

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 40 of 2011

Dated: 1st May, 2012

Present: HON'BLE MR. JUSTICE P S DATTA, JUDICIAL MEMBER
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER,

Damodar Valley Corporation,
DVC Towers,
VIP Road, Kolkata -700 054.

...Appellant

Versus

- (i) Central Electricity Regulatory Commission,
3rd and 4th floor, Chanderlok Building,
Janpath, New Delhi – 110001.
- (ii) West Bengal State Electricity Distribution Company Limited,
Vidyut Bhawan,
Block `DJ`, Sector-11,
Salt Lake City, Kolkata – 700091.
- (iii) Jharkhand State Electricity Board,
Engineering Building, HEC,
Dhurwa, Ranchi – 834 004.
- (iv) Madhya Pradesh Power Trading Company Ltd.
Shakti Bhawan, Vidyut Nagar,
Jabalpur-482008. ...Respondents

Counsel for the Appellant : Mr M G Ramachandran

Counsel for the Respondent : Mr Nikhil Nayyar for R-1
Mr R B Sharma for R- 3
Mr Manoj Dubey for R-4

JUDGMENT

PER MR. V J TALWAR TECHNICAL MEMBER

1. Damodar Valley Corporation (DVC) is the Appellant herein. It is a statutory body established by the Central Government under the DVC Act 1948 for the development of Damodar Valley with three participating Governments, namely, the Central Government, the Government of West Bengal and the Government of Jharkhand.
2. The Central Electricity Regulatory Commission (Central Commission) is the 1st Respondent herein. The 2nd Respondent, West Bengal State Electricity Distribution Company is the distribution licensee in the State of West Bengal. Jharkhand State Electricity Board is the 3rd Respondent. 4th Respondent is a trading licensee in the State of Madhya Pradesh having share in the power of Mejia Unit 5&6 generating station of the Appellant.
3. On 1.12.2008 the Appellant filed a petition being No.155/2008 for determination of Tariff for Mejia Thermal Power Station Units 5&6 (2x250 MW) from the date of Commercial Operation. The Central Commission passed the impugned order on 23.12.2009 determining the generation tariff for Mejia Unit 5&6.
4. Aggrieved by the impugned order of the Central Commission dated 23.12.2009, the Appellant has filed this Appeal.
5. Brief facts of the case are as under:

- 5.1. The Appellant Damodar Valley Corporation was constituted under the Damodar Valley Corporation Act, 1948. The main purpose of DVC was the overall development of the Damodar Valley Corporation through various multifarious activities undertaken by the DVC. Such activities include generation and supply of electricity, irrigation and flood control, soil conservation activities, building and operating multi-purpose dams etc. Therefore, the Appellant DVC is a generating company as well as a transmission and distribution utility. The Electricity Act, 2003 has recognized DVC as a deemed transmission and distribution licensee and the provisions of the DVC Act (related to its licensed activity) will apply as long as those are not inconsistent with the provisions of the Electricity Act, 2003.
- 5.2. The Central Commission passed a tariff order on 3.10.2006 determining the Annual Revenue Requirements and the generation and transmission tariff of DVC for the financial years 2006-07, 2007-08 and 2008-09. The Generation and Transmission tariff determined by the Central Commission for sale of power was to be used as the input cost by State Commissions of West Bengal and Jharkhand for the determination of the distribution tariff of DVC.
- 5.3. Aggrieved by the order dated 3.10.2006 passed by the Central Commission DVC preferred an appeal being Appeal No. 273 of 2006 before this Tribunal.

- 5.4. The Tribunal disposed of the Appeal No. 273 of 2006 along with other similar Appeals through a common Judgment dated 23.11.2007 setting aside the order dated 3.10.2006 passed by the Central Commission and directed the Central Commission to de novo determine the revenue requirements and tariff of DVC in terms of the principles laid down and the directions given in this judgment.
- 5.5. The Central Commission preferred an Appeal being no. 4289 of 2008 before the Hon'ble Supreme Court against the judgment and order dated 23.11.2007 passed by this Tribunal in Appeal no 273 of 2006. The Hon'ble Supreme Court did not grant stay of operation of Tribunal's order.
- 5.6. The Central Commission passed an order on 6.8.2009 implementing the directions of the Tribunal dated 23.11.2007.
- 5.7. Aggrieved by the Central Commission's order dated 6.8.2009 the Appellant had filed an Appeal before the Tribunal being Appeal No.146 of 2009 mainly on the ground that the Central Commission has not implemented the directions contained remand order dated 23.11.2007 passed by this Tribunal in letter and spirit and therefore, the order of the Central Commission dated 6.8.2009 was liable to be set aside. This Appeal of the Appellant was dismissed by the Tribunal in its Judgment dated 10.5.2010.
- 5.8. In the mean time the Appellant filed a Petition, being No.53/2008 filed before Central Commission on 16.4.2008 for

approval of provisional tariff in respect of Mejia thermal Power generating station Unit No.5. Central Commission by its order dated 30.4.2008 approved the provisional tariff for MTPS Unit No.5. On 17.11.2008 the Central Commission directed the Appellant to file petition for determination of final tariff and permitted the Appellant to charge provisional tariff till 30.11.2008.

5.9. Accordingly, on 1.12.2008 the Appellant filed a petition being No.155/2008 for approval of Tariff for Mejia Thermal Power Units 5&6 (2x250 MW) from the date of Commercial operation Date (CoD).

5.10. The Central Commission passed the impugned order on 23.12.2009 approving the final tariff in respect of Mejia TPS Unit 5&6. Aggrieved by the impugned order dated 23.12.2009 passed by the Central Commission, the Appellant has filed the present appeal.

6. The Appellant has raised the following issues in the present Appeal for our consideration:

- i. Notional interest during construction;
- ii. Un-discharged liabilities duly incurred as on the date of the commercial operation but pending payment.
- iii. Interest on Capital contribution admissible as per Section 38 of the Damodar Valley Corporation Act, 1958.
- iv. O & M Expenses relating to payment made by virtue of the revision of pay to the DVC personnel as a result of the

implementation of the Sixth Pay Commission Recommendations.

- v. Contribution to the Sinking Fund as per the provisions of Section 40 of the DVC Act, 1948.
 - vi. Rate of Interest on working capital.
7. However, during the proceedings of this Appeal, the Appellant did not press for issues related to Sinking Fund and Rate of Interest on working capital listed at Sl. No. 5 &6 above.
8. At the outset, we would like to clarify that the Appellant DVC is a **deemed licensee** in terms of fourth proviso to the Section 14 of the Electricity Act 2003 and the provisions of DVC Act would be applicable in relation to its licensed activities, so long such provisions are not inconsistent with the provisions of the Electricity Act 2003. Section 14 of the 2003 Act is reproduced below:

***“14. Grant of licence.—**The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person—*

(a) to transmit electricity as a transmission licensee; or

(b) to distribute electricity as a distribution licensee; or

(c) to undertake trading in electricity as an electricity trader,

in any area as may be specified in the licence:

*Provided that any person engaged in the business of **transmission or supply of electricity** under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the*

Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the Appropriate Commission and thereafter the provisions of this Act shall apply to such business:

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

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

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

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

*Provided also that the Appropriate Commission may grant a licence to two or more persons **for distribution of electricity** through their own distribution system within the same area, subject to the conditions that the applicant for grant of licence within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements 1[relating to the capital adequacy, creditworthiness, or code of conduct] as may be prescribed by the Central Government, and no such applicant, who complies with all the requirements for grant of licence, shall be refused*

grant of licence on the ground that there already exists a licensee in the same area for the same purpose:

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

*Provided also that where a person intends to **generate and distribute electricity** in a rural area to be notified by the State Government, such person shall not require any licence for such generation and distribution of electricity, but he shall comply with the measures which may be specified by the Authority under section 53:*

*Provided also that a **distribution licensee** shall not require a licence to undertake trading in electricity. {emphasis added}*

9. Perusal of section 14 would reveal that this section deals with licensing i.e. transmission, distribution and trading license only. This Tribunal in a number of cases has held that generation does not require any license under this Act. It is, therefore, obvious that provisions of DVC Act would be applicable to the activities of the Appellant related to transmission and distribution licensee only.
10. The present Appeal is against the Central Commission's order determining the tariff for Mejia Thermal Power Station unit 5 & 6, which is not an activity related to licensee status of the Appellant and, accordingly, the provisions of DVC Act 1948 would not be applicable in this case. We would also like to clarify that the DVC Act, 1948 has not been saved in terms of section 173 or section 185 of the 2003 Act. In fact section 174 of the 2003 Act has given overriding effect to the 2003 Act. The Hon'ble Supreme Court in Gujarat Urja Vikas

Nigam Limited versus ESSAR Power Limited (2008)4SCC755 has held that

“55. In our opinion Section 174 and Section 175 of the Electricity Act, 2003 can be read harmoniously by utilizing the Samanjasya, Badha and Gunapradhana principles of Mimansa. This can be done by holding that when there is any express or implied conflict between the provisions of the Electricity Act, 2003 and any other Act then the provisions of the Electricity Act, 2003 will prevail, but when there is no conflict, express or implied, both the Acts are to be read together.”

11. Section 62 read with Section 79 of 2003 Act mandates the Central Commission to determine, inter alia, the tariff for supply of electricity by a generating company in accordance with the Regulations framed under Section 61 of the Act. Any provision of DVC Act providing recovery of revenue through tariff being inconsistent with the Tariff Regulations would not be applicable.
12. We shall now deal with these issues one by one in the light of our observations expressed above.
13. The first issue before us for our consideration is related to **Notional interest during construction**. In respect of this issue following submissions have been made by the learned Counsel for the Appellant:
 - 13.1. The matter in issue relates to the determination of the Interest during Construction (**IDC**) applicable to the capital cost of Mejia Units 5 and 6 in terms of the Tariff Regulations, 2004 notified by the Central Commission. Regulation 17 of the Tariff Regulations, 2004 deals with the capital cost. As per the

Regulation 17, the actual capital expenditure including interest during construction (IDC) incurred up to the date of commercial operation of the generating station is admissible.

13.2. From June, 2004 till July 2006, the funding of the project has been entirely through equity. Thereafter, from August 2006 onwards the funding has been partly through loan and partly through equity. The debt equity ratio on the Date of Commercial Operation was 69.22% of loan and 30.78 of equity.

13.3. The cumulative capital cost funding from June, 2004 onwards should be divided in the debt equity ratio of 70:30, the excess equity deployed should be treated as a loan in terms of regulation no. 20 and all such equity amount has to be treated as notional loan and notional IDC should be duly allowed. The Central Commission has, however, not considered the above in the impugned order and has allowed the actual IDC.

13.4. The issue relating to IDC on notional loan has already been decided by this Tribunal in the following cases: (a) NTPC Vs. CERC and Ors., 2008 ELR (APTEL) 916 : Appeal No. 151 & 152 of 2007 decided on 10.12.2007 ; (b) NTPC Vs. CERC and Ors 2009 ELR APTEL 337 : Appeal No. 133,135, 136 & 148 of 2008 decided on 16.03.2009.

13.5. In these judgments the Tribunal has dealt with a situation where the loan borrowed from the Banks and Financial Institutions were repaid by the NTPC during the construction period itself. The Tribunal had held that when the loan has been repaid

through internal accrual, the same should be treated as a notional loan and IDC is admissible.

14. Per contra, the learned Counsel for the Central Commission made the following contentions:

14.1. There is no provision for allowing notional IDC in the Tariff Regulations 2004.

14.2. The Appellant has relied on the judgments of this Hon'ble Tribunal in Appeal Nos. 151 and 152 of 2007 dated 10.12.2008 and judgment in Appeal Nos. 133, 135, 136 and 148 of 2008 dated 16.3.2009.

14.3. In these cases repayment of loan by the generator prior to the date of commercial operation has been considered as deemed loan from the generator and interest during construction had been allowed on such deemed loans. In other words, only the equity which has been used for repayment of loan during construction shall be treated as deemed loan and IDC on such loans are admissible.

14.4. In the present case, the Petitioner has treated equity deployed in excess of the normative equity as deemed loan and has claimed interest during construction thereon for the entire period of construction, without linking any repayment to such additional deployment.

- 14.5. The claim of the petitioner is at variance with the directions of this Tribunal in judgment dated 10.12.2008 in Appeal Nos.151 and 152 of 2007.
15. The learned Counsels for the 3rd and 4th Respondents echoed the contentions of the Central Commission and added that the 'ratio' of this Tribunal's judgments in Appeal no. 151 & 152 of 2007 and Appeal No. 133,135, 136 & 148 of 2008 would not be applicable in the present case.
16. In the light of rival contentions of the parties, let us first examine as to whether the ratio of Appeal no. 151 & 152 of 2007 and Appeal No. 133,135, 136 & 148 of 2008 would be applicable to the present case.
17. The Appellant, NTPC in these cases had taken common loan for two or more generating stations on the strength of its balance sheet and allocated the loan to the respective generating stations. Part of loan was repaid during the construction period from NTPC's internal resources. The question before the Tribunal in these Appeals was: "Whether the Central Commission has dealt with appropriately the tariff adjustments for repayment of the common loan taken by NTPC on its balance-sheet for two or more generating stations in regard to interest during construction which should form part of the capital cost?". In these cases it was held that the repayment of loan from internal sources may be considered as deemed loan from NTPC to the project and accordingly interest on such deemed loan to be considered in the capital Cost.

18. However, in the present case before us, the Appellant DVC has funded the project from June, 2004 to July, 2006 entirely on its own equity. Thereafter, the project was funded on loan and equity. The Appellant has requested that 70% of its equity injected in to the project during June, 2004 to July, 2006 should be considered as normative loan and Interest on such normative loan may be allowed. From the above it is clear that the facts of the present case are totally different from the Appeals the Appellant has relied upon. Therefore, the ratio of those appeals cannot be applied in the present case.
19. Let us now examine the issue *denovo* on its own footings.
20. Power sector is capital intensive sector. Each project requires large amount of capital investment. Capital is invested in the project during construction stage either through debt from financial institutions or through developer's own funds in the form of equity. Debt amount also brings in the liability of interest during construction (IDC). However, equity poured in to the project does not earn any return during construction of the project. Return on Equity becomes payable only after commercial operation of the project. If the project is funded through equity only, the final capital cost would be the total amount of equity invested. However, if the project is funded through debt alone, project cost would also include interest during construction. Admittedly the project has been 100% funded through equity by the Appellant during first two years of construction. The Appellant has claimed that 70% of the equity, it has injected in to the project during initial period, has to be considered as notional loan in accordance with regulation no. 20 of Central Commission's 2004 Tariff

Regulations. Accordingly, the Appellant is entitled to notional interest against the notional loan. In other words, the Appellant is claiming return on part of the equity during construction.

21. The claim of the Appellant is based on Regulation 20 of the Tariff Regulation, 2004 which is reproduced below:

“20. Debt-Equity Ratio: (1) In case of all generating stations, debt–equity ratio as on the date of commercial operation shall be 70:30 for determination of tariff. Where equity employed is more than 30%, the amount of equity for determination of tariff shall be limited to 30% and the balance amount shall be considered as the normative loan.

Provided that in case of a generating station where actual equity employed is less than 30%, the actual debt and equity shall be considered for determination of tariff.

(2) The debt and equity amount arrived at in accordance with clause (1) shall be used for calculating interest on loan, return on equity, Advance Against Depreciation and Foreign Exchange Rate Variation.”

22. Bare perusal of the Regulation 20 reproduced above would reveal that debt – equity ratio of 70:30 is to be considered as on date of commercial operation and for the purpose of determination of tariff. It does not provide that the debt - equity ratio of 70:30 would be considered during construction of the project or after its commercial operation. Factually, debt component of the capital cost has to be repaid as per term of the loan and equity component of capital would remain constant during the life of the project. Therefore, debt – equity ratio would vary from time to time and after repayment of loan only equity would remain. Similarly, Capital would be injected during

construction of the project depending upon the requirement and availability of funds either from loan or from equity and debt – equity ratio would vary. In the present case debt – equity ratio had been varying from quarter to quarter throughout the construction period. In the beginning equity component was 100% and during some months it was as low as 10%. If the contention of the Appellant is accepted then interest on ‘normative’ loan would be payable when equity is more than 30% but when loan is more than 70%, interest on actual loan would have to be provided. This would result in unjust increase in the capital cost of the project. As brought out above, the Appellant’s claim of ‘notional interest’ on ‘notional loan’ during construction period is in fact a claim on return on equity during construction which is not permissible. The issue is accordingly decided against the Appellant.

23. Next issue is related **to un-discharged liabilities duly incurred as on the date of the commercial operation but pending payment.**
24. The Appellant in its petition before the Central Commission had claimed capital cost of Rs 107602.45 lakh as on the date of commercial operation of Unit.No.5, which was inclusive of liabilities and notional IDC. However, the Central Commission in its order dated 23.12.2009 while determining the capital cost of the generating station had excluded the un-discharged liabilities to the tune of Rs 10549.34 Lakh as this amount had not been actually incurred by the Appellant as on CoD of the project.

25. The learned counsel for the Appellant has contended that the Central Commission has ignored the claim of Rs. 10549.34 Lakh as part of capital cost and that this amount of the capital expenditure has been retained by the Appellant as a mere custodian to ensure smooth functioning of the machinery, equipments and supply of spares and to secure appropriate services from various entities supplying such equipments and machinery and towards other requirements. The Appellant has further contended that this aspect has already been decided by this Tribunal in NTPC Limited v. Central Electricity Regulatory Commission & Ors., 2008 ELR (APTEL) 916 and in NTPC Limited v. Central Electricity Regulatory Commission & Ors. 2009 ELR (APTEL) 337, wherein this Hon'ble Tribunal has held as under:

"4.00 To sum up, our conclusions on the four issues raised in these Appeals are as under:

a. The words 'actual expenditure incurred' contained in Regulation 17 of the Act would refer to the liabilities incurred and the same would not refer to the actual cash outflow. Since the wordings in Regulation 17 are very clear, the only rational interpretation would be that the appellant would be entitled to recover the actual capital expenditure incurred without reference to the actual cash outflow."

26. The learned counsel for the Appellant further added that the above decisions have been followed in number of cases by this Tribunal. Reference in this connection is craved to the following:

(a) NTPC Limited v. Central Electricity Regulatory Commission & Ors., 2011 ELR (APTEL) 224;

(b) NTPC Limited v. Central Electricity Regulatory Commission & Ors., 2010 ELR (APTEL) 871;

(c) NTPC Limited v. Central Electricity Regulatory Commission & Ors., 2011 ELR (APTEL) 924

27. The learned counsel for the Central Commission informed that the issue of un-discharged liabilities forming part of the capital cost is squarely covered by the decisions of the Tribunal in its judgments dated 10.12.2007 and 16.3.2009 in Appeal Nos. 151 & 152/2009 and Appeal Nos. 133, 135, 136 and 148/2008 respectively. He further submitted that the Central Commission has filed Civil Appeals before the Hon'ble Supreme Court against the above said judgments of the Tribunal and the same are pending. Since no stay has been granted by the Hon'ble Supreme Court, the judgments of this Tribunal have been implemented by the Central Commission while revising the tariff of the generating stations of NTPC Ltd, based on additional capital expenditure for the period 2004-09. The Central Commission undertakes to implement the said judgment in respect of the generating stations of the Appellant herein and allow the un-discharged liabilities deducted from capital cost, subject to the final outcome of the aforesaid Civil Appeals.
28. In view of categorical undertaking made by the Central Commission to implement the judgment of this Tribunal in Appeal no. 151& 152 of 2009 dated 10.12.2007 and in Appeal nos. 133, 135, 136 and 148 of 2008 dated 16.3.2009 in respect of the generating stations of the Appellant i.e. Mejia unit 5 & 6 and would allow un-discharged liabilities deducted from the capital cost, subject to the final outcome of the Civil Appeals filed by the Central Commission before the

Supreme Court against the orders of this Tribunal in the said Appeals, the issue is decided in favour of the Appellant.

29. Next issue before us is related to **Interest on Capital contribution admissible as per Section 38 of the Damodar Valley Corporation Act, 1958.**
30. The Central Commission has, in the impugned order, allowed interest on 70% of the capital cost and Return on Equity on balance 30% of the capital cost in accordance with the regulation no. 20 of the 2004 Tariff Regulations read with this Tribunal's judgment in Appeal No. 273 of 2006 in the matter of DVC Vs CERC. The Appellant has contended that it is entitled to the interest on capital accordance with the Section 38 of DVC Act 1948. In other words, the Appellant has claimed interest on 100% of capital cost in terms of Section 38 of DVC Act, 1948 and Return on Equity on 30% of the Capital Cost.
31. The learned counsel for the Appellant assailing the view taken by the Central Commission in the impugned order restricting the interest on 70% of capital cost has made the following submissions:
 - 31.1. In view of section 38 of the DVC Act, the Central Commission was required to allow the Appellant the interest on capital as envisaged under this section. The same issue had been considered by this Tribunal in Appeal No. 273 of 2006, Damodar Valley Corporation v. Central Electricity Regulatory Commission & Ors. And had decided in favour of the Appellant in its order dated 23.11.2007.

31.2. Prior to the enactment of the Electricity Act, 2003 the DVC Act allowed the Appellant itself to determine tariff and consequently the profit. In this regard, Section 20 of the DVC Act and there was no limitation whatsoever on the quantum which Appellant could derive as surplus, namely any amount of return not restricted unlike the licensees or State Electricity Boards which were regulated as per Schedule VI or Section 59 of the Electricity (Supply) Act, 1948 respectively.

31.3. There was no need for any check on Appellant as it was a statutory body under the control of the Central Government, the two provincial Governments also participating in the management and nature of the functions discharged by the Appellant being of great public importance. It was therefore open to Appellant to provide for rate of return in excess of 14% or 16% in addition to other costs, expenses and charges including interest on capital. Such return was in the form of net profit as envisaged in Sections 37 and 40 of the DVC Act. While Part IV of the DVC Act provided for determination of other aspects such as interest on capital, depreciation, reserves etc. by the Comptroller & Auditor General, there was no stipulation in regard to rate of return.

31.4. In the circumstances, after the enactment of the Electricity Act , 2003 and the Central Commission exercising the function of tariff determination, the rate of return to be provided is to be as per the Tariff Regulations, 2004 and accordingly it would be 14 %. This rate of return is in addition to specific aspects provided

for in Part IV of the DVC Act including Interest on capital as per section 38 of the DVC Act 1948.

31.5. Special provisions have been made in Part IV of the DVC Act and the Parliament has not disturbed the same while enacting the Electricity Act, 2003 keeping in view the objective and purpose of the DVC Act to develop the Damodar Valley and undertake multifarious activities for larger public interest.

32. While refuting the contentions of the Appellant, the learned counsel for the Central Commission made the following submissions:

32.1. The Appellant has alleged that the Central Commission in its order dated 23.12.2009 has completely ignored the directions of this Hon'ble Tribunal in judgment dated 23.11.2007 in Appeal No. 273 of 2006 and has not allowed any interest under Section 38 of the DVC Act, 1948 as a part of tariff of DVC.

32.2. Consequent upon the aforesaid judgment, the matter was taken up again on remand by the Central Commission. The Central Commission by its order dated 6.8.2009 implemented the directions of this Tribunal. Aggrieved by the same, the Appellant herein once again approached this Tribunal in Appeal No. 146 of 2009. In the said appeal the Appellant specifically contended that the Central Commission had erred in ignoring the direction of this Tribunal to consider the provisions of Part IV of the DVC Act. By its judgment dated 10.5.2010, this Tribunal rejected this contention of the Appellant and had held

that the Central Commission had complied with the remand order by allowing return on equity and interest on loan .

32.3. The findings of the Central Commission in the impugned order are in accordance with the observations of this Tribunal and the submission of the Appellant on this count deserves no consideration.

33. In reply to above submission of the Central Commission that the findings of the Commission had been upheld by this Tribunal in Appeal no. 146 of 2009, the learned counsel for the Appellant made the following submissions:

33.1. That this Tribunal in the subsequent decision dated 10.5.2010 has not considered the impact of Section 38 of the DVC Act properly. Section 38 provides for the payment of interest on capital contribution which means the total capital contributed both by way of equity and debt. The payment of interest under Section 38 is in addition to the servicing of the gross block of assets through debt and equity as per the Tariff Regulations, 2004 notified under the Electricity Act, 2003.

33.2. Such payment of interest on capital contribution in addition to the interest on loan capital is a well accepted position. This Tribunal has perhaps wrongly proceeded on the basis that the payment of interest on working capital provided by each participating Governments as per Section 38 of the DVC Act is the same as in the case of interest on the borrowed capital or interest on notional loan where equity is in excess of normative

contained in the debt equity ratio. While, the Tribunal has referred to para E.13 of its earlier judgment dated 23.11.2007 it has missed to consider the essential paragraphs namely Para 16, para A-15 and A-16 which lays down the principles.

33.3. It was specifically provided in para A-15 of the judgement dated 23.11.2007 that DVC provides interest on capital contributed by the participating Governments and accrued interest has been allowed to be retained by DVC and is ploughed back into the capital with the tacit consent of the participating Governments, this is to be provided to DVC as per Section 38 of the DVC Act.

34. In view of the rival contentions of the parties and the reliance of the Appellant on this Tribunal's judgment in Appeal No. 273 of 2006 dated 23.11.2007 and Central Commission's reliance on the judgment of this Tribunal in Appeal No.146 of 2009 dated 10.5.2010, it has become imperative to refer to these judgments. Relevant portion of judgment dated 23.11.2007 in Appeal no. 273 of 2006 is quoted below:

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

...

A-15 *It is to be noted that DVC provides interest on capital contributed by the participating Governments. The accrued interest has been allowed to be retained by DVC and is ploughed back into capital with the tacit consent of the participating Governments. This has to be provided to DVC as per the provisions of Section 38 of the DVC Act.*

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

....

E.13 *As regards the liability arising under section 38 of the DVC Act on account of interest on capital provided by each of the participating Governments, we have to keep in mind that the total capital to be serviced has to be equal to the value of operating assets when they are first put to commercial use. Subsequently, the loan component gets reduced on account of repayments while equity amount remain static. As per the scheme of the determination of tariff as per Tariff Regulations 2004, the recovery is in two forms; either by way of ROE or by way of interest on loans. **We direct the Central Commission to ensure that capital deployed in financing operating assets is getting fully serviced either through Return on***

Equity or interest on loan (including on the equity portion not covered as part of equity eligible for Return of Equity)."

35. The learned counsel for the Central Commission has relied on this Tribunal in its Judgment in appeal no. 146 of 2009 dated 10.5.2010 upholding the findings of the Central Commission relating to the present issue. Relevant portion of judgment in Appeal no. 146 of 2009 read as under:

"71. In regard to this issue, as indicated above, the Tribunal in the remand order dated 23.11.2007 directed the Central Commission to ensure that the capital deployed in financing operating assets is getting fully serviced either through return on equity or interest on loan. In compliance with the said order of the Tribunal, the Central Commission allowed Debt Equity Ratio on the total capital employed and provided return @ 14% on the normative equity capital in accordance with regulation 21(1)(iii) and provided interest on loan of the normative type in accordance with regulation 21(1)(i). As such, the Central Commission has complied with the remand order by allowing return on equity and interest on loan."

36. Bare perusal of the above judgment would reveal that this Tribunal has held that the Central Commission has fully complied with the remand order by allowing return on equity and interest on loan. This judgment of this Tribunal has not been challenged by the Appellant and has, therefore, attained finality. Accordingly, we are not expressing our observations on the applicability of DVC Act on the issue of determination of tariff of a generating station of the Appellant (generating company) and also not inclined to interfere with the findings of the Central Commission in the impugned order on this issue. The issue is decided against the Appellant.

37. The last issue before us is related to **O& M Expenses relating to payment made by virtue of the revision of pay to the DVC personnel as a result of the implementation of the Sixth Pay Commission Recommendations.**
38. The issue is related to increase in the employees' expenditure in view revision of pay as a result of implementation of the Sixth Pay Commission's Recommendations. The Central Commission did not go into merits of the claim of the Appellant and has directed it to approach the Commission at an appropriate stage.
39. The learned counsel for the Appellant argued that the Central Commission has deferred the determination of the expense incurred without any indication as to the appropriate time for raising the issue. There is no finding of imprudence by the Central Commission with respect to the expense incurred. In the circumstances, the Central Commission ought to have allowed the recovery of the expense legitimately incurred by the Appellant. The delay in the recovery of such legitimate expenses greatly affects the finances of the Utility.
40. The learned counsel for the Central Commission submitted that the issue of non-consideration of additional expenditure on account of pay revision in respect of other generating stations in the Central Commission's order dated 6.8.2009 in Petition No. 66 of 2005 was raised by the Appellant in Appeal No.146 of 2009 and this Hon'ble Tribunal by its judgment dated 10.5.2010 upheld the order dated 6.8.2009 granting liberty to the appellant to approach the Commission on this count. Pursuant to this, the Appellant has filed Petition No.272

of 2010 before the Commission for additional capital expenditure for deferred elements for 2006-09 and has claimed the impact of pay revision in respect of its other generating stations. It is further submitted that in terms of the liberty granted by the Commission in its order dated 23.12.2009 in Petition No.155 of 2008, the Appellant has also filed Petition No.148/GT/2011 before the Commission on 21.6.2011 in respect of this generating station, claiming amongst others the impact of additional O&M expenses due to pay revision during the period from 24.9.2008 to 31.3.2009. Both Petition No. 272/2010 and Petition No. 148/GT/2011 are presently under consideration by the Commission.

41. In view of the submission made by the Central Commission that the issue is already under consideration before it, we do not intend to interfere with the process. However, we give liberty to the Appellant to approach this Tribunal, if required, at appropriate stage.

42. Summary of our findings:

- a. **Bare perusal of the Regulation 20 of Central Commission's 2004 Tariff regulations would reveal that debt – equity ratio of 70:30 is to be considered as on date of commercial operation and for the purpose of determination of tariff. It does not provide that the debt - equity ratio of 70:30 would be considered during construction of the project or after its commercial operation. In the present case debt – equity ratio had been varying quarter to quarter throughout the construction period. In the beginning equity component was 100% and during some months it was as**

low as 10%. If the contention of the Appellant is accepted then interest on 'normative' loan would be payable when equity is more than 30% but when loan is more than 70%, interest on actual loan would have to be provided. This would result in unjust increase in the capital cost of the project. The Appellant's claim of 'notional interest' on 'notional loan' during construction period is in fact a claim on return on equity during construction which is not permissible. The issue is accordingly decided against the Appellant.

- b. In view of categorical undertaking made by the Central Commission to implement the judgment of this Tribunal in Appeal no. 151 & 152 of 2009 dated 10.12.2007 and in Appeal nos. 133, 135, 136 and 148 of 2008 dated 16.3.2009 in respect of the generating stations of the Appellant i.e. Mejia unit 5 & 6 and would allow un-discharged liabilities deducted from the capital cost, subject to the final outcome of the Civil Appeals filed by the Central Commission before the Supreme Court against the orders of this Tribunal in the said Appeals, the issue is decided in favour of the Appellant.
- c. Bare perusal of the our judgment in Appeal no. 146 of 2009 would reveal that the Central Commission had fully complied with the remand order by allowing return on equity and interest on loan. This judgment of this Tribunal has not been challenged by the Appellant and has, therefore, attained finality. Accordingly, we are not expressing our observations on the applicability of DVC Act on the issue of determination of tariff of

a generating station of the Appellant (generating company) and also not inclined to interfere with the findings of the Central Commission in the impugned order on this issue. The issue is decided against the Appellant.

d. In view of the submission made by the Central Commission that the issue related to implementation of sixth pay commission's recommendations is already under consideration before it, we do not intend to interfere with the process. However, we give liberty to the Appellant to approach this Tribunal, if required, at appropriate stage.

43. The Appeal is partially allowed to the extent indicated in main body of this judgment. However, there is no order as to costs.

**(V J Talwar)
Technical Member**

**(Justice P S Datta)
Judicial Member**

Dated: 1st May, 2012

REPORTABLE/NOT REPORTABLE