APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 153 OF 2015

Dated : 28th May, 2018

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

IN THE MATTER OF:

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

Versus

1 Delhi Transco Ltd
Shakti Sadan, Kotla Road
New Delhi-110002

2. BSES Yamuna Power Ltd.,
Shakti Kiran Building, Karkardooma
New Delhi-110092

3. BSES Rajdhani Power Ltd.,
BSES Bhawan, Nehru Place,
New Delhi-110 019

4. Tata Power Delhi Distribution Limited
(Formerly known as North Delhi Power Ltd.)
Grid Substation Building
Hudson Lines, Kingsway Camp
New Delhi- 110 009

5. Punjab State Power Corporation Ltd
Interstate Billing, Shed No. TI-A,
lbowal,Patiala-147 001,Punjab

6. M. P. Power Management Company Ltd
(Formerly known as Madhya Pradesh Power Trading Co Ltd),
Shakti Bhawan, Vidyut Nagar,
Jabalpur -482008

7. Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building
36, Janpath, New Delhi – 110 001 **……Respondents**

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya

Counsel for the Respondent(s) : Mr. S. K. Chaturvedi
Mr. Vishnu S. Pillai for R-1

Mr. R.B. Sharma for R-3

Mr. Shivi Sanyam
Mr. Manish Srivastav
Mr. Anurag Bansal
Ms. Sakshi Mehrotra
Ms. Prachi Johri for R-4

Mr. Ravi Sharma
Mr. Rishabh Donnel Singh for R-6

J U D G M E N T

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

1. The present Appeal has been filed under Section 111 of the Electricity Act, 2003 against the impugned Order dated 20.04.2015 passed by the Central Electricity Regulatory Commission (hereinafter referred to as the **'Central Commission**') in Petition No. 66/GT/2012, whereby the Central Commission has decided the generation tariff for the Appellant's Durgapur Steel Thermal Power Station, Unit Nos. I and II (2 x 500 MW) for the period from their respective dates of commercial operation(**'COD'**) till 31.3.2014, based on the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter referred to as **'Tariff Regulations, 2009'**).

1.1 Being aggrieved by the above order of the Central Commission, the Appellant, DVC is filing the present Appeal on the aspects & issues stated hereinafter.

1.2 Respondent Nos.1 to 5 are Delhi Transco Limited, BSES Yamuna Power Limited, BSES Rajdhani Power Ltd., Tata Power Delhi Distribution Ltd., Punjab State Power Corporation Ltd. are generating/distribution and transmission companies constituted under Companies Act and involved in the business of Electricity

1.3 Respondent No. 6 is M.P. Power Management Company Limited, engaged in holding all the DISCOMs in the state.

1.4 Respondent No.7 is Central Electricity Regulatory Commission constituted under the Electricity Act, 2003 for carrying out various regulatory functions as stipulated under Section 79 of the Act.

2. **BRIEF FACTS IN ISSUE:**

a) The Central Commission has computed the period available for commercial operation of the Durgapur Steel Thermal Power Station (Project / Plant) from the date of Letter of Award (as per DVC's internal agenda note) and not from the date of Investment Approval passed by the Board as per the provisions of the Tariff Regulations, 2009, particularly when the letter of award was issued to the contractor before the investment approval.

b) The Central Commission has rejected the claim made by DVC for time overrun, not properly appreciating the justifications given by DVC for the delay in achieving the commercial operation and consequent to the rejection of the time over run, the Central Commission has disallowed the cost overrun (IDC).

c) The Central Commission has only partly allowed the contribution made by DVC towards the sinking fund. For the year 2013-14 in the petition no.

66/GT/2012,DVC had claimed sinking fund contribution against two bonds floated on 30.03.2012 and 25.03.2013. As against the total amount of Rs 2665.61 lakhs, Central Commission has considered only the first bond amounting to Rs 1562.46 lakhs and disallowed the second bond.

3. **FOLLOWING QUESTIONS OF LAW FOR CONSIDERATION:**

3.1 Whether the Central Commission was right in computing the time line allowed for establishing the thermal power project with reference to the Letter of Award issued to the EPC contractor as mentioned in DVC internal agenda note for Board approval instead of the date of the investment approval by the Board as provided for the Tariff Regulations, 2009?

3.2 Whether the Central Commission is right in rejecting the time over run claimed by DVC in the implementation of the project and the justifications given for the said purpose?

3.3 Whether the Central Commission is right in disallowing the cost overrun (IDC) on account of the delay in the commissioning of the project?

3.4 Whether the Central Commission has correctly computed and considered the contribution made by DVC towards the sinking fund for the year 2013-14 to be allowed in the tariff ?

4. The learned counsel, Mr. M.G. Ramachandran, appearing for the Appellants has filed the following written submissions :-

4.1 There has been a wrong computation of the period available for achieving the commercial operation. The Central Commission has calculated the commencement of the period allowed from the Letter of Award of the contract (As per DVC's internal agenda note), whereas the period allowed is to be computed from the date of Investment Approval as per the Tariff Regulations, 2009. The Central Commission has not considered properly the justification

given by DVC for the time overrun of 22 months for Unit No. I and 29 months for Unit No. II, even if the computation of time is to be from the date of the Letter of Award;

a) Commencement Date Of Timeline allowed.

4.2 Regulation 15 of the Tariff Regulations, 2009 which deals with return on equity specifically provides with reference to Appendix 2 as under:

> *"Provided that in case of projects commissioned on or after 1st April, 2009, an additional return of 0.5% shall be allowed if such projects are completed within the timeline specified in* ***Appendix-II."***

(i) Appendix II to the Tariff Regulations, 2009, inter alia, provides for the time schedule as under:

> *"1. The completion time schedule shall be reckoned from the date of investment approval by the Board (of the generating company or the transmission licensee), or the CCEA clearance as the case may be, up to the date of commercial operation of the units or block or element of transmission project as applicable."*

(ii) The Central Commission has not followed the Regulation 15 read with Appendix II in computing the timeline from the date of the investment approval;

4.3 The Central Commission has proceeded to compute the timeline allowed from the Letter of Award by DVC to the contractors. There is absolutely no provision in the Tariff Regulations, 2009 for such computation of time Line from the Letter of Award. The Letter of Award is a preliminary step taken by DVC prior to the Investment Approval to be ready with the project implementation immediately upon the Investment Approval. The Investment Approval is necessary for DVC to achieve financial closure. Without the financial closure, the Letter of Award cannot be implemented. In the above context, the issue of the Letter of Award and timeline fixed by DVC with reference to the Letter of Award are only an internal agenda and programme of

DVC for the DVC Officers and contractors to implement the project at an early date. This, however, has no statutory binding.

4.4 The Central Commission has erroneously proceeded on the basis that Regulation 15 and Appendix II applies only to the issue of Additional Return on Equity for early commissioning and does not apply to the timeline for completion of the project. Such an interpretation would lead to an absurd and anomalous result.

4.5 It is also a well settled principle of Law that when there is a Regulation, the same is binding on the Commission. The Judgments on which the Appellant has placed reliance are as follows:

(i) PTC India Limited –v-CERC 2010 (4) SCC 603

(ii) M/s Ferro Alloys Corporation Limited -v-OERC (Appeal No.52 of 2012 in the order dated 23.9.2013

(iii) Haryana Power Generation Corporation Ltd –v-HERC (Appeal No. 131 of 2011 in the order dated 1.3.2012)

b) Time Overrun and Consequent Cost Overrun to be allowed

4.6 At the outset, DVC states that if Issue (a) is decided in favour of DVC, there will be no time overrun in excess of what has been allowed. DVC had pleaded for time overrun in aggregate of 22 months for Unit I and 29 months for Unit II. The Central Commission has allowed only 13 months for each of the Units. If the issue (a) is decided in favour of the Appellant then majority of the remaining delay gets subsumed within the difference between the date of the Letter of Award and the date of the Investment Approval;

4.7 Without prejudice to the above, it is submitted that there is no justification for the Central Commission to restrict the time overrun to 13 months for each of the Units as against 22 months for Unit I and 29 months for Unit II claimed by DVC. Time overrun was claimed by the Appellant on account of the following counts:

(a) Getting Possession of Land for main Plant area
(b) Leveling and Grading
(c) Charging of Cross Country pipe line and availability of Raw Water & DM Water arrangement
(d) Availability of Coal

POSSESSION OF LAND FOR MAIN PLANT AREA

4.8 The time overrun in aggregate of 25 months comprises 12 months on account of the delay in the actual acquisition of land on which the power plant was to be established and 13 months on account of the non-availability of borrowed earth for land filling from ECL's Khajora Mines. The Central Commission has allowed only a period of 3 months for the delay in the actual acquisition of land for the power plant.

4.9 The Central Commission has, therefore, proceeded purely on surmise and conjectures in holding that an area of 339 acres is sufficient for implementing the project and/or commencement of the construction of the power plant. The Central Commission has not indicated anything to dispute the factual aspects placed by DVC of the delay in the actual acquisition of land ad-measuring 683.625 acres required for the construction of the power project excluding place where the ash pond, drain and boundary wall were to be established. In the absence of any satisfactory evidence to show that DVC could have constructed the power project with the availability of only 339 acres out of 683.63 acres (less than 50%), the Central Commission ought not to have proceeded on the mere assumption as stated in the impugned Order at Paragraph 18 (a).

4.10 The Central Commission is therefore wrong in concluding that only 3 months time as against 12 months claimed by DVC is required to be allowed for the delay in the possession of the land for the main plant area when there is nothing to dispute that the claim made by DVC that the actual possession of the land required for the main plant area of 683.63 acres got delayed by 12

months and was available to DVC after a considerable delay. There is no justification or cause for the Central Commission to have restricted the time overrun for a period of 3 months only in the facts and circumstances of the case.

LEVELLING AND GRADING

4.11 The Central Commission is also wrong in restricting the time overrun claimed by DVC of 13 months for levelling and grading to only 10 months on the purported basis that the additional 3 months claimed by DVC is taken care of in the 3 months time overrun allowed for the delay in the possession of the main plant area. Only after 683.63 acres of land required for the main plant area (after excluding 126.15 acres for ash pond, drain and boundary wall) is available, the work of levelling and grading can take place. The requirement of borrowed earth for the purpose of land filling would be only after the possession of 683.63 acres and not before. There is, therefore, no basis for the Central Commission to conclude that 3 months time overrun allowed for the delay in the actual possession of the main land would compensate 3 months time required or possession of the borrowed land for undertaking levelling and grading work.

4.12 The time overrun on account of non-availability of land for undertaking the main plant installation and time overrun on account of non-availability of borrowed earth for land filling etc are two independent causes of delay and are not over-lapping. In the facts and circumstances of the case, the Central Commission ought to have considered the entire 13 months for levelling and grading and the entire 12 months for non-availability of main plant area.

4.13 The actual possession of the entire plant area, in the present case of 683.63 acres and availability of borrowed earth for undertaking filling work while levelling and grading the main plant area are absolutely essential for the project

to be implemented. The Central Commission has, therefore, not considered the relevant aspects pleaded by DVC and set out in various affidavits filed before the Central Commission in a proper perspective.

CHARGING OF CROSS COUNTRY PIPE LINE AND AVAILABILITY OF RAW WATER AND DM WATER ARRANGEMENT

4.14 The Central Commission erred in not allowing the time overrun of 19 months in regard to the non-availability of raw water and DM water to the project which require laying down of cross country pipelines and charging of the same. The above could be done only with the approval of the Railway Authority wherever the pipelines crosses the railway land. The Central Commission has proceeded to reject the said claim only on the ground that there was a slackness on the part of DVC ignoring the fact that DVC has taken all reasonable steps to obtain the necessary permission from the railways. Above all, there is no reason whatsoever for DVC to delay obtaining the said permission particularly when the construction and completion of the project was dependent upon the above water arrangements.

4.15 The Central Commission is wrong in proceeding on the basis that DVC had delayed submission of the documents to railway authorities till 4.1.2010 for way-leave permission. Prior to that, DVC had been dealing with the railways and could make an application only as per the requirements of the railways as intimated from time to time. There is, therefore, no justification for the Central Commission to proceed on the basis that DVC delayed filing the necessary documents till 4.1.2010.

4.16 As per the reasoning sought to be given by the Central Commission for rejection of the claim for the time overrun in getting the water arrangements done on account of the application having been filed only on 4.1.2010, the time from the said date till 7.3.2011, namely, a period of 14 months out of 19 months claimed by the Appellant ought to have been allowed.

AVAILABILITY OF COAL

4.17 The non-availability of the Fuel Supply Agreement delayed the commissioning of the project. The Central Commission ought not to have proceeded on the basis that the power plant had functioned without the Fuel Supply Agreement. The non-availability of Fuel Supply Agreement ensuring adequate quantum of supply of coal at the expected price was essential for DVC to complete the project and declare the same under commercial operation. The Central Commission ought to have examined the reasons and justifications given by DVC for the delay on account of the non-availability of the Fuel Supply Agreement instead of summarily rejecting the same on the ground that the power plant can be under commercial operation without a Fuel Supply Agreement. The rejection of the delay of 14 months on account of the non-availability of the Fuel Supply Agreement by the Central Commission is, therefore, wrong.

INTEREST DURING CONSTRUCTION

4.18 The Interest During Construction (IDC) for the delay in the construction and commercial operation of the power plant as claimed by DVC, ought to have been allowed. The reliance placed by the Central Commission on the decision of this Tribunal in appeal no. 104 of 2011 decided on 12.1.2012 in the matter of Power Grid versus CERC is wrong. The decision is clearly distinguishable from the facts of the present appeal and is not applicable. In that case the Tribunal was dealing with a situation where the Investment approval date was prior to the Letter of Award Date, which is opposite to the peculiar facts of the present appeal. In the present case, the Letter of Award was prior to the Investment Approval.

4.19 The Central Commission erred in the calculating of the admissible IDC or disallowance of the IDC on account of the rejection of time overrun by proportionately deducting the IDC for the period of 9 months in the case of

Unit I and 16 months in the case of Unit II. The Central Commission in any event (even if the time overrun is not allowed) ought to have considered the inadmissible IDC for the time overrun of the above said period disallowed not on the basis of actual number of months of time overrun but based on the deployment of capital i.e. debt borrowed for the project, the deferred draw down of debt and consequential effect as compared to the debt that would be drawn in the case of there being no time overrun. The IDC admissible in the case of debt being drawn in time should not have been rejected on account of the time overrun.

c) *Contribution to Sinking Fund*

4.20 In the Order dated 23.11.2007 passed by this Hon'ble Tribunal in Appeal No. 273 of 2006, the aspect of Contribution to the Sinking Fund has been considered and settled in favour of DVC. The relevant extracts of the Order dated 23.11.2007 are as under:

> "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.*
>
> *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."*

Despite the above, the Central Commission has not fully allowed the amount claimed by DVC as contribution to the Sinking Fund.

4.21 The Central Commission has allowed only a part of the contribution made by DVC towards the sinking fund. For the year 2013-14 in the Petition No. 66/GT/2012, DVC had claimed sinking fund contribution against two bonds floated on 30.03.2012 and 25.03.2013. As against the total amount of Rs. 2665.61 lakhs, Central Commission has considered only the first bond amounting to Rs 1562.46 lakhs and disallowed the second bond. The Central Commission has not considered the amount of Rs 1103.15 lakhs towards sinking fund contribution. The above is an error in the decision of the Central Commission and need to be corrected.

4.22 For the reasons mentioned herein above, the appeal filed by DVC on the three specific aspects (Issues (a), (b) and (c)) are required to be allowed and the impugned Order of the Central Commission is required to be modified to the above extent.

5. The learned counsel, Mr. R.B. Sharma, appearing for Respondent No.3, BSES Rajdhani Power Ltd. has filed the following written submissions :-

Computation of Construction Period:

5.1 The Appellant has alleged that the Commission has computed time period for construction from the Letter of Award and not from the date of Investment Approval as per provisions of Regulation 15(2) of the Tariff Regulations, 2009. The allegation of the Appellant is without any basis and misconceived. The timeline specified in Appendix-II by the Commission as provided under 1st and 2nd proviso to Regulation 15(2) of the Tariff Regulations, 2009 is for considering whether any project is entitled for additional Return of 0.5% on account of timely completion. The provisions of Regulation 15 of the Tariff Regulations, 2009 is quoted below for reference:

15. Return on Equity.

(1) Return on equity shall be computed in rupee terms, on the equity base determined in accordance with regulation 12.

(2) Return on equity shall be computed on pre-tax basis at the base rate of 15.5% to be grossed up as per clause (3) of this regulation:

Provided that in case of projects commissioned on or after 1st April, 2009, an additional return of 0.5% shall be allowed if such projects are completed within the timeline specified in Appendix-II:

Provided further that the additional return of 0.5% shall not be admissible if the project is not completed within the timeline specified above for reasons whatsoever.

5.2 The perusal of Appendix-II enclosed with the Appeal defining timeline for completion of projects is in the context of Regulation 15 of the Tariff Regulations, 2009 for grant of additional Return of 0.5% on account of timely completion. The contention of the Appellant about the applicability of this regulatory provision in the present case is misconceived as this is not a case where the Appellant is claiming an additional Return of 0.5% for timely completion.

5.3 Another contention of the Appellant is that the Commission has computed the time taken for construction of the project from the date of letter of award and not from the Investment Approval. On this issue, it is submitted that the Investment Approval was granted by the DVC vide Resolution No. 7567 (item 5) dated 30.04.2007 and not on 16.6.2008 as contended in the Appeal. DVC in this Investment Approval vide Resolution No. 7567 (item 5) taken in its 573rd meeting held on dated 30.04.2007 has also mentioned the COD of Unit#1: 36 months and Unit#2: 38 months from the date of LOA. The Commission has also adopted the same timeline and the zero date to commence the project. It is, thus, evident that the Investment Approval was granted by the DVC on 30.04.2007 which stipulated the COD of Unit#1: 36 months and Unit#2: 38 months from the date of LOA. The contentions raised by Appellant are in utter disregard to the facts available in the Appeal.

Disallowing Claim on Time Over run:

5.4 The Appellant has alleged that the Commission has disallowed the claim on Time Over run on various counts. On this issue, it is submitted that there are no specific regulations to deal with the issue related to the time over run related costs under the Tariff Regulations, 2009. However, Hon'ble Tribunal for Electricity in its judgment dated 27.4.2011 in Appeal No. 72 of 2010 (MSPGCL Vs MERC & others) have laid down the guiding principles for prudence check of time over run and cost overrun of a project.

5.5 The Commission in this case has examined the issue related to the time overrun related costs on the principles set out by the Hon'ble Tribunal as mentioned in the impugned Order. The details of the actual Time Over run in the execution of the project and the Time Over run condoned by the Commission are furnished below in tabular form;

S.No.	Reasons for Time Overrun	Time Overrun Claimed	Time Overrun Allowed
1.	Possession of land for main Plant	12 months	3 months
2.	Leveling and Grading	13 months	10 months
3.	Charging of Cross country Pipe line and availability of raw water and DM water arrangement	19 months	Not allowed
4.	Availability of Coal	14 months	Not allowed
	Total	58 months	13 months

(i) The perusal of the above table would show that the Appellant although claimed a time Over run of 58 months against the above four activities, yet the cumulative Time Over run for Unit-I was 22 months and Unit-II 29 months. This is for the fact that all activities in the execution of the project may not result into delay because of the time period cushion available for their execution. The activities which are on the critical path

are capable of delaying the project. Accordingly, the Commission directed the Appellant to furnish the reasons for time overrun of 22 months for Unit-I and 29 Months for Unit-II along with PERT chart indicating the activities on critical path and impact of delay on those activities. The Appellant stated that all information has been submitted and no further details are available for submission. The relevant para of the Impugned Order on this issue is reproduced below for reference;

> ***"16. The petitioner was directed to furnish the reasons for time overrun of 22 months for Unit-I and 29 months for Unit-II along with the PERT chart, and the petitioner has failed to furnish complete information in the required forms. On a specific query by the Commission during the hearing on 11.11.2014 as regards the submission of additional details regarding time and cost overrun along with PERT chart, the learned counsel for the petitioner clarified that all information has been submitted and no further details are available for submission in the matter."***

(ii) It may, therefore, be noted that the Appellant denied the complete information on the question of time and cost overrun to the Commission as well to the Respondent-beneficiaries. What is most surprising that the Appellant filing the tariff petition with the request to condone the delay (time overrun) and yet fails to submit the required information along with PERT Chart. In the absence of the detailed information, the Commission was working only on the limited information which was put before him and in holding the Appellant responsible for time over run for the period which was not condoned in the impugned order.

(iii) Respondent-BRPL submits that the PERT/CPM is widely used techniques in project management. The PERT (Programme Evaluation and Review Technique) chart clearly shows the sequence and inter-relationships of all activities in the project. The critical path on the network determines the duration of the project. The Appellant by not subjecting himself to the present managerial techniques and concealing the material information in

the form desired by the Commission, only shows that he may be hiding the crucial information from the Commission and the beneficiary-respondents which otherwise expose him to a large extent.

(iv) The timeline of 36 months for Unit-I and 38 months for Unit-II from the date of LoA was stipulated in the Investment Approval of the Appellant vide Resolution No. 7567 (item 5) dated 30.04.2007 taken in its 573rd meeting held on dated 30.04.2007. The same timeline was incorporated in the Letter of Award issued on 27.07.2007. Thus, the Appellant got nearly three months additional benefits with the stipulation that the completion period will commence from the date of LOA. Further, the contention of the Appellant regarding the applicability of the judgment dated 12.01.2012 in Appeal No. 104 of 2011 in the matter of Power Grid Corporation of India Ltd. Vs. CERC and others is also incorrect as the investment approval date in this case is also prior to the LOA and thus, there are no distinguishable facts, as claimed.

(v) The Commission in the impugned order has also pointed out the tendencies of the Appellant to deny the relevant details to the Central Commission and also to the beneficiary-respondents. Such tendency to conceal the material facts from the Commission as well from the beneficiary-respondents is not a desirable feature. The Appellant must know that he is operating in a regulatory environment and it is in his interest to follow the regulatory regime by filing complete details to claim the benefits. Hon'ble Tribunal in its judgment dated 28.11.2013 in Appeal No. 165 of 2012 has observed as under:-

> ***"29. The Central Commission has been mandated to determine the transmission tariff for the Appellant. The Central Commission has every right to ask any relevant details from the Appellant for carrying out the prudence check on the expenditure of the Appellant."***

Respondent-BRPL submits that it is a common feature that the relevant details sought by the Commission are resisted at every possible stage and also denied at times as is noted in this case.

(vi) The perusal of Para-18 of the impugned Order would show that the Commission has examined the question of time and cost overrun in the light of the judgment of this Tribunal and while examining the question of time and cost overrun, the Commission has been more than considerate in condoning the time overrun and the Appellant therefore absolutely should have no grievance against the order of the Commission.

(vii) The Commission in spite of denial of information by Appellant has condoned the time over-run of thirteen (13) months in the execution of the project which appears to be justified but the balance period of time overrun is due to factors entirely attributable to the Appellant. The impugned order of the Commission is wholly justified as the same is in accordance with the judgments of this Tribunal quoted above.

Allowing partly towards the Sinking fund

5.6 The Appellant has alleged that the Commission has only partly allowed the contribution made by DVC towards the sinking fund. It has been alleged that that the Commission has considered only the first bond floated on 30.03.2012 and disallowed the 2nd bond floated on 25.03.2013. It may, however, be noted that the Appellant did not submit the complete information on the question of contribution towards the sinking fund and the Commission has no option but to finalize the contribution towards sinking fund as per information before it. Lack of correct and complete information is a perennial problem.

5.7 The Commission has directed the Appellant to furnish complete information bond-wise, project-wise contribution towards the sinking fund duly certified by Auditor at the time of truing-up of the Capital expenditure and tariff under Regulation 6 of the Tariff Regulations, 2009. Thus, the Commission is yet to

form its opinion on this issue and therefore the Appeal on this issue is premature.

6. **The learned counsel, Ms. Prachi Johri, appearing for Respondent No.4, Tata Power Delhi Distribution Ltd. has filed the following written submissions :-**

6.1 The Appellant has neither made out any reason for interference with the order of the CERC nor has the Appellant pointed out any infirmity in the impugned order. As such, the present appeal is merely an attempt to get tariff increased on account of false and frivolous pleas that were raised and rejected vide the impugned order after detailed discussions.

6.2 The Appellant has argued that its alleged date of investment approval is 16.06.2008 and hence the period available for achieving commercial operation ought to be calculated from 16.06.2008. In support of this contention, the Appellant has relied on a sanction order dated 16.06.2008 of DVC and has termed it as investment approval. The Appellant has further relied on Regulation 15 of the Tariff Regulations proviso whereof refers to Appendix II where date is calculated from the date of investment approval.

6.3 The CERC has dealt with the submission in detail at para 8 of the impugned order that Appendix II of Tariff Regulations is attracted only to compute the additional RoE of 0.5% provided therein and not for assessing time overrun. The CERC observes that the same has also been observed by this Tribunal in Appeal no. 104/2011. Upon consideration of the Appellant's argument, the CERC concluded that the total time for the purpose of time overrun shall be reckoned on the basis of timeline indicated in LoA and not from the date of investment sanction.

6.4 The submissions of Respondent No.4 on this aspect are as follows:

i. The Appellant itself vide Petition dated 24.07.2013 at paragraph 7 submitted its revised calculation of COD calculated from the date of start of work/zero date (03.08.2007).

ii. Alleged revision of the calculation vide letter dated 13.09.2013 is admittedly submitted based on Regulation 15 and its application in the case of Chanderpur Plant (CTPS Unit). However, the Appellant has patently misread the order passed in case of CTPS Unit. The only conclusion drawn by the Ld. Commission upon considering the period from date of investment approval is that in relation to additional RoE as is clear from paragraph 12. It is submitted that paragraph 11 cannot be read in isolation without paragraph 12 as no conclusion is drawn in paragraph 11. The conclusion is drawn only at paragraph 12 and is confined to additional RoE.

iii. Such change in its submission by the Appellant was not only wrong, incorrect and on wrong application of law but was also a complete afterthought to claim benefit.

iv. The period cannot be computed from investment sanction as various steps are taken after investment approval like finding a contractor, awarding the contract, etc.

v. The Appellant has always assumed that the period is to be calculated from LoA as is evident from its own submission or approval of estimated costs whereby, under the table, the Appellant itself mentions the assumption as to calculation from the date of LoA.

vi. The sanction dated 16.06.2008 is also granted based on these assumptions/ submissions of the Appellant and as such the Appellant is ought to be now estopped from raising a contradictory stance.

6.5 The Appellant has argued that the scheduled commercial date be calculated from the date of investment sanction and benefit be given of the time overrun. The reasons for time overrun are stated as – time in land acquisition, levelling and grading of land, charging of cross country pipeline and availability of coal.

6.6 The CERC has dealt with the contentions of the Appellant in detail. The CERC at paragraph 10 -12 has held that there is time overrun of 22 months for unit 1

and 29 months for unit 2. At paragraph 12, the CERC notes that vide affidavit dated 24.09.2014 the Appellant itself has computed period from the zero date i.e.03.08.2008, CERC at paragraph 13 gives its reasoning that the dates of 36 months and 38 months when calculated from the date of LoA coincide with the date of the Commonwealth Games for which the project was conceived and therefore, the dates need to be calculated from the date of LoA only. The CERC then deals with each reason for time overrun and allows and disallows time period as deemed fit by it.

6.7 The submissions of Respondent no. 4 on this issue are as follows:

i. From a perusal of the impugned order it is clear that the Appellant was asked to supply information as to further delay but the Appellant responded that no further information was available with it to justify the delay. As such, the Appellant cannot now claim any advantage as to the said delay which it has no information on and which it cannot explain.

ii. The time overrun has to be calculated from the date of LoA and not from the date of investment approval. The submissions made hereinbefore may be considered part and parcel of the present submissions

iii. The CERC has justly and fairly considered the reasons for time overrun as brought out below:

   a. **Land acquisition**: The CERC has held that 339 acres out of 583 acres of land became available to the Appellant on 16.10.2007 and as such the period upto 16.10.2007 is not due to delay by the Appellant but any period beyond that is attributable to the Appellant's own delay as the Appellant "could have started the erection work". The Appellant has falsely submitted that it could not complete erection work when only 339 acres was available whereas the finding of the CERC is categorical that there was no reason to delay start of work once substantial portion of land became available. Had the Appellant been diligent it could have

started construction of parts of the project on such huge portion of 339 acres and the rest of it could have been constructed as the land became available.

b. **Levelling and grading** - Claim made by the Appellant has been allowed by the Ld. CERC to the extent as it was found proper

c. **Charging of cross country pipeline** - The CERC has rightly held that factually the Appellant is to blame for the delay since even though the Appellant was aware of the requirement of the project for Commonwealth Games and yet it delayed application for necessary approval from Railways by about 3 years. This is not controverted by the Appellant.

d. **Fuels Supply Agreement** - The CERC has rightly held that if the final project could be approved without an FSA in place then the same cannot now be claimed as a reason for delay at this stage. This is not controverted by the Appellant.

iv. The Appellant is not entitled to any further benefit of time overrun since the reasons for the same are attributable to the Appellant

Contribution to sinking fund

6.8 The Appellant has argued that it will not press the out of two bonds claimed by the Appellant to be its contribution towards the Sinking Fund, only one has been considered by the CERC. The CERC has dealt with the factual position in detail at paragraph 73 – 75 and found that the Appellant has not only not submitted full details but also that there was no actual cost outlay by the Appellant to make a claim for contribution in this regard to sinking fund.

6.9 The submissions of Respondent no.4 are as follows:

I. The Appellant has failed to provide necessary details of the two bonds claimed by it to the CERC. The Appellant has not even provided such details before this Appellate Tribunal. Therefore, for lack of material particulars, the present claim deserves to be dismissed.

II. There having been no actual cost outlay, the Appellant cannot claim any benefit as to contribution to sinking fund.

III. The Appellant during oral arguments has agreed to not press this claim therefore further submissions are reserved.

6.10 Therefore, the present appeal being frivolous and a complete afterthought deserves to be dismissed and the impugned order upheld.

7. The learned counsel, Mr. Ravi Sharma, appearing for Respondent NO.6, M.P. Power Management Company Ltd. has filed the following written submissions :-

7.1 The main contention of Appellant, DVC to challenge Impugned Order is that the Central Commission has considered and accepted the **Zero Date** for Schedule COD (**SCOD**) for commissioning the Project from duly approved LOA issued to Contractor i.e. BHEL on 27.07.2007 by the management of Appellant, DVC and rejected Appellant's illegitimate claim to reconsider the zero date from subsequently issued Board approved date i.e. 16.06.2008.

7.2 The Central Government had cleared the project, which was envisaged to supply power to the respondent, Delhi Transco Ltd as per petitioner Corporation resolution No. 7567 dated 30.4.2007 in view of upcoming Commonwealth Games in year 2010. Thus, the generating station was contemplated to be under commercial operation on or before October, 2010.

7.3 The LOA after due approval from Management of Appellant, DVC was issued to BHEL, an EPC Contractor on 27.07.2007 (Zero Date as considered by the Central Commission) while awarding the turn key EPC Contract for the lump sum price of USD 64,758,500 plus EURO 64,292,250 plus INR 25,987,888,000 for the execution of main package scope of Work of Project. The SCODs of units of the generating station as per the agenda Note of the 573rd meeting of the Appellant's Corporation and Letter of Acceptance (LOA) are 36 months for Unit-I and 38 months for Unit-II from that the date of LOA.

It is humbly submitted before this Tribunal that inspite of the fact that LOA indicates a time line schedule of 36 & 38 months for commissioning of Unit I and Unit II from Zero Date, the Central Commission has considered and condoned the delays of 13 months for commissioning of both Unit I and Unit II while considering the benchmark as established and directed by this Tribunal in its judgment dated 27.04.2011 Appeal No. 72 of 2010.

7.4 The turnkey EPC Contractor i.e. BHEL was given the timeline of 36 and 38 months for achieving SCOD from Zero Date i.e. 27.07.2007 whereas, Appellant is pleading for before this Tribunal to consider the zero date from so called investment approval by BOD (16.06.2008), which is without any basis because:

a. Appellant's Project work had started on 03.08.2007 - please refer the observation made by Ld. Central Commission in paragraph of 18 (a) of Impugned Order, which is reproduced as under:

"………………………………………………………………………..

As per LOA, the zero date of the project was 27.7.2007 and ***the work had started on 3.8.2007."***

b. Leveling and grading work had been completed by turnkey EPC Contractor i.e. BHEL on 08.03.2008 which is much prior to so called investment approval by BOD date i.e. 16.06.2008. This means leveling and grading work would have started much prior to the completion date. Please refer the observation made by Ld. Central Commission in paragraph of 18 (b) of Impugned Order, which is reproduced as under:

"……………………………………………………………………….

From the letter dated 8.3.2008 of M/s BHEL, it is observed that the filling and cutting had been completed up to 8.3.2008."

7.5 From the above observations of the Central Commission, it is clear that LOA has been considered as **Zero Date** by the Appellant, DVC as well as its turnkey EPC Contractor i.e. BHEL for the commissioning of Project. It is a fact that no commercial organization in this world would do anything over and above its main package scope of work. As Appellant and its Contractor had failed to achieve the SCOD, they had intentionally created the paper works for subsequent Investment Approval to take the plea for extending the SCOD at the cost of public money. Therefore, Appellant and BHEL both must shoulder the responsibility to absorb the cost incurred due to inordinate and unjustifiable delay in execution of the Project and same could not be passed on to the consumers.

7.6 It could be observed from paragraphs 8, 10, 11, 12 and 13 of the Central Commissions order dated 20.04.2015, that the SCOD as per timeline specified by the Central Commission has been merely considered to examine whether the units of the generating station are entitled for additional Return on Equity (RoE) of 0.5% for timely commissioning of plant in terms of 2009 Tariff Regulations, and not for assessing the Time Overrun. It is clarified that the timeline specified by the Commission in Regulation 15 of the 2009 Tariff Regulations is for considering whether any project/unit is entitled for an additional Return on Equity (ROE) of 0.5% on account of timely commissioning of unit/project and shall not be taken as a benchmark norm to assess the actual time over run in the commissioning of different units.

7.7 The Central Commission has rightly appreciated this fact that Project of Appellant was sanctioned by Central Government to cope-up with huge electricity demand arising due to upcoming Commonwealth Games in year 2010 in Delhi. So, the arguments of Appellant for consideration of time schedule for completion of the project as per CERC time line is 44 months for First unit and 50 months for Second unit from the date of investment approval

of 16.6.2008, is not only frivolous but also made to hide inefficiency of Appellant and its Contractor BHEL.

7.8 Appellant in its Tariff Petition No. 66/GT/2012 had given the reasons for Time Overrun mainly on the grounds i.e. Delay due to possession of land for Plant area; Delay due to Leveling and Grading; Charging of cross Country pipe line & availability of raw water and DM water arrangement; and availability of coal. The Aforesaid reasons given by the Appellant in the Tariff Petition were analyzed by the Ld. Central Commission prudently and partly disallowed their claim in its Impugned Order.

7.9 There was an inordinate delay in commissioning of Project (Unit I & II) from Zero Date i.e. 27.07.2007, which is clearly attributable to Appellant. The causes of delay in commissioning of the Project put forth by Appellant were fully within the control of Appellant because possession of Land, leveling and grading, availability of raw and DM water and coal was the sole responsibility of Appellant/DVC and beneficiaries cannot be held responsible for unavailability of the above resources. Delay on account of these factors is entirely attributable to Generating Company as held by this Tribunal at paragraph 7.4(i) in its judgment dated 27.04.2011 in Appeal No. 72 of 2010 which provides that delay in providing inputs like making land available to contractor, slackness in project management such as improper coordination between various contractors etc. are the factors entirely attributable to generating company.

7.10 The basic tenet of regulatory tariff determination process is that inefficiency of the operator (generating company, transmission licensee or distribution licensee) cannot be passed on to their beneficiaries/consumers. Any act of the operator or its agent or contractors which is not in line with prudent utility practices and results in loss, would have to be borne by operator and losses as a result of imprudent practices cannot be passed on to the beneficiary or

procurers. Thus, the activity of possession of land is fully attributable to the Appellant; however, the Central Commission has condoned the delay of three months for acquisition of land to Appellant, DVC, which is against the principle laid down by this Tribunal in Appeal No. 72 of 2010(supra) and may kindly be revoked in the interest of justice.

7.11 There was an inordinate delay of 13 months due to non-availability of borrowed earth for land filing from ECl's Kajora mines is fully attributable to Appellant as the same cannot be construed to mean as delay caused due to natural calamities or force majeure. Merely on a fact that Appellant, DVC was in correspondence with ECL for procurement of filling material but there was no clearance from ECL, cannot fully establish the fact that said reasons were beyond the reasonable control of Appellant. If, Appellant had taken the requisite approval upon receiving the approval from Central Government, same could have been obtained much earlier. Hence, in view of aforesaid, it is humbly submitted that the Central Commission has grossly erred in condoning the delay of 10 months on account of levelling and grading holing, which is grossly against the principle laid down by this Tribunal in Appeal No. 72 of 2010(supra).

7.12 In view of aforesaid, the condonation of total delay of 13 months on accounts of acquisition of land and levelling and grading holing was done irrationally and erroneously, against the principle laid down by this Tribunal in Appeal No. 72 of 2010(supra), hence, it is requested to this Tribunal to overrule and reject the same in interest of justice and to safe guard the interest of consumers.

7.13 The Cost of Interest During Construction (**IDC**) varies with the actual time overrun or actual time taken for the completion of Project. The Central Commission has considered the actual Time Overrun of 13 months for both Unit I & II. However, in paragraph 2 of this Written Submission, answering Respondent No.6 has established that the Central Commission has grossly

erred in allowing the 13 months Time Overrun. Interest during construction shall be computed corresponding to the loan from the date of infusion of debt fund, and after taking into account the prudent phasing of funds upto SCOD. The said delay of 22 months and 29 months in commissioning of Unit I & II were totally controllable and attributable factors to Appellant, DVC.

7.14 Appellant has failed to furnish sufficient reasons to show that delay caused was beyond the control of the Appellant. Beneficiaries, on one hand, could not get the benefit of the project due to inordinate delay, and on the other hand, are being penalized with extra IDC and FC for no fault of theirs. Section 61 of the Electricity Act, 2003, deals with Tariff Regulations and specifies the terms and conditions for the determination of tariff, and in doing so, the appropriate commission is obligated to be guided by the provisions contained therein. Clause (d) thereof provides for safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner. The additional IDC is an evidence to establish that the appellant has failed to act as a prudent operator and the entire cost should have been attributed to the account of the developer. The Appellant owns the entire responsibility for implementing the project in timely manner and the delay in supply and non-performance by the contractors of the Appellant is not a solid and cogent ground to absolve the Appellant from liability to implement the project within the mandated time frame. The entire additional cost is a result of failure of the Appellant to act in accordance with prudent utility practices.

7.15 In view of aforesaid, it is humbly requested to this Tribunal to disallow the excessive and unreasonable IDC allowed by the Central Commission and reduce the IDC amount i.e. Rs. 348.01 Cr for Unit I and, Rs. 216.59 Cr for Unit II up till the date of schedule COD as per LOA.

7.16 The Central Commission has rightly partially allowed the contribution made by Appellant towards sinking fund. The Central Commission has rightly

observed that the claim of the Appellant towards interest on sinking fund cannot be considered as there is no actual cash out lay towards interest.

7.16 It is rightly observed by the Central Commission that the bond was issued on 30.03.2012, which was only been utilized for funding the Project and accordingly has to be considered for determination of the contribution to the sinking fund and claim of the Appellant cannot be considered as there was no actual cash outlay in terms of interest on the sinking fund.

7.17 As rightly observed by Central Commission, there was actually no cash outlay or there was no actual expenditure occurred. When the funds like Sinking Funds are being managed outside the company by some expert fund managers or a bank, bank or fund managers utilizes that amount for investing in some other securities and annually provides returns on the Fund in form of dividend or higher interest rates. The dividend or income received on the funds managed by bank or fund managers are subject of capital gain tax or considered as income. Similarly, in present case in hand Sinking Fund of Appellant, DVC which is being managed by Bank or outside expert fund manager outside the Appellant Company in escrow account, on that fund, fund managers gives hefty returns by means of higher interest or dividend. Appellant is on one hand enjoying higher returns from the Sinking Fund by means of dividend or higher interest and on other hand trying to include imaginary interest contribution as an expenditure in the capital cost of tariff to claim further benefits at the cost of public. It will be an unjust enrichment to Appellant, DVC.

7.18 The Tariff Regulation, 2009 has been very clear and only discusses about the actual expenditure and outstanding liabilities or interest received from bank should not form part of the capital cost. Basis for the entire scheme for determination of annual fixed charges specified in the 2009 Tariff Regulations is ``cost plus” approach. For this reason, the term ``expenditure incurred” or ``incurred” are qualified by ``actual” or ``actually” emphasizing ``something

real" or ``real" as opposed to something constructive, or theoretical or speculative. The Appellant DVC is not incurring any actual expenditure or paying/deposited any interest on the Sinking Fund, whereas, the outside fund managers automatically deposit the profit / dividend received from those investments, invested in various securities available in the market, in the escrow account of the fund.

7.19 In present case, interest or income received has been deposited by other entity not the Appellant, without corresponding actual cash out flow, it will amount to unjust enrichment of the Appellant at the cost of the consumer who ultimately bears the burden of tariff. It seems Appellant is trying to misguide this Tribunal through technical and complex arguments. In view of above submissions, it is requested before this Tribunal to reject the Appeal of the Appellant on this ground.

8. **We have heard at length the learned counsel appearing for the Appellants and the learned counsel appearing for the Respondents and considered carefully their written submissions/arguments during the proceedings and available material on record. The following principal issues emerge in Appeal No. 153 of 2015 for our consideration:-**

Issue No.1: Computation of time period for commissioning of the project;

Issue No.2: Assessment of the time over rum in the implementation of the project and corresponding cost overrun (IDC).

Issue No.3: Consideration for the contribution met by DVC towards sinking fund for the financial year 2013-14.

8. Our findings & Analysis :

8.1 **Issue No.1 :**

The Appellant has alleged that the Central Commission has made a wrong computation of the period available for achieving the commercial operation as

it has considered the commencement of period allowed for COD from the Letter of Award (LoA) whereas, as per Tariff Regulations, 2009, the same should have been taken from the date of investment approval. It has further been submitted that the Central Commission has not considered properly the justification given by the Appellant for the time over run for Unit No.1 and Unit No.2 even if the computation of time is to be reckoned from the date of LoA. The Appellant has quoted the stipulations under Regulation 15 of the Tariff Regulations, 2009 which deals with return on equity (RoE) and specifically provides with reference to Appendix –II which, inter-alia specifies the time schedule for completion of a thermal project. The Appellant has indicated that instead of following the Regulation 15 read with Appendix-II for computation of time line from the date of investment approval, the Central Commission has proceeded to compute the time period allowed for commissioning from LoA placed by DVC to the contractors.

8.2 The learned counsel appearing for the Appellant contended that, in the Tariff Regulations, 2009, there is absolutely no provision for such computation of timeline from the LoA and in fact, LoA is a preliminary step taken by the DVC prior to the investment approval with an objective of its readiness for taking of the project immediately after the investment approval. The investment approval is essential to achieve financial closure without which LoA cannot be implemented. It is further contended by the Appellant that the issue of LoA and timeline fixed for completion of the project by its Board are only an internal decision so as to indicate commitments for its officers and contractors to execute the project at an early date and has no statutory binding. Thus, the Central Commission has wrongly proceeded on the basis that Regulation 15 and Appendix-II applies only to the issue of additional RoE for early commissioning and does not apply to the computation of timeline for completion of the project. It is also a well settled principle of law, when there is a Regulation, the same is binding on the Commission and this has been held

by several judgments such as - (i) ***PTC India Limited –v-CERC 2010 (4) SCC 603; (ii) M/s Ferro Alloys Corporation Limited -v-OERC (Appeal No.52 of 2012 in the order dated 23.9.2013; and (iii) Haryana Power Generation Corporation Ltd –v-HERC (Appeal No. 131 of 2011 in the order dated 1.3.2012).***

8.3 In its rejoinder dated 27.04.2018, the Appellant has refuted the charges made by the Respondents regarding concealing some facts on investment approval. The Appellant has clarified that the approval of Govt. of India was given only on 07.03.2008 and the final sanction order was made by DVC on 16.06.2018 as such the investment approval given by DVC Board in its resolution dated 30.04.2007 was an internal decision of which the relevant portion is reproduced below:-

> ***"to authorise Chairman DVC to accept the final terms and conditions and rate of interest of the project loan sanction by Rec. However, the actual borrowing is subject to borrowing approval from GOI in terms of section 42 of DVC Act".***

With these facts, the Appellant has reiterated that the completion period ought to have been computed by the Central Commission from the final investment sanction 16.06.2008 instead of counting the same from LOA(27.07.2007).

8.4 ***Per contra***, the learned counsel appearing for Respondent No.3 submitted that the allegations of the Appellant regarding computation of timeline for completion of the project is without any basis and are misconceived. The timeline specified in Appendix-II by the Central Commission under first and second proviso to Regulation 15(2) of the Tariff Regulations, 2009, is for considering whether any project is entitled for additional RoE of 0.5% on account of timely completion. Accordingly, the contention of the Appellant about applicability of this regulatory provision in the present case is on wrong footing as this case is not for claiming an additional RoE for timely completion. The learned counsel further pointed out that the Central

Commission has rightly computed the total time for construction of the project from the LoA and not from the investment sanction. The learned counsel submitted that the investment approval was granted by the DVC vide Resolution No.7567 (Item 5) on 30.04.2007 and not on 16.06.2008 as has been claimed by the Appellant. Further, DVC in this investment approval dated 30.04.2007 has also mentioned the COD of Unit I – 36 months and Unit II – 38 months from the date of LoA. It is, thus evident that the investment approval for the project was granted on 30.04.2007 and the Central Commission has also adopted the same zero date to commence the project along with the respective commissioning period for both the units.

8.5 The learned counsel appearing for Respondent No.4 argued that the Central Commission has rightly considered the reckoning date as date of LoA in spite of alleged date of investment approval of 16.06.2008. The Central Commission has dealt with the submission of the Appellant in detail at Para 8 of the impugned order that Appendix-II of Tariff Regulations is attracted only to compute the additional RoE of 0.5 Per cent provided therein and not for assessing time over run. The Central Commission further observes that this aspect has also been decided by the Hon'ble Tribunal in Appeal No.104 of 2011. The learned counsel has further contended that the Appellant has patently misread the order passed by the Central Commission in case of Chanderpur Thermal Power Station. The learned counsel has also pointed out that the Appellant itself vide Petition dated 24.7.2013 at Para 7 submitted its revised calculation of CoD calculated from date of start of work/zero date (03.08.2007).

8.6 The learned counsel appearing for Respondent No.6 submitted that the Central Commission has considered and accepted zero date for scheduled CoD of the project from duly approved LoA issued to BHEL (27.7.2007) and rejected the Appellant's illegitimate claim to consider the zero date from final investment sanction (16.06.2008). While reiterating the correctness of the impugned

order, the learned counsel brought out that the Central Govt. had cleared the project for supplying power to the Respondent – DTL in view of upcoming Commonwealth Games in the year 2010. Accordingly, LoA after due approval of DVC Management was issued to BHEL, the EPC contractor, on 27.07.2007 (zero date) with a clear provision of 36/38 months for completion of Unit I / Unit II. As also observed by the Central Commission in Para 18 (a) of the impugned order, the work at the project had started on 03.08.2007 and the levelling and grading work had been completed by BHEL on 08.03.2008 which is much prior to so-called investment approval i.e. 16.06.2008. As such, the contention of the Appellant to insist for zero date as 16.06.2008 appears to be without logic and rationale. The learned counsel has further submitted that the date of LoA has been considered as zero date by the DVC Management as well as its EPC contractor (BHEL) for commissioning of the project so as to match the same with start of the Commonwealth Games in October, 2010.

Our findings

8.7 We have considered the submissions of the learned counsel appearing for the Appellant as well as Respondent Nos. 3, 4 & 6 relating to this issue. The main issue for the rival contentions is consideration of the zero date for the start up of project work and the time period considered for completion of the generating units for CoD. While the Appellant has repeatedly argued for zero date as date of final investment sanction i.e. 16.06.2008, the Respondents have contested that the project gets started immediately after the LoA and timeline to be considered for commissioning up of the project as stipulated in the LoA gets reckoned from the date of LoA. In the present case, being a project of National Importance, envisaging power supply to DTL for Commonwealth Games, 2010, the preparatory works for investment approval and placement of LoA was required to be expedited to meet the deadline matching with the commencement of Commonwealth Games. It is significant to note that with

this clear objective for the project keeping in mind, the DVC Management approved the implementation of the project with the investment approval on 30.04.2007 stipulating completion period of 36-38 months for both the units in order to complete the project in all respects and to start generation well before the Commonwealth Games. Further, as a general practice, the projects being implemented by CPSUs' or other utilities get similar approvals by their respective Board with specific timelines for completion. The final investment sanction by GOI/CPSU Board in fact, reduces to a mere formality and cannot be considered as zero date as being claimed in the present case. Admittedly, if one considers the date of final investment sanction by MOP/DVC (16.06.2008) as zero date, the project cannot be completed in two years and three months and resultantly, cannot yield in power supply to DTL as envisaged from the project for the Commonwealth Games (October, 2010). **Hence, we find no legal infirmity or ambiguity in the impugned order of the Central Commission so far as the issue of computation of completion period of the project considering the zero date from LOA (27.07.2007) is concerned.**

9. **Issue No.2 :**

9.1 The Appellant has contended that, against its pleading for time overrun of 22 months for Unit 1 and 29 months for Unit II, the Central Commission has allowed only 13 months for each of the units. The Appellant has claimed time overrun on account of four items – a) getting possession of land for main plant area; b) levelling and grading; c) charging of cross country pipe line and availability of raw water & DM Water arrangements; and d) availability of coal. The Appellant has further contended that for item a), the Central Commission has allowed only 3 months against the actual time overrun of 25 months in the actual acquisition of land for the power plant (12 months) and borrowed earth for land filling (13 months). It is alleged by the Appellant that the Central Commission has proceeded purely on surmises and conjectures in

holding that an area of 339 acres was sufficient for execution of the project out of the total estimated land requirement of 683.625 acres. The Appellant has further submitted that the land acquisition and its possession is quite difficult task in the implementation of power projects and as such, there is no justification for the Central Commission to restrict the time overrun to this account merely on presumptions.

9.2 The Appellant has claimed a time overrun of 13 months for levelling and grading against which the Central Commission has restricted to 10 months with a consideration that the additional three months claimed by DVC is taken care of in the three months time overrun allowed for the delay in the possession of the main plant area. Therefore, there is no basis in the Central Commission to conclude that three months, time overrun allowed for the delay in the actual possession of the main land would compensate three months time required for undertaking levelling and grading work. Similar is the logic given by the Central Commission for the time overrun on account of non-availability of land for undertaking the main plant installation as alleged by the Appellant.

9.3 The Appellant has stated that the Central Commission has erred in not allowing the time overrun of 19 months in regard to the non-availability of raw water and DM water arrangments which require laying down of cross country pipelines and charging of the same. Despite the fact that DVC has taken all reasonable steps to obtain requisite permission from the railways, the Central Commission rejected the said claim of time overrun on the ground that there was a slackness on the part of the Appellant in submission of application and related documents. The Appellant has clearly indicated that after discussions with the railways, it applied for the clearance on 04.01.2010 and got the permission on 07.03.2011 and accordingly, at least a period of 14 months which was taken by railways in approval ought to have been allowed by the Central Commission. Regarding time overrun due to non-availability of fuel

supply agreement, the Appellant has sought for delay of 14 months on this account but the Central Commission rejected the same. The Central Commission has made reliance on the decision of this Tribunal in Appeal No. 104 of 2011 decided on 12.12.2012 in the matter of Power Grid vs. CERC which as per the Appellant is wrong. The Appellant has emphasised that the decision is clearly distinguishable from the fact of the present case and that of the case of Power Grid where the investment approval date was prior to the LoA date.

9.4 It has further been contended by the Appellant counsel that, the Central Commission while calculating the admissible IDC ought to have considered the inadmissible IDC for the time overrun of the above said period disallowed not on the basis of actual number of months of time overrun but based on the deployment of capital i.e. debt borrowed for the project, the deferred draw down of the debt and consequential effect as compared to the debt that would be drawn in the case of there being no time overrun. As such, the IDC admissible in the case of debt being drawn in time should not have been rejected on account of the time overrun.

9.5 ***Per contra,*** the learned counsel for the Respondent No.3 submitted that there are no specific regulations to deal with the issue related to time and cost overrun under the Tariff Regulations, 2009. However, Hon'ble Tribunal in its judgment dated 27.04.2011 in Appeal No.72 of 2010 have laid down guiding principles for prudence check of time overrun and cost overrun of a project. The learned counsel further brought out that the Appellant although projected a cumulative time overrun of 58 months against the above four activities but the aggregate time overrun for Unit I - 22 months and for Unit II – 29 months has been claimed. It is thus clear that all he activities involved in the execution of a project may not result into delay of project completion because of time cushion available for execution of each activity. The only activities falling on

critical path attribute to the actual delay in completion period. He further pointed out that the Central Commission accordingly directed the Appellant to furnish detailed reasons for delay along with PERT chart indicating the activities on critical paths and impact of delay from those activities. It is relevant to note that the Appellant denied the complete information on this issue to the Commission as well as to the Respondents. The learned counsel further pointed out that in fact the Appellant got nearly three months additional benefit considering the investment approval on 30.04.2007 and LoA on 27.07.2007. It is thus emerged that that the Central Commission in spite of denial of information by the Appellant has condoned the time overrun of 13 months in the execution of the project which appears to be just and reasonable.

9.6 The learned counsel appearing for Respondent No.4 has contended on similar lines as that of Respondent No.3 as far as the consideration of the Central Commission to the time overrun and cost overrun claimed by the Appellant is concerned. He mentioned that the Central Commission has justly and fairly considered the reasons for time overrun indicated by the Appellant and has given valid and cogent reasons in the impugned order for not allowing the entire claim on time overrun and restricted the same to 13 months. In fact, the Central Commission has been quite liberal in allowing time overrun of 13 months despite the fact that the Appellant has miserably failed in completing the project envisaged for an event of national importance.

9.7 The learned counsel for Respondent No.6 contended that all the grounds indicated by the Appellant for allowing time overrun have been duly analysed by the Central Commission and after prudence check, partially allowed the claim of the Appellant in this regard. The learned counsel proceeds on saying that most of the reasons indicated for time over run were fully within the control of the Appellant and beneficiaries cannot be held responsible for the slackness or imprudence on the part of the Appellant. Hon'ble Tribunal in its

judgment dated 27.04.2011 in Appeal No.72 of 2010 has already provided a guiding principle in respect of time and cost overrun and consequentially applicable in the present case also. He pointed out that the basic tenet of regulatory process is that inefficiency of the generating / transmitting / distribution companies cannot be passed on to their beneficiaries / consumers. Keeping these facts in view, the learned counsel reiterated that the time overrun of 13 months as allowed by the Central Commission is in contravention of the above judgment of the Tribunal. It is further contended by the learned counsel that the Appellant has failed to furnish sufficient reasons to show that delay caused was beyond its control and accordingly the entire additional cost is a result of failure on the part of the Appellant. It is surprising that the beneficiaries on the one hand could not get the benefit of the project due to inordinate delay and on the other hand, they are being penalised with extra IDC and FC for no fault of theirs. Thus, the excess and unreasonable IDC as claimed by the Appellant should not be allowed resulting into undue burden on the beneficiary / consumers.

Our Findings :-

9.8 We have considered the verbal and written submissions of the learned counsel appearing for the Appellant and the Respondent Nos. 3, 4 & 6 and also analysed their arguments made during the proceedings. Although, the Appellant has claimed a total time overrun of 58 months mainly on four accounts but the Central Commission has allowed only 13 months. While taking note of the findings of the Central Commission in its impugned order, we opine that most of the reasons indicated by the Appellant are generally applicable to almost all the power projects in one form or the other. Further, all the delays do not occur in series and most of the activities are undertaken by the project developers in a parallel mode by means of which only those activities which fall on critical path and slip from the set schedule, cause the

actual delay in the project completion. It is also clear from the claim of the Appellant for actual time overrun of 22/29 months for Unit I / II against the cumulative figure of 58 months. We also note that most of the delays could have been averted by the remedial measures timely taken by the Appellant. It will also not be out of context to mention that the project being of strategic nature and of National Importance relating to Commonwealth Games, 1980, it required sincere efforts and close monitoring with requisite CPM/PERT etc. in dealing with problems and remedies thereof in a time bound manner.

9.9. The Appellant has contested that the reliance placed by the Central Commission on the decision of this Tribunal in appeal no. 104 of 2011 decided on 12.1.2012 in the matter of Power Grid versus CERC is wrong. The decision is clearly distinguishable from the facts of the present appeal and is not applicable. In that case the Tribunal was dealing with a situation where the Investment approval date was prior to the Letter of Award Date, which is opposite to the peculiar facts of the present appeal. In the present case, the Letter of Award was prior to the Investment Approval. We have evaluated the case with specific reference to the above judgment and find that both cases are almost similar in facts and are duly covered by the said findings of this Tribunal. Therefore, regarding additional IDC for the time overrun, we hold that the Central Commission has applied proper prudence by allowing 13 months time overrun and has striked a balance between the generator and the beneficiaries/consumers.

9.10 **Further, we also agree with the contentions of the Respondents that on the one hand they have not availed the desired benefit of power supply due to inordinate delay in commissioning of the project and on the other hand they are being penalised on account of additional IDC for no fault of theirs. In view of these facts, the impugned order does not suffer from any unjustness or perversity on this issue.**

10. **Issue No.3 :**

10.1 The Appellant further contended that, in the order dated 23.11.2007, passed by this Tribunal in Appeal No.273 of 2006, the aspect of contribution to sinking fund has been considered and settled in favour of DVC. However, the Central Commission has not fully allowed the amount claimed by DVC as contribution to the sinking fund. The Appellant has further contended that the Central Commission has allowed only a part of the contribution met by DVC towards the sinking fund. For the year 2013-14 in its petition DVC has claimed sinking fund contribution against two bonds floated on 30.03.2012 and 25.03.2013 amounting to Rs.26.656 crores whereas the Central Commission considered only the first bond amounting to Rs. 15.625 crores and disallowed the second bond. The Central Commission has thus erred in not considering the amount of Rs. 11.032 crores towards sinking fund contribution. The learned counsel for Respondent No.3 indicated that the Appellant did not submit the complete information as asked for by the Central Commission regarding contribution towards sinking fund and the Commission has no option but to finalise the same based on the available relevant records before it. The Commission is yet to form its opinion on this issue and, therefore, the appeal on this issue is premature.

10.2 The learned counsel for the Respondent No.4 submitted that the Central Commission has dealt with the factual position on this issue in detail at para 73 to 75 and has found that the Appellant has not submitted full details on one hand on the other, there was no actual cost outlay by the Appellant to make a claim for contribution to sinking fund. Thus, for want of details information in the matter and having been no actual cost outlay, the Appellant is not entitled for any benefit as to contribution to sinking fund. Moreover, during oral arguments, the Appellant has agreed not to press this claim.

10.3 The learned counsel for Respondent No.6 contended that the Central Commission has rightly allowed only partial contribution made by the Appellant towards sinking fund as there is no actual cash outlay towards interest on sinking fund which has claimed by the Appellant. When the funds like sinking fund are being managed outside the company by some expert fund managers or a bank, the amounts are utilized for investing in some securities and get annual profits/returns on the fund in form of dividend or interest. It is alleged that the Appellant is, on one hand, enjoying high returns from the sinking fund by the means of dividend or higher interest and on the other hand, trying to include imaginary interest contribution as an expenditure in the capital cost to claim further benefits at the cost of public. It is, therefore, rightly disallowed by the Central Commission.

Our Findings :

10.4 We have gone through the facts and findings of the Central Commission on this issue and note that there does not appear much rationale in the claim of the Appellant as far as the issue of sinking fund is concerned. **Moreover, as submitted by the Appellant in its rejoinder submission dated 27.04.2018 that the sinking fund aspect has been considered by the Central Commission in the true up proceedings vide order dated 27.02.2017 passed in Petition No.204/gt/2015 and in view of this, DVC does not wish to pursue their issue relating to the sinking fund.**

Summary of our findings :-

11.1 After hearing the learned counsel for the Appellant and the learned counsel for the Respondents and after going through their written submissions, we note that the primary issue emerges for the consideration of zero date i.e. date of start of project and associated completion period for Unit I & Unit II. As brought out in our deliberations and analysis., in foregoing paras, it is a

general practice in almost all the CPSUs & other utilities to accord investment approval for a project as early as possible and place the LoA for EPC contract, subsequently. In the instant case of DVC, keeping in view the urgency of completing the project as per its requirement to supply power to Delhi for Commonwealth Games, 2010, the DVC Management accorded investment approval for the project on 30.04.2007 and allowed placing of LoA on 27.07.2007 with completion period of 38 months for commissioning of the project in all respects before October, 2010. We further observe that the Central Commission has considered these factual details of the project for assessment of completion period, time overrun and corresponding cost overrun etc. rightly in its impugned order and in accordance with the judgments passed by this Tribunal dated 27.04.2011 & 12.12.2012. As contested by the Respondents and also decided by the Central Commission, the final investment sanction date i.e. 16.06.2008 cannot be considered as zero date as claimed by the Appellant. **We note that the Central Commission, after critical evaluation of the relevant material on records assigned valid and cogent reasons and has rightly justified for passing the order. Therefore, we do not find any error in the Impugned Order.**

11.2 In light of the facts, placed on record, before us, it is relevant to note and mention that the Appellant has miserably failed in implementation of the reference project though being of National Importance for an international event. It has frustrated the very purpose for which the project was conceived and approved. The issues raised in the Petition have been evaluated by the Central Commission rightly and judicially with valid and cogent reasoning. We, therefore, conclude that there is no legal infirmity or ambiguity in the impugned order passed by the Central Commission. Hence, the appeal filed by the Appellant (DVC) is liable to be dismissed, being devoid of merit and the impugned order deserves to be upheld.

ORDER

We are of the considered opinion that the issues raised in the instant appeal being Appeal NO.153 of 2015 are devoid of merits. Hence, the appeal is dismissed and the impugned order dated 20.04.2015 passed by the Central Electricity Regulatory Commission in Petition No.66/GT/2012 is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **28th day of May, 2018.**

(S.D. Dubey) **Technical Member**	**(Justice N.K. Patil)** **Judicial Member**

REPORTABLE / ~~NON-REPORTABLE~~

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