Central Commission in this regard.**

**iii) We find that the Central Commission has determined the capital cost of the Project after considering the report of the Standing Committee constituted by the Ministry of Home Affairs and after prudence check as per its Regulations. Therefore, we do not find any infirmity in this regard.**

**iv) We do not find any imprudency in the expenditure incurred for additions and extra work which were not covered in the Detailed Project Report.**

**v) We do not find any substance in the contention of the Appellant regarding discrepancies and inconsistencies in the information furnished by NEEPCO as the Central**

**Commission has considered all the aspects and then decided the tariff after prudence check.**

47. In view of above, the Appeal is dismissed as devoid of any merits. No order as to costs.

48. Pronounced in the open court on this

**26th day of February, 2014.**

**(Justice Surendra Kumar)  
Judicial Member**

**( Rakesh Nath)  
Technical Member**

√  
**REPORTABLE / ~~NON-REPORTABLE~~**  
Vs