

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 357 of 2017
APPEAL No. 22 of 2018

Dated : 30th May, 2025

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

APPEAL No. 357 of 2017

Rosa Power Supply Company Limited

3rd Floor, South Wing,
Reliance Centre, Nr Prabhat Colony,
Off Western Express Highway,
Santa Cruz (E) Mumbai
Mumbai City MH 400055

...Appellant

- Versus -

1. Uttar Pradesh Electricity Regulatory Commission

Through its Secretary
II Floor, Kisan Mandi Bhawan,
Gomti Nagar, Vibhuti Khand,
Lucknow-226010

2. Uttar Pradesh Power Corporation Limited

Through its Managing Director
Shakti Bhawan, 14 – Ashok Marg,
Lucknow-226001

3. Mr. Rama Shankar Awasthi

R/o 301, Surbhi Delux Apartments
6/7 Dalibagh, Lucknow-226001

...Respondents

Counsel on record for the Appellant(s) : Sajan Poovayya Ld. Sr. Adv.

Shri Venkatesh
Shryeshth Ramesh Sharma
Suhael Buttan
Priya Dhankar
Himangi Kapoor
Anant Singh
Vineet Kumar
Aditya Tiwari
Nehal Jain
Nikunj Bhatnagar
Kunal Veer Chopra
Vedant Choudhary
Ashutosh Kumar Srivastava
Bharath Gangadharan
Abhishek Nangia
Siddharth Nigotia
Nihal Bhardwaj
Shivam Kumar
Kartikay Trivedi
Mohit Gupta
Manu Tiwari
Aashwyn Singh
Punyam Bhutani
Harsh Vardhan
for App. 1

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for Res. 1

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Hemant Sahai
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Shryeshth Ramesh Sharma
Molshree Bhatnagar
Amrita Narayan
Himangini Mehta
Nived Veerapaneni
for Res. 2

Ranjitha Ramachandran
Poorva Saigal
Anushree Bardhan
Shubham Arya
Arvind Kumar Dubey
for Res. 3

APPEAL No. 22 of 2018

Uttar Pradesh Power Corporation Ltd.

Through its Chairman
7th Floor, Shakti Bhawan 14,
Ashok Marg, Lucknow- 226001
Email: ceppaa2019@gmail.com

...Appellant

Versus

1. Uttar Pradesh Electricity Regulatory Commission

Through its Secretary
II Floor, Kisan Mandi Bhawan,
Gomti Nagar, Vibhuti Khand,
Lucknow -226010
Email: secretary@uperc.org

2. Rosa Power Supply Company Limited

Through its Managing Director
Having its registered office at
Administrative Block, Hardoi Road,
PO Rosar Kothi, Tehsil Sadar,
Distt. Shahjahanpur -2422401

Alternate Address:

Rosa Power Supply Company Limited
Through its Managing Director
520, F Block, Kasmanda House,
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3. Rama Shanker Awasthi

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...Respondents

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Nihal Bhardwaj
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Punyam Bhutani
Harsh Vardhan
Anant Singh
for Res. 2

Ranjitha Ramachandran
Poorva Saigal
Anushree Bardhan
Shubham Arya
Arvind Kumar Dubey
for Res. 3

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. Both these appeals arise out of the common order dated 22nd August, 2017 passed by Uttar Pradesh Electricity Regulatory Commission (hereinafter referred to as “the Commission”) thereby disposing of the following three petitions filed by Rosa Power Supply Company Limited :-

- (a) Petition No. 967 of 2014 for truing up of tariff for 600 MW, Rosa Thermal Power Plant Stage I for the period Financial Year 2009-10 to 2013-14;
- (b) Petition No. 968 of 2014 for fixation of tariff for 2x300 MW, Rosa Thermal Power Plants Stage II for the period Financial Year 2011-12 to 2013; and
- (c) Petition No. 1016 of 2014 for fixations of tariff for 4x300 MW Rosa Thermal Power Plant Stage I and State II for the 2nd control period (Financial Year 2014-15 to 2018-19) read with Petition No. 1068 of 2015 for removal of “Hardship” as per 2014 Regulations issued by the Commission.

2. For the sake of convenience and in order to avoid any confusion, the parties to these appeals would be herein after referred to by their respective names.

3. We may also noted that Respondent No. 3 in both the appeals namely Shri R.S. Awasthi is a consumer representative who has participated in the proceedings of the petitions before the Commission also.

Factual Matrix

4. M/s Rosa Power Supply Company (Appellant in Appeal No. 357 of 2017 and hereinafter referred to as “Rosa Power”) is a wholly owned subsidiary of Reliance Power Limited and is a generating company with a meaning of the term in Section 2(28) of the Electricity Act, 2003..

5. These two appeals concern the Rosa Thermal Power Plant situated in District Shahjahanpur, Uttar Pradesh comprising of (2x300 MW) Stage I and (2x300 MW) stage II units. The project was originally envisaged with a capacity of 567 MW by the Government of Uttar Pradesh in 1993 and Indo Gulf Fertilizers and Chemical Ltd. (Aditya Birla Group) was allotted the project. Thereafter, Indo Gulf Fertilizers and Chemical Ltd. created a special purpose vehicle namely Rosa Power Supply Company Ltd. and started the initial project development activities. The Power Purchase Agreement (PPA) dated 24th September, 1998 was executed between Rosa Power and Uttar Pradesh Electricity Board. The PPA was subsequently amended by the 1st supplementary agreement dated 24th September, 1999.

6. The Commission issued UPERC (terms and conditions for determination of generation tariff) Regulations, 2004 (hereinafter referred to as 2004 “Tariff Regulations”) on 7th June, 2005.

7. Later on, the capacity of the project was increased from 567 MW to 600 MW which was approved by the Commission vide order dated 2nd February, 2006. Meanwhile, Rosa Power was taken over by Reliance Group from Aditya Birla Group on 1st November, 2006 and the same was duly approved by the Commission vide order dated 8th November, 2006. Accordingly, an amended and re-instated power purchase agreement was signed between Rosa Power and Uttar Pradesh Power Corporation Limited (Appellant in Appeal No. 22 of 2018 and hereinafter referred to as “UPPCL”) on 12th November, 2006 for 600 MW. The amended PPA was approved by the Commission vide order dated 1st November, 2006.

8. Thereafter, reliance proposed to expand the capacity of the project from 600 MW to 1200 MW and accordingly Petition No. 610 of 2009 was filed by Rosa Power before the Commission for approval of Supplementary Power Purchase Agreement (SPPA) for sale of 300 MW of power to UPPCL and approval for project cost for 600 MW (2x300 MW) of Stage II. The petition was approved by the Commission vide order dated 15th June, 2009 holding therein that the terms and conditions of tariff approved for Stage I shall also

be applicable to Stage II of the project. Subsequently, SPPA was amended to include plants of 300 MW of power also from extension project by way of amendment dated 19th May, 2011 which was also approved by the Commission vide order dated 22nd December, 2011.

9. Meanwhile, the Commission had issued UPERC (terms and conditions of generation tariff) Regulations, 2009 (in short 2009 Tariff Regulations.) The Regulations provided that these are in addition to and not in derogation to the PPA signed between the parties and the parties may approach the Commission for remedy in case no such remedy is provided under the PPA.

10. Rosa Power filed petition No. 660 of 2010 seeking extension of provisional tariff for 300 MW Stage I of the project. It was disposed of vide order dated 17th May, 2019 thereby approve the provisional tariff for Unit I of Stage I which was applicable for the period in between Commercial Operation Date (COD) of Unit I and Unit II. Vide subsequent order dated 28th March, 2011 passed by the Commission in Petition No. 706 of 2010 filed by Rosa Power, the Commission approved final tariff for the Stage I of the project for period from Financial Year 2009-10 to 2013-14 subject to prudence check of capital cost at the time for fling of tariff petition for next tariff period.

11. Vide order dated 21st May, 2012 passed in Petition No. 787 of 2012 filed by Rosa Power for determination of provisional tariff for Stage II of the project, the Commission provisionally approved the fixed charges for Stage II as Rs.1.63 per kWh and Rs.1.65 per kWh for Financial Years 2011-12 & 2012-13 respectively.

12. The Commission notified 1st amendment to 2009 Tariff Regulations on 20th March, 2012 in order to incorporate the true-up of tariff provision inter-alia along with other amendments.

13. Vide order dated 25th June, 2012 passed in Petition No. 786 of 2012, the Commission approved additional capital cost of Rs.550.20 crores for the project. Thereafter, the Commission appointed a Statutory Expert Committee vide letters dated 1st November, 2013, 25th November, 2013 and 2nd January, 2014 for evaluation of capital cost of the Rosa Thermal Power Project.

14. On 16th December, 2014, the Commission notified UPERC (terms and conditions of tariff) Regulations 2014 (hereinafter referred to as “2014 Tariff Regulations”).

15. Subsequently, Rosa Power filed petition Nos. 967 of 2014, 968 of 2014 and 1016 of 2014 which have been disposed off by the Commission vide impugned order dated 22nd August, 2017.

16. The said impugned order has been challenged by Rosa Power in Appeal No. 357 of 2017. Initially, in the memo of appeal nine grounds of challenge to the impugned order have been raised. However, during the course of arguments, only following three grounds have been agitated;

- (a) Disallowance of claim towards re-instatement of Interest on Working Capital (IoWC) passed on actual landed coal cost;
- (b) Non-consideration of Un-Disputed Liability (UDL), well-approved capital cost;
- (c) Incorrect computation of Secondary Fuel Oil Consumption (SFOC) for Stage II of the project.

17. In Appeal No. 22 of 2018, the UPPCL has assailed the said order dated 22nd August, 2017 of the Commission on following grounds/aspects :-

- (i) Failure to prescribe Secondary Fuel Oil Consumption for Financial Years 2009-10 to 2013-14 for Stage I in accordance with the operation norms prescribed under 2009 Tariff Regulations.
- (ii) Failure to conduct prudence check on the contract award procedure for Engineering Procurement and construction (EPC) contracts; Outside Battery Limits (OSBL) and additional capital works;
- (iii) Allowance of Interest During Construction (IDC) without any scrutiny /prudence check of the actual expenditure.

- (iv) Allowance of overhead expenditure solely on the basis of Expert Committee Report dated 8th June, 2014 without conducting independent prudence check and;
- (v) Erroneous calculation of Undischarged Liabilities (“UDL”).

18. We have heard Mr. Sanjay Sen, Learned Senior Counsel appearing on behalf of Rosa Power, Mr. B.P. Patil, Learned Senior Counsel appearing on behalf of UPPCL, Mr. C.K. Rai, Learned Counsel for the Commission and Mr. Ranjitha Ramachandran, Learned Counsel for Mr. R.S. Awasthi – Respondent No. 3 in both the appeals. We have also perused the impugned order and written submissions filed by the Learned Counsels.

19. We now proceed to analyze and discuss the rival contentions and submissions of the parties issue-wise.

Issue (a) : Disallowance of claim towards re-instatement of Interest on Working Capital (IoWC) passed on actual landed coal cost;

20. Rosa Power is aggrieved by refusal of the Commission of its claim on true-up of Interest on Working Capital (IoWC) for stage I of the project.

21. The contention of Rosa Power is that in the final tariff order dated 28th March, 2011 passed by the Commission in Petition No. 76 of 2010, IoWC was computed based on certain data available at that relevant point of time with the addition of an annual escalation @5% year on year in price of coal

and secondary fuel oil consumption while keeping the other parameters constant. It is submitted that in view of the same the hypothetical assumptions on the basis of which the said final tariff order for stage I of the project was issued, required to be trued-up during the final tariff determination. It is further submitted that the Commission overlooked the revision in working capital requirement due to increase in price of coal procured from alternative sources while undertaking truing up exercise. Basically the contention of the Rosa Power is that it imported coal and also procured coal from spot market due to shortage of linking coal which was approved by the Commission in its final tariff order but while truing up, the Commission has deviated from its approach by not considering the procurement of coal and consequently impact on IoWC. Thus, according to the Rosa Power, the disallowance of its claim towards reinstatement of IoWC based on actual coal cost is erroneous and cannot be sustained.

22. We may note here that the Commission in the impugned order, has disallowed the claim of Rosa Power for truing-up of IoWC on the ground that neither the PPA nor 2009 Regulations provided for truing-up of IoWC.

23. The impugned order on the issue is entirely supported on behalf of the Respondents stating that the Commission has followed the mandate of 2009 Tariff Regulations in determining the tariff for Stage I of the power project. It

is argued that the Commission had no power to carry out with the true-up of IoWC as the same is not provided under the relevant Tariff Regulations.

24. On behalf of the Rosa Power, it has also been argued that absence of specific provision for truing up of IoWC is not a bar for the Commission to exercise power to “Regulation” vested in it under Section 86(1)(b) of the Act. It is argued that true-up exercise is carried out to validate the gaps between the provisional values and the actual cost on audited accounts and, therefore, truing-up of IoWC also forms an integral part of the process. Referring to the judgement of the Hon’ble Supreme Court in U.P. Co-operative Cane Unions Federation v. West U.P. Sugar Mills Association, (2004) 5 SCC 430 and PTC India Limited Vs. CERC 2010 4 SCC 603, it is argued that the existence of the Regulation is not pre-condition for Regulatory Commission to take any measures which it is statutorily empowered to undertake.

Our Analysis

25. The applicable Regulations for the determination of tariff for stage I of Thermal Power plant of Rosa Power and for true-up of tariff are 2009 Tariff Regulations issued by the Commission. These Regulations provide for determination of two part tariff i.e. Fixed Charges and Variable Charges. Regulation 21 of the Regulations provides for the methodology for

Computation of Capacity (Fixed) charge. IoWC is a component of fixed charges. The methodology of computation of IoWC is specified in Regulation 21(1)(v)(a) of these 2014 Regulations which is extracted herein below :-

“21. Computation of Capacity (Fixed) Charge:

21 (1) (v) Interest on Working Capital

a) Working capital shall cover:

Coal Based/fired generating stations

i. Cost of coal for 1^{1/2} months for pit-head generating stations and 2 months for non-pit-head generating stations, corresponding to the target availability:

ii. Cost of secondary fuel oil for two months corresponding to the target availability;

iii. Operation and Maintenance expenses for one month;

iv. From 2009-2010, Maintenance spares @ 20% of operation and maintenance expenses; and

v. Receivables equivalent to two months or actual, whichever is lower, comprising of fixed and variable charges for sale of electricity calculated on the target availability.”

26. Regulation 21(1)(v)(b) of the Regulations provide for the rate of IoWC which shall be allowed to the generating company and the same is reproduced herein below :-

“21. Computation of Capacity (Fixed) Charge:

*21 (1)(v)(b) **Rate of Interest on working capital shall be on normative basis and shall be equal to the short-term Prime Lending Rate of State***

Bank of India as on 01.04.2009 or on 1st April of the year in which the generation station or a unit thereof is declared under commercial operation, whichever is later. Interest on working capital shall be payable on normative basis notwithstanding that the generating company has not taken working capital loan from any outside agency. (underline supplied)”

27. It needs to note that 2009 Tariff Regulations originally did not contain any provision with respect to the truing-up of Generation Tariff. It is by way of amendment carried out in the year 2012 that a new Regulation 5(5) was introduced which permitted true up of generation tariff in the following words:-

"5(5) Truing up of Capital Expenditure and Tariff:

(i) The Commission shall carry out truing up exercise along with the tariff petition filed for the next tariff period, with respect to the capital expenditure including additional capital expenditure incurred upto 31-3-2014, as admitted by the commission after prudence check at the time of truing up: Provided that the generating company may in its discretion make an application before the Commission one more time prior to 2013-14 for revision of tariff.

(ii) The generating company shall make an application, as per Appendix I to these regulations, for carrying out truing up exercise in respect of the generation station or any of its units thereof by 31-10-2014.

(iii) The generating company shall submit for the purpose of truing up, details of capital expenditure and additional capital expenditure incurred for the period from 1-4-2009 to 31-03-2014, duly audited and certified by the auditors.

(iv) Where after the truing up the tariff recovered exceeds the tariff approved by the Commission under these regulations the generating company shall refund to the beneficiaries, the excess amount so recovered along with simple interest at the rate equal to short-term Lending Rate Bank of India prevailing as on 1st April of the respective year.

(v) Where after the truing up the tariff recovered is less than the tariff approved by the Commission under these regulations the generating company shall recover from the beneficiaries, the under-recovered amount along with simple interest at the rate equal to short-term Lending Rate Bank of India prevailing as on 1st April of the respective year.

(vi) The amount under-recovered or over-recovered, along with simple interest at the rate equal to the short-term Prime Lending Rate of State Bank of India prevailing as on 1st April of the respective year, shall be recovered or refunded by the generating company, in six equal monthly instalments starting within three months from the date of the tariff issued by the Commission after the truing up exercise.”

28. Perusal of the amended 2009 Tariff Regulations would reveal that these provide for true-up of generation tariff only with respect to the capital expenditure including the additional expenditure capital incurred upto 31st March, 2014 after prudence check.

29. Now, we turn to the order dated 28th March, 2011 passed by the Commission which was final tariff order for Phase I of the power project and which the Commission has observed as under :-

"5. TARIFF DESIGN

Tariff in respect of the RPSCL Phase-I (Unit-1 & 2) has to be determined under UPERC (Terms and Conditions of Generation Tariff) Regulations, 2009, agreed PPA and Commission's observations. RPSCL has applied for fixation of tariff in respect of completed units as per Appendix - 1 as prescribed in UPERC (Terms and Conditions of Generation Tariff) Regulations, 2009. The provisional tariff on completion of Unit-1 was approved by the Commission vide order dated 17.5.2010 with the direction. that after determination of tariff by the Commission, any over or under recovery of charges on account of provisional tariff shall be subject to retrospective adjustment along with simple interest calculated at rate equal to short term Prime Lending Rate of State Bank of India prevailing as on 1st April of the relevant year.

Tariff for sale of electricity from Rosa thermal power generating station shall comprise of three parts, namely,

(i) The annual capacity (fixed) charges consisting of:

...

(e) Interest on working capital; and

...

6.3 Fixed Charges as determined by the Commission

The Fixed Charges calculated as per the provisions of the PPA agreed between the parties and approved by the Commission are as below:

Total Fixed Charges						
S. No.	Particular	2009 -10	2010-11	2011-12	2012-13	2013-14
1.	Return on Equity @ 15.5%	3.78	12.61	142.49	144.75	144.75
	Incentive for timely commissioning of Plant @ 0.5%	0.12	3.89	4.60	4.67	4.67
	Total Return on Equity including Incentive	3.90	124.50	147.09	149.41	149.41
2.	Depreciation	2.90	92.51	109.25	110.98	110.98
3.	A A D	0.00	0.00	60.81	71.25	71.25

4.	Interest on Debts	5.48	171.64	190.37	176.59	158.93
5.	Interest on Working Capital	1.16	39.52	48.58	50.54	52.21
6.	O&M Expenses (Normative)	2.63	88.86	107.28	113.46	119.94
	Total:	16.07	517.04	663.37	672.23	662.73

(Figure in Rs. Crore)

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7. OTHER PROVISIONS

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(b) The Commission shall carry out true up exercise with respect to the capital expenditure incurred up to 31.03.2014 for Unit I and Unit II along with the tariff petition by the Petitioner seeking the approval of tariff for the next multi-year tariff period and as admitted by the Commission after prudence check. RPSCL shall make an application as per Appendix- I of UPERC (Terms and Conditions of Generation Tariff) Regulations, 2009 for carrying out true up exercise. RPSCL shall submit details of duly audited and certified Capital Expenditure and Additional Capital Expenditure incurred for the period from 12.03.2010 to 31.03.2014 for the purpose of true up of the tariff approved by the Commission in this Order."

30. Perusal of the said entire final tariff order dated 28th March, 2011 issued by the Commission, which is not reproduced here for the sake of brevity, would clearly reveals that the order was passed on the basis of certain indicating parameters only namely:-

- (a) Indicative Variable Cost for calculation of IoWC
- (b) Total Indicative Receivables for IoWC
- (c) Indicative Fuel cost for calculation of Indicative Variable Cost
- (d) Shortage of indigenous coal and requirement to procure from alternate sources

31. It may not be disputed that increase in price of coal procured from alternative sources due to shortage of indigenous linkage coal would certainly increase the working capital requirement accordingly. Therefore, the claim of Rosa Power for true-up of IoWC does appear to be bona-fide and genuine. However, the moot issue which arises for adjudication is whether the Commission ought to have gone for true-up of IoWC in the absence of any specific provision in this regard in 2009 Tariff Regulations.

32. Determination of tariff under Section 62 of the Electricity Act, 2003 is one of the functions of the State Electricity Commissions envisages under 86(1) of the Act. At the same time Section 86(1)(b) of the Act empowers the State Electricity Commission to regulate the purchase and procurement process of electricity by the Distribution Licensee and the price of which electricity shall be procured from the generating companies or the licensees from other sources. Therefore, apart from tariff determination, Regulation of purchase price of the electricity i.e tariff is also one of the important and basic functions of State Electricity Commissions. Under Section 86 of the Electricity Act, the State Electricity Commissions enjoy the functions of determination of tariff, Regulation of tariff, adjudication as well as advisory role. Section 181 empowers the State Electricity Commissions to enact Regulations by issuing notifications thereby enjoying the power of legislation

under the concept of “Delegated Legislation.” Evidently, the functions empowers of the State Electricity Commissions under Section 181 are legislative in nature whereas those under Section 86 are administrative or adjudicatory in nature.

33. In a recent case titled as Power Grid Corporation of India Limited Vs. Madhya Pradesh Power Transmission Company Limited & Ors. Civil Appeal No. 6848 of 2025 decided on 15th May, 2025 the Hon’ble Supreme Court had the occasion to deal with the Regulatory powers of Central Commission under Section 79 of the Electricity Act, 2003 in the absence of specific Regulation on a particular aspect. In that case, the Central Electricity Regulatory Commission had imposed liability of payment of compensation for delay in completion of the transmission assets on the Respondent MPPTCCL in the absence of the specific provision in this regard in 2014 Tariff Regulations applicable thereto. It has been held by the Apex Court as under :-

*“42. In **Energy Watchdog v. CERC**, reported in (2017) 14 SCC 80, this Court has further held that Section 79(1) is the repository of the regulatory powers of the CERC and such powers must be exercised in consonance with the guidelines or regulations under Section 178. However, if there are no such guidelines or regulations in place, it cannot be said that the hands of the CERC are tied when it encounters a regulatory lacuna. The relevant*

portion of the judgment reads thus:

“20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to “regulate” tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways -either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its

regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."

(Emphasis supplied)

43. In the case on hand, the CERC vide its orders dated 21.01.2020 and 27.01.2020 respectively imposed the liability of payment of compensation for delay onto the respondent no. 1. It is the case of the respondent no. 1 that by doing so, the CERC did not act in conformity with the 2014 Tariff Regulations which do not provide for payment of transmission charges by a party to whom the delay is attributable. In our considered view, the said argument does not hold any water. This Court's dictum in **PTC** (supra) and **Energy Watchdog** (supra) respectively settles the law in this regard and the absence of a regulation under Section 178 does not preclude the CERC from exercising its powers under Section 79(1) to make specific regulations or pass orders between the parties before it."

34. Arguments were advanced before the Hon'ble Supreme Court in the said case that the Central Commission did not possess any regulatory or legislative power while adjudicating a petition and its functions at that time were purely as that of quasi judicial body, which were repelled by the Apex Court in the following words :-

“46. It is the submission of the respondent no. 1 that the CERC does not possess any regulatory or legislative power while adjudicating a petition and it functions as a purely quasi-judicial body, therefore, it does not have the jurisdiction to impose a charge on the respondent no. 1. In our considered view, the said argument must fail for the reason that Section 79 of the Act, 2003 envisages dual function of regulation and adjudication to be performed by the CERC. The expressions “to regulate”, “to determine” and “to adjudicate” are used for different purposes in the list of matters enumerated under Section 79(1) and cannot be incorporated within the umbrella term of “adjudication”.

*47. The exposition of law in **PTC** (supra) clarifies the scheme of regulatory powers and functions under the Act, 2003. It was held therein that Section 178 that deals with making of regulations by way of subordinate legislation by the CERC, is wider than Section 79(1) which enumerates specified areas where the CERC exercises regulatory functions to be discharged by orders or decisions. Therefore, unlike the regulations enacted under Section 178 that have a general application, the CERC, under Section 79, has both regulatory and adjudicatory functions which it exercises in respect of specific issues arising between specific parties. The relevant portion of the judgment reads thus:*

“92. (i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of

regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions).”

48. The regulatory powers provided to the CERC under Section 79 are of ad hoc nature and are required to be exercised by the CERC in context of the specific circumstances of the parties before it. The rationale for provision of such ad hoc powers by the Act, 2003 is to ensure that regulatory gaps, if any, that may be discovered on a case-to-case basis, are filled or removed. Therefore, there is no doubt in our mind that the CERC is enabled to exercise its regulatory powers by way of orders under Section 79 and the purview of Section 79 is not limited to only adjudicatory orders but includes within its scope administrative functions as well.”

35. The Hon'ble Supreme Court also held that there is no blanket ban on the Central Commission to exercise its regulatory functions by way of orders under Section 79(1) of the Electricity Act, the relevant portion of the judgement is extracted herein below :-

57. The respondent no. 1 has averred that the CERC cannot conflate its powers of regulation with its adjudicatory functions and a regulation cannot be brought into force by way of a judicial order. In the specific case of **Nuclear Power Corporation** (supra), we are inclined to agree with the submission of the respondent no. 1 to the extent that a regulation cannot be

*done through the process of adjudication. However, could it be said that there is a blanket ban on the CERC to exercise its regulatory functions by way of orders under Section 79(1)? In light of this Court's dictum in **AERA** (supra), our answer to this question must be an emphatic 'No'.*

*58. We are of the view that even though the orders under Section 79 may not always be limpid as regards the matters where CERC is exercising its regulatory functions yet this cannot be the reason to conclude that the CERC passes all orders in its capacity as an adjudicator. The nomenclature "judicial order(s)" as used in **Nuclear Power Corporation** (supra) does not change the nature of a specific order that the CERC gives in its capacity as a regulator and the courts must understand the true import of an order to determine the nature thereof.*

*59. The CERC granted liberty to the appellant herein to claim compensation from the respondent no. 1 to deal with a situation caused due to an unprecedented event not covered by any guidelines, regulations or contractual provisions between the parties. The dictum of this Court in paragraph 20 of **Energy Watchdog** (supra), indicates that in such a situation where there is an absence of regulations and guidelines, the Act, 2003 mandates the CERC to strike a judicious balance between the parties keeping in mind commercial principles and consumers' interest, in exercise of its general regulatory powers under Section 79(1).*

60. The aforesaid leaves no manner of doubt in our mind that though the CERC's orders dated 21.01.2020 and 27.01.2020 respectively were for determination of tariff, yet the order granting liberty to the aggrieved appellant to claim compensation from the defaulting party is a consequence of a regulatory lacuna in the 2014 Tariff Regulations and therefore, is an instance of regulation of tariff between the parties."

36. We are conscious that the Hon'ble Supreme Court in the above noted case was dealing with the powers and functions of the Central Commission under Section 79 of the Electricity Act, 2003. However, the observations of the Court in that case are squarely applicable to the powers and functions of the State Electricity Commissions under Section 86 of the Act for the reason that both the legal provisions are pari-materia in so far as the power to regulate the price of electricity i.e. tariff is concerned. Section 79(1) (a) & (b) empowers the Central Commission to regulate tariff of generating companies whereas Section 86(1)(b) empowers the State Electricity Commissions to regulate purchase price of the electricity. Both these legal provisions empower the Central Commission as well as Electricity Commissions respectively to discharge, apart from adjudicatory functions, regulatory as well as advisory functions also.

37. Therefore, considering the dictum of the Hon'ble Supreme Court in the above noted judgement in Power Grid case, it is manifest that there is no bar upon the State Electricity Commissions also in exercising the regulatory functions by way of orders passed under Section 86 of the Act while adjudicating the tariff petition.

38. In the instance case, undisputedly 2009 Tariff Regulations do not provide for true up of IoWC. At the same time, it is also evident that on account of shortage of domestic linkage coal, Rosa Power was constrained to procure coal from alternative sources at increased price due to which the working capital requirement also increased. It is also noted that in the final tariff order dated 28th March, 2011, the IoWC was computed on the basis of certain indicative parameters only which were available at that time. Therefore, all these subsequent developments did necessitate carrying out of true-up of IoWC also which was refused by the Commission merely on the technical ground that 2009 Tariff Regulations do not provide so. It is one thing to say that in the facts and circumstances of a case, true up of IoWC is not needed but it is another thing to say that true up of IoWC, even if warranted, cannot be done as the Regulations do not provide for the same. It is manifest from the above noted judgement of the Apex Court that absence of specific provision for truing-up of IoWC is no bar for the

Commission to exercise the power to “Regulate” vested in it under Section 86(1)(b) of the Act on the ground that the basic purpose of true-up exercise is to validate the gaps between the provisional unaudited values actuals based on audited accounts so that a generating station is capable of recovering the cost of electricity in reasonable manner as provided under Section 61 (d) of the Act.

39. We may also note that the Commission has realized the lacuna in this regard in 2009 Tariff Regulations while notifying the subsequent 2014 Tariff Regulations in which the norms for computation of IoWC have been prescribed as under :-

(v) Interest on Working Capital

(a) Working capital shall be allowed on a normative basis and for coal based generating stations shall include:

- (i) Cost of coal for 15 days for pit-head generating stations and 30 days for non-pit-head generating stations, corresponding to the target availability;*
- (ii) Cost of coal for 30 days for generation corresponding to the target availability*
- (iii) Cost of secondary fuel oil for two months corresponding to the target availability and in case of use of more than one secondary fuel oil, cost of fuel oil stock for the main secondary fuel oil;*
- (iv) Operation and Maintenance expenses for one month;*
- (v) Maintenance spares @ 20% of operation and maintenance expenses; and*
- (vi) Receivables equivalent to two months of capacity charges and energy charges for sale of electricity calculated on the target availability.*

(b) The cost of fuel in cases covered under sub-clauses (i) and (ii) of clause (a) of this regulation shall be based on the landed cost incurred (taking into account normative transit and handling losses) by the generating company and gross calorific value of the fuel (on 'as received basis' as defined by the Central Electricity Regulatory Commission) for the three months preceding the first month of the period for which tariff is to be determined and no fuel price escalation shall be provided during the tariff period."

40. It is significant to note that Regulation 25(v)(b) was not present in the 2009 Tariff Regulations and for this reason only, indicative variables were considered by the Commission during Tariff Determination under these Regulations and, therefore, those indicative figures required to be true-up or re-instated in the light of actual cost of coal in subsequent true-up proceedings.

41. Hence, we are unable to sustain the impugned findings of the Commission on this issue. The same are set aside. The issue is remanded back to the Commission with the directions to conduct true-up of IoWC also on the basis of the material furnished by the Rosa Power.

42. Issue stands disposed off in favour of the Rosa Power.

Issue (b) of Appeal No. 357 of 2017; Non-consideration of Un-Discharged Liability (UDL), well-approved capital cost;

Issue (v) of Appeal No. 22 of 2018; Erroneous calculation of Un-Discharged Liabilities.

43. Both these issues related to treatment given by the Commission to un-discharged liability claimed by the Rosa Power and are, therefore, taken together for disposal.

44. In order to fully appreciate the contention of the parties on these issues we find it pertinent to extract the relevant findings of this Commission of this issue contained in the impugned order :-

“Un-discharged Liabilities

3.2.12 UPPCL submitted that as per the Tariff Regulations, the un-discharged liabilities are to be excluded from the capital cost being considered for the purposes of tariff, which are as follows:

Particulars	2009-10	2010-11	2011-12	2012-13		2014-15
Creditors for capital Expenditure	228.82	179.96	81.53	77.98		166.11
Retention Money for Capital Expenditure	185.90	210.60	252.19	112.63		147.61
Total	414.72	390.56	333.56	190.61		313.72

3.2.13 In reply RPSCCL submitted that UPPCL has wrongly relied upon the definition of capital cost provided in Tariff Regulations applicable for FY 2014-19, which is not applicable in this matter since, the capital cost was approved in control period 2004-09 and project was commissioned in control period in 2009-14. Also the Commission while approving the SPPA vide order dated 15.06.2009, clarified that the Regulations 2009-14 will only be applicable, when any remedy is not available under the PPA.

3.2.14 Further RPSCCL submitted that as per standard practice and accounting principles also expenditure incurred includes payment deferred or retained on

account of any reason including retention amount as per contract terms or security deposit linked to performance guarantee, which has also been upheld by Hon'ble APTEL in its various judgments. Hence the entire amount capitalized should be considered for tariff determination.

3.2.15 In reply, UPPCL submitted that the UPERC (Terms and Conditions of Generation Tariff) Regulations 2009 and amendments thereafter are squarely applicable in the instant case as the Supplementary PPA dated 11.09.2009 was approved by the Commission vide Order dated June 15, 2009. Further UPPCL submitted that CERC amended the tariff Regulations after the Hon'ble APTEL judgments in the appeal cited as cited by RPSCL. UPPCL also submitted that the RPSCL's contention that the unpaid liabilities were converted into security deposit is tenable as it is not depicted in audited accounts.

3.2.16 UPPCL has also submitted that they are not denying the admissibility of un-discharged liability and can be considered under incurred capital cost but it cannot be considered for tariff determination and true-up.

3.2.17 Further the Commission to ascertain Un-discharged liability sought data on Undischarged Liability and the discharge of Un-discharge Liability year wise vide its letter dated June 21, 2017. RPSCL submitted the sought information on June 26, 2017 as under:

Stage-I	2010-11	2011-12	2012-13	2013-14
Opening Liability	452.98	390.56	46.86	15.21
Addition	0.00	0.00	0.00	0.00
Discharge	62.41	343.70	31.65	15.21
Closing Liability	390.56	46.86	15.21	0.00

Stage-II	2012-13	2013-14	2014-15
Opening Liability	286.86	175.40	221.45
Addition	0.00	46.05	0.00
Discharge	111.45	0.00	82.37
Closing Liability	175.40	221.45	139.08
Capital Advances	41.02	26.68	9.27
Net Capital Liabilities	134.39	194.78	129.82

Commission's View

3.2.18 The Commission observes that as per the provision provided in Uttar Pradesh

Electricity Regulatory Commission (Terms and Conditions of Generation Tariff) Regulations, 2009, Un-discharged Liability is to be deducted from capital cost, which is shown as follows:

“(xv) ‘Expenditure incurred’ means **the fund, whether the equity or debt or both, actually deployed and paid in cash or cash equivalent, for creation or acquisition of a useful asset and does not include commitments or liabilities for which no payment has been released;**” (Emphasis added)

“17.Capital Cost:

Subject to prudence check by the Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of final tariff. **The final tariff shall be determined based on the admitted capital expenditure actually incurred up to the date of commercial operation of the generating station** and shall include capitalised initial spares subject to following ceiling norms as a percentage of the original project cost as on the cut off date:

....” (Emphasis added)

3.2.19 Also similar provision is provided in UPERC (Terms and Conditions of Generation Tariff) Regulations, 2014. Hence considering the applicability of provision of Regulations or PPA as discussed in Section 3.1, the Commission is of the view that Regulations shall be applicable and as per the Clause 14 (XV) read with clause 17 of the Regulations, Capital cost has been approved after deduction of net Undischarged Liability and considering discharge. The Capital cost till FY 2013-14 has been allowed after deducting undischarged liability as on COD and year wise discharge of liability till FY 2013-14 as under:

Stage-I	2010-11	2011-12	2012-13	2013-14
Opening Liability	452.98	390.56	46.86	15.21
Addition	0.00	0.00	0.00	0.00
Discharge	62.41	343.70	31.65	15.21
Closing Liability	390.56	46.86	15.21	0.00

Stage-II	2012-13	2013-14
Opening Liability	286.86	175.40
Addition	0.00	46.05
Discharge	111.45	0.00
Closing Liability	175.40	221.45
Capital Advances	41.02	26.68
Net Capital Liabilities	134.39	194.78

However, discharge of liability for the period FY 2014-15 to FY 2018-19 shall be

considered while truing up of tariff for FY 2014-15 to FY 2018-19.

45. Perusal of the impugned order shows that the Commission had deducted un-discharged liability of Rosa Power from the capital cost from Financial Year 2010-11 to Financial Year 2013-14 in the amounts of Rs.452.98 crores, Rs.390.56 crores, Rs.46.86 crores and Rs.15.21 crores respectively.

46. Rosa Power is aggrieved by approval of capital cost of the power project for these Financial Years after deduction of un-discharged liability which according to it, is contrary to Regulation 17 of 2009 Tariff Regulations as well as 2014 Tariff Regulations and also to the judgements of this Tribunal in Appeal No. 46 of 2009 NTPC Limited Vs. CERC & Ors. decided on 31st March, 2010 and Appeal No. 133 of 2008 NTPC Limited Vs. CERC and Ors. decided on 16th March, 2009.

47. UPPCL is aggrieved by erroneous calculation of un-discharged liability of Rosa Power while approving the capital cost of the power project for the above noted Financial Years. The contention of the UPPCL is that the un-discharged liability should have been computed on the basis of the year-wise figures given by it which were derived from CA certificates submitted by Rosa Power but the Commission has allowed altogether different figures without giving any reason for ignoring the figures produced by it.

48. It appears that relying upon the definition of “Capital Cost” and “Expenditure Incurred” as provided under Regulation 17 of 2009 Tariff Regulations as well as 2014 Tariff Regulations, the Commission has taken view that undischarged liability is not part of capital cost and hence needs to be deducted while approving the capital cost.

49. Regulation 17 & 18 of 2009 Tariff Regulations are reproduced herein below:-

17. Capital Cost:

Subject to prudence check by the Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of final tariff. The final tariff shall be determined based on the admitted capital expenditure actually incurred up to the date of commercial operation of the generating station and shall include capitalised initial spares subject to following ceiling norms as a percentage of the original project cost as on the cut off date:

- | | | | |
|------|--|---|------|
| (i) | Coal-based generating stations | - | 2.5% |
| (ii) | Gas Turbine/Combined Cycle generating stations | - | 4.0% |

Provided that where the Power Purchase Agreement entered into between the generating company and the beneficiaries provides a ceiling on capital expenditure and the actual capital expenditure exceeds such ceiling, such increase/escalations shall be decided by the Commission on case to case basis on an application filed by the generating company.

Provided further that in case of the existing generating stations, the capital cost admitted by the Commission prior to the date of commencement of this regulation shall form the basis for determination of tariff.

Note

Scrutiny of the project cost estimates by the Commission shall be limited to the reasonableness of the capital cost, financing plan, interest during construction, use of efficient technology, and such other matters for determination of tariff.

18. Additional capitalisation:

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

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

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

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

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

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

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

for determination of tariff. The said items are illustrated and may include any other similar items.

50. It is true that expressions used in Regulations 17 & 18 of 2009 Tariff Regulations is "Actual Expenditure Incurred". It is on the basis of use of said expression in these Regulations that Learned Counsel for UPPCL argued that for computation of capital cost and additional capitalization respectively, only the actual expenditure incurred by a generating station i.e. the Appellant herein for setting up and constructing the power plant has to be taken into consideration. However, we note that this Tribunal had the occasion to interpret the words "Actual Expenditure Incurred" contained in Regulation 17 in Appeal No. 133 of 2008 NTPC Ltd. Vs. CERC and Ors. decided on 16th March, 2009 and it was held :-

"(b) Judgment dated 16.03.2009 in Appeals No. 133/08, 135/08, 136/08 & 148/08, 2009 SCC OnLine APTEL 37 by this Hon'ble Tribunal: "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.

b. The Central Commission cannot treat depreciation as the deemed repayment of loan, where the depreciation is higher than the normative repayment of loan. The depreciation amount, unlike advance against depreciation has to be allowed regardless of whether there is any liability to repay the loan or not. The depreciation is admissible notwithstanding any loan is taken or otherwise.

c. The 'First in First out' method cannot be adopted. However, the deployment of internal resources of NTPC which is in addition to the equity contribution should be considered as a deemed loan from the NTPC to the project. NTPC is entitled to claim deemed interest on such loans during construction.

d. The cost incurred on Renovation and Modernization and Life Extension could only be allowed to be capitalized after decapitalization of the replaced assets. Mere completion of the Residual Life Assessment Studies without the timely implementation of its recommendations does not add any benefit to the plant. Any expenditure admitted by the Commission for determination of tariff on Renovation and Modernization and Life Extension shall be serviced on normative debt equity ratio after writing off the original amount of the replacement assets from the original project cost. So, the finding given by the Central Commission that the expenditure on the completed RLA Study may only be considered along with the cost incurred on R&M works after completion of the said works is perfectly justified."

51. The interpretation and meaning given by this Tribunal to the words "Actual Expenditure Incurred" in the said appeal No. 133 of 2008 was approved by this Tribunal in the subsequent judgement dated 31st March, 2010 in Appeal No. 46 of 2009 titled NTPC Ltd. Vs. CERC and Ors. The relevant portion of the judgement is extracted herein below :-

"5. The question raised in this case, as pointed out by the Learned Counsel for the Appellant are:

- (i) Whether the Central Commission was right in excluding the committed liabilities in relation to capital assets established, commissioned and put to use to the extent of amount which has not been paid and has been retained by NTPC by way of Retention Money, Security Deposit or similar such things to ensure performance of the work undertaken by the contractors and others in accordance with the contract and is to be released in due course?*
- (ii) Whether the Central Commission is justified in not allowing the cost of Maintenance Spares in the capital cost after taking into account the additional capitalization incurred by the Appellant while computing the interest on working capital?*

....

7. The relevant portion in the judgment dated 16.03.2009 is as follows:

"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.

"19. We are, therefore, of the opinion that the entire value of the capital asset, as soon as the same is put into operation is recoverable by way of capital cost under Regulation 17 itself, notwithstanding the fact that the part of the payment for the capital asset has been retained."

.....

11. The observations made by this Tribunal, as quoted above, would squarely apply to the present facts of the case. Therefore, this claim also made by the Appellant has to be allowed in favour of the Appellant. Thus we consider that the order impugned by the Central Commission on these two issues are not valid in law and as such the same is set aside and consequently the Appellant is entitled to include both the amounts in respect of undischarged liabilities and also the cost of maintenance spares into the capital cost.

12. The Appeal is allowed. No cost."

52. From the perusal of the above judgement of this Tribunal, it is manifest that the meaning of capital expenditure needs to be seen in totality of the project cost notwithstanding the fact that a part of contract value remains unpaid and has been retained as per contractual terms to seek further performance of the plant and also on account of guarantees and warranties placed by the contractors towards guaranteed performance of the plant. The observations in this regard of this Tribunal in the above noted two judgements appear to be inconsonance with the accounting standards i.e. Ind. AS – and Ind. AS 37 which indicate that expenditure reference to the recognition of a cost for outflow of resources for goods or services received or committed to be received which may or may not result minimum cash out flow or signifies a commitment made by the concerned entity. These

observations of this Tribunal are squarely applicable to the facts of the present case also and we see no good reasoning taking any departure. Therefore, the impugned findings of the Commission on the aspect of un-discharged liabilities cannot be sustained and the same are hereby set aside.

53. Consequently, the Commission is directed to include the amounts of undischarged liability also in the capital cost computed for the Financial Years 2010-11, 2011-12, 2012-13 and 2013-14 for Stage-I and Stage-II of the power project of Rosa Power.

54. Since no deduction is to be made in respect of un-discharged liabilities for computation of capital cost for the power project of Rosa Power for above noted Financial Years, the contention of the UPPCL to the effect that the amounts of un-discharged liabilities have been computed erroneously while ignoring the figures submitted by it is relegated to the pale of insignificance and become infructuous. Therefore, no finding is required to be given on those contentions raised by UPPCL.

55. The issues under consideration stand disposed off accordingly in favour of Rosa Power.

Issue (c) in Appeal No. 357 of 2017 :- Incorrect computation of Secondary Fuel Oil Consumption (SFOC) for Stage II of the project.

Issue No. (i) in Appeal No. 22 of 2018 :- Failure on the part of the Commission to prescribe SFOC for Financial Year 2009-10 to 2013-14 for Stage I of the power plant of Rosa Power in accordance with the 2009 Tariff Regulations.

56. Both these issues raised by the parties in their respective appeals relate to computation of SFOC by the Commission in the impugned order and, therefore, are taken together for disposal.

57. The relevant portion of the impugned order on this issue is extracted herein below :-

“6.3.3 Representative calculation of Variable Charges:

Variable charge per unit of Generation – For the purpose of calculation of normative working capital

Based on the operation norms provided in the UPERC (Terms and Conditions of Generation Tariff) Regulations, 2009, the variable charge per unit of generation for Rosa Power Station for the period from FY 2011-12 to FY 2013-14 has been arrived at. The calculation shown below is representative of the variable cost calculation and has been used to arrive at some of the components of normative working capital.

Variable charge per unit of generation for Rosa Power Station

Particulars	Units	FY 2011-12	FY 2012-13	FY 2013-14
Capacity	MW	300	600	600
Availability Factor	%	85	85	85
Gross Station Heat Rate	kcal/kWh	2500	2500	2500
Auxiliary Energy Consumption	%	9	9	9
Gross Generation	MU	557	4468	4468
Ex-bus Energy Sent Out	MU	507	4066	4066
Specific Oil Consumption	ml/kWh	1	1	1

Weighted Average GCV of Oil	kcal/L	9838	9582	9495
Price of Oil	Rs./kL	51671	63566	66994
Weighted Average GCV of Coal	kcal/kg	3619	3816	3834
Price of Coal	₹/MT	3939	5080	5076
Rate of Energy Charges Ex-bus	Paise/kWh	303.49	371.30	369.69

58. It is evident that the Commission, in the impugned order, has considered the SFOC at 1 ml/ kWh for the period from the year 2012 to 2014 for Stage II of the power plant of Rosa Power.

59. Section 12.3 of the amended and reinstated PPA dated 12th November, 2006 executed between UPPCL and Rosa Power is material on the aspect under consideration and is extracted herein below:-

“Section 12.3 Variable Charge

(a) Variable Charge shall mean the cost of Primary Fuel and the cost of Secondary Fuel.

(b) The Cost of Primary Fuel (CPF) shall mean, for any Operating Month, the cost of Primary Fuel, calculated in accordance with the following formula:

$$CPF = \frac{[FC * kWh * (HR - FR * OCV)] + MTP}{GCV}$$

Where:

(i) FC is the estimated average Unit cost of the Primary Fuel fired at the Station Inducing the cost of procurement of Fuel under Coal

Supply Contract and procurement of Fuel on spot purchase / short-term contract basis from domestic / International suppliers from time to time in consultation with UPPCL and expressed in Rs. per kg. The cost in Rs. per kg. shall include all costs of the Primary Fuel whether fixed or variable Including any purchase costs, transportation charges, taxes, royalties, cost of handling and processing of the Primary Fuel. The computation of energy charges shall be arrived at after considering normative transit and handling losses as percentage of the quantity of coal dispatched by the coal supply company during the month at the rate of 0.8%. Notwithstanding anything to the contrary contained in this Agreement, the impact of the cost of 'Wagon Investment Scheme shall be included as part of the cost of Primary Fuel, if it becomes necessary for executing legally enforceable Agreements with Indian Railways and Primary Fuel Supplier respectively, and for running the Station efficiently.

(ii) KWh is the Measured Energy metered at the Interconnection Point during such Operating Month in Kilowatt hours.

(iii) HR is the station heat rate at the Interconnection Point and shall be 2747 kcal/kWh based on normative gross station heat rate of 2500 kcal/kWh and normative Auxiliary Consumption of 9.0%.

(iv) The normative Auxiliary Consumption for the purpose of tariff shall be 9.0%.

(v) FR is the normative Secondary Fuel consumption rate at the Interconnection Point and shall be 2.20 ml/kWh based on normative secondary fuel consumption 2 ml/kWh and normative Auxiliary Consumption of 9.0%.

(vi) OCV is the average gross calorific value of the Secondary Fuel fired at the Station expressed as Kcal/ml.

(vii) GCV is the average gross calorific value of the Primary Fuel fired at the Station during the Operating Months expressed as Kcal/kg.

(viii) MTP is the amount payable by ROSA by way of minimum take payments In respect of Primary Fuel and Secondary Fuel limited to the quantities required to achieve generation at Achievable Plant Load Factor (80%) in case of UPPCL Force Majeure, Political Force Majeure, UPPCL default and Despatch Instructions.

(c) Cost of Secondary Fuel” (CSF) shall mean for any Operating Month the cost of Secondary Fuel calculated in accordance with the following formula:

$$CSF = KWH * FR * FO$$

Where:

(i) KWh is the Measured Energy metered at the Interconnection Point during such Operating Month in Kilowatt hours.

(ii) FR is the normative Secondary Fuel consumption rate at the Interconnection Point and shall be 2.20 ml/kWh based on normative secondary fuel consumption 2 ml/kWh and normative Auxiliary Consumption of 9.0%.

(iii) FO is the estimated average unit cost of the Secondary Fuel fired at the Station expressed in Rs. Per ml.

60. Sub-clause (v) of the above quoted Section 12.3 of the PPA specifies the rate for normative secondary fuel consumption at 2 ml/kWh.

61. Regulation 16 of the 2009 Tariff Regulations issued by the Commission on 31st March, 2009 relates to norms of operation of the power plants. Clause (iv) of the same is material for our consideration and is quoted herein below

:-

“(iv) Secondary fuel oil consumption

Coal-based generating stations:

(a) All coal-based thermal power generating stations except those covered under sub-clauses below

During Stabilization period

Subsequent period

*(i) existing on or before 31.3.09
4.5 ml/kWh*

2.0 ml/kWh

(ii) commissioned on or after 1.4.09

2.5 ml/kWh

1.0 ml/kWh

(b)

(Figure in ml/kWh)

S. No.	Power Station	2009-10	2010-11	2011-12	2012-13	2013-14
i)	Obra-A	4.0	3.8	3.6	3.4	3.2
ii)	Obra-B	2.5	2.4	2.3	2.2	2.1
iii)	Panki TPS	2.5	2.4	2.3	2.2	2.1
iv)	Harduaganj TPS	4.5	4.3	4.1	3.9	3.7
v)	Parichha	3.0	2.9	2.8	2.7	2.6

Note-1

After Renovation and Modernization of generating unit(s) in a generating station, secondary fuel oil consumption shall be higher by 0.2 ml/kWh due to each of such unit for initial 120 days after its re-commissioning, in case of generating stations covered under sub clauses (i) and (ii) above.

62. We may also note that the Commission in its order dated 28th March, 2011 in Petition No. 706 of 2010, has approved final tariff for the Stage I of the power project of Rosa Power for the period from 2009-10 to 2013-14 subject to prudence check of capital cost at the time for filing of tariff petition for the next tariff period. Vide the said order, the Commission had approved SFOC of 2 ml/kWh and had directed the Rosa Power to approach it for revising the norms of operation in accordance with the 2009 Tariff Regulations. It is, therefore, evident that while passing the said final tariff order, the Commission had taken into consideration the parameters as

agreed between the parties in the PPA which were distinct to the parameters specified in this regard in 2009 Tariff Regulations. However, despite the same, neither UPPCL nor Rosa Power assailed the said order of the Commission and the same attained finality as both the parties acted upon the same.

63. It is also to be noted that in the order dated 15th June, 2009 passed in Petition No. 610 of 2009, the Commission had held that the terms and conditions of tariff approved for Stage I of the power project of Rosa Power shall also apply to its Stage II. This order of the Commission also attained finality as none of the parties impugned the same.

64. At this juncture, it is also relevant to note that Regulation 2(5) of 2009 Tariff Regulations provide that these Regulation are in addition and not in derogation to the terms and conditions of determination of tariff approved by the Commission in a Power Purchase Agreement signed between a generating company and Distribution Licensee/beneficiary. It is further provided that either party to the power purchase agreement may approach the Commission for specific relief, under these Regulations and amendments thereof, if such provision or remedy is not available in the Power Purchase Agreement signed between them.

65. It is in the context of the said Regulation 2(5) of 2009 Tariff Regulations and the previous orders passed by the Commission referred to herein above, that the Learned Counsel for Rosa Power submitted that when in the order dated 28th March, 2011, the Commission considered SFOC of 2ml/kWh in terms of the parameters/specifications mentioned in the PPA executed between the parties, it was not permissible for the Commission to take a departure while passing the impugned order at true-up stage and to consider SFOC at 1ml/kWh in terms of Regulation 16 of 2009 Tariff Regulations.

66. At the same time, it is argued on behalf of the UPPCL that the impugned order of the Commission on the aspect under consideration is perfectly justified as the same is in tune with the 2009 Tariff Regulations. It is further argued that in the order dated 28th March, 2011, the Commission had erroneously considered SFOC of the power project of Rosa Power at 2ml/kWh contrary to the 2009 Tariff Regulations and, therefore, SFOC should be approved is 1ml/kWh for both the Stage I and Stage II of the power project in accordance with the Tariff Regulations.

Our Analysis

67. We have already noted herein above the provisions of Regulation 2(5) of 2009 Tariff Regulations. These clearly indicate that the 2009 Tariff Regulations do not do away with the specifications/parameters agreed

between the parties and recorded in the PPA dated 12th November, 2006. It is very clearly specified that these Regulations are in addition to and not in derogation of the terms and conditions embodied in the PPA signed between the parties. It is only in case a provision or remedy is not available in the PPA executed between the parties that any of the parties was at liberty to approach the Commission to seek specific relief in that regard under the Regulations.

68. In the instant case, the formula for calculation of variable charge based on, inter alia, primary and secondary fuel, normative auxiliary consumption, normative secondary fuel consumption, normative transit and annual losses, average GCV of fuel etc. has been provided in Section 12.3 of the PPA. Therefore, it cannot be said that the PPA is lacking in any specific provision or a remedy on this aspect. It is for this reason that none of the parties had approached the Commission under Regulation 2(5) of 2009 Tariff Regulations seeking specific relief in this regard.

69. Therefore, it cannot be said that the Commission had committed any error in considering these parameters/specifications provided in Section 12.3 of the PPA in approving SFOC of 2ml/kWh in the order dated 28th March, 2011 in Petition No. 706 of 2010, thereby approving final tariff for Stage I of the power project of Rosa Power. It is further evident that for the same

reason, UPPCL chose not to assail the said order and acted upon the same. Having accepted the order dated 28th March, 2011 of the Commission in totality without any demur, UPPCL cannot be now permitted to assail the said order in these proceedings which arise out of the subsequent order of the Commission dated 27th August, 2017.

70. It is also to be noted that the proceedings before the Commission which have culminated in the impugned order dated 27th August, 2017 were for true-up of the capital cost of the project upto 31st March, 2014 and, therefore, in the true-up exercise, it was not permissible for the Commission to deviate from the norms considered in the order dated 28th March, 2011 and to proceed on the basis of altogether different norms of operation. It is no longer *res-integra* that the Commission cannot change the rules of the game after the game has begun i.e. the parameters/specifications cannot be altered and the methodology for computing capital expenditure for a power project cannot be changed at the stage of true-up.

71. The proceedings for true-up cannot be used to upset the methodology used for determination of ARR for the reason that “True-up” stage is not an opportunity to re-think de novo on the principles/ premises considered and approved at the stage of determination of ARR. On this aspect, following observations of the Hon’ble Supreme Court in BSES Rajdhani Power Limited

Vs. Delhi Electricity Regulatory Commission 2023 4 SCC 788 are apposite and are extracted herein below :-

"52. The DERC determines the tariff of the licensee under Section 62 in such a manner as determined by the 2007 MYT Regulations. This function is governed, inter alia by safeguarding all consumers' interest and at the same time recovering the cost of electricity in a reasonable manner, such that "distribution and supply of electricity are conducted on commercial principles" which encourage and reward competition, efficiency, economic use of resources, good performance and optimum investments.

...

54. *As noticed above, a tariff order is quasi-judicial in nature which becomes final and binding on the parties unless it is amended or revoked under Section 64(6) or set aside by the Appellate Authority, **Apart from this, we are also of the view that at the stage of "truing up", the DERC cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the initial projection of ARR.***

...

56. *This view has been consistently followed by Aptel in its subsequent judgments and we are in complete agreement with the above view of Aptel. **In our opinion, "truing up" stage is not an opportunity for the DERC to rethink de novo on the basic principles, premises and issues involved in the initial projections of the revenue requirement of the licensee. "Truing up" exercise cannot be done to retrospectively change the methodology/principles of tariff determination and reopening the original tariff determination order thereby setting the tariff determination process to a naught at "true-up" stage."***

[Emphasis Supplied]

16. Therefore, once it was settled that the provisions of the PPA will override the provisions of the 2009 Tariff Regulations, and the same has been followed by Ld. UPERC in its Final Tariff Order dated 28.03.2011, it cannot

change the rules of the game after the game has started and follow a separate methodology while truing-up.”

72. Therefore, the findings of the Commission on the issue under consideration are erroneous and are hereby set aside. We direct that the SFOC for the power project of Rosa Power for the period from Financial Years 2011-12 & 2013-14 shall be considered and approved as 2ml/kWh as specified in Section 12.3 of the amended and re-instated PPA dated 12th November, 2006 executed between the parties.

73. Accordingly, the issue is hereby decided in favour of the Rosa Power.

Issue (ii) :- Failure on the part of the Commission to conduct prudence check on the contract award procedure in Engineering Procurement and Construction (EPC) contracts, Out Station Battery Limit (OSBL) and Additional Capital Works.

74. This issue has been raised by UPPCL in its Appeal No. 22 of 2018.

75. Grievance of UPPCL is that before passing the impugned order, the Commission has failed to conduct prudence check over the contract award procedure for the capital cost claimed by Rosa Power under the heads (i) EPC Contracts (ii) OSBL and, (iii) Additional Capital Works.

76. It is argued on behalf of the UPPCL that the Commission has proceeded merely on the basis of report of the Expert Committee without itself

conducting a prudence check which it was bound to do in view of Regulation 17 of 2009 Tariff Regulations. It is submitted that the Commission has even ignored the comments furnished by UPPCL on the Expert Committee Report and has even not considered various objections raised by it on the procedure adopted by Rosa Power for the award of EPC contract/OSBL contract and Additional Capital Works.

77. On behalf of the Rosa Power, it is argued that the Commission has the exclusive domain of conducting the prudence check and UPPCL usurp result the same by insisting on additional information in order to perform its own audit. It is submitted that Rosa Power extended and provided un-hindered, un-restricted and complete access to all its accounting data including payment vouchers, auditor certificates, SAP Access etc. whatsoever desired by UPPCL and its appointed Committee and further all documents which were handed over to Rosa Power by the erstwhile developer of the power project in regard to selection of EPC contractor were provided to UPPCL as well as the Expert Committee. It is pointed out that UPPCL was kept informed on a continued basis in respect of the developers of the Rosa Thermal Power Plant and was also involved in the proceedings of the international competitive bidding process for selection of the EPC contractor. It is submitted that even the financial bid was opened in the presence of the

UPPCL representatives and UPPCL was always a part of the EPC contract award process which was a transparent process.

78. With regard to the contract award for all additional capital works, it is submitted that copies of all Request for Qualification (“RFQ”), Bill of Quantity (BOQ) and technical specifications as well as corresponding offers received from contractors for the respective packages were offered to UPPCL appointed Committee for scrutiny and even originals were made available to the Committee for verification. It is submitted that Expert Committee report categorically captures the transparent process followed by RPSCL for award of additional capital works, right from issuance of RFQ to award of the works.

Our Analysis and Discussion

79. We feel it apposite to extract herein the findings and discussion of the Commission on this issue as contained in the impugned order :-

“Contract Award Procedure

3.2.33. UPPCL submitted that since the original document related to contract award procedure were not provided to them for examination, they are not in a position to provide any comments on Contract Award Procedure for EPC, OSBL and additional Capital work contracts. Further UPPCL requested the commission to conduct a prudence check on the contract award procedure and ensure that the contracts have been awarded at arm’s length price. UPPCL has also submitted that they have checked the register of contracts maintained by RPSCL under Section 31 of the Companies Act, 1956 wherein they have not found any entry which relates RPSCL with UEEPL.

3.2.34. *In reply RPSCL submitted that UPPCL has no locus to undertake denovo prudence check which falls within the exclusive domain of this Commission or the Expert Committee appointed by it. Also UPPCL was updated by RPSCL on continuous basis and was involved in the selection of the EPC contractors. Further, the non-availability of original offers related to award of EPC contracts, additional capital works cannot be an excuse for questioning the contract procedure by UPPCL as copies of all the original offers were provided to UPPCL for verification. RPSCL also submitted that neither the Commission nor the Expert Committee has found any substantiate reason to say that the RPSCL and UEEPL are related party and further submitted that they are not related parties as Companies Act, 2013 and Companies Act, 1956.*

Commission's View

3.2.35. *It is observed that the expert Committee established by the Commission for prudence check of the capital cost has not raised any such concern in its report. Also, there is no such evidence available showing that the contract award procedure was not conducted in transparent manner. However, the Commission would like to mention that any findings which may come at a later stage showing that the immoral practice were involved in contract award procedure will be considered in the subsequent orders of the Commission."*

80. We may note here that vide letters dated 1st November, 2013, 25th November, 2013 and 2nd January, 2014, the Commission had appointed a Statutory Expert Committee for evaluation of capital cost of the Rosa Thermal Power Project. Perusal of the above extracted portion of the impugned order reveals that the Commission had based its findings primarily on the report of the said Expert Committee which had not raised any concern in the said report.

81. Even though the terms "Prudence Check" is not defined either in the Electricity Act, 2003 or in any of the Regulations issued by the Commission,

it has been judicially recognized that aim and object of “Prudence Check” is to evaluate the quantum of expenditure and the rationale behind it. Following principles have been judicially evolved for the purpose of ascertaining as to whether an expenditure has been made prudently or not :-

“(a) If an expenditure is in accordance with the benchmark prescribed by the Appropriate Commission, then the same would be considered prudent.

(b) Further, prudence check is to be carried out by the State Commission / Appropriate Commission in accordance with its Regulations already specified for the concerning Control Period.

(c) The expenditure so incurred by the Generator has to be justifiable, efficacious and ought to be aligned to the project specific requirements. In other words, if the Generator is able to demonstrate that for the purpose of executing the project, it was necessary that such expenditure is incurred then the same ought to be passed on to the beneficiary through the Tariff determination process.”

82. In the instant case, following facts, which have been brought to our notice on behalf of the Rosa Power during course of arguments, are very material :-

“(a) The Unit configuration of the selected bidder was changed from 2 x 283.5 MW to 2 x 300 MW in joint consultation with UPPCL to reduce per MW cost of the Rosa TPP.

(b) The Technical and Commercial Bid evaluation was submitted to UPPCL by Rosa Power. The said process was completed by January 2004.

(c) *It is pertinent to mention that there was no significant progress on the Rosa TPP for next 2 years and Shanghai Electric Company Limited ("SEC") (EPC Contractor) was seeking US\$ 30 Million increase in contract price for delay. It was only after November 2006, when Reliance Group acquired Rosa Power, it started negotiations with SEC for reducing the price escalation sought for delay and successfully signed EPC Contract for Stage-I in March, 2007.*

(d) *The EPC Contract was signed on 06.03.2007 after three years of submission of the original quote by the SEC and the EPC Contract Price of USD 208.50 Mn (USD 167.5 Mn for BTG & USD 41 MN for BOP) and Rs 1126.77 Crores (for BOP) was still lower than L2 bidder of the EPC Contract Bid.*

(e) *The entire EPC Contract signed with EPC Contractor was submitted to the Ld. UPERC and UPPCL vide Petition No. 600 of 2009. No fact or data was concealed from UPPCL in this matter.*

(f) *Further, the EPC Contract for Stage-II was awarded at the same price as that for Stage-I except for escalation due to appreciation of Chinese Yuan vis-a-vis USD and for increase in cost of steel, Wholesale Price Index (WPI) and labour. These adjustments were made on the basis of publicly available data on currency appreciation, escalation in steel, cement, WPI and labour indices and is a standard and normal practice followed in the industry to provide for such escalations.*

(g) *Again the EPC Contract for Stage-II was submitted in Petition No. 610 of 2009 to the Ld. UPERC and UPPCL for seeking approval of the capital cost for Stage-II. Again, no objections were raised by UPPCL during the pendency of the aforesaid petition. Ld. UPERC vide its order dated 15.06.2009 approved the capital cost for Stage-II and directed Rosa Power to endeavour further negotiation for reduction in EPC Contract Price and also directed to involve UPPCL in such negotiations.*

(h) Further, Rosa Power made attempts to negotiate with the EPC Contractor and even invited UPPCL to join such negotiations. However, EPC Contractor refused any further reduction in the contract price.

83. There is no denial of these facts on behalf of the Respondents, particularly UPPCL. It is, thus, manifest that UPPCL was involved in the signing of EPC contract by Rosa Power with the EPC contractor and did not raise any objection at that time. These facts further indicate that appropriate prudent and transparent practices were followed by Rosa Power in selection of EPC contractor while keeping UPPCL in loop at every crucial stage. Therefore, UPPCL cannot be permitted to raise finger about the selection of EPC contractor now at this stage.

84. Similarly, it is nowhere disputed on behalf of the UPPCL that all documents including RFQ, BOQ, payment vouchers, auditor certificates, SAP Access etc. have been provided by Rosa Power to UPPCL for its analysis of the contract award procedure. Nothing has been brought on record on behalf of the UPPCL to show that it had objected to any of these documents as being false and fabricated.

85. We concur with the observations of the Commission that once the Expert Committee formed for prudence check of capital cost of the Rosa Thermal Power Plant has not raised any concern in this regard in its report, the Commission was not obliged to conduct a fresh prudence check when

the report of the Expert Committee did not find any fault in the facts and figures submitted by Rosa Power. The Commission has categorically stated that no such evidence is available to show that the contract award procedure was not conducted in a transparent manner.

86. It may be noted here that Rosa Power Thermal Power Project was commissioned well before the scheduled date approved by the Commission and there was no delay by any of the contractors selected by Rosa Power for construction of the Rosa Power Project. It is manifest that the quality of the works completed by the contractors selected by Rosa Power has been verified by the Expert Committee constituted by the Commission and also by the members of Committee appointed by UPPCL for this purpose who had visited the site. It is nowhere the case of UPPCL that overall project cost of Rosa Thermal Power Plant is at higher side when compared to the other thermal power plants of similar configuration, regarding whom the prudence check has been done by the respective Electricity Regulatory Commissions.

87. Merely because UPPCL had submitted some objections and has raised certain questions with regard to the procedure adopted for award of EPC contract, OSBL contract and additional capital works contract, even though being involved in the process for the same, it cannot be said that the Expert Committee Report could not have been adopted and acted upon by the

Commission while passing the impugned order. The Commission has even granted liberty to UPPCL to bring to its notice at any stage the immoral practices that may have been involved in contract award procedure, which the Commission would consider in the tariff petition for subsequent years. Therefore, let the UPPCL point out and explain the immoral practices, if any, adopted by Rosa Power in contract award procedure, in subsequent tariff petitions to the Commission which would be duly considered by the Commission.

88. Be that as it may, we do not find any merit in the contentions of UPPCL on the issue in consideration. Therefore, the issue is decided against the UPPCL.

Issue No. (iii) Allowance of Interest During Construction (IDC) by the Commission without any scrutiny/prudence check of the actual expenditure :-

This issue has been raised by UPPCL in its Appeal No. 22 of 2018.

89. The grievance of UPPCL is that the Commission has erroneously allowed increase in IDC of the project without any prudence check thereby leading to unnecessary cost being passed on to its consumers. It is submitted that Rosa Power has drawn excess long-term loan than required for the construction of the project thereby leading to higher IDC for the project

and in turn leading to increase in tariff. It is submitted that Rosa Power had withdrawn loan funds carrying interest @11% per annum and since the same were lying un-utilized, Rosa Power invested these funds in mutual funds which offered a return of only 7% per annum approximately. Thus there is a differential of 4% interest approximately which is borne by UPPCL in the form of IDC and which should have been disallowed by the Commission. It is argued that the Commission is duty-bound to conduct a prudence check in order to ensure that the costs have been incurred prudently but has merely proceeded on the basis that IDC amount has not crossed the prescribed ceiling limit.

90. On behalf of Rosa Power, it is submitted that project developers need to draw debt in advance, anticipating cash flow needs in upcoming days, months and quarters, to maintain liquidity for handling contingencies or unforeseen issues at the site or with the suppliers. It is pointed out that UPPCL has considered dividend income sourced from investments in mutual funds by Rosa Power as part of “Excessive Debt Drawl” but the correct approach is that the interest impact should only be calculated on the actual debt amount excluding the dividend income and not from mutual fund investments. Additionally, the dividend income itself should be deducted from financial impact being computed and, therefore, the calculation of

UPPCL in respect of increase in IDC on account of investment in mutual fund is incorrect. It is submitted that majority of investment made by Rosa Power in the mutual funds were only for a period of few days as an interim arrangement to reduce the impact of IDC on the project cost, pending utilization of the debt. It is submitted that the detailed account statements of mutual funds have been shared with UPPCL and, therefore, the contention of UPPCL that investment of loan amount in mutual fund has led to increase in IDC is not sustainable.

Our Analysis

91. The discussion of the Commission on this issue and its findings are extracting herein below :-

“Purchase of mutual fund out of long term loans and IDC

3.2.26 UPPCL submitted that the investment of the money drawn from long term loan for purchase of Reliance Mutual funds has led to increase in IDC by amount of Rs. 10.46 Crore and the same ought to be disallowed from the capital cost. Further, UPPCL submitted that the penal interest amounting to Rs. 26.35 lakh may be disallowed from the capital cost by the Commission. Further UPPCL has submitted that RPSCL should submit details about the debt refinancing undertaken by it and about the benefits of it to the beneficiaries and consumers.

3.2.27 In reply RPSCL submitted that the UPPCL has not highlighted the fact that the majority of these investment made in mutual fund

were made for period of few days only and were interim and prudent arrangement to avoid idling of funds in current account in order to reduce the IDC.

3.2.28 RPSCL submitted that the IDC of the Rosa TPP is well within the amount approved by the Commission, which proves that it has made debt drawl prudently during the implementation of the project.

3.2.29 UPPCL submitted that the investment in mutual funds in some cases has been for the period in range of 8 to 10 month and to the tune of several hundred Crores. Hence it cannot be contended that RPSCL had invested in Mutual Funds schemes only as a stop-gap arrangement pending utilization towards capital expenditure.

3.2.30 Further UPPCL reiterated that the penal interest of Rs. 0.26 Crore must be disallowed and RPSCL must be directed by the Commission to submit the complete details of the debt refinancing undertaken by it in November 2014 including the benefits owing to such debt refinancing to beneficiaries and consumers.

3.2.31 Further, the Commission vide its letter dated June 21, 2017, directed RPSCL to file written submission showing the impact of investment of money drawn from loan in mutual funds on capital cost, which was submitted by it on June 23, 2017.

Commission's View:

3.2.32 After closely scrutinizing the submissions made by RPSCL and other stakeholders, the Commission is of the view that RPSCL has managed the funds prudently and completed the project

within defined timeline and approved IDC. Hence, the Commission considers it appropriate to allow IDC as claimed by the petitioner i.e. Rs. 554.66 Crore as against Rs. 567.33 Crore earlier approved by the Commission.

92. It appears that the Commission had directed Rosa Power to file written submissions showing the impact of investment of money drawn from loan in mutual funds on capital cost and upon considering the same together with the fact that Rosa Power has completed the project within the defined timeline and approved IDC, and it found the claim of Rosa Power justified and accordingly allowed the same.

93. We are unable to find any flaw in the findings of the Commission and its decision on the issue under consideration. As contended on behalf of the Rosa Power it is not practicable for a project developer to achieve 100% synchronization of debt drawl with vendor payments to meet the capital expenditure of the project. The developers must draw debt in advance based on the estimated cash flow required to meet the capital expenditure for coming days, months or quarters. It is also true that a developer has to maintain certain liquidity to make any contingency and exigency that may develop at site or with suppliers etc. keeping this in mind we are of the opinion that drawal of loan in advance by Rosa Power in anticipation of required expenditure in coming days and months and investing the same in

mutual funds for short durations was commercially wise and prudent decision to earn some interest on the same instead of keeping the money idle in the bank account. Undisputedly, it was a short term arrangement pending utilization of funds which has certainly reduced the IDC burden as the dividend income has to be deducted from the financial impact while computing IDC. It is manifest that by managing the funds prudently, the Rosa Power had not crossed the prescribed ceiling limit of IDC and had also completed the project within the defined timeline.

94. Hence, we do not find any merit in the contentions of the UPPCL on this issue. The issue stands decide in favour of Rosa Power.

Issue No. (iv) Allowance of overhead expenditure solely on the basis of Expert Committee Report without carrying out an independent prudence check.

95. The findings of the Commission on this aspect are extracted herein below:-

Overheads

3.2.36 UPPCL submitted that the allowable legal and professional charges for RPSCL are Rs. 3.13 Crore as against Rs. 51.94 Crore claimed by the petitioner as the remaining charges has been paid towards the expenses of other group companies. Also, the amount allowable under 'Reimbursement of expenses to Group Companies' head stands at Rs. 26.20 Crore as against Rs. 33.66

Crore claimed by the petitioner, as only such expense is to be allowed under capital cost, which is directly attributable to the project or is incurred by RPSCL.

3.2.37 RPSCL in its reply submitted that its overhead expense is highly competitive among similar projects established and commissioned in similar time frame. Also, the overhead expense has been prudently spent for the service rendered by the group companies for the timely completion of the project.

3.2.38 In reply UPPCL reiterated that only those expenses are to be considered under capital cost, which is directly incurred for the implementation of the said project.

Commission's View:

3.2.39 The overheads forms part of the Capital Cost, which has already been verified by the Expert Committee appointed by the Commission for conducting prudence check of the capital cost of RPSCL. Since, the Expert Committee has not raised any issue on the amount booked for overheads, the Commission consider it appropriate to allow same as claimed by the petitioner and as recommended by the Expert Committee.

96. The grievance of the UPPCL is that the Commission has mechanically allowed the following expenses solely on the basis of Expert Committee Report;

- (a) Expenses claimed towards legal and provisional charges amounting to Rs.51.94 crores; and
- (b) Reimbursement of expenses to group companies amounting to Rs.33.66 crores.

97. It needs to note that in the pleadings and submissions before the Commission, UPPCL had itself contended that Rs.3.13 crores are allowable to Rosa Power as against Rs.51.94 crores claimed towards legal and provisional charges as the remaining charges have been paid towards the expenses of other group companies. It was also the contention of UPPCL before the Commission that the amount allowable under “Reimbursement of expenses to group companies” head stands at Rs.26.20 crores as against Rs.33.66 crores claimed by Rosa Power. Thus, according to UPPCL itself only a sum of Rs.9.46 crores out of Rs.33.66 crores reimbursed by Rosa Power to the group companies was not allowable. However, in the appeal before this Tribunal, the UPPCL has changed its stand and has prayed for dis-allowance of entire expenses amounting to Rs.51.94 crores towards legal/provisional charges and Rs.33.66 crores towards reimbursement of expenses to the companies.

98. Therefore, it is manifest that UPPCL is not itself sure as to exactly which part of the expenses claimed by Rosa Power under these two heads is allowable and which part should be dis-allowed. Taking of contradictory stands by UPPCL before the Commission and before this Tribunal indicates that it is raising objections to the claims of the Rosa Power under these

heads only for the sake of objections in the absence of any cogent justifications.

99. Further, as noted by the Commission in the impugned order, the Expert Committee constituted by it for conducting prudence check of the capital cost of Rosa Thermal Power Project, has not raised any issue on the amount booked for overheads.

100. We are unable to countenance the submissions on behalf of the UPPCL that the Expert Committee has not discussed the prudence of such expenses in its report. Learned Counsel for UPPCL has failed to bring to our notice any portion of the Expert Committee report which would show or suggest that the Committee had not considered or checked the prudence of these expenses incurred by Rosa Power. Therefore, the contentions of UPPCL on the issue under consideration are found to be devoid of any force.

101. The issue stands decided in favour of Rosa Power.

Additional issues :- Carrying cost sought by Rosa Power on its claims disallowed by the Commission.

102. This issue arises in the Appeal No. 357 of 2017 of Rosa Power in view of prayer made therein for grant of carrying cost also on its claims which have been disallowed by the Commission and agitated in the Appeal. It is submitted on behalf of Rosa Power that carrying cost may be granted at Late

Payment Surcharge (LPSC) rate with monthly rests/on monthly compounding basis.

103. Rosa Power relies on the judgment of the Hon'ble Supreme Court in *Uttar Haryana Bijli Vitran Nigam Limited vs. Adani Power (Mundra) Limited and Ors. (2023) 2 SCC 624* wherein it was held that if the parties have agreed to pay interest on compounding basis for delayed payments, the same principle will apply for carrying cost since both, carrying cost and LPSC are to be factored in towards time value of money:

13.since the appellants had agreed to pay interest on compounding basis for delayed payments, the very same principle would apply for carrying cost as well, since both, carrying cost and late payment surcharge are to be factored in towards time value of money."

104. To determine how LPSC is to be calculated, Rosa Power contends that the formula as set out in the Restated PPA would apply. Rosa Power once again relies on Regulation 2(5) of the 2009 Tariff Regulations for this purpose.

105. Section 12.17 of the Restated PPA provides for rebates and late charges wherein the late payment surcharge rate is fixed at 1.25% per month:

"12.17 Rebates, Late Charges

...

(b) In case the payment of bills of Fixed Charges and Variable Charges by UPPCL is delayed beyond a period of 1 month from the date of billing, a late payment surcharge of the rate of 1.25% per month shall be levied by ROSA on the outstanding amount of the bills and payable by UPPCL."

106. Rosa Power contends that as per Section 12.17, LPSC is calculated at 1.25% per month "on outstanding amount" of the bills on monthly basis. Therefore, it has to be inferred that the same is to be monthly rest and compounded monthly for payment of carrying cost.

Our view

107. There is no manner of doubt that legitimate entitlements, the recovery of which have been deferred, albeit owing to pending court proceedings, must be allowed to be recovered along with carrying cost. This Tribunal as well as the Hon'ble Supreme Court of India has time and again directed payment of Carrying Cost/interest in case of deferment in realization of monies. The purpose of the same is to ensure that in practical terms, the

time value of money is adhered to. Since this principle is well settled, there is no need to burden this judgment with references to precedents.

108. The question that arises therefore is, at what rate should carrying cost be allowed? This issue, it appears, is no longer *res integra* in view of the recent judgment of the Hon'ble Supreme Court in *Haryana Bijli Vitran Nigam Limited vs. Adani Power (Mundra) Limited and Ors.* (2023) 2 SCC 624.

109. There is no legal impediment in awarding compound interest to compensate for the lost time value of money. The Hon'ble Supreme Court, in *Indian Council for Enviro-Legal Action v. Union of India*, (2011) 8 SCC 161 has observed that to do complete justice and to implement the concept of time value of money practically, interest has to be levied. Further, it has been held that power of courts to order compound interest by way of restitution is not fettered in any way.

110. Even this Tribunal has, in several cases, including in Judgment dated 22.03.2022 passed in Appeal No. 118 of 2021 titled as *Rattan India Power Ltd. vs. Maharashtra Electricity Regulatory Commission & Anr.*, , held that the rate of recovery of Carrying Cost will be the same as the rate prescribed for LPSC under the contract.

111. In view of the above, we hold that Carrying Cost is to be paid on the claims of Rosa power (on the principal amount plus LPS) allowed vide this judgement at LPSC rate on monthly compounding basis as per the rate stipulated in the Restated PPA.

Conclusion

112. We summarize our findings as under :-

Sl. No.	Issue	Findings
1.	Issue (a) Disallowance of claim towards re-instatement of Interest on Working Capital (IoWC) passed on actual landed coal cost;	We are unable to sustain the impugned findings of the Commission on this issue. The same are set aside. The issue is remanded back to the Commission with the directions to conduct true-up of IoWC also on the basis of the material furnished by the Rosa Power.
2.	Issue (b) of Appeal No. 357 of 2017; Non-consideration of Un-Discharged Liability (UDL), well-approved capital cost; Issue (v) of Appeal No. 22 of 2018; Erroneous calculation of Un-Discharged Liabilities.	The findings of the Commission on this issue are set aside and Commission is directed to include amounts of undischarged liability also in the capital cost computed for financial years 2010-11, 2011-12, 2012-13 & 2013-14 for Stage I and Stage II of the Rosa Thermal Power Project. Since no deduction is to be made in respect of un-

		discharged liabilities for computation of capital cost for the power project of Rosa Power for above noted Financial Years, the contention of the UPPCL to the effect that the amounts of un-discharged liabilities have been computed erroneously while ignoring the figures submitted by it is relegated to the pale of insignificance and become infructuous. Therefore, no finding is required to be given on those contentions raised by UPPCL.
3.	<p>Issue (c) in Appeal No. 357 of 2017 :- Incorrect computation of Secondary Fuel Oil Consumption (SFOC) for Stage II of the project.</p> <p>Issue No. (i) in Appeal No. 22 of 2018 :- Failure on the part of the Commission to prescribe SFOC for Financial Year 2009-10 to 2013-14 for Stage I of the power plant of Rosa Power in accordance with the 2009 Tariff Regulations.</p>	The findings of the Commission on the issue under consideration are erroneous and are hereby set aside. We direct that the SFOC for the power project of Rosa Power for the period from Financial Years 2011-12 & 2013-14 shall be considered and approved as 2ml/kWh as specified in Section 12.3 of the amended and re-instated PPA dated 12 th November, 2006 executed between the parties.
4.	Issue (ii) :- Failure on the part of the Commission to conduct prudence check on the contract award procedure in Engineering Procurement and Construction (EPC) contracts, Out Station	We do not find any merit in the contentions of UPPCL on the issue in consideration. Therefore, the issue is decided against the UPPCL.

	Battery Limit (OSBL) and Additional Capital Works.	
5.	Issue No. (iii) Allowance of Interest During Construction (IDC) by the Commission without any scrutiny/prudence check of the actual expenditure :-	We are unable to find any flaw in the findings of the Commission and its decision on the issue under consideration. The issue stands decide in favour of Rosa Power.
6.	Issue No. (iv) Allowance of overhead expenditure solely on the basis of Expert Committee Report without carrying out an independent prudence check.	The contentions of UPPCL on the issue under consideration are found to be devoid of any force. The issue is decided in favour of Rosa Power.
7.	Additional issue in Appeal No. 357 of 2017 : Grant of Carrying cost on the claims of Rosa Power disallowed by the Commission.	Rosa Power is held entitled to carrying cost on the claims allowed vide this judgement at LPSC rate on monthly compounding basis as stipulated in the restated PPA.

113. Accordingly, the Appeal No. 22 of 2018 filed by UPPCL stand dismissed. Appeal No. 357 of 2017 filed by Rosa Power stands allowed in above terms.

Pronounced in the open court on this 30th day of May, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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