IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 244 OF 2017,
APPEAL NO. 293 OF 2018,
APPEAL NO. 341 OF 2019
&
APPEAL NO. 49 OF 2020

Dated: **14.07.2025**

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

APPEAL NO. 244 OF 2017

IN THE MATTER OF:
M/s. Jaiprakash Power Ventures Ltd.
Sector 128, Noida,
Uttar Pradesh – 201 304. **…Appellant(s)**

Vs.

1) Madhya Pradesh Electricity Regulatory Commission
5th Floor, Metro Plaza, Arera Colony,
Bittan Market, Bhopal – 462016.
(Through its Secretary)

2) M. P. Power Management Co. Ltd.
Shakti Bhawan, Rampur, Jabalpur,
Madhya Pradesh – 482008.
(Through its Managing Director)

3) M. P. Poorv Kshetra Vidyut Vitran Co. Ltd.,
Shakti Bhawan, Rampur, Jabalpur,
Madhya Pradesh – 482008.
(Through its Managing Director)

4) M.P. Madhya Kshetra Vidyut Vitran Co. Ltd.
Bijli Nagar Colony, Nishtha Parisar,
Govindpura, Bhopal,
Madhya Pradesh – 462023.

(Through its Managing Director)

5) M. P. Paschim Kshetra Vidyut Vitran Co. Ltd.,
G. P. H. Compound, Polo Ground,
Indore, Madhya Pradesh,
(Through its Managing Director). **…Respondent(s)**

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
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Mr. Avijeet Lala
Ms. Astha Sharma
Ms. Shreya Dubey
Ms. Nameeta Singh
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Ms. Mandakini Ghosh for R-1

Mr. Ravin Dubey for R-2

<u>APPEAL NO. 293 OF 2018</u>

<u>IN THE MATTER OF</u>:

M/s. Jaiprakash Power Ventures Ltd.
J. A. House, 63, Basant Lok,
Vasant Vihar, New Delhi – 110057. **…Appellant(s)**

Vs.

1) Madhya Pradesh Electricity Regulatory Commission
5th Floor, Metro Plaza, Arera Colony,
Bittan Market, Bhopal – 462016.
(Through its Secretary)

2) M. P. Power Management Co. Ltd.
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Bijli Nagar Colony, Nishtha Parisar,
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G. P. H. Compound, Polo Ground,
Indore, Madhya Pradesh,
(Through its Managing Director). **…Respondent(s)**

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Ms. Narayani Anand
Ms. Nameeta Singh
Ms. Nithya Balaji
Ms. Gayatri Aryan

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Mr. Alok Shankar for R-2

APPEAL NO. 341 OF 2019

IN THE MATTER OF:

M/s. Jaiprakash Power Ventures Ltd.

J. A. House, 63, Basant Lok,
Vasant Vihar, New Delhi – 110057. **…Appellant(s)**

Vs.

1) Madhya Pradesh Electricity Regulatory Commission
5th Floor, Metro Plaza, Arera Colony,
Bittan Market, Bhopal – 462016.
(Through its Secretary)

2) M. P. Power Management Co. Ltd.
Shakti Bhawan, Rampur, Jabalpur,
Madhya Pradesh – 482008.
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Madhya Pradesh – 482008.
(Through its Managing Director)

4) M.P. Madhya Kshetra Vidyut Vitran Co. Ltd.
Bijli Nagar Colony, Nishtha Parisar,
Govindpura, Bhopal,
Madhya Pradesh – 462023.
(Through its Managing Director)

5) M. P. Paschim Kshetra Vidyut Vitran Co. Ltd.,
G. P. H. Compound, Polo Ground,
Indore, Madhya Pradesh – 452015.
(Through its Managing Director). **…Respondent(s)**

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Mr. Ashish Anand Bernard
Mr. Paramhans Sahani for R-2

APPEAL NO. 49 OF 2020

IN THE MATTER OF:

M/s. Jaiprakash Power Ventures Ltd.
J. A. House, 63, Basant Lok,
Vasant Vihar, New Delhi – 110057. **…Appellant(s)**

Vs.

1) Madhya Pradesh Electricity Regulatory Commission
5th Floor, Metro Plaza, Arera Colony,
Bittan Market, Bhopal – 462016.
(Through its Secretary)

2) M. P. Power Management Co. Ltd.
Shakti Bhawan, Rampur, Jabalpur,
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4) M.P. Madhya Kshetra Vidyut Vitran Co. Ltd.
Bijli Nagar Colony, Nishtha Parisar,
Govindpura, Bhopal,
Madhya Pradesh – 462023.
(Through its Managing Director)

5) M. P. Paschim Kshetra Vidyut Vitran Co. Ltd.,
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(Through its Managing Director). **…Respondent(s)**

Counsel for the Appellant(s) :	Mr. Sanjay Sen, Sr. Adv. Mr. Sakya Singha Chaudhuri Mr. Avijeet Lala Ms. Shreya Mukerjee Mr. Nishant Talwar Ms. Meha Chandra Ms. Nameeta Singh Ms. Gayatri Aryan Ms. Narayani Anand Ms. Astha Sharma Ms. Nithya Balaji
Counsel for the Respondent(s) :	Ms. Mandakini Ghosh for R-1 Mr. Ravin Dubey for R-2

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. M/s. Jaiprakash Power Ventures Limited (in short "JPVL") filed this Batch of Appeals challenging the following Impugned Orders passed by the Madhya Pradesh Electricity Regulatory Commission (in short "MPERC" or "Commission"):

a) Order dated 24.05.2017 in Petition No. 72 of 2015,
b) Order dated 20.07.2018 in Petition No. 41 of 2017,
c) Order dated 25.07.2019 in Petition No. 05 of 2019, and
d) Order dated 22.10.2019 in Petition No. 07 of 2019.

2. The Appellant is aggrieved by the decision of the State Commission in disallowing the revenue requirements of JPVL under various heads, claiming that

the Impugned Orders are in violation of the decisions of this Tribunal and also in derogation of the provisions of the Electricity Act, 2003, Tariff Regulations, and other Statutes. The following disallowances have been made by the Commission:

i. Disallowance of 50% of the cost incurred under various heads, for the period beyond SCOD, even though such cost was incurred due the reasons beyond the control of JPVL and admitted by the Respondent No. 2.

ii. Decision on liquidated damages by the Commission without there being any actual adjudication in the matter.

iii. Disallowance of O&M expenses of the dedicated transmission line and cost of O&M expenses & maintenance spares of the same in the computation of interest on working capital.

iv. Disallowance of Rs. 295 per metric ton of additional levy on coal while computing pre-commissioning fuel expenses and interest on working capital for FY 2014-15.

v. Disallowance of ROM price, additional premium & incidence of the taxes thereon while computing the cost of coal for FY 2015-16 for the purpose of working out interest on working capital.

vi. Disallowance of inadequate capacity charges on 7.5% of the contracted energy under the Power Purchase Agreement dated 06.09.2011.

vii. Disallowance of grossing up of ROE with the normal tax rate or MAT rate.

viii. The unit-wise allocation of disallowance of FERV appears to be disproportionately loaded on Unit I.

Description of Parties

3. The Appellant, JPVL, is a generating company having set up a 2 x 660 MW Jaypee Nigrie Super Thermal Power Plant (in short “Power Station”) in the State of Madhya Pradesh (in short “M.P.”).

4. Respondent No. 1, MPERC is the State Electricity Regulatory Commission, having been vested with the powers under the Electricity Act, 2003 (in short “Act”) to determine the tariff of the Power Station.

5. Respondent No. 2, MPPMCL, a government company under the control of the State Government of M.P., inter alia, functioning as a holding company for the sale and purchase of power on behalf of the Distribution Companies of the State.

6. Respondents Nos. 3 to 5 are the distribution licensees of the State of M.P.

Factual Matrix of the Case

7. The Appellant, M/s. Jaiprakash Power Ventures Ltd. is aggrieved by the Impugned order and judgment dated 24.05.2017 passed by the MPERC in Petition no. 72 of 2015.

8. The Appellant’s Power Station consists of two units of 660 MW each, both of which have achieved COD and are therefore fully operational. The JPVL has entered into a Power Purchase Agreement (in short “PPA”) dated 05.01.2011 with MPPMCL under which the Appellant is required to supply 30% of the installed capacity (in short “Contracted Capacity”) of the Power Station to MPPMCL.

9. JPVL and Respondent No. 2 further entered into a second Power Purchase Agreement on 06.09.2011 for the supply of 7.5% of the net power from the Project to the Respondent No. 2 at variable charges/cost (the Power Purchase Agreements dated 05.01.2011 and 06.09.2011 are collectively referred to as "PPAs"). Pursuant to completion of the project, JPVL had filed Petition No. 72 of 2015 on 07.12.2015 before the Commission for the determination of the tariff for supply of power from the Jaypee Nigrie Super Critical Thermal Power Project from 03.09.2014 to 31.03.2015. The Commission passed the Impugned Order on 24.05.2017.

10. The details of the batch of appeals are as under:

Sr. No.	**Appeal No.**	**Details of the Impugned Order**
1.	244 of 2017	Arising out of order dated 24.05.2017 in Petition No. 72 of 2015 for determination of final generation tariff for the Nigrie plant from 03.09.2014 to 31.05.2015.
2.	293 of 2018	Arising out of order dated 20.07.2018 in Petition No. 41 of 2017 with regard to true-up of generation tariff for FY 2015-16.
3.	341 of 2019	Arising out of order dated 25.07.2019 in Petition No. 5 of 2019 with regard to true-up of generation tariff for the Nigrie plant for FY 2016-17.

4.	49 of 2020	Arising out of order dated 22.10.2019 in Petition No. 07 of 2019 with regard to true-up of generation tariff for the Nigrie plant for FY 2017-18.

11. Aggrieved by the above, the present batch of appeals is being preferred.

12. Considering the common issues in this batch of appeals and identical contesting parties, the four appeals are taken together, inter alia, Appeal No. 244 of 2017 is taken as the lead appeal.

13. The other issues raised in the other three appeals shall be considered after completing the issues raised in Appeal No. 244 of 2017.

Our Observations and Conclusion

14. The Appellant submitted that it entered into a Power Purchase Agreement (PPA) on 06.09.2011 with the Government of Madhya Pradesh for supplying 7.5% of annual electricity generation at energy charges only, as consideration for setting up the power plant within the state and availing state-allotted coal. Following the cancellation of coal block allocations (Amelia North and Dongrital-II), the Appellant has requested the State to revise the contracted supply under the PPA to 5%.

15. The Appellant's grievance is that the Commission has not allowed the proportional recovery of fixed costs/capacity charges related to the 7.5% supply to the State under the PPA when computing capacity charges recoverable from

Respondent No. 2 (MPPMCL). Under Regulation 34.2 of the 2012 Tariff Regulations, annual capacity charges include components such as return on equity, loan interest, etc., which are to be derived from the capital cost of the entire plant as per Regulation 17.

16. Since the 7.5% supply constitutes a form of royalty, the Appellant submits that the full capacity charges of the plant should be equitably distributed among all beneficiaries based on their contracted share.

17. However, this issue has already been adjudicated and rejected by this Tribunal in its judgment dated 22.03.2024 in Appeal No. 283 of 2017 and batch.

18. Accordingly, the issue stands settled against the Appellant.

19. The issue regarding the disallowance of grossing up the return on equity with the MAT rate is also considered concerning the Bina Thermal Plant of the Appellant, an issue *inter partes* only, in Appeal No. 283 of 2017 and batch. This Tribunal, by its judgment dated 22.03.2024, allowed such grossing up. However, this decision has been challenged by MPPMCL in Civil Appeal No. 6552 of 2024, which is presently pending before the Hon'ble Supreme Court.

20. Therefore, the issue is kept open, subject to the decision of the Hon'ble Supreme Court in Civil Appeal No. 6552 of 2024. The Appellant is given liberty to raise the issue once the decision is rendered by the Hon'ble Supreme Court.

21. There are eight issues raised in these appeals, inter alia, the following two issues are decided as mentioned in the previous paragraphs:

i. Disallowance of inadequate capacity charges on 7.5% of the contracted energy under the Power Purchase Agreement dated 06.09.2011.

ii. Disallowance of grossing up of ROE with the normal tax rate or MAT rate.

22. Accordingly, out of eight (8) issues, the following six (6) issues are argued by the Appellant:

(a) **<u>Issue No. 1-</u>** Disallowance of 50% of the cost incurred under various heads, for the period beyond SCOD, even though such cost was incurred due to reasons beyond the control of JPVL and admitted by the Respondent No. 2.

(b) **<u>Issue No. 2-</u>** Decision on liquidated damages by the Commission without there being any actual adjudication in the matter.

(c) **<u>Issue No. 3-</u>** Disallowance of O&M expenses of the dedicated transmission line and cost of O&M expenses & maintenance spares of the same in the computation of interest on working capital.

(d) **<u>Issue No. 4-</u>** Disallowance of Rs. 295 per metric ton of additional levy on coal while computing pre-commissioning fuel expenses and interest on working capital for FY 2014-15.

(e) **<u>Issue No. 5-</u>** Disallowance of ROM price, additional premium & incidence of the taxes thereon while computing the cost of coal for FY 2015-16 for the purpose of working out interest on working capital.

(f) **Issue No. 6-** The unit-wise allocation of the disallowance of FERV appears to be disproportionately loaded on Unit I.

23. The Appellant submitted that the Commission, while finalizing the capital cost of the Nigrie plant, has proceeded to disallow part of the various costs, such as overhead expenses, IDC, interest on FCCB, etc., on the ground of delay beyond the Scheduled Commercial Operation Date (in short "SCoD") of the plant. The total amounts disallowed on this ground are as follows:

(Rs. Cr)

S.N.	Particulars of claims	Claimed	Allowed	Difference
1.	IDC / Financing cost up to COD of Unit II, i.e., 20.02.2015	2527.35	2161.90	365.45
2.	IDC / Financing cost on allocated portion from 03.09.2014 (COD of Unit I) up to 20.02.2015 (COD of Unit II)	53.12	29.70	23.42
3.	Establishment Charges	285.33	268.14	17.19

24. The Appellant also argued that the figures of deducted amounts in the Table above form part of the soft costs. The Start-up fuel charges and FERV do not represent disallowance on account of delay and have not been set out in the Table above. While establishment charges have also been separately indicated in the order at para 106 r/w Table 13 of the Impugned Order, IDC / Financing cost up to COD of Unit II, i.e., 20.02.2015 for Rs. 2161.90 crores after deduction of Rs. 365.45 crores, consists of the disallowed amounts towards IDC (excluding interest on FCCB) of Rs. 178.73 crores, LD deducted amount of Rs.120.77 crores and

Rs.65.95 crores towards interest on FCCB. These amounts have not been shown separately in Table 21. However, when added up, they reflect the extent of deduction, i.e., 178.73 crores, 120.77 crores, 65.95 crores, Rs. 365.45 crores.

25. Also refer to paragraphs 98 and 99 of the Impugned Order for the disallowed amount of Rs. 178.73 crores, Paragraph 102 with Table 12 (at page 134 of Appeal Paper Book) for Rs. 120.77 crores. For, interest on FCCB, the Appellant had provided the complete details of interest paid for the period up to 20.02.2015 in its submissions dated 19.05.2016 towards the break-up of the total IDC/ Financing cost of Rs.2527.35 crores (shown as claimed amount in Table 21 of the Impugned Order against claimed costs at page 154 of Appeal Paper Book).

26. The total amount towards interest claimed towards FCCB interest has been shown as Rs 396.92 crores (matching with the amount shown in Table 11 at page 133 of the Appeal Paper Book). An amount of Rs. 65.95 crores has been deducted under this head.

27. The State Commission submitted that out of the above, Issue No. III and IV, along with the two issues as mentioned above, are covered by earlier judgments of this Tribunal's Judgment. Also, Issue No. V is the subject matter of challenge in Appeal No. 95/2016 pending before Court I. Hence, the Appellant has advanced arguments in Issue No. I, II & VI.

28. Let us take up the adjudication issue-wise.

Issue No. 1- *Disallowance of 50% of the cost incurred under various heads, for the period beyond SCOD, even though such cost was incurred due to reasons beyond the control of JPVL and admitted by the Respondent No. 2.*

Submissions of the Appellant (issue 1)

29. The Appellant submitted that the Commission, while carrying out such deductions towards IDC, etc., has proceeded on the basis that there was a delay in the COD of the two units. The Commission has considered a delay of 155 days in the COD of Unit I and 143 days in the COD of Unit II.

30. The Appellant, while setting up the Nigrie plant, had faced various hindrances and occurrences that were beyond the reasonable control of the Appellant and could not have been avoided by the Appellant. In this regard, the Appellant had issued a letter dated 24.02.2014 to MPPMCL setting out in detail the various events that had delayed the construction and commissioning of the project, along with accompanying information/ documents. It is pertinent that having considered the Appellant's letter dated 24.02.2014, the procurer MPPMCL by a letter dated 27.05.2014 was pleased to inform the Appellant of its decision to revise the scheduled COD for Unit I of the plant to 31.07.2014 in terms of Article 4.1.6 of the PPA after having considered the various/ aspects mentioned in the Appellant's letter. The relevant portion of the MPPMCL letter dated 27.05.2014 is extracted below for ready reference:

> "*This is in reference to the letter cited under reference vide which M/s JPVL, has requested for revision in the scheduled COD. MPPMCL has considered the various reasons/ aspects mentioned therein and it has been decided that, as per provision in Article 4.1.6 of the PPA, revised scheduled COD for Unit-I of Thermal Power Plant (2 x 660 MW) of M/s Jaypee Nigrie Super Thermal Power Plant will be 31st July, 2014.*"

31. Subsequently, by another letter dated 04.08.2014, the SCOD for Unit I was further revised to 31.08.2014, the relevant extract for the extension letter is as under:

> *"In this regard it is to convey that, MPPMCL, has considered your request and it has been decided that the Revised Scheduled COD for Unit-1 of 2x660 MW Super Thermal Power Project of m/s Jaypee Nigrie will be 31, August 2014, on the condition that M/s Jaypee agree for payment of PGCIL open access charge if any, levied prior to the actual COD.*
>
> *Please immediately convey your acceptance as above for revised scheduled COD for Unit-1 to become effective."*

32. Article 4.1.5 of the PPA defines the "Scheduled Commercial Operation Date". Further, Article 4.1.6 provides for 'revision of SCOD'. The provisions of the PPA are reproduced hereinbelow for ready reference:

"*4.1.5 Scheduled Commercial Operation Date*

The Company shall achieve Commercial Operation Date for the first Unit by March, 2014 and subsequent Unit of the Power Station within six (6) Months thereafter.

4.1.6 Revised Scheduled Commercial Operation Date

The Parties may mutually agree to revise the Scheduled CoD for Commissioning of any Unit or the Power Station (hereinafter referred to as Revised Scheduled Commercial Operation Date or Revised Scheduled COD) and such Revised Scheduled COD shall thereafter be the Scheduled COD."

33. In view of the above provisions and the revised SCOD agreed upon by MPPMCL / Respondent No. 2, the SCOD for Unit I stood at 31.08.2014 and for Unit II at 28.02.2015, being the period of six months from the SCOD of Unit I. Thus, the status of SCOD and actual COD of the plant are reproduced below:

	Scheduled COD (as revised)	Actual COD
Unit I	31.08.2014	03.09.2014
Unit II	28.02.2015	21.02.2015

34. There is a delay of three days for the commissioning of Unit I and no delay in the commissioning of Unit II. It is pertinent to note that the Commission has not taken into account the fact that the SCOD for the plant was revised by agreement of the parties in terms of the provisions of the PPA. The argument of the counsel

for the Commission that the Commission can decide on the SCOD of the plant irrespective of the agreement between the parties is not correct for the following reasons:

- The Tariff Regulations, 2012, do not provide for the Commission to ascertain the date of SCOD *de hors* the agreement between the generator and the Discom;
- The Commission has completely ignored the documents exchanged between the parties revising the SCOD;
- The justification sought to be raised by the Commission at the stage of appeal cannot be sustained, as none of the contentions have been recorded in the impugned order. Having not recorded any reasons whatsoever for ignoring the revised SCOD, such reasons cannot be supplied as an improvement to the impugned order.
- It would have been a different case if some reasons had been recorded by the Commission for ignoring the revised SCOD that could have been further elaborated upon by the Commission. However, in the absence of any reason whatsoever, the Commission cannot now be allowed to improve upon its order.
- It would be unfair and contrary to the principles of judicial propriety and principles of natural justice to allow the Commission to provide justifications after the appeal has been filed, when no reasons were recorded in the impugned order.
- This Hon'ble Tribunal, being the first appellate court, cannot allow the infirmities of the impugned order to be addressed at the appellate stage. If reasons were recorded, it could, at best, be considered the correctness of such reasons.

35. The impugned order at page 96 has extracted the allegedly submitted statements made by the Appellant in its Affidavit dated 29.11.2016. The extracted portion, however, is a reproduction of the letter of the Appellant dated 24.02.2014, by which the Appellant had informed MPPMCL about the force majeure conditions, MPPMCL duly accepted that for revising the SCOD. The Commission at para 97 of the impugned order has given a finding that the reasons for delay in achieving COD were not beyond the control of the Appellant and that such constraints/ obstructions are envisaged/ considered while arriving at the scheduled COD. <u>The Commission has not recorded any reasons for coming to such a conclusion, and therefore, the finding at para 97 is bad in law,</u> being without any reasons and at the *ipse dixit* of the Commission.

36. Without prejudice to the above, the arguments of the Commission at the time of hearing with regard to the contents of such letter dated 24.02.2014 are dealt with herewith as a matter of abundant precaution. Appellant does not admit to the maintainability of such reasons at the appellate stage.

i. Unprecedented rainfall

37. The counsel for the Commission at the time of hearing had produced certain pages of the DPR of the plant to highlight that there was heavy rainfall experienced at the project site on regular basis as per the statistics provided in the DPR and, therefore, there was no unprecedented rainfall as claimed by the Appellant. This aspect has not been recorded in the impugned order. Nonetheless, this issue had been explained by the Appellant in its Rejoinder to MPPMCL Reply at para 9 of the Rejoinder, which is extracted below for ready reference:

"*9. MPPMCL has claimed that the Appellants have misled the Hon'ble Tribunal by quoting partial data (i.e., lowest values) whilst, as per DPR submitted by the Appellant, the Average rainfall is 1,748.4 mm, which is more than the actual rain in 2011 and 2012. It is respectfully submitted that the meteorological data mentioned in the DPR and as annexed by the Respondent in its Reply was sourced by the DPR Consultant from the meteorological station at Satna while the Project is located at Nigrie in District: Singrauli. This is because the Full Time or Regular Observatory is located in District: Satna and Part Time Observatory is located in District: Sidhi. It is submitted that although the DPR mentioned the Meteorological Station of Sidhi, the data from which the value of 1748.4 mm has been sourced is of Satna; whereas, the data submitted by the Appellant while seeking extension of CoD has been sourced from Automatic Weather Station (AWS) in District: Singrauli and communicated by the Collector of Land Records, District: Singrauli. The Project is, therefore, situated in a different district, about 180 kilometres from Satna. The Data provided in the DPR dated August, 2009, which was for representative purposes, was also based on the data period between 1951 to 1980, while the Project started in 2008. The ground realities at the project site with regard to average rainfall were significantly different. Therefore, the relevant parameters for the purpose of the Project were those applicable in District Singrauli*."

38. In view of the above explanation, it is clear that the rainfall indicated in the DPR is not relevant to ascertain the position at the plant site.

ii. Change of water intake system from weir to barrage

39. It is the submission of the counsel for the Commission that the decision to change the water intake system from weir to barrage was at the behest of the Appellant and, therefore, the enhanced cost on such account cannot be passed on to the consumers.

40. It is pointed out in this regard that the change in the water intake system was necessitated on account of a change in the allocation of water to the project from the concerned authority and that the requirement for creating of storage reservoir arose from such a change in allocation. In this regard, reference may be made to the certificate dated 09.02.2011 issued by the Office of the Chief Engineer, Ganga Basin Rewa (MP). According to the document, the Government of Madhya Pradesh had originally permitted the Appellant to draw 65.3 Cusecs of water from the Gopad river. Given the minimum daily flow at the relevant location, the Appellant was sure to get the allocated water round the year, except for a few days in the summer, for which a small reservoir could be constructed near the plant area, and that <u>there was no requirement for creating a reservoir in the river</u>. However, the Government had subsequently allocated 89.6 Cusec water to M/s DB Power Ltd. and 44.8 Cusec water to M/s Surya Chakra Power Ventures Ltd. from the Gopad river. They planned to create storage reservoirs in the river channel upstream of the Nigrie diversion weir. Accordingly, it was observed that the Appellant was also <u>required to create a storage reservoir in the river channel</u>

by constructing a gated barrage at Nigrie to meet the shortfall of water to the extent possible during the lean period.

41. Based on the above certificate, the Appellant had written to the Chief Engineer Ganga Kachhar, Rewa (MP), for approval of the scheme of barrage at Nigrie for storage and diversion of water from the Gopad river. Based on the application of the Appellant, in principle acceptance was accorded by the Chief Engineer by letter dated 16.02.2013. None of these facts have been discussed in the impugned order, and the impugned order has proceeded to hold the Appellant responsible for delay despite the genuine requirement for creation of a barrage on account of a change in allocation of water.

iii. Delayed approval for the construction of the transmission line

42. The Commission has not recorded any finding against this ground of delay in the impugned order. However, in the course of arguments, it was contended that the delay is attributable to the Appellant since the Appellant has not produced any document to show that it was repeatedly following up for the forest clearance and wildlife clearance. Moreover, even if there was a delay in the grant of approval, the clearance affected only 12 km out of the 161 km long double circuit Nigrie-Satna transmission line and should have been completed within a proportionate period of one month from the date of approval.

43. It is pointed out that the delay in the grant of forest and wildlife clearance was not attributable to the Appellant and was dependent upon the procedure for

clearance by the concerned departments of the Government. The same constitutes force majeure events and has been duly considered by MPPMCL/ Respondent No. 2 for rescheduling the SCOD. It is also pointed out that the construction of high-voltage transmission lines is a complex affair and cannot be executed in parts without having due regard to the route, location of towers, and other details for the transmission line to be constructed in the prohibited area. The suggestion that the portion of the transmission line for which approval was delayed could have been completed within a proportionate period of one month lacks merit and is not practicable for on-ground execution of the project. No reasons whatsoever have been recorded in the impugned order to reject the ground of delay. The arguments of the Commission are an afterthought and cannot be considered. The impugned order is bad in law, being an unreasoned order.

iv. Challenges in the movement of the generator stator from Hazira to Nigrie

44. The Commission has not recorded any finding against this ground of delay in the impugned order. However, in the course of arguments, it was contended that the delay is attributable to the Appellant since the Appellant should have foreseen the challenges in moving the stator from the Hazira port to the plant site at the time of planning the project.

45. It is submitted that the detailed description of the nature of impediments faced by the Appellant in the movement of the generator stator had been explained by the Appellant to the Respondent No. 2 by its letter dated 24.02.2014, which had been duly accepted by the Respondent No. 2 for revision of SCOD. The

Commission had not carried out any prudence check or asked for the necessary documents in support of the delay caused by such transportation of the generator stator. It cannot be allowed to improve upon its order by now developing arguments in relation to this issue. It is nonetheless pointed out that the photographs of the logistical challenges had also been enclosed with the letter dated 24.02.2014. No reason has been indicated by the Commission for disregarding such information and documents.

v. Act of God – Tsunami in Japan

46. It has been contended during the hearing that, save and except a letter from M/s L&T about the occurrence of a Tsunami, no other details have been provided. The Commission has not recorded any reasons in the impugned order to reject the ground of force majeure on account of the Tsunami in Japan affecting the supply of the STG package.

47. In view of the above discussion, it is clear that the Commission has concluded para 97 of the impugned order without recording any details of any prudence check or the reasons for arbitrarily concluding that the reasons for delay in achieving COD were not beyond the control of the Appellant. There has been a non-application of mind on the part of the Commission, coupled with the absence of any reason to support its conclusions. In view of the same, the finding at para 97 of the impugned order is ex facie illegal and not tenable in law.

48. In view of the above position, the reference by the Commission to the principles laid down by this Hon'ble Tribunal in Appeal No. 72 of 2020 has no applicability to the facts of the present case. Apart from the fact that the judgment is clearly distinguishable on facts, the Commission has not indicated in the impugned order as to how the principles of the said judgment would be applicable and in relation to which of the specific reasons for delay. In view of the above, <u>it is most respectfully submitted that the amounts disallowed in the soft costs as shown in the Table above, pursuant to the computation of the Commission in Table 21 of the impugned order, have to be set aside and such deductions should be allowed as part of capital cost</u>.

<u>Submissions of the Respondent No. 1, MPERC (issue 1)</u>

49. Regarding Issue No. 1, it is submitted that the Respondent Commission has correctly disallowed 50% of the overhead expenses for the delay in commissioning of the project. The Appellant was to commission Unit 1 on 31.03.2014 and Unit 2 on 30.09.2014. However, the Appellant could commission Unit 1 on 03.09.2014 and Unit 2 on 21.02.2015. The Respondent No. 1 has rightly allowed 50% of the costs due to the delay in achieving commissioning by the Appellant, following the approach given by this Tribunal in Appeal No. 72 of 2010.

50. Firstly, the Appellant has claimed time and cost overrun due to excessive rainfall in Nigrie. The Appellant has submitted that the rainfall during 2011-2013 was higher than the average rainfall in the project area. It is respectfully submitted that Appellant has submitted in DPR prepared in August 2009 that average annual rainfall at the project site was 1748.4 mm, and all project-related activities were planned accordingly, including the scheduled commercial operation date of the

project. Further, the rainfall in the range of 1200 mm to 1400 mm cannot be considered under the category of excessive rainfall, and this is a misinterpretation of the Appellate for its benefit. Hence, they cannot claim that excess rainfall had delayed the project. Further, the Appellant had not given any details regarding what activities had been slowed down due to rainfall. The Appellant has also not placed on record any letters/communications exchanged with the BTG contractor evidencing that rainfall has slowed down progress of the project. The Appellant has also not produced any photographs, etc. showing rainfall affecting the project. Hence, it is submitted that this Hon'ble Tribunal may not allow any cost overruns due to alleged excess rainfall at project site and should not passed on this cost overrun (due to delay in commissioning) to the consumers of the State.

51. Secondly, the Appellant has claimed change of water intake system from weir to barrage has resulted in delay of the project. The Appellant has submitted that change in water intake system was due to advise of the Government of Madhya Pradesh letter dated 9.02.2011. However, it is submitted that the Appellant themselves sought permission to change the design of the water intake system. Reference may be made to Appellant's letter dated 8.12.2010 to the Chief Engineer, Ganga Kachhar, Rewa. The office of the Chief Engineer approved the design change on 16.02.2013. It is respectfully submitted that the Appellant has failed to place any communication to show that it had followed up with the office of the Chief Engineer to obtain approval in a timely manner. Further, even after the approval was granted in February 2013, there was enough time for the Appellant to execute the project in a timely manner. Hence, the Impugned Order rightly disallows fifty percent of the costs incurred due to delay in commissioning of the project.

52. Thirdly, Appellant has wrongfully claimed cost overruns due to delay in approval for construction of 161 KM, 400 KV Double Circuit Nigrie – Satna Transmission Line for evacuating power from the project. About 12 Kms, of the transmission line passes through Forest area. The Appellant claimed that Diversion of Forest Land was approved by MoEF vide ref: F.No. 8-80/2012-FC dated 5th June 2013; the Standing Committee of National Board for Wild Life, MoEF recommended the project for Wild Life Clearance vide its ref: 6-43/2007 WL-1 dated 1st February 2013 and State clearance was received thereafter on 17th December. It is respectfully submitted that delay in obtaining clearances related to forest approvals was not considered an uncontrollable factor at the time of issuance of the Impugned Order. The Appellant has not shown that it has followed up with the MoEF after making the application in 2011. Not one single reminder, follow-up document which has been exchanged with the MoEF has been placed. Further, as per Article 3.1.1. (vi), the Appellant is responsible for obtaining clearance from the MoEF within 12 months of 5.01.2011; hence, any failure on the part of Appellant to fulfil its contractual obligations cannot be passed onto the consumers.

53. Further, it is pertinent to note that Appellant vide letter 1.7.2010 appointed consultant for detailed survey of Nigrie Stana transmission line and awarded turnkey contract to Jyoti Structures Ltd. on 16.7.2011 for construction of the transmission line within time period of 15 months i.e., 11.6.2011 to 10.9.2012. Hence, 161 kms was envisaged to be constructed within 15 months, i.e. the contract envisaged construction of approximately 10 kms per month. Accordingly, even if it is accepted that the project was delayed due to delay in grant of clearances by MoEF, even then the Appellant had sufficient time from December 2013 till March 2014 to construct the remaining 12 kms (which would take

approximately a month as per the time period envisaged in contract dated 16.7.2011). Hence, delay in grant of forest clearance cannot be treated as a force majeure event and the consumers of the state cannot be burdened with cost overruns caused due to lackadaisical attitude of the Appellant.

54. Fourthly, the Appellant has claimed that movement of Generator Stator from Hazira to Nigrie Site took around 8 months after the stator left at L&T works Hazira on 22.11.2011 and finally reached Nigrie site in 07.07.2012. It is respectfully submitted that alleged delay on part of the BTG contractor, L & T cannot be passed onto the consumers. It is pertinent to mention that as per the BTG/STG contract executed between the Appellant & L&T, time is of the essence and timelines shall be strictly adhered to by the contractor. The timelines have been mentioned in Appendix I of the contract. At Appendix I, it is mentioned that generator shall be delivered within 32 and 38 months of the start date, i.e., 23.07.2009 for Unit 1 and 2 respectively. Hence, at the time of entering into the contract the timelines were clearly mentioned. Any delay in achieving timelines by the contractors cannot be passed onto the consumers.

55. Lastly, the Appellant has claimed commissioning of the Project was also delayed because of Tsunami in Japan. It is respectfully submitted that Appellant has not submitted any details regarding activities which were specifically affected due to the Tsunami. Information was incomplete and therefore, the Impugned Order correctly does not recognise fifty percent of the costs associated with delay in commissioning of the Project.

56. Accordingly, Respondent No. 1, while issuing the Impugned Order held that the delay in achieving COD were not completely beyond the control of Appellant and such constraints/obstructions are envisaged/considered while arriving at the Scheduled COD, hence, total cost overrun on account of all such reasons cannot

be considered to pass on to the beneficiaries/end consumers of electricity generated and supplied from this project.

57. After examining the all above factors, the respondent Commission found that the delay in commissioning of the project was partially attributable to main contractor/supplier and partially attributable to the Appellant generating company. Therefore, the cost of time over run allowed to shared equally between the generating company and the consumers. Further, the Respondent No. 1 has correctly placed reliance on the judgement of the Tribunal in Appeal No 72 of 2010 in the following manner:

> *"7.12. In view of above, we feel that this case falls under category (iii) described in Para 7.4. Accordingly, following the principles of prudence check laid down by us, **the cost of time over run has to be shared equally between the generating company and the consumers.** Admittedly, there is no enhancement in cost of the contract price of the equipment as no price variation escalation was permissible to BHEL beyond the schedule date of completion of the Project according to the terms of the agreement. The impact of time over run beyond the contractual schedule is only on IDC and overhead costs. Accordingly, the same have to be shared between the generating company and the consumers. Excess IDC and overhead costs for time overrun from scheduled date of commissioning to actual date of commissioning has to be worked out on prorate basis with respect to total actual time taken in commissioning of the unit. 50% of the excess IDC and overhead costs*

will have to be disallowed. Deduction on account of 50% of the Liquidity Damages received by the Appellant from its suppliers/contractors has also to be allowed from the capital cost, to give due credit for LDs to the consumers. This issue is answered accordingly.”

58. In line with the above Judgment, the reasons for delay in achieving actual COD from Scheduled COD fall under the category (iii) described in abovementioned ruling of Hon’ble Tribunal. Accordingly, the Impugned Order had considered only 50% of IDC and Overhead costs increased from Scheduled COD to actual COD of the Project.

59. The Appellant has also argued that Respondent Commission has not provided any reasoning for disallowance of 50% of the costs. It is respectfully submitted that issuance of a tariff order is akin to a legislative process. This has been upheld by the Hon’ble Supreme Court in Ashok Soap Factory v. Municipal Corporation of Delhi (1993) 2 SCC 37 (Para 29.); PTC v. CERC, (2010) 4 SCC 603 and Transmission Corporation of Andhra Pradesh Ltd. v. M/s Rain Calcining Ltd. & Ors., Civil Appeal No. 4569/2003 (para 28 & 41). The Hon’ble Supreme Court while referring to earlier judgments, has held the following in Transmission Corporation of Andhra Pradesh Ltd. v. M/s Rain Calcining Ltd. & Ors., Civil Appeal No. 4569/2003:

> *“28. The tariff fixation is generally a legislative function as held in Ashok Soap Factory v. Municipal Corporation of Delhi, (1993) 2 SCC 37 thus:*
>
> > *“29. Apart from that the fixation of tariff is a legislative function and the only challenge to the fixation of such levy can be on the*

> *ground of unreasonableness or arbitrariness and not on demonstrative grounds in the sense that the reasons for the levy of charge must be disclosed in the order imposing the levy or disclosed to the court, so long as it is based on objective criteria."*

With respect to tariff fixation as legislative function reference has also been made to decisions of this Court, in Pawan Alloys & Casting Pvt. Ltd., Meerut v. U.P. State Electricity Board, (1997) 7 SCC 251, Oil and Natural Gas Commission v. Association of Natural Gas Consuming Industries of Gujarat, (1990) Supp. SCC 397, Rohtas Industries Ltd. v. Chairman, Bihar State Electricity Board, (1984) Supp. SCC 161.

…

41. A Constitution Bench of this Court in PTC India Ltd. v. Central Electricity Regulatory Commission (supra), has held that tariff fixation under the Electricity Act, 2003, is a legislative function in its character. Section 178 of the said Act deals with the making of Regulation by the Central Commission under the authority of subordinate legislation. The same is broader than section 79 (1), which enumerated the regulatory function of the Central Commission in specified areas. A regulation under section 178, as a part of the regulatory framework, intervenes and even overrides the existing contracts between the regulated entities since it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation.

This court further observed that in the absence of regulation, the Commission has the power of fixation of the tariff. It is not dependent upon the framing of the regulation. This Court has laid down thus:

"25. The 2003 Act contains separate provisions for the performance of dual functions by the Commission. Section 61 is the enabling provision for framing of regulations by the Central Commission; the determination of terms and conditions of the tariff has been left to the domain of the Regulatory Commissions under Section 61 of the Act whereas actual tariff determination by the Regulatory Commissions is covered by Section 62 of the Act. This aspect is very important for deciding the present case. Specifying the terms and conditions for determination of tariff is an exercise which is different and distinct from actual tariff determination in accordance with the provisions of the Act for the supply of electricity by a generating company to a distribution licensee or transmission of electricity or wheeling of electricity or retail sale of electricity.

26. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the Appropriate Commission shall determine the actual tariff following the provisions of the Act, including the terms and conditions which may be specified by the appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made appealable vide Section 111. These provisions, namely, Sections 61, 62, and 64, indicate the dual nature of functions performed by the Regulatory

Commissions viz. decision-making and specifying terms and conditions for tariff determination.

*** *** ***

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court, which we have discussed hereinafter. For example, under Section 79(1)(g), the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

*** *** ***

57. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on the one hand and the *various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a precondition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures the Central Commission takes under Section 79(1)(j) have to be in conformity with Section 178.*

58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognised, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could *not have been done across the board by an order of the Central Commission under Section 79(1)(j).*

*** *** ***

66. While deciding the nature of an order (decision) vis-àvis a regulation under the Act, one needs to apply the test of general application. On the making of the impugned 2006 Regulations, even the existing power purchase agreements (PPA) had to be modified and aligned with the said Regulations. In other words, the impugned Regulations make an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC under Section 178 of the 2003 Act. All contracts coming into existence after making of the impugned 2006 Regulations have also to factor in the capping of the trading margin. This itself indicates that the impugned Regulations are in the nature of subordinate legislation. Such regulatory intervention into the existing contracts across the board could have been done only by making regulations under Section 178 and not bypassing an order under Section 79(1)(j) of the 2003 Act. Therefore, in our view, if we keep the above discussion in mind, it becomes clear that the word "order" in Section 111 of the 2003 Act cannot include the impugned 2006 Regulations made under Section 178 of the 2003 Act.

71. This judgment in Jagdamba Paper Industries (P) Ltd. v. Haryana SEB, (1983) 4 SCC 508, is important from another angle also. It indicates that regulations under Section 79 of the 1948 Act were to be in the nature of subordinate legislation, *therefore, all contracts had to be in terms of such regulations. In the present case also, if one examines the terms and conditions of the licences, power to fix trading margin is expressly contemplated by such terms. The said judgment further held that the Board is a statutory authority and has to act within the framework of the 1948 Act. If the act of the Board is not in consonance or in breach of some statutory provisions of law, rule, or regulation, it is always open to challenge in a petition under Article 226 of the Constitution.*

79. Applying the above judgments to the present case, it is clear that fixation of the trading margin in the interState trading of electricity can be done by making of regulations under Section 178 of the 2003 Act. Power to fix the trading margin under Section 178 is, therefore, a legislative power and the notification issued under that section amounts to a piece of subordinate legislation, which has a general application in the sense that even existing contracts are required to be modified in terms of the impugned Regulations. These Regulations make an inroad into contractual relationships between the parties. Such is the scope and effect of the impugned Regulations, which could not have taken place by an order fixing the trading margin under Section 79(1)(j). Consequently, the impugned Regulations cannot fall within the ambit of the word "order" in Section 111 of the 2003 Act.

*** *** ***

> *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). (ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation."*
>
> *(emphasis supplied)"*

60. Hence, a tariff order cannot be held to the same standards of an order passed by the Appropriate Commission in an adjudicatory proceeding. One has to see the entire records placed before the Commission in a tariff proceeding and not just the Impugned Order. In any event, this Hon'ble Tribunal has held in its judgment dated 20.07.2016, passed in Appeal No. 271 of 2013, TPDDL v. DERC, that State Commission, acting as a Respondent, can mention reasons, not discussed in its order, to justify the order passed by it. The relevant extract is as under:

> "*7.3) We are unable to accept this contention of the appellant that the Delhi Commission cannot be allowed to take additional grounds during submissions in this appeal before this Appellate Tribunal, which grounds or reasons were not mentioned in the Impugned Order,* ***since the Delhi Commission is a respondent in this appeal before us, it is free to take the other reasons or grounds to justify its Impugned***

Order apart from the reasons already discussed or mentioned in the Impugned Order.

7.4) The learned Delhi Commission has not acted upon the said press release of the CERC solely or in isolation but it has considered several other factors in disallowing the penal UI Charges of Rs.3.65 crore. ***So far as the law laid down in Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors. (supra) is concerned the present case is not squarely covered by the said proposition of law.*** *We are further unable to accede to the contention of the appellant that natural justice principle has been violated in passing the Impugned Order by Delhi Commission, as no opportunity was given to the appellant to justify the said UI Charges."*

(Emphasis supplied)

61. This order of the Hon'ble Tribunal having not been challenged has attained finality and is thus, binding. It is thus submitted that the submissions made by the Respondent Commission in the instant appeal can be considered by this Hon'ble Tribunal while adjudicating the matter.

62. Further, this Hon'ble Tribunal is the court of first appeal and can look into questions of facts and law. Now that the specific filings of Appellant are placed before this Hon'ble Tribunal, it is prayed that this Hon'ble Tribunal may take a holistic view of the facts and accordingly decide the present appeal.

63. Further, it is respectfully submitted that as per the PPA executed between the Appellant and Respondent No.2, only this Respondent Commission has the power to determine tariff as per law and its own regulations. Article 10.1 of the PPA is as below:

"10.1.1. The Tariff shall comprise Capacity Charge, Variable Charge and any other charges as may be determined by the Appropriate Commission under Law and as per the norms contained in the tariff regulations notified by the Appropriate Commission."

64. The Respondent Commission is not bound to take into account any extension of SCOD by Respondent No. 2 which is not recognised under the Tariff Regulations.

<u>Submissions of the Respondent No. 2, MPPMCL (issue 1)</u>

65. MPPMCL submitted that the Appellant has cited a number of reasons for delay in achieving COD of the Project viz.:

i. Unprecedented Rainfall
ii. Change of water intake system
iii. Delayed approach for construction of Transmission Line
iv. Major Challenges in movement of Generator Stator from Hazira to Nigrie site; and
v. Tsunami in Japan

66. Argued that MPERC has carefully considered all reasons cited by the JPVL for the delay and after careful consideration of submissions made, documents filed found and observed that most of the reasons for delay in achieving COD were not beyond the control of JPVL and such constraints/ obstructions are envisaged/ considered while arriving at the Scheduled COD.

67. The claim of Unprecedented Rainfall during 2011 and 2012 is totally incorrect. At page nos. 4 to 6 of the Detailed Project Report (DPR) prepared by M/s Development Consultant (submitted along with the Tariff Petition), "Meteorological Data" clearly shows Average Annual Rainfall as 1,748.4 mm in Sidhi District, where the Project Site is located. Actual rainfall for the years 2011 and 2012 is actually "deficient" by 8.4% and 27.62% respectively.

68. The Appellant has also not placed on record any letters/ communications exchanged with the BTG contractor evidencing that rainfall has slowed down progress of the project. The Appellant has also not produced any photographs, etc. showing rainfall affecting the project.

69. Further, submitted that the Appellant has contended that change of water intake system from weir to barrage consequent to advise of the Government of Madhya Pradesh (Letter Dated 9.02.2011), has resulted in delay in completion of the Project.

70. Above contention is entirely misconceived and wrong. Perusal of content of Appellant's letter dated 8.12.1010 addressed to the Chief Engineer, Ganga Kachhar, Rewa, reveal that the Appellant themselves had sought permission to change the design of the water intake system which was approved on 16.02.2013.

71. Besides, the Appellant has failed to place any communication before MPERC to show that it had followed up with the office of the Chief Engineer to obtain approval in a timely manner. Further, even after the approval was granted in February 2013, there was enough time for the Appellant to execute the project

in a timely manner. Hence, the MPERC has rightly disallows 50% of the costs incurred due to delay in commissioning of the Project.

72. Appellant has wrongly claimed cost overruns due to delay in approval for construction of 161 KM, 400 KV Double Circuit Nigrie –Satna Transmission Line for evacuating power from the Project out of which only about 12 Kms line length passes through Forest area.

73. The Appellant has failed to produce any document (Letters/ Reminders etc.) showing follow- up with the MoEF after making the application for seeking Forest Clearance for the Project in 2011. Further, as per Article 3.1.1. (vi), the Appellant is responsible for obtaining clearance from the MoEF within 12 months of 5.01.2011, Hence any failure on the part of Appellant to fulfil its contractual obligations cannot be passed onto the consumers.

74. Further, it is pertinent to note that Appellant vide letter 01.07.2010 appointed consultant for detailed survey of Nigrie Stana transmission line and awarded turnkey contract to Jyoti Structures Ltd. on 16.7.2011 for construction of the transmission line within time period of 15 months i.e., 11.6.2011 to 10.9.2012. Hence, 161 kms was envisaged to be constructed within 15 months, i.e. the contract envisaged construction of approximately 10 kms per month. Accordingly, even if it is accepted that the project was delayed due to delay in grant of clearances by MoEF, even then the Appellant had sufficient time from December 2013 till March 2014 to construct the remaining 12 kms (requiring approximately a month as per the time period envisaged in contract). Hence, delay in grant of forest clearance cannot be treated as a force majeure event and the beneficiaries and

consumers of the State cannot be burdened with cost overruns caused due to lackadaisical attitude of the Appellant.

75. According to the Appellant, major challenges were faced while transporting Generator Stator from L&T works at Hazira to Nigrie Site, which caused delay in achieving COD. Pertinently, the weight, size and expected challenges etc were already known to the Contractor while entering into the contact of supply. Also, as per the BTG/ STG contract executed between the Appellant & L&T, time is of the essence and timelines shall be strictly adhered to by the Contractor. According to the Contract, Generator were to be delivered within 32 and 38 months from the start date, i.e., 23.07.2009 for Unit 1 and 2 respectively. Failure in achieving clearly mentioned timelines by the Contractor leading to delay in completion of the Project cannot be passed onto the beneficiaries/ consumers.

76. The Appellant has claimed that the commissioning of the Project was also delayed because of Tsunami in Japan. However, the Appellant has not submitted any details regarding activities which were specifically affected due to the Tsunami. Information was incomplete and therefore, the MPERC has not accepted the reason for delay.

77. Accordingly, MPERC, while issuing the Impugned Order rightly held that the delay in achieving COD were not completely beyond the control of Appellant and such constraints/ obstructions are envisaged/ considered while arriving at the Scheduled COD, hence, total cost overrun on account of all such reasons cannot be considered to pass on to the beneficiaries/ end consumers of electricity generated and supplied from this project.

78. Further, the MPERC has correctly placed reliance on the judgement of this Tribunal in Appeal No 72 of 2010 and in line with the said Judgment, the reasons for delay in achieving actual COD from Scheduled COD fall under the category (iii) described in abovementioned ruling of this Tribunal. Accordingly, the Impugned Order had considered only 50% of IDC and Overhead costs increased from Scheduled COD to the actual COD of the Project.

Analysis and Decision on Issue 1

79. The State Commission vide the Impugned Order has held as under:

"Delay in COD of Units

95. The petitioner submitted that unit I and unit II of Jaypee Nigrie Super Thermal Power Plant (JNSTPP) achieved COD on dated 3rd September 2014 and 21st Feb 2015, respectively.

96. In response to Commission's query, by affidavit dated 29th November' 2016 the petitioner submitted that (JNSTPP) was scheduled for commissioning in March 2014 but it got delayed and delay is attributable to the following reasons:

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*97. **On going through the above mentioned reasons stated by the petitioner for delay in achieving COD of units, it is observed that most of the reasons for delay in achieving COD were not beyond the control of petitioner and such***

constraints/obstructions are envisaged/considered while arriving at the Scheduled COD. *The total cost overrun on account of all such reasons cannot be considered to pass on to the beneficiaries/end consumers of electricity generated and supplied from this project. On this issue of increase in capital cost due to delay in achieving COD, Hon'ble Appellate Tribunal for Electricity (APTEL) in its Judgment in Appeal No. 72 of 2010 has held the following:*

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98. In line with the above Judgment, the reasons for delay in achieving actual COD from Scheduled COD fall under the category (iii) described in abovementioned ruling of Hon'ble APTEL. Accordingly, in this order, the Commission has considered only 50% of IDC and Overhead costs increased from Scheduled COD to actual COD of the Project as given below:

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99. Accordingly, IDC of Rs 178.73 crore is allowed beyond Scheduled CoD and the same is considered in the capital cost in this order."

80. From the above, it can be seen that the State Commission restricted the claim of the Appellant on the ground that "*most of the reasons for delay in achieving COD were not beyond the control of petitioner and such constraints/obstructions are envisaged/considered while arriving at the Scheduled COD."*

81. **The State Commission, thus, decided the issue without going into the merit of the case or carrying out a prudent check. Such an approach is neither justified nor warranted.**

82. The State Commission failed in its duty by ignoring the fact that the MPPMCL vide letters dated 27.05.2014 and 04.08.2014 has extended the COD without any condition, after considering the request made by the Appellant, citing various reasons, including the ones as noted by the State Commission in the Impugned Order.

83. We also noted that contrary to 'NIL' findings in the Impugned Order, the State Commission argued at length during the hearing and made lengthy Written Submissions.

84. **However, on the issue of extension given by the MPPMCL, the State Commission failed to make any submission before us or through their Written Submission.**

85. It is a settled principle of law that the State Commission is bound to accept any decision taken by the contractual parties in the PPA regarding extension of time agreed to in the commissioning of the project, once the PPA is duly approved by the State Commission.

86. This Tribunal in **W*alwhan Renewable Energy Limited vs. KERC & ors.***, Appeal No. 115 of 2020 and batch, (dated 12.04.2022), has held as under:

*"**53.** This issue is irrelevant at this stage considering that the BESCOM through its Board of Directors considered the proposal of the Appellant and recommended the extension of SCOD. On the perusal of the minutes of the 82nd and 83rd Board meeting, it cannot be denied that the Board of Directors have agreed and recommended the proposal of the Appellant for extension of the SCOD.*

***54. We are of the opinion that once the Distribution Licensee has accorded in principle approval and/ or recommended the proposal of the Appellant for the extension of the SCOD after diligently examining it under the contractual terms and conditions of the PPA, the State Commission is bound to accept the same**."*

87. In the instant case, extension was granted twice by the MPPMCL, on the request of the Appellant, the relevant extracts of the Appellant's letters are quoted as under, seeking extension of time:

"Dear Sir,

This is in reference to the captioned PPA of 5th January, 2011 for supply of-30% of the installed capacity at regulated tariff and PPA dated 6th September,2011 for 7.5% of net generation at variable cost from Jaypee Nigrie Super Thermal Power Project (JNSTPP)(2x660MW). In accordance with the PPA's, the commercial *operation date of first Unit of the project is March 2014 and second Unit 6 months thereafter.*

In connection with the above, we wish to submit as under:-

1. *We, are pleased to inform you that implementation of the project is in very advance stage, with over 10500 Workers, Supervisors Managers working at site on round the clock basis. All out efforts are being made to ensure commissioning of the project at the earliest. Some recent photographs of the key sections of the Project site are attached for your kind perusal to, show the advanced stage of the Project progress. (Ann-I).*

   You are kindly aware that in a large Project, there are always uncertainties which result due to act of God / reasons beyond the control of the Project proponent. In case of JPSTPP, the following may please be noted:-

   i) Unprecedented Rainfall:

   ----------"

88. From the above, it is clear that the Appellant requested the MPPMCL for extension of COD, citing the occurrence of uncertainties which result from an act of God/reasons beyond the control of the Project proponent. Further, the advanced stage of construction was cited through the photographs of construction sites.

89. The reasons given by the Appellant are nothing but the reasons placed by it before the State Commission, which were duly considered and accepted by MPPMCL for granting extension.

90. In the instant case also, the holding company MPPMCL has granted extension twice without imposing any condition therein, after examining the facts as submitted by the Appellant before the MPERC and this Tribunal, without imposing any condition therein, except payment of transmission charges to PGCIL, certainly not a matter of dispute. The relevant extracts are quoted as under:

MPPMCL's letter dated 27.05.2014:

"*This is in reference to the letter cited under reference vide which M/s JPVL, has requested for revision in the scheduled COD. MPPMCL has considered the various reasons/ aspects mentioned therein and it has been decided that, as per provision in Article 4.1.6 of the PPA, revised scheduled COD for Unit-I of Thermal Power Plant (2 x 660 MW) of M/s Jaypee Nigrie Super Thermal Power Plant will be 31st July, 2014.*"

MPPMCL's letter dated 04.08.2014

"In this regard it is to convey that, MPPMCL, has considered your request and it has been decided that the Revised Scheduled COD for Unit-1 of 2x660 MW Super Thermal Power Project of m/s Jaypee Nigrie will be 31, August 2014, on the condition that M/s Jaypee agree for payment of PGCIL open access charge if any, levied prior to the actual COD.

> *Please immediately convey your acceptance as above for revised scheduled COD for Unit-1 to become effective."*

91. It cannot be argued now that the facts as brought out now are different from the facts as submitted before MPPMCL and after duly considering the various reasons/ aspects mentioned by the Appellant, the procurer, MPPMCL, vide letter dated 27.05.2014, granted revised scheduled COD for Unit-I of Thermal Power Plant (2 x 660 MW) of M/s Jaypee Nigrie Super Thermal Power Plant as 31st July, 2014, as per provision in Article 4.1.6 of the PPA and further extended the COD to 31.08.2014, vide letter dated 04.08.2014.

92. This Tribunal, in ***SEI Aditi Power Private Limited & Ors. VS. KERC & Ors.,*** *APPEAL NO. 360 OF 2019 & IA NO. 1932 OF 2019,* decided on 14.07.2021, has held as under:

> *"**120**. It is noticed that there is no mention that Appellants were not ready in August or September 2016 and extension cannot be granted. Last Para clearly says extension of SCOD is recommended up to 30.03.2017 for approval on force majeure reason.*
>
> ***121**. This conduct of the Respondent BESCOM cannot be appreciated. On one hand it accepts there was force majeure event, and on the other hand it takes a different and divergent stand at a later stage. It is well settled legal position that a party having admitted a fact, then it is bound by such admission made by it……"*

93. The Hon'ble Supreme Court in ***Bangalore Electricity Supply Co. Ltd. v. Hirehalli Solar Power Project LLP, (2025) 1 SCC 435 : 2024 SCC OnLine SC 2253***, has held as under:

> ***"38. Finally, we have also considered the letter by the appellant dated 2-3-2017 that granted a 6-month extension to the respondents after considering its individual facts and circumstances.*** *This grant of extension must be seen in light of the Government's direction to Discoms dated 24-11-2016 to set up 3-member committees to consider each request for extension.* ***This shows that the appellant, after considering the specific case of the respondents, has itself accepted that they are entitled to the benefit of Article 2.5 read with Article 8.3 of the PPA.*** *Even before KERC, the appellant did not challenge the respondents' contentions.*
>
> ***39. Therefore, at the appellate stage before Aptel and this Court, the appellant cannot be permitted to take a contrary stance and raise the plea that the delay was attributable to the respondents and not covered by the force majeure clause or that there was non-compliance with the notice requirement under Article 8.3(b)(i). We therefore reject the contentions of the appellant that force majeure does not apply in this case.***
>
> ***40.*** *In light of the above findings of fact by Aptel that the delay is not attributable to the respondents and that the force majeure clause is applicable, it rightly held that the extension of time under Article 2.5 is warranted and the commissioning of the project on 24-8-2017 is*

within the extended period of 24 months. Consequently, Aptel also rightly held that there is no occasion for the imposition of liquidated damages under Articles 2.2 and 2.5.7 or for the reduction of tariff under Article 5.1 of the PPA.

Conclusion

***41.** After considering the learned counsel's submissions in light of the above findings of Aptel, we find that no substantial question of law arises in the present case. Aptel has primarily decided a question of fact as to the attributability of the delay, and from the above, it is clear that Aptel's findings are neither illegal nor unreasonable. Hence, we find no reason to interfere with the same."*

94. This Tribunal in ***Chennamangathihalli Solar Power Project LL.P vs. Bangalore Electricity Supply Company Limited*** (Appeal No. 351 of 2018), has decided as under:

9.1 Having regard to the deliberations and our analysis, as stated supra, we are of the opinion that there was nothing wrong on the part of KERC to suo motto interfere in the matter. As being a State Regulator, it has jurisdiction to look into affairs of ESCOMS in purchase and supply of powers in the larger interest of consumers. ***However, as the COD extension was granted under the signed PPA between the parties and after applying, due diligence in the matter considering all prevailing facts and matrix of events, the State Commission***

> ***ought to have considered the same and approved so as to meet the ends of justice. Needless to mention that the PPA' Terms & Conditions were duly approved by the State Commission which crystallised the rights of the parties."***

95. As noted from the PPA, Article 4.1.5 of the PPA defines the "Scheduled Commercial Operation Date". Further, Article 4.1.6 provides for 'revision of SCOD'. The provisions of the PPA are quoted as under:

> "*4.1.5 Scheduled Commercial Operation Date*
>
> *The Company shall achieve Commercial Operation Date for the first Unit by March, 2014 and subsequent Unit of the Power Station within six (6) Months thereafter.*
>
> ***4.1.6 Revised Scheduled Commercial Operation Date***
>
> ***The Parties may mutually agree to revise the Scheduled CoD for Commissioning of any Unit or the Power Station (hereinafter referred to as Revised Scheduled Commercial Operation Date or Revised Scheduled COD) and such Revised Scheduled COD shall thereafter be the Scheduled COD*."**

96. Therefore, the extension in SCoD is explicitly rooted in the PPA. Such extension has been granted by MPPMCL on the request of the Appellant herein; thus, it is the mutually agreed-upon revision of the SCoD. Accordingly, once the extension is granted by the MPPMCL, the State Commission is bound to accept it

as a mutually agreed extension under the provisions of the PPA approved by the Commission.

97. Further, the State Commission's reliance on this Tribunal's judgment in Appeal No. 72 of 2010 is misplaced as the said judgment is based on different facts, where the reasons for delay are partially not under the control of the developer, and no extension was granted by the procurer therein, the reasons as noted therein are quoted as under:

> *"2.4. On 1.11.2007 the Parli Unit no. 6 was commissioned after a delay of about 14 months with respect to the contractual data of commissioning agreed with BHEL. According to the Appellant, the delay was caused due to technical inadequacy and breaches on the part of BHEL, the principal supplier of the main plant.*
>
> *2.5. Subsequently, the Appellant filed a petition before the State Commission for determination of tariff for Unit-6 at Parli.*
>
> *2.6. On 21.10.2009, the Respondent no. 1/State Commission passed the impugned order disapproving a part of Capital cost mainly on account of delay in commissioning of the project. Aggrieved by the said order dated 21.10.2009, the Appellant has filed this Appeal."*

98. Therefore, the extension of COD by the MPPMCL in terms of the PPA cannot be challenged by the Respondents, including MPPMCL itself. In the light of the settled principle of law and various judgments as quoted above, the issue is decided in favour of the Appellant.

99. **The decision of the State Commission is set aside on the count of disallowance of 50% of the cost incurred till the extended timeline, i.e., up to 31.08.2014, the Appellant is allowed 100% of the cost incurred corresponding to the period up to 31.08.2014.**

Issue No. 2- *Decision on liquidated damages by the Commission without there being any actual adjudication in the matter.*

Submissions of the Appellant (issue 2)

100. In paragraphs 100 to 102 of the impugned order, the Commission disallowed ₹120.77 crores from the capital cost claimed by the Appellant, attributing it to 50% of liquidated damages (LDs) that the Appellant was allegedly entitled to recover from its contractor for delays in the supply of the Steam Turbine Generator (STG).

101. The Appellant contends this disallowance is erroneous, as the STG supply was delayed due to the 2011 Tsunami in Japan; a force majeure event which was duly communicated to MPPMCL through a letter dated 24.02.2014, enclosing L&T's communication dated 17.03.2011. Based on this, MPPMCL had revised the Scheduled Commercial Operation Date (SCOD). The Commission failed to consider these facts or review the terms of the L&T contract concerning force majeure.

102. Moreover, as the SCOD was revised to reflect the delay caused by uncontrollable events, the Appellant did not suffer any loss under the PPA. Therefore, the conditions for claiming damages, contractual breach, and actual injury are not met. Consequently, there was no legal basis for assuming recovery of LDs, and the disallowed ₹120.77 crores ought to be reinstated into the capital cost.

<u>Submissions of the Respondent No. 1, MPERC (issue 2)</u>

103. Regarding liquidated damages, the Impugned Order holds that Appellant was liable to recover Liquidated Damages under the contracts executed by the Appellant for delays in commissioning of the Project. The Respondent No. 1 in the Impugned Order perused the Steam Turbine Generator contract and noted that the contract provided for payment of Liquidated Damages in the following manner:

> *"The parties agree that the liquidated damaged for delay in completion shall only be levied after 48 months and months for Unit I and Unit II respectively from the effective date. The rate of Liquidation Damage ("LD") for delay in completion shall be 0.5% (one half of one percent) per week or part thereof of the delay subject to a maximum of 2.5 % the SG Package Supply Price (excluding the price of mandatory spares) for each units. The overall ceiling for LD for both Unit and Unit II shall be restricted to a maximum of 5% of SG Package Supply Price (excluding the price of mandatory spares)"*

104. The effective date of above contract was 23th July' 2009 whereas, 48 months came to end by 23th July' 2013. In view of the above provision under contract

award, the Respondent No. 1 provisionally worked out the Liquidated Damages (LD) of Rs. 241.55 crore (being 5% of BTG cost of Rs. 4830.90 crore actually incurred and shown under TPS 5B of the petition). However, in line with above mentioned Judgment by Hon'ble Appellate Tribunal for Electricity, only 50% of aforesaid LD i.e. Rs 120.77 crore was provisionally deducted from the capital cost. However, Respondent No. 1 had given the liberty to the Appellant to approach the Respondent No. 1 with the actual details of LD as and when deducted from the contractors/vendors at the time of filing true up petition. Till date, Appellant has not come up with the actual details of LD in any of the petitions filed. Hence, it is respectfully submitted that the Appellant's claim is premature and it should first approach Respondent No. 1 with details regarding LD. **Further, the consumers should not be made to suffer in the event the Appellant has failed to enforce the terms of its own contract.**

Submissions of the Respondent No. 2, MPPMCL (issue 2)

105. MPERC has comprehensively dealt with the issue of Liquidated Damages in Paras 100 to 103 of the Impugned Order. MPERC is entirely within its jurisdiction to deduct 50% of Liquidated Damages for delay beyond 48 months from the effective date (23.07.09) of the contract for Steam Generator Package which is eventually recoverable from the contractor/ supplier by the Petitioner, as per the clear terms of the Contract. Timely recovery of LD from contractors/ suppliers is the responsibility of the Appellant only. As such the said amount cannot be allowed to be included in the Capital Cost of the Project and passed on to the Consumers.

106. Pertinently, the Steam Turbine Generator contract provided for payment of Liquidated Damages in the following manner:

> *"The parties agree that the liquidated damaged for delay in completion shall only be levied after 48 months and months for Unit I and Unit II respectively from the effective date. The rate of Liquidation Damage ("LD") for delay in completion shall be 0.5% (one half of one percent) per week or part thereof of the delay subject to a maximum of 2.5 % the SG Package Supply Price (excluding the price of mandatory spares) for each units. The overall ceiling for LD for both Unit and Unit II shall be restricted to a maximum of 5% of SG Package Supply Price (excluding the price of mandatory spares)".*

107. The effective date of above contract was 23,07.2009 whereas, 48 months came to end by 23.07.2013. In view of the above provision under contract award, the MPERC provisionally worked out the Liquidated Damages (LD) of ₹ 241.55 crore (being 5% of BTG cost of ₹ 4,830.90 crore actually incurred and shown under TPS 5B of the petition). However, in line with above mentioned Judgment by Hon'ble Appellate Tribunal for Electricity, only 50% of aforesaid LD i.e. ₹ 120.77 crore was provisionally deducted from the capital cost. However, MPERC had given the liberty to the Appellant to approach the MPERC with the actual details of LD as and when deducted from the contractors/vendors at the time of filing true up petition. Till date, Appellant has not come up with the actual details of LD in any of the Petitions filed.

108. MPERC has also made it clear that at the time of filing true up Petition in the subject matter, JPVL shall be at liberty to approach the Commission with the actual details of LD. Hence, it is respectfully submitted that the Appellant's claim is premature and it should first approach MPERC with details regarding LD. Further, the consumers should not be made to suffer in the event the Appellant has failed to enforce the terms of its own contract.

Analysis and Decision on Issue 2

109. The State Commission vide the Impugned Order has held as under:

> *100. With regard to Liquidated Damages, vide Commission's letter dated 4th March' 2016, the petitioner was asked to inform the details of LD/ penalty if any, recovered /to be recovered from the contractors/ vendors on account of delay in completion of works. In response, by affidavit dated 19th May' 2016, the petitioner submitted that it has not recovered any LD/ penalties from any contractors/ vendors as the execution and finishing works and defect liability period/guarantee period is yet to expire.*
>
> *101. It is noted that the Liquidated Damages are not recovered by the petitioner even at this stage of seeking/claiming final tariff for the project under subject. It is further observed from the contention of petitioner that the Liquidated Damages are certainly recoverable from respective contractors. On going through the contract awards submitted by the petitioner for Steam Turbine Generator and others,*

it is noted that the respective clause in contract regarding Liquidated damages for delay in completion provided the following:

> *"The parties agree that the liquidated damaged for delay in completion shall only be levied after 48 months and months for Unit I and Unit II respectively from the effective date. The rate of Liquidation Damage ("**LD**") for delay in completion shall be 0.5% (one half of one percent) per week or part thereof of the delay subject to a maximum of 2.5 % the SG Package Supply Price (excluding the price of mandatory spares) for each units. The overall ceiling for LD for both Unit and Unit II shall be restricted to a maximum of 5% of SG Package Supply Price (excluding the price of mandatory spares)".*

102. The effective date of above contracts was 23th July' 2009 whereas, 48 months came to end by 23th July' 2013. In view of the above provision under contract award, the Commission has provisionally worked out the Liquidated Damages (LD) of Rs. 241.55 crore (being 5% of BTG cost of Rs. 4830.90 crore actually incurred and shown under TPS 5B of the petition). However, in line with above mentioned Judgment by Hon'ble Appellate Tribunal for Electricity, only 50% of aforesaid LD i.e. Rs 120.77 crore is provisionally deducted from the capital cost as given below:

----

103. However, at the time of filing true up petition in the subject matter, the petitioner shall be at liberty to approach the Commission with the actual details of LD as and when deducted from the contractors/vendors."

110. The State Commission, after taking note of granting only 50% of the soft cost during the extended period and the liquidated clause in the contract awarded by the Appellant to the EPC contractor, levied LD of Rs. 120.77 crores.

111. The first issue has already been decided in the foregoing paragraphs, as **Issue No. 1**, in favour of the Appellant, accordingly, the only issue left is regarding the liquidated damages clause in the contract between the Appellant and the Contractor.

112. The Appellant submitted that the deduction of Rs. 120.77 crores by the Commission is arbitrary and without basis in fact or law. It was pointed out that no such Liquidated Damages (LD) have been recovered or adjudicated against the BTG contractor (L&T). The Appellant asserts that there was no contractual breach by the contractor since the delay in supply of the Generator Stator was due to force majeure, specifically, the tsunami in Japan, which affected Toshiba's supply chain.

113. The Appellant contends that the Commission cannot presume recoverability of LD in the absence of actual realization or at least an established legal right. Since no such recovery was made or is pending, any deduction is purely hypothetical and leads to an unjustified downward adjustment of capital cost.

114. The Commission justified the deduction on the ground that Clause 11.1.1 of the BTG contract permitted recovery of LD at the rate of 0.5% per week of delay, capped at 5% of contract value, if the contractor failed to deliver within 48 months.

115. Given the admitted delay, the Commission computed the maximum LD of Rs. 241.55 crores and deducted only 50% of the same provisionally.

116. It was also stated that the deduction is subject to true-up, and the Appellant was at liberty to present evidence of actual recovery or non-recovery at the time of final true-up.

117. MPPMCL submitted that the Appellant had the contractual right to recover LD and failed to do so. In the absence of any contractual or adjudicatory relief sought by the Appellant against the contractor, the consumer should not bear the burden of default or non-enforcement.

118. It is settled that any adjustment in capital cost on account of LD can be justified only where the generator has either recovered or is legally entitled to recover such amounts. In this case, the Commission itself notes that no LD has been recovered. It has also accepted that the issue is not final and left it open for true-up.

119. The Appellant has placed on record that the delay was caused by factors beyond the contractor's control, particularly natural disasters, and thus LD was not legally enforceable. There is nothing in the record to suggest that the Appellant has waived enforceable rights or acted collusively.

120. We find that in the absence of adjudicated recovery or established legal enforceability of LD, a provisional deduction at this stage, without any determination, is not supported by the material on record. The Appellant has not

admitted any such liability, nor has the Commission shown such recovery as probable.

121. The Commission could have deferred the issue entirely to true-up rather than making an anticipatory deduction. This would have avoided premature adjustments and allowed more accurate accounting later.

122. Therefore, the deduction of Rs. 120.77 crores from the capital cost towards presumed LDs is set aside.

123. It is also seen that the Contractor vide letter dated 17.03.2011 informed the Appellant regarding the Force Majeure Event occurrence due to ***Tsunami*** in Japan, the details are reproduced as under:

> *"As you know, on and since Friday March 11, 2011, an extensive area of Japan has been affected in connection with catastrophic natural and physical disasters including earthquake, tsunami, flood and inundation, tire and nuclear emergency. This has resulted in widespread damage and disruption to business and infrastructure including disruption to transport, domestic and international travel, communication, labor and other services and supplies.*
>
> *Our joint venture partner Mitsubishi Heavy Industries (MHI) and Mitsubishi Electrical Corporation (MELCO), Japan and their sub-vendors, supplying several critical equipment under the STG Package Contract are also affected.*

Hence, as per the provisions of Clause No. 37 of GCC of the Contract, L&T hereby wishes to place on record and notify JAIPRAKASH POWER VENTURES LIMITEC regarding the occurrence of the above Force Majeure event which may affect the Time for Completion.

Our Joint Venture partners i.e. MHI & MELCO, Japan are assessing the impact arising out of the above Force Majeure Condition. We shall revert to you in due course of time.

Further, notwithstanding above, L&T will try to minimize the effects due to the occurrence of the above Force majeure condition."

124. Undisputedly, a ***Tsunami*** was a natural calamity/ natural disaster covered under the Force Majeure Event.

125. Further, the project was commissioned within the extended timeline granted by the MPPMCL, except for unit 1, which was commissioned with a delay of 3 days only, considering the occurrence of the Tsunami as one of the reasons cited by the Appellant.

126. **Accordingly, we agree with the Appellant that as the SCOD was revised to reflect the delay caused by uncontrollable events, the Appellant did not suffer any loss under the PPA. Therefore, the conditions for claiming damages, contractual breach, and actual injury are not met. Consequently, there was no legal basis for assuming recovery of LDs, and the disallowed ₹120.77 crores ought to be reinstated into the capital cost, after deducting an LD for a period of 3 days corresponding to unit 1 only.**

127. **In light of the reasons above, the issue is decided in favour of the Appellant.**

Issue No. 3- *Disallowance of O&M expenses of the dedicated transmission line and cost of O&M expenses & maintenance spares of the same in the computation of interest on working capital.*

Submissions of the Appellant (issue 3)

128. The Appellant submitted that the Commission at paras 189 to 194 has disallowed the O&M expenses of the transmission line setup by the Appellant from Nigrie to Satna for the evacuation of power. In this regard, it is pointed out that the dedicated transmission line was set up by the Appellant on account of the failure/ breach on the part of the Respondent No. 2 to set up such a line as envisaged under the PPA dated 05.01.2011. In this regard, the relevant provisions of the PPA are reproduced below:

- *Definition of Delivery Point (at page 105 of Vol. 1) – "Delivery Point" shall mean the ex-bus point of the Power Station at the Power Station switchyard.*
- *Definition of Interconnection Facilities (at page 107 of Vol. 1) – "Interconnection Facilities" shall mean the facilities on the Procurer's side of the Delivery Point for receiving and metering Electrical Output in accordance with this Agreement and which shall include, without limitation, all other transmission lines and associated equipment, transformers and associated equipment,*

relay and switching equipment and protective devices, safety equipment and, subject to Article 8, the Metering System required for the power station.

… … … …

- *Article 3.2 (i) and (ii) – Satisfaction of Conditions Subsequent by the Procurer (at page 116 of Vol. I)*

  The Procurer agrees and undertakes to duly perform and complete following activities within the time stipulated against each, unless such completion is affected due to any Force Majeure Event or due to the Company's failure to comply with its obligations under this Agreement or if any of the activities is specifically waived in writing by the Company.

  i) The Procurer shall have obtained open access and/ or connectivity for evacuation of the Scheduled Energy from the Delivery Point at least 60 (sixty) days prior to the Commissioning of the first Unit;

  ii) ***the Procurer shall have established the necessary evacuation infrastructure beyond the Delivery Point required for evacuation of the Scheduled Energy at least 210 days prior to Commissioning of the Unit;***

  … … … …

  Article 4.2 (i), (ii), (iv) and (v) – Procurer's Obligations

  Subject to the terms and conditions of this Agreement, the Procurer undertakes to be responsible at its own cost and risk, for:

  (i) Obtaining open access and/ or connectivity for evacuation of the Contracted Capacity from the Delivery Point at least 60 (sixty) days prior to Commissioning of the first Unit;

(ii) Establishing necessary evacuation infrastructure beyond the Delivery Point required for evacuation of the Contracted Capacity at least 210 days prior to Commissioning of the first Unit;

… …

(iv) Ensuring the availability of Interconnection Facilities for evacuation of Contracted Capacity from the Delivery Point; (v) Payment of the Tariff in accordance with Article 10;

(v) Payment of all charges for transmission as per prevailing regulations issued by the Appropriate Commission(s) beyond the Delivery Point corresponding to Contracted Capacity;

129. As per the Power Purchase Agreement (PPA), the responsibility for transmission beyond the Delivery Point defined as the bus-bar at the Nigrie plant rests with Respondent No. 2 (MPPMCL), including associated costs and losses. However, by letter dated 20.01.2014, Respondent No. 2 unilaterally directed the Appellant to construct and complete the 400 kV transmission line up to the Satna sub-station. The Appellant complied and now seeks reimbursement of maintenance costs and transmission losses, consistent with the original understanding under the PPA.

130. The Appellant argues that the 2012 Tariff Regulations apply only to the generating station, which, under Section 2(30) of the Electricity Act, excludes dedicated transmission lines. The Electricity (Removal of Difficulty) Fifth Order, 2005, dated 08.06.2005, clarifies that a dedicated transmission line is neither a regular transmission nor distribution line. The Appellant contends it was compelled to incur and bear costs due to Respondent No. 2’s breach of contractual

obligations and asserts that allowing such costs would not impose an additional burden on Respondent No. 2, who was originally liable under the PPA.

131. The Appellant also relies on the Tribunal's judgment dated 22.03.2024 in Appeal No. 283 of 2017 and batch, which dealt with the same issue for its Bina plant and allowed O&M expenses for the dedicated transmission line. The said order has already been implemented by the Commission, despite a pending challenge before the Hon'ble Supreme Court.

Submissions of the Respondent No. 1, MPERC (issue 3)

132. The MPERC submitted that out of the above, Issue No. III is covered by earlier judgments of this Tribunal's Judgment.

Submissions of the Respondent No. 2, MPPMCL (issue 3)

133. It is submitted that the cost incurred in Dedicated Transmission Line has been considered as part of Project Capital Cost, which has been considered for determination of tariff. However, there is no provision for allowing separate O & M Expenses for Dedicated Transmission Line and Bay in 2012 Generation Tariff Regulations, therefore the same was disallowed by MPERC.

134. In the context of the above issue, the submissions made by MPPMCL in Paras 26 to 27 of its Reply dated 15.12.17 may kindly be considered.

<u>Analysis and Decision on Issue 3</u>

135. The Appellant argued that the 400 kV dedicated transmission line was constructed by it at its own cost since MPPMCL failed to develop the evacuation infrastructure as obligated under the PPA. The capital cost of the line was admitted by the Commission, but the associated O&M expenses were disallowed while computing working capital.

136. The Appellant submitted that since the dedicated transmission line was constructed at its cost due to MPPMCL's failure to provide the required evacuation infrastructure under the PPA, and the capital cost of the same has been accepted by the Commission, the associated O&M expenses should be allowed.

137. It is noted that there is no dispute that the Appellant constructed a dedicated transmission line from the generating station to the pooling point at Satna, at its own cost. It is also not in dispute that the capital cost of this transmission line has been admitted by the Commission as part of the capital cost of the generating station.

138. Undisputedly, the said line was to be constructed by the Respondent.

139. The Appellant has further submitted that the line forms an integral part of the generating station and that its O&M expenses, being essential to operate and maintain the line, ought to have been allowed by the Commission while computing interest on working capital.

140. Importantly, the Appellant has relied upon this Tribunal's judgment dated 22.03.2024 in Appeal No. 283 of 2017 and batch, involving the Bina Thermal Power Plant of the same Appellant, wherein this Tribunal directed that the O&M expenses incurred for the dedicated transmission line constructed under similar circumstances were to be allowed. The relevant extract is quoted as under:

> ***"48. In the light of above, we are satisfied the Appellant is entitled for additional O&M expenses for the DTL established by it in addition to the O&M expenses granted as per the relevant Regulations, accordingly, the issue is decided in favour of the Appellant."***

141. It was submitted that the facts in the present appeal are identical and therefore the Commission ought to have allowed the same treatment. The Appellant contends that the Commission's disallowance, without distinguishing the present case from the one decided in Appeal No. 283 of 2017, is arbitrary and unjustified.

142. We find merit in the Appellant's contention. Once the Commission has accepted the capital cost of the dedicated transmission line as part of the total project cost, and the Appellant has placed on record that such construction was necessitated by the procurer's failure to develop the evacuation infrastructure under the PPA, there is no justifiable basis to deny the associated O&M expenses.

143. The fact that this Tribunal has, in Appeal No. 283 of 2017, already considered and allowed identical claims by the same Appellant under the same regulatory regime reinforces this view.

144. The Respondents have not placed on record any distinction in fact or law between the present case and that decided in Appeal No. 283 of 2017. Even MPERC accepted that the issue is covered by the said judgment.

145. In the absence of such distinction, and considering that the Appellant has incurred expenditure for maintaining an asset that was accepted as part of the project cost, the Commission's disallowance of O&M expenses appears unreasonable and unsupported.

146. **The disallowance of O&M expenses for the dedicated transmission line, despite its capital cost being admitted, is unjustified. The Impugned Order, on this count, is set aside.**

147. **The Commission shall allow the O&M expenses incurred by the Appellant for the said transmission line while computing working capital.**

148. **The issue is decided in favour of the Appellant.**

Issue No. 4- *Disallowance of Rs. 295 per metric ton of additional levy on coal while computing pre-commissioning fuel expenses and interest on working capital for FY 2014-15.*

Submissions of the Appellant (issue 4)

149. An additional levy of ₹295/MT was imposed on coal supplied by Madhya Pradesh State Mining Corporation Ltd. to the Appellant for the period up to 31.03.2015, following the Hon'ble Supreme Court's judgment in **M.L. Sharma v. Principal Secretary & Others**. The Commission disallowed the Appellant's claim to recover this levy as part of energy charges, and this decision was upheld by the Tribunal in its judgment dated 21.03.2024 in Appeal No. 257 of 2015.

150. The Appellant has since challenged the Tribunal's judgment before the Hon'ble Supreme Court in Civil Appeal No. 7794 of 2024, where notice was issued to the Respondents on 29.07.2024. **Given the pending proceedings, the Appellant is not pressing this issue at present and requests that it be kept in abeyance, subject to the outcome before the Hon'ble Supreme Court.**

Submissions of the Respondent No. 1, MPERC (issue 4)

151. Regarding the issue of considering the impact of Additional Premium as part of Interest on Working Capital, it is submitted that this issue is pending before Court I in Appeal No. 95/2016. The Appellant herein has challenged the order of Respondent Commission dated 28.01.2016 in SMP No. 49/2015 in Appeal No. 95/2016. The Appellant has contended therein that impact of Additional Premium should be passed on as part of fixed cost in Appellant's tariff. As per Regulation 27 of the MPERC Tariff Regulations, 2015, Interest on Working Capital forms a part of AFC/Capacity charges. Hence, Appellant's contention can only be adjudicated in Appeal No. 95/2016 and cannot be adjudicated in the present matter.

Submissions of the Respondent No. 2, MPPMCL (issue 4)

152. This Hon'ble Tribunal has already considered this issue of "Additional Levy on Coal" in Appeal No. 257 of 2015 wherein the Appellant had challenged order dated 12.08.15 passed by MPERC in Petition No. 37 of 2016 and in Final Order Dated 09.11.20 decided the issued against the JPVL. The relevant portion of the order dated 09.11.20 is quoted in Paras 28 to 31 of the Reply Dated 15.12.17 filed by MPPMCL.

153. A Review Petition No. 1 of 2021 was filed by JPVL, against the order dated 09.11.20 passed by this Tribunal in Appeal No. 257 of 2015 dismissing the Appeal and upholding the order of the MPERC in Petition No. 37 of 2015 dated 12.08.15. In its order, in R.P. No. 1 of 2021 dated 13.07.23, this Hon'ble Tribunal set aside the Order Dated 09.11.20 and held that the said Order suffered from an error apparent on the face of the record and Appeal No. 257 of 2015 was restored to file, to be heard afresh.

154. Subsequently, the A. No. 257 of 2015 was heard again on merits and the Final Order and Judgment was passed on 21.03.24 in which this Hon'ble Tribunal was pleased to dismiss the Appeal and hold that the Order Passed by MPERC in P. No. 37 of 2015 did not suffer from any error and did not deserve to be interfered by this Hon'ble Tribunal. The conclusion of the Tribunal in the said Final Order is extracted below for ready reference:

*"**XIII. CONCLUSION:***

<u>Viewed from any angle, we are satisfied that the impugned order passed by the MPERC, in Petition No. 37 of 2015 dated</u>

12.08.2015, disallowing pass through of 'Additional Levy', as part of the generation tariff, and in holding that Additional Levy cannot be passed through as tariff and be borne by consumers of the State, does not necessitate interference in appellate proceedings. The Appeal fails and is, accordingly, dismissed.

Pronounced in the open court on this the 21st day of March, 2024."

[Emphasis Added]

Analysis and Decision on Issue 4

155. The Appellant submitted that the Additional Levy of Rs. 295 per metric tonne was imposed by the Ministry of Coal, Government of India, pursuant to the judgment dated 24.09.2014 of the Hon'ble Supreme Court in ***Manohar Lal Sharma v. Principal Secretary & Ors. [W.P. (Crl.) No. 120/2012***, which cancelled certain coal block allocations. The Appellant contends that this levy was a mandatory statutory charge and was paid on the coal used for trial operations, and therefore forms part of the actual fuel cost incurred during the pre-commissioning period. It has been submitted that this cost, being a legitimate outlay borne by the generator, should have been allowed by the Commission while computing the pre-commissioning fuel expenses and the working capital requirement for FY 2014-15.

156. The Commission, in its order as well as in its written submissions, has taken the position that this very issue was considered and decided by this Tribunal in Appeal No. 257 of 2015. In that case, the Tribunal upheld the disallowance of the Additional Levy on the ground that it did not qualify as a prudent expenditure

incurred for the purpose of generation, and that it was in the nature of a penalty or consequence imposed due to the cancellation of coal block allocations.

157. The Commission has also stated that it followed the Tribunal's reasoning in Appeal No. 257 of 2015, and accordingly rejected the Appellant's claim for inclusion of this levy in fuel cost for tariff computation for FY 2014-15.

158. The Appellant has not disputed that the issue of the Rs. 295/MT Additional Levy has already been adjudicated by this Tribunal in Appeal No. 257 of 2015, and a Civil Appeal against that judgment is pending before the Hon'ble Supreme Court. No new grounds or distinguishing facts have been placed before us in the present appeal that would justify a departure from that earlier decision.

159. **In view of the above, we are of the opinion that the Commission acted in accordance with judicial precedent as it stood on the date of the tariff order, and the claim has already been considered and rejected by this Tribunal in an earlier round of litigation.**

160. **The disallowance of Rs. 295 per MT towards Additional Levy for FY 2014-15 is consistent with the Tribunal's earlier judgment in Appeal No. 257 of 2015.**

161. **However, since a Civil Appeal is pending before the Hon'ble Supreme Court, the Appellant is at liberty to seek appropriate relief depending on the outcome of the said appeal.**

<u>Issue No. 5-</u> *Disallowance of ROM price, additional premium & incidence of the taxes thereon while computing the cost of coal for FY 2015-16 for the purpose of working out interest on working capital.*

<u>Submissions of the Appellant (issue 5)</u>

162. Madhya Pradesh State Mining Corporation Ltd. (MPSMCL), a State Government entity, was allotted the Amelia (North) and Dongri Tal II coal blocks in 2003. To develop these mines and facilitate power generation within the State, MPSMCL invited bids for a joint venture. A key eligibility criterion required bidders to establish a 1000 MW power plant. Jaiprakash Associates Ltd. (JAL), affiliated with the Appellant, was selected and entered into a joint venture agreement with MPSMCL in 2006. In line with this, the Appellant executed an implementation agreement with the State Government to establish the power plant, later scaled up to 1320 MW.

163. However, following the Hon'ble Supreme Court's decision in ***M.L. Sharma v. Principal Secretary (2014) 9 SCC 516***, the coal block allotments were cancelled effective 31.03.2015. The Amelia (North) block was later re-allocated through auction under the Coal Mines (Special Provisions) Act, 2015, and related rules. As the Appellant's 1320 MW plant set up at an estimated cost of ₹11,700 crores was operational and heavily debt-laden, it participated in the re-auction and was awarded the Amelia (North) block.

164. It bid a zero Run-of-Mine (ROM) price and committed to pay ₹612/MT as an additional premium. Unit I of the plant achieved COD on 03.09.2014 and Unit II on 21.12.2015. The Ministry of Coal initially conducted a reverse bidding process, where bidders quoted discounts on CIL's notified ROM price. Since all shortlisted bidders quoted zero, the process shifted to forward bidding, requiring bidders to offer an additional premium per MT of coal payable to the State. The highest premium bidder was selected, with a mandatory clause prohibiting recovery of the additional premium through energy charges in the tariff.

165. Following the bidding process for the Amelia (North) coal block and policy directions issued by the State Government under Section 108 of the Electricity Act, the State Commission initiated suo motu proceedings (SMP No. 49 of 2015) to revise energy charges applicable to the Nigrie plant. As a result, the cost of coal was reduced from ₹2170/MT to ₹859/MT by excluding the ROM cost and the additional premium payable to the State Government.

166. In determining the tariff for FY 2015-16, the Commission (paras 201–212 of the impugned order) disallowed the Appellant's actual coal costs for computing interest on working capital and instead applied a weighted average coal rate per its earlier order dated 26.01.2016 in SMP No. 49 of 2015.

167. The Appellant argues that while the additional premium and ROM costs cannot be recovered as energy charges (fuel cost), this restriction should not apply to the capacity charges component, particularly for computing working capital, which is part of fixed charges. Further, the Commission's 28.01.2016 order rejecting recovery of the additional premium through energy charges is already under challenge in Appeal No. 95 of 2016. However, the current issue pertains

specifically to recognizing the ROM cost, additional premium, taxes, and levies as part of the landed cost of coal for computing working capital, and is distinct from the subject matter of the pending appeal.

168. Regulation 37.1(i) of the Tariff Regulations, 2012, provides that working capital for coal based generating stations shall cover, *inter alia*, the cost of coal for two months for non-pithead generating stations corresponding to normative availability. The working capital determined under Regulation 37 forms part of capacity charges as per Regulation 34.2. The relevant regulations are as follows:

> *"34 Components of Tariff*
>
> *34.1 Tariff for sale of electricity from a thermal power generating station shall comprise of two parts, namely, the recovery of Annual Capacity (fixed) Charges and Energy (variable) Charges to be worked out in the manner provided hereinafter.*
>
> *34.2 The annual Capacity (fixed) Charges shall consist of:*
>
> *(a) Return on Equity;*
>
> *(b) Interest and Financing Charges on Loan Capital;*
>
> *(c) Depreciation;*
>
> *(d) Lease/Hire Purchase Charges;*
>
> *(e) Operation and Maintenance Expenses;*
>
> *(f) Interest Charges on Working Capital;*

(g) Cost of Secondary Fuel Oil;

(h) Special allowance in lieu of R&M or separate compensation allowance, wherever applicable:

Provided that in case of coal based thermal generating stations, expenses on normative secondary fuel oil consumption during the Year shall be included in the Fixed Charge.

34.3 The Energy (variable) Charges shall cover main fuel cost.

37 Working Capital

37.1 The Working Capital for Coal based generating stations shall cover:

(i) Cost of coal for 45 Days for pit-head generating stations and two months for non-pit-head generating stations, corresponding to the normative availability;

(ii) Cost of secondary fuel oil for two months corresponding to the normative availability:

Provided that in case of use of more than one secondary fuel oil, cost of fuel oil stock shall be provided for the main secondary fuel oil.

(iii) Maintenance spares @ 20% of the normative O&M expenses;

(iv) Receivables equivalent to two months of capacity charges and energy charges for sale of electricity calculated on the Normative Annual Plant Availability Factor; and

(v) Operation and Maintenance expenses for one month.

37.2 The cost of fuel 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 as per actual for the preceding three months and no fuel price escalation shall be provided during the Tariff period."

169. The Appellant submits that the landed cost of coal used for calculating interest on working capital (a component of capacity charges) must be treated separately from the computation of energy charges under Regulation 41 of the 2012 Tariff Regulations. However, the Commission, relying on its order dated 26.01.2016 in SMP No. 49 of 2015, wrongly applied a reduced coal rate of ₹859.46/MT for FY 2015-16, excluding additional premium, taxes, and levies, despite having allowed ₹2668.60/MT for the earlier period ending 31.03.2015.

170. The Appellant argued that the Commission erred by applying bid conditions related to the Amelia (North) coal block, specifically Clause 3.10.2, which prohibits passing on the additional premium as energy charges to capacity charges as well. Since working capital is linked to capacity charges, and there is no restriction under the bid documents for including the additional premium in capacity charge computation, the Commission's treatment is flawed.

171. In this regard, it is pointed out that the Delhi High Court while examining scope of exclusion of additional premium for purposes of tariff has in its common judgement dated 09.03.2017 passed in WP (C) No. 3786 of 2015 and WP(C) No. 4885 of 2015 has been pleased to observe that the corrigendum dated 31.01.2015

to the tender documents to which additional premium was introduced, at a reference only to the energy charge component and there was no reference made with respect to fixed charge/ capacity charge. The Hon'ble Court held that the successful bidders were entitled to claim fixed charges on the additional premium. The relevant portion of the judgment is as follows:

> *"35. After examining the factual backdrop and the sequence of events which have taken place in the context of the present petitions, it is evident that the Standard Tender Document published on 27.12.2014 did not at all envisage the situation where, through the methodology of reverse bidding, the price bid could be reduced to rupees "zero". It is for this reason that there was no concept of Additional Premium in the Standard Tender Document. Subsequently, when it was realised that there was a possibility that the reverse bidding process could be so aggressive as to reduce the price bid to rupees "zero", the concept of Additional Premium was introduced. This was done through the said Corrigendum No. 3 published on 31.01.2015. It was specifically pointed out that where the reverse bidding resulted in a price bid equivalent to rupees "zero", nothing could be passed through as a component of energy charge other than the fixed rate of Rupees 100 per tonne and other permissible charges. It was specifically pointed out that the Additional Premium could not be a pass through item for the purposes of power tariff. But, as already observed earlier, all this was in the context of the energy charge. There was no mention whatsoever of the fixed/capacity charge component of the power tariff. When the bidders were bidding for the coal mines, which were*

earmarked for the power sector, they were obviously calculating their costs and benefits. It is obvious that as their costs would go up, their benefits would reduce. The price bid for coal would, therefore, automatically be dependent, amongst other things, on the ultimate estimation of the tariff of power under the tariff bid regime under Section 63 of the Electricity Act, 2003 that may ultimately result. That power tariff had two components - energy charges and fixed/capacity charges. The Tender Conditions made clear stipulations with regard to energy charges and what could be passed through and what could not. But, the Tender Conditions were silent on fixed/capacity charges. Therefore, it would not be unreasonable to assume that when the petitioners made their bids in the auction, they would not have contemplated that the fixed charges/capacity charges would be subjected to a ceiling or a cap. What that ceiling would be is, of course, not known at the moment, but the fact is that there could be a ceiling. It would, therefore, not be wrong to observe that had the Tender Condition clearly indicated that there would be or could be a ceiling on fixed charges/capacity charges, the bids might have been entirely different as the economics would have changed.

………

37. We are of the view, as already pointed out above, that a decision to put a cap on fixed charges/capacity charges component of the power tariff would definitely have an impact on the bidding for the coal mines, which were earmarked for the power sector. It is our view that when the petitioners participated in the auction, they were clear that (a) Rs. 100 per tonne could be passed through to the energy charge *component of the power tariff; and (b) the Additional Premium could not be passed through. The petitioners were, however, not aware that there would be or there could be a cap on the fixed charge/capacity charge component of the power tariff. We do not agree with the submissions made on behalf of the respondents that the bidders were aware that there could be a cap on the fixed charge/capacity charge. Therefore, the bidding proceeded on the basis that there would be no fixed charge/capacity charge. Whether this was ethically or morally correct or not is not the relevant issue. What is important is that the decision to place a cap on fixed charges/capacity charges would have impacted the bidding and consequently, the viability of the coal mines."*

172. The Appellant continued to argue that Regulation 37.1 distinguishes between "cost of coal" (Reg. 37.1(i)), relevant to working capital, and "energy charges" (Reg. 37.1(iv)), relevant to receivables. While the deduction of additional premiums may be appropriate for calculating receivables under energy charges, the "cost of coal" used for computing working capital should reflect the actual cost incurred. The Appellant had claimed ₹2170.46/MT as the actual coal cost for working capital, which was not disputed on merits.

173. However, the Commission erroneously used the lower rate determined for energy charges under SMP No. 49 of 2015. Further, the Commission incorrectly reduced statutory levies under MPGATSVA from ₹34.93/MT to ₹5.69/MT and excise duty from ₹102.54/MT to ₹21.61/MT.

174. The Appellant contends this approach is contrary to the plain meaning of Clause 3.10.2 of the Ministry of Power's tender documents and inconsistent with the Hon'ble Delhi High Court's judgment. It is submitted that the correct coal rate for FY 2015-16 should be ₹2170.46/MT, as filed by the Appellant in its tariff petition.

Submissions of the Respondent No. 2, MPPMCL (issue 5)

175. In the context of the issue of "ROM price, additional premium & incidence of the Taxes thereon while computing the cost of coal for FY 2015-16 for the purpose of working out interest on working capital", the submissions made by MPPMCL in Paras 32 to 35 of its Reply Dated 15.12.17 may kindly be considered.

176. MPERC has comprehensively dealt with the issue in Suo Moto Petition (SMP) No. 49 of 2015 while considering ROM price of coal and Additional Premium. In its Order Dated 28.01.16 passed in SMP No. 49 of 105, MPERC has considered the issue of "Additional Premium" at great length and not finding any merit in the contention of JPVL that Additional Premium is to be reckoned as part of fixed charges being in the nature of capital cost rejected the claim. (Paras 53 to 62 of the Order Dated 28.01.16).

Analysis and Decision on Issue 5

177. The Appellant has submitted that during FY 2015-16, coal for the generating station was sourced from the Amelia (North) coal block, which was allotted to the Appellant through competitive bidding. The Appellant stated that the landed cost of coal used for generation includes all statutory components as incurred, including

additional premium payable under the terms of allocation, and that these costs form part of the actual fuel cost incurred for the station.

178. The Appellant has challenged the Commission's approach of excluding certain components of coal cost, such as the additional premium and related taxes, from the computation of working capital for FY 2015-16. It has contended that these components were actually incurred, are not artificial or inflated, and were necessary outflows under the statutory bidding and allocation framework governing the Amelia (North) coal block. The Appellant has submitted that the disallowance of these costs results in an incorrect and artificially suppressed working capital requirement.

179. Respondent No. 1, in its written submissions, has stated that the issue raised by the Appellant in this regard is already the subject matter of challenge in Appeal No. 95 of 2016, which is pending before this Tribunal in Court 1. MPERC has not elaborated further on the merits of the disallowance in the present appeal.

180. However, the current issue pertains specifically to recognizing the ROM cost, additional premium, taxes, and levies as part of the landed cost of coal for computing working capital, and is distinct from the subject matter of the pending appeal.

181. We note that the Appellant's contention is based on the actual coal source, i.e., the Amelia (North) coal block being an allocated source under a statutory bidding scheme. The Appellant has asserted that the fuel costs it seeks to recover reflect actual incurred costs, which were not artificially structured, and are backed by required documentation.

182. The Commission has not disputed that the coal was sourced from the Amelia (North) block, nor has it questioned the existence of a statutory obligation to pay the premium.

183. In view of the submissions and the record before us, we are of the opinion that the Commission's disallowance of the premium and associated costs has been made based on the zero ROM price quoted in the bid. The Appellant's contention that these costs were actually incurred remains unrebutted.

184. However, the issue involves the interpretation of bid-linked coal pricing and allocation mechanisms, which require further scrutiny. Accordingly, the matter is remanded to the Commission for a fresh determination on the admissibility of such components as part of working capital, after considering the statutory framework and the Appellant's cost records.

185. **The State Commission is directed to decide the issue afresh after hearing the contesting parties, within three months from the date of this judgment.**

> ***Issue No. 6-*** *The unit-wise allocation of the disallowance of FERV appears to be disproportionately loaded on Unit I.*

Submissions of the Appellant (issue 6)

186. Regulation 17.1 of the Tariff Regulations, 2012, provides that capital cost for a project shall include any gain or loss on account of Foreign Exchange Rate Variation (FERV). Regulation 29 of the Tariff Regulations, 2012, deals with FERV. As per Regulation 29.4, a generating company is entitled to recover the cost of hedging and FERV on year-to-year basis as income or expense in the period in which it arises. It is submitted that the income/ expense towards FERV has to be distributed proportionately amongst the different units of the generating company. However, in the present case, the Commission has erred in loading major part of the FERV cost that has been disallowed by it for the period up to 03.02.2014, i.e., the date of commissioning of Unit I, as part of capital cost of Unit I while the balance amount has been allocated to Unit II. This has resulted in significant variation in capital cost of the two units.

187. The Appellant had claimed notional loss of Rs. 223.72 crores on account of FERV. The Commission disallowed such amount claimed towards notional FERV loss and further considered an amount of Rs. 91.95 crores as actual gain on FERV. As a result, the Commission in effect disallowed an amount of Rs. 315.66 crores on account of FERV, i.e., Rs. 223.72 + Rs. 91.95 crores. The Appellant has not challenged such disallowance by the Commission.

188. However, the amount of disallowance has been arbitrarily and wrongly distributed amongst the two units wherein Rs. 299.42 crores towards FERV gain up to 03.09.2014 has been loaded on Unit I and only an amount of Rs. 16.25 crores has been loaded on Unit II. No reason or calculation has been provided in the impugned order at the relevant paras 111 to 127 of the impugned order for such disproportionate allocation of FERV.

189. During the course of arguments, it was submitted by the counsel for the Commission that the Appellant had not furnished the unit-wise claim towards FERV in its tariff filings and, therefore, the allocation was done in the manner as provided in the impugned order. The contention of the Commission is not tenable on facts for the reason that (i) the loss incurred towards the project was being done in parallel for both the units and it is not a case where the work for Unit II started after the commissioning of Unit I. The Commission as an expert body is well aware of the manner of setting up of such large thermal projects. Therefore, there was no logic for the Commission to consider the entirety of the FERV gains up to 03.12.2014 for Unit I only; (ii) as a matter of fact, the Appellant in form 5B of the tariff petition had indicated the Foreign Exchange Rate Variation at Sr. No. 8.2 of its submissions wherein out of the notinal FERV loss of 223.72 crores, Rs. 146.01 crores was claimed towards Unit I and Rs. 77.71 crores was claimed towards Unit II. Even going by such distribution, the actual gain in FERV of Rs. 91.95 crores held by the Commission should also have been distributed on the same basis. <u>The submission of the Commission that no details of distribution of FERV was amongst the two units was provided by the Appellant is contrary to the tariff filings at Form 5B</u>.

190. The Commission ought to have appropriated the disallowance of FERV on Unit-I and Unit-II in proportion to the capitalisation cost of the respective unit as on the date of COD. Since the total cost capitalized on 02.09.2014, as per CA certificate, for Unit I was INR 6,554 Crore and the total cost including Unit II was INR 10,655 Crore, thus, the amount of FERV which should have been disallowed on Unit I should be proportionate to the total cost i.e. 6554/10655. 6554 is 61.5% of 10655. Applying the same proportion to the disallowed amount, the break-up for

Unit I would be INR 175 Crore while the balance amount of INR 109.09 Crore should be apportioned to Unit II for this period. The balance Notional FERV for FY 2014-15, i.e., INR 30.97 Crore should have been apportioned to Unit II.

191. Out of the above issues, raised in Appeal No. 244 of 2017, issues with regard to (i) disallowance of O&M expenses on dedicated transmission lines and bay, and (ii) disallowance of recovery of capacity charges on prorated basis on account of supply of 7.5% power to the State of Madhya Pradesh, are common in all the other appeals, namely Appeal Nos. 293 of 2018, 341 of 2019, 49 of 2020.

192. One of the other common issues in all of the other appeals is the disallowance of additional premium as part of capital cost for the Nigrie plant. This issue has not been argued and may be deferred for consideration in view of the challenge in Appeal No. 95 of 2016.

193. Apart from this there are two other issues in relation to treatment of FERV that have arisen in Appeal Nos. 293 of 2018 and Appeal No. 49 of 2020, respectively.

<u>Submissions of the MPERC (issue 6)</u>

194. Regarding Issue No. VI, Respondent No. 1 vide letter dated 4.03.2016 had asked the Appellant to submit details of FERV hedging charged on revenue and FERV loss/ gain if any, along with all relevant supporting documents. By affidavit

dated 19.05.2016, the Appellant submitted that in line with regulation 29 of MPERC, a summarized and year wise details of FERV variations including gain and loss due to hedging reflects that the total works out to Rs. 223.72 Crores which comprises value of Rs. 146.01 Crores as on 2.09. 2014 and Rs. 77.71 Crores as on 20.02. 2015, being the CODs of Unit I and Unit II respectively. The response of Appellant was found inadequate and lacking clarity. Therefore, on 28.08.2016, the Appellant was again asked to clarify its' claim of Rs.146.01 Crore and Rs.77.71 Crores as on COD of Unit No. I & II, respectively on account of Foreign Exchange Rate Variation. By affidavit dated 28.09.2016, the Appellant submitted the following is in line with Regulation 29 of MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2012, claimed Rs. 223.72 crore (which comprises value of Rs. 146.01 crore as on 2.09. 2014, being the COD I and Rs. 77.71 crore as on 20.02. 2015 being COD II) as Foreign Exchange Variation. Therefore, in additional data gap reply, Appellant has always filed the information of FERV on yearly basis. Hence, Respondent No. 1, has allocated FERV notional Loss upto 02.09.2014 in unit no 1 and after 02.09.2014 in unit no 2. The Appellant had not given any separate FERV details for Unit No 1 & Unit No 2 in its additional reply nor in its petition.

<u>Submissions of the Respondent No. 2, MPPMCL (issue 6)</u>

195. MPERC has considered FERV based on information submitted by the Appellant which was on yearly basis. MPERC has allocated FERV notional Loss up to 02.09.2014 in Unit No. 1 and after 02.09.2014 in Unit No. 2. The Appellant had neither given separate FERV details for Unit No 1 & Unit No 2 in its Additional Reply nor in its Petition.

196. MPPMCL has made its submissions on above issue in Para Nos. 43 to 45 of its Reply Dated 15.12.2017, which may kindly be considered.

Analysis and Decision on Issue 6

197. The Appellant has submitted that the Madhya Pradesh Electricity Regulatory Commission (MPERC) has incorrectly and disproportionately allocated the disallowance on account of FERV (Foreign Exchange Rate Variation) to Unit I of the Nigrie Thermal Power Station. It has contended that under Regulation 17.1 and Regulation 29 of the MPERC Tariff Regulations, 2012, the impact of FERV being a capital cost component is to be accounted for and proportionately distributed among different units of a generating station.

198. According to the Appellant, while it had claimed a notional loss of Rs. 223.72 crores towards FERV, the Commission disallowed the same and treated Rs. 91.95 crores as actual gain on FERV, thereby resulting in a total effective disallowance of Rs. 315.66 crores (i.e., Rs. 223.72 + Rs. 91.95 crores). The Appellant has submitted that although it does not dispute the disallowance itself, it objects to the manner of its allocation entirely to Unit I, i.e., Rs. 299.42 crores, while only Rs. 16.25 crores has been allocated to Unit II.

199. The Appellant has argued that no reasons or calculations have been provided by the Commission in the impugned order to justify such disproportionate allocation of FERV disallowance. It is submitted that the works for Unit I and Unit II were carried out in parallel, and it is not the case that Unit II was commissioned

significantly later than Unit I. As such, the Commission's action of loading the entire disallowance on Unit I lacks any logical or technical basis.

200. The Appellant further submitted that in Form 5B of the Tariff Petition, it had disclosed FERV data in which Rs. 146.01 crores was claimed towards Unit I and Rs. 77.71 crores towards Unit II, out of the total FERV of Rs. 223.72 crores. Even if the Commission were to treat Rs. 91.95 crores as FERV gain, that gain should have been proportionately distributed in the same ratio. The Appellant has also contended that, based on CA-certified capitalisation data, the cost capitalised as on 02.09.2014 was Rs. 6,554 crores for Unit I, and Rs. 10,655 crores for both units combined. Therefore, any allocation of FERV disallowance should have been made in the ratio of 61.5% (Unit I) and 38.5% (Unit II). Applying that ratio, Rs. 175 crores ought to have been allocated to Unit I and Rs. 109.09 crores to Unit II, with a further allocation of Rs. 30.97 crores to Unit II for FY 2014–15.

201. In response, Respondent No. 1 (MPERC) has submitted that it had sought detailed FERV information from the Appellant through letters dated 04.03.2016 and 28.08.2016. In its replies dated 19.05.2016 and 28.09.2016, the Appellant submitted consolidated, year-wise FERV data, which included the figures of Rs. 146.01 crores and Rs. 77.71 crores as on the respective CODs of Unit I (02.09.2014) and Unit II (20.02.2015). MPERC has stated that the data submitted by the Appellant was found inadequate and lacking in clarity. Therefore, the Commission allocated the FERV notional loss up to 02.09.2014 to Unit I, and the amount after 02.09.2014 to Unit II. MPERC has submitted that the Appellant had not submitted separate or unit-wise FERV details either in the original petition or in the additional data replies.

202. Respondent No. 2 (MPPMCL) has also submitted that the Commission considered FERV based on yearly information furnished by the Appellant. It reiterated that the Appellant did not provide unit-wise segregation of FERV in its filings. MPPMCL has referred to paragraphs 43 to 45 of its reply dated 15.12.2017 and relied on the Commission's approach in allocating the disallowance as per the COD timeline.

203. The Appellant has not disputed the total disallowance of Rs. 315.66 crores on account of FERV but has challenged its allocation primarily to Unit I. The Commission and MPPMCL have taken the position that the Appellant failed to provide separate unit-wise details at the time of tariff filing and in its data responses. The Tribunal notes that the Appellant had in its filings indicated the amounts of Rs. 146.01 crores and Rs. 77.71 crores for Units I and II respectively, though the adequacy of the breakdown has been questioned by the Commission.

204. Considering that this issue involves unit-wise financial allocation of a disallowed cost component and that there is a dispute regarding the sufficiency of the unit-wise data filed by the Appellant, the Tribunal is of the view that the matter requires re-examination by the Commission.

205. **Accordingly, the issue is remanded to the Commission to verify the correctness of the FERV allocation, after hearing the contesting parties and obtaining necessary information in addition to the material placed on record and Form 5B of the tariff petition, and to pass appropriate orders giving detailed reasons for its allocation.**

<u>Additional Issues in the Batch of Appeals</u>

APPEAL NO. 293 OF 2018

206. The Appellant has raised the following issues in Appeal No. 293 of 2018:

i. Disallowance of additional capitalization towards procurement of assets of Amelia (North) Coal Mine and payment of Additional Premium on coal received is unjustified,

ii. Disallowance of O&M expenses of the transmission line and bay is unsustainable,

iii. Disallowance of recovery of pro-rated expenses of operating the Project from beneficiaries of 92.5% capacity on account of supply of 7.5% of concessional power under the PPA dated 06.09.2011 is unjustified,

iv. Consideration of claim of FERV with respect to exchange rate at the scheduled date of repayment against the exchange rate as on the actual date of repayment is contrary to the provisions of Tariff Regulations,

v. Disallowance of additional capitalization on account of land which was part of original scope of work

207. Out of the above five (5) issues, the issue nos. i., ii. and iii. are already covered above by the Appeal No. 244 of 2017.

208. The additional issues in Appeal No. 293 of 2018 are as under which are dealt with herein below :

i. Disallowance of claim towards FERV, and

ii. Disallowance of claim for Additional Capitalization w.r.t. statutory dues

Disallowance of claim towards FERV (Appeal No. 293 of 2018)

209. The Appellant had made a claim with regard to Foreign Exchange Rate Variation (FERV) on principal repayment and interest payments based on the exchange rate as on the date of payment. However, the Commission at para 130-131 of the impugned order has disallowed such claim and has proceeded to consider the exchange rate on the scheduled date of payment.

210. The amounts claimed by the Appellant are as follows:

Sl	Particulars	Claimed	Allowed
1.	Actual FERV expenses incurred on the Actual Repayments made during FY 2015-16	148.66 Cr	141.81 Cr
2.	Actual FERV expenses incurred on the Actual Interest Payments made during FY 2015-16	17.92 Cr	15.77 Cr

*Please see Table at para 120 of Impugned Order at page 95 of Appeal paper book for claimed amounts and Table at para 131 of Impugned Order at page 104 of Appeal paper book

211. The Appellant submitted that the Commission in the impugned order has not found fault with the Appellant with regard to the payment of principal and interest payments on a date other than the scheduled date of payment. The Commission

has not recorded any reason for not considering the amounts claimed by the Appellant based on the actual date of payment. The disallowance of such amount being made without any reason, is arbitrary and liable to be set aside. In fact, in a separate proceeding in the matter of M/s MB Power (Madhya Pradesh) Ltd. v. MPPMCL and Others, petition no. 68 of 2016, the Commission has at para 179 of the order interpreted the provisions with regard to FERV in the following words:

> "*179. In light of aforesaid provisions in MPERC Tariff Regulations 2012, the petitioner is entitled to recover the cost of Foreign Exchange Rate Variation as income or expense on actual basis every year based on Annual Audited Accounts of the respective year.*"

212. Also submitted that the payment towards principal and interest on loan are actual expenses incurred by the Appellant and unless the Commission in its prudency check has recorded in writing along with reasons that the Appellant had not acted in a prudent manner by making payments on a date other than the scheduled date of payment, there is no basis for disallowing the amounts claimed by the Appellant. In view of the above, it is humbly submitted that the Appellant be held to be entitled to the amounts claimed by it towards loan repayment and interest payments for ECB and FCCB at actuals.

213. The MPPMCL submitted that the claim for FERV is governed by Regulation 29 of the Tariff Regulations 2012. The same is extracted hereunder for ready reference:

29 Foreign Exchange Rate Variation (FERV)

29.1 The Generating Company may hedge foreign exchange exposure in respect of the interest on foreign currency loan and repayment of foreign loan acquired for the generating station, in part or full in the discretion of the Generating Company.

29.2 Every Generating Company shall recover the cost of hedging of Foreign Exchange Rate Variation corresponding to the normative foreign debt, in the relevant Year on Year-to-Year basis as expense in the period in which it arises and extra rupee liability corresponding to such foreign exchange rate variation shall not be allowed against the hedged foreign debt.

29.3 To the extent the Generating Company is not able to hedge the foreign exchange exposure, the extra rupee liability towards interest payment and loan repayment corresponding to the nom1ative foreign currency loan in the relevant Year shall be permissible provided it is not attributable to the Generating Company or its suppliers or contractors.

29.4 The Generating Company shall recover the cost of hedging and Foreign Exchange Rate Variation on Year-to-Year basis as income or expense in the period in which it arises.

214. MPPMCL also submitted that a bare perusal of Regulation 29 indicates that only in addition to the hedging cost, only such cost which cannot be hedged due to reasons not attributable to the generator can be passed on in the tariff. It is submitted that admittedly

- Two foreign currency loans had been taken by JPVL. A Foreign Currency Convertible Bond (FCCB for USD 200 million (Rs. 922.40 Crores) and an External Commercial Borrowing (ECB) for JPY 1530 Crores (Rs. 848.90 Crores).
- JPVL executed four hedging contracts with ICICI Bank.
- Out of four hedging contracts, three contracts are for Currency Pair of JPY/USD whereas the fourth contract is for currency pair of USD/INR. The first hedging contract (HC-1) was for hedging of total principal amount of ECB (JPY 1530 Crores). The second hedging contract (HC- 2) was for the interest payable on JPY 1258 Crores and third contract (HC- 3) was for hedging of interest payable on balance ECB i.e. JPY 272 Crores.
- For Currency pair USD/INR, JPVL had executed the fourth contract (HC- 4) for hedging of only 50% of outstanding principal and interest payable for Currency Pair USD/INR.

215. MPPMCL submitted that the learned MPERC has been more than lenient in allowing the FERV cost as would have been due in the event the foreign currency loans had been repaid on their scheduled date. Neither in the true-up petition nor in the instant appeal has any reason been given why the repayment could not happen on the scheduled date of payment.

216. Further, argued that one of the basic tenets of tariff determination on cost plus basis as laid down by this Hon'ble Tribunal is that all 'controllable factors' cannot be burdened on the consumers and would have to be the account of the defaulting entity (judgement dated 27.04.2011 in Appeal No. 72/2010). The relevant part of the judgment is extracted hereunder for ready reference:

> *"7.4. The delay in execution of a generating project could occur due to following*
> *reasons:*
>
> *i) due to factors entirely attributable to the generating company, e.g., imprudence*
> *in selecting the contractors/suppliers and in executing contractual agreements including terms and conditions of the contracts, delay in award of contracts, delay in providing inputs like making land available to the contractors, delay in payments to contractors/suppliers as per the terms of contract, mismanagement of finances, slackness in project management like improper co-ordination between the various contractors, etc.*
>
> *ii) due to factors beyond the control of the generating company e.g. delay caused*
> *due to force majeure like natural calamity or any other reasons which clearly establish, beyond any doubt, that there has been no imprudence on the part of the generating company in executing the project.*
>
> *iii) situation not covered by (i) & (ii) above.*

In our opinion in the first case the entire cost due to time over run has to be borne by the generating company. However, the Liquidated Damages (LDs) and insurance proceeds on account of delay, if any, received by the generating company could be retained by the generating company. In the second case the generating company could be given benefit of the additional cost incurred due to time over-run. However, the consumers should get full benefit of the LDs recovered from the contractors/suppliers of the generating company and the insurance proceeds, if any, to reduce the capital cost.

In the third case the additional cost due to time overrun including the LDs and insurance proceeds could be shared between the generating company and the consumer. It would also be prudent to consider the delay with respect to some benchmarks rather than depending on the provisions of the contract between the generating company and its contractors/suppliers. If the time schedule is taken as per the terms of the contract, this may result in imprudent time schedule not in accordance with good industry practices."

217. Also, pleaded that in the instant case since there is no reason provided for delay in repayment of the foreign currency loans, liabilities of foreign exchange rate variation as on actual date of payment could not have been passed on to the consumers.

<u>Analysis and Decision on FERV (Appeal No. 293 of 2018)</u>

218. The State Commission vide the Impugned Order has held as under:

*"**Commission's Analysis:***

……

131. On detailed scrutiny of the submissions along with the details and documents placed on record by the petitioner towards FERV expenses and hedging cost claimed by the petitioner, the Commission has considered to allow the following cost towards FERV expenses and hedging cost in this order during FY 2015-16:

Amount in Rs. Crores

S. No	Particulars	FERV
1	FERV expenses incurred on the Repayments made during FY 2015-16	141.81
2	FERV expenses incurred on the Interest Payments made during FY 2015-16	15.77
3.	Hedging Costs incurred net of Settlement amount received during FY 2015-16	32.99
4	**Total**	**190.57**

"

219. After considering the submissions made by the Appellant and Respondent No. 2 for the disallowance of the claim towards Foreign Exchange Rate Variation (FERV) in Appeal No. 293 of 2018, it is observed that the issue in question pertains to the Commission's decision to reject a portion of the FERV claim by the Appellant, on the ground that it considered the scheduled date of payment rather than the actual date of payment of foreign currency loans while computing admissible FERV amounts.

220. The Appellant contends that it had incurred actual expenses towards FERV on both principal repayments and interest payments during FY 2015-16, and these were duly reflected in its books and supported by Annual Audited Accounts. The

amounts claimed included ₹148.66 crores towards repayment of principal and ₹17.92 crores towards interest, whereas the Commission allowed only ₹141.81 crores and ₹15.77 crores, respectively.

221. According to the Appellant, there is no finding in the Impugned Order indicating that the Appellant acted imprudently or that the deviation from the scheduled repayment timeline was unjustified. More importantly, the Appellant has emphasized that in a prior decision of the Commission itself in Petition No. 68 of 2016 (***M/s MB Power (MP) Ltd. v. MPPMCL & Others***), it had been held that FERV is to be allowed on actuals based on audited financial statements and not necessarily based on scheduled payment timelines, the relevant extract of the referred Order is as under:

> "*179. In light of aforesaid provisions in MPERC Tariff Regulations 2012, the petitioner is entitled to recover the cost of Foreign Exchange Rate Variation as income or expense on actual basis every year based on Annual Audited Accounts of the respective year.*"

222. On the other hand, Respondent No. 2 (MPPMCL) has sought to justify the disallowance by relying on Regulation 29 of the MPERC Tariff Regulations, 2012. It was contended that while Regulation 29.4 allows recovery of FERV on a year-to-year basis as income or expense, this is subject to prudency norms and is applicable only if the extra rupee liability is not attributable to the generating company or its agents. MPPMCL also placed reliance on the Commission's view that, in the absence of a valid explanation for making repayments on dates other

than the scheduled ones, any excess burden due to exchange rate variation should not be passed on to the consumers.

223. Upon perusal of Regulation 29 of the 2012 Tariff Regulations, it is evident that the recovery of FERV cost is permissible provided the same is either hedged or incurred without fault on the part of the generating company.

224. Regulation 29.3 specifically provides that to the extent the generating company is not able to hedge its exposure, extra rupee liability may still be permissible if it is not attributable to the generating company or its suppliers/contractors.

225. Further, Regulation 29.4 mandates that the FERV shall be treated as an income or expense in the period it arises, reinforcing the principle of actual cost recovery.

226. In the present case, we find that there is no recorded finding by the Commission that the Appellant was imprudent or negligent in deferring the payments or that the actual payments deviated from the contractual obligations in a manner attributable to the Appellant.

227. The impugned order is notably silent on the reasons for such disallowance, despite acknowledging that the payments were made and that the Appellant claimed FERV based on actuals. This, in our considered view, renders the impugned disallowance arbitrary and unsupported by reasoning.

228. The Respondent No. 2's reliance on the Commission's discretion to disallow costs due to a lack of justification for delay is misplaced unless the delay or payment pattern is found to be in breach of prudent financial practices or regulatory requirements. In the absence of such a finding, the Appellant's claim, which is substantiated by audited financial records, cannot be disallowed merely because the payment dates differed from the scheduled ones.

229. Additionally, we take note of the Appellant's reliance on the Commission's own precedent in Petition No. 68 of 2016, which clearly recognizes the admissibility of FERV on an actual basis. That principle ought to have been applied in the present matter unless there were distinguishing factors, which have not been pointed out by the Respondents or identified in the Impugned Order.

230. **Accordingly, we find merit in the Appellant's grievance that the Commission acted erroneously in disallowing the differential FERV amount without assigning any reasons or conducting a prudence check, as envisaged under the applicable Regulations, and therefore the Appellant is entitled to recover the FERV costs as per actuals, duly reflected in its audited financials.**

Disallowance of claim for Additional Capitalization w.r.t. statutory dues (Appeal No. 293 of 2018)

231. The Appellant submitted that the amount approved by the Board of the Appellant towards land for additional capitalization was Rs. 37 crores, which amount has been allowed by the Commission. However, the Commission has disallowed an additional amount of Rs. 37 Lacs (1% of Rs. 37 crores) towards

payment for statutory dues. Please see para 49 of the Impugned Order at page 64 of the Appeal Paper book.

232. The Appellant also submitted that this amount, being paid towards statutory dues, should be allowed as part of the capital cost.

233. MPPMCL argued that MPERC disallowed the cost of land beyond the board approval amount since the same could not be said to be as per the original scope of work and also did not fall under any other head for which capitalisation could be allowed in terms of the applicable regulations. It is submitted that JPVL failed to provide any documentary evidence of the fact that the additional capitalisation claimed was part of the original scope of work. It is submitted that the fact the deviation was minor is also evidence of the fact that only. such cost for which no justification was available has been disallowed by the MPERC.

Analysis and Decision on* Additional Capitalization *(Appeal No. 293 of 2018)

234. The State Commission in the Impugned Order has held as under:

> *"49. On further scrutiny of the petitioner's response on each component claimed under additional capitalization vis-a-vis the issues raised by the Commission and the provisions under Regulation 20.1 of MPERC Tariff Regulations, 2012, the Commission has observed the following:*
>
> ***Land:***
>
> *(i) The petitioner has claimed capital addition of Rs. 11.63 Crore against acquisition of 64.74 Ha land through Land Acquisition*

Department, GoMP from the private land owners for barrage. The petitioner has also mentioned that due to change in design of the water intake system from weir to a gated barrage on account of GoMP's decision to allocate 89.6 cusec water to D.B. Power Ltd. and 44.8 cusec water to Surya Chakra Power Ventures Pvt. Ltd. in 2010 for their projects situated upstream on the Gopad River. The petitioner further submitted that vide letter dated 16th February' 2013, Water Resources Department (WRD) conveyed the in-principle approval for design of the barrage. The petitioner filed a copy of WRD letter dated 16th February' 2013 in this regard.

(ii) In Commission's order dated 24th May' 2017 in Petition No. 72 of 2015, the original scope of work of the Nigrie Power Project was considered as Rs. 11,700 Crore based on the resolution of Board of Directors dated 30th May' 2015. In Para 137 of aforesaid Commission's order, it has been explicitly mentioned that the details of various works filed by the petitioner during proceedings of Petition No. 72 of 2015 are taken on record to check any further additional capitalization to be claimed by the petitioner in future. In Form 5B filed with the subject petition, the petitioner has filed the break-up of the project cost of Rs. 11700 Crore as approved by the Board of the Company.

(iii) On perusal of Form 5B filed with the petition, the Commission observed that as per revised estimate, the cost of land is Rs. 37.00 Crore whereas, the cost of land including addition during FY 2015-16 filed by the petitioner is Rs. 37.37 Crore as on 31st

March' 2017 which is Rs. 0.37 Crore over and above the cost under the original scope of work.

(iv) In view of the submission made by the petitioner for additional capitalization in respect of Land, the Commission has observed that the said additional capitalization on account of acquisition of land claimed by the petitioner is in compliance with the directions of GoMP Water Resources Department. It is further observed that the additional capitalization claimed by the petitioner is capitalized and recorded in Audited Annual Accounts of Jaypee Nigrie Power Plant and Asset cum Depreciation Register for FY 2015-16. The aforesaid additional capitalization is covered under Regulation 20.1(c) of the Tariff Regulation 2012 but the amount claimed by the petitioner is in excess of the amount towards land in original scope of work. Therefore, the Commission has considered the expenses of Rs. 11.26 Crore (within the original scope of work) in this order.

(v) Therefore, the details of additional capitalization towards land considered in this order is as given below:

(a) Total cost of land as per revised capital cost approval by BoD (under Original Scope of works) is Rs.37.00 Crore

(b) Cost of land approved as on 31.03.2015 (as per Commission's tariff order dated 24.05.2017) is Rs. 25.74 Crore

(c) Cost of land claimed under additional capitalization during FY 2015- 16 is Rs. 11.63 Crore

(d) Cost of land considered in this order under additional capitalization during FY 2015-16 is Rs. 11.26 Crore

(e) Total actual cost of land as on 31.03.2016 considered in this order is Rs. 37.00 Crore"

235. The Appellant has assailed the decision of the State Commission in disallowing an amount of ₹37 lakhs, which was claimed as part of the additional capitalisation under the head of statutory dues, linked to the capital cost of land acquired for the project. It is the Appellant's case that while the Commission allowed ₹37 crores as approved by the Board of the Appellant for the cost of land, it disallowed an additional 1% thereof, i.e., ₹37 lakhs, incurred towards mandatory statutory dues, without recording any justification or prudence check.

236. The Appellant has argued that these statutory dues are an unavoidable fiscal obligation, directly connected with the acquisition of land and therefore ought to be recognised as part of the capital cost.

237. It has further submitted that the statutory dues are incidental and integral to land acquisition and form a necessary expenditure for capitalisation under the applicable Tariff Regulations.

238. On the other hand, Respondent No. 2 (MPPMCL) has contended that the Commission rightly disallowed the said amount on the ground that the cost claimed was over and above the Board-approved land cost and did not fall within the original scope of work as envisaged in the investment approval.

239. It has further submitted that no documentary evidence or regulatory justification was furnished by the Appellant to demonstrate that such cost formed part of an allowable head of expenditure for the purpose of additional capitalisation

under the relevant regulatory framework. It is their stand that the minor deviation claimed is itself indicative of a lack of substantiation for the additional cost, and that only costs duly justified and supported by scope-based documentation were admitted by the Commission.

240. Upon consideration of the rival contentions and material on record, we note the following:

a) Nature of the Claim: The amount of ₹37 lakhs, representing 1% of the land cost, has been described as statutory dues. While the exact nature of these dues (such as registration charges, stamp duty, cess, etc.) has not been elaborated in the written submissions, there is no dispute that they were incurred in relation to the land acquisition. As such, they are not extraneous or speculative in nature but are fiscally mandated expenditures.

b) Relevance to Capital Cost: The capital cost under the Tariff Regulations includes all expenditure incurred on the project up to the date of commercial operation, including interest during construction and incidental expenses, provided they are found to be justifiable and prudently incurred. The statutory dues claimed herein appear to have been expended for enabling lawful ownership or possession of the land, a prerequisite for project establishment, and therefore are prima facie eligible for capitalisation, subject to a prudence check.

c) Regulatory Scope and Approval Ceiling: Respondent No. 2's objection appears to rest on the fact that the additional ₹37 lakhs exceed the Board-approved amount of ₹37 crores for land cost. However, Board approval is an administrative ceiling and not a regulatory constraint per se. If the actual expenditure has been incurred and can be validated with supporting documentation, the Commission ought to consider it on its merits, particularly when the claim is towards statutory liabilities which may not have been precisely determinable at the time of Board sanction.

d) Absence of Prudence Check or Reasoned Rejection: From a perusal of the record, it appears that the Commission has disallowed the amount solely on the basis that it exceeded the Board-approved figure, without undertaking any specific prudence check or providing reasons as to why the statutory dues though incurred were not admissible under the applicable Tariff Regulations. In the absence of any finding of imprudence, delay, or non-essentiality, the disallowance appears to be arbitrary.

e) Judicial and Regulatory Precedents: It is well settled that statutory levies, being non-discretionary and mandatory payments under law, are eligible to be capitalised provided they are directly linked to the acquisition of project assets. In this case, the statutory dues claimed are closely tied to the cost of land, which the Commission has already allowed. The exclusion of a small proportion of related costs without justification goes against the principles of holistic and reasoned regulatory treatment.

241. In light of the above discussion, the Tribunal finds that the Appellant's claim for ₹37 lakhs towards statutory dues merits acceptance. The Commission has failed to record any cogent reasoning for its disallowance, nor has it disputed the genuineness or necessity of the expenditure. The disallowance solely on account of the amount being more than the Board-approved figure is not tenable in

regulatory law. The said amount, being a lawful and incidental expense incurred for land acquisition, ought to have been allowed as part of the capital cost.

242. **Accordingly, the disallowance of ₹37 lakhs towards statutory dues under additional capitalisation is set aside. The Commission is directed to allow the said amount as part of the capital cost while undertaking the next tariff exercise.**

APPEAL NO. 49 OF 2020

243. The Appellant has raised the following issues in Appeal No. 49 of 2020:

i. Disallowance of additional capitalization towards procurement of assets of Amelia (North) Coal Mine and payment of Additional Premium on coal received is unjustified,
ii. Disallowance of O&M expenses of the transmission line and bay is unsustainable,
iii. Disallowance of recovery of pro-rated expenses of operating the Project from beneficiaries of 92.5% capacity on account of supply of 7.5% of concessional power under the PPA dated 06.09.2011 is unjustified,
iv. Disallowance of the claim of Foreign Exchange Rate Variation ("FERV") of Rs. 3.06 crores paid by the Appellant as actual interest amount on FCCB in March 2015.

244. Out of the above four (4) issues, the issue nos. i., ii. and iii. are already covered above by the Appeal No. 244 of 2017.

245. The Appellant has challenged an additional ground of 'Disallowance of claim towards FERV' (issue no. iv. above) in Appeal No. 49 of 2020.

246. The Appellant had filed an amount of Rs. 3.06 crores towards FERV on the interest part of FCCB as on 31.03.2015. The said claim was made in relation to FY 2014-15. The Commission at paras 136-139 of the impugned order proceeded on the basis that the said amounts had not been claimed in the final tariff order for FY 2014-15 but had not claimed such amount in such proceedings or even in the Appeal filed by the Appellant against such final tariff order dated 24.05.2017 in petition no. 72 of 2015.

247. The Appellant argued that it is an undisputed position that the Commission in the said tariff order of 24.05.2017 on petition no. 72 of 2015 had admitted the principal amount and the interest rate towards FCCB. However, by inadvertence, the Appellant had missed out providing information separately regarding such interest amount of Rs. 3.06 crores. This is due to the fact that the Appellant had provided its computation in the tariff filings for the interest component on ECB and FCCB up to the date of commissioning of Unit II of the project, i.e., 20.02.2015, and had inadvertently missed out on the amount paid as interest on 31.03.2015. The reasons leading to missing out of the missing amount were explained in the petition.

248. Also, submitted that the Commission has not questioned the sanctity or correctness of the amount of interest payment of Rs. 3.06 crores. The basis for the disallowance arises from the fact that the amount had not been indicated to the Commission in the proceedings for the final tariff of FY 2014-15 in the petition no.

72 of 2015. The Appellant having incurred the amount towards interest payment, the same should not have been disallowed.

249. The Appellant submitted that this amount of Rs. 3.06 crores should be allowed as part of the capital cost.

250. MPPMCL submitted that the Appellant had never claimed the said interest in any of the following Petitions:

(i) *P.No. 72 of 2015 determining Final Tariff for FY 2014-15 (Based on Annual Audited Account)*

(ii) *P.No. 41 of 2017 filed for true-up of tariff for FY 2015-16 based on the Annual Audited Accounts*

(iii) *P.No. 07 of 2018 filed for determination of Multi Year Tariff (MYT) for the control period FY 2016-17 to FY 2018-19*

(iv) *P.No. 05 of 2019 filed for true-up of tariff for FY 2016-17*

(v) *P.No. 05 of 2019 for true-up of tariff for FY 2016-17*

251. Further, argued that in the Impugned Order, MPERC has comprehensively dealt with the claim of FERV and observed that the final tariff order dated 24.05.19 was issued by MPERC after considering all the relevant facts and allowed FERV as permissible under applicable Tariff Regulations.

252. Given above, MPPMCL submitted that all the submissions made by the Appellant are wrong and misconceived and do not deserve to be considered, and there is no infirmity in the Order dated 18.11.20 passed by MPERC in P. No. 72 of 2015 and does not call for interference by this Tribunal.

<u>Analysis and Decision on FERV (Appeal No. 49 of 2020)</u>

253. The State Commission held as under:

> *"**Commission's Analysis***
> *136. With regard to Foreign Exchange Rate Variation (FERV), it is observed that the petitioner filed an amount of Rs.3.06 Crore towards FERV on interest part of FCCB as on 31.03.2015.*
> *137. With regard to above claim towards FERV, the following status of petitioner's filing right from its first petition for determination of final tariff upto several true-up petitions is given below:*
> *i. The Commission issued final tariff order of the Nigrie thermal power project on 24th May' 2017 in petition No. 72 of 2015. In the aforesaid final tariff order, the Commission had determined the tariff for FY 2014-15 based on the Annual Audited Accounts and FERV of Rs. 38.19 Crore for FY 2014-15 on actual basis as filed by the petitioner.*

But FERV of Rs. 3.06 Crore now claimed in subject petition was neither filed in its petition No. 72 of 2015 nor in any subsequent additional submissions of the petitioner in that petition. Therefore, the FERV claimed in final tariff petition was completely allowed in Commission's order dated 24th May' 2017.

ii. Subsequently, the petitioner filed true-up petition No. 41 of 2017 for FY 2015- 16 based on the Annual Audited Accounts. The petitioner had not filed its FERV claim of Rs 3.06 Crore in the petition placed in the public domain for inviting comments/suggestions. Vide order dated 20th July' 2018, the Commission issued order on the aforesaid true-up petition.

iii. The petitioner had also filed MYT petition No. 07 of 2018 for the control period FY 2016-17 to FY 2018-19 based on the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2015. No such claim was filed in this petition also. The Commission had issued the MYT order on the aforesaid petition on 29th November' 2018.

iv. The petitioner filed true-up petition No. 05 of 2019 for FY 2016-17. The petitioner had not claimed any amount towards FERV on interest of FCCB in the petition. The Commission vide order dated 25th July' 2019 issued the order on the aforesaid petition No. 05 of 2019.

138. In view of the above, it is observed that in the final tariff order dated 24th May' 2017, the Commission had allowed FERV for FY 2014-15 as filed by the petitioner in its additional submission. Further, the petitioner had never claimed FERV of Rs. 3.06 crore in the true-up/ MYT petitions filed after issue of aforesaid final tariff order. The Commission has also observed that all aforesaid orders issued by the

Commission have been challenged by the petitioner before Hon'ble Appellate Tribunal for Electricity and these orders are sub-judice before Hon'ble Tribunal as on date. The petitioner has never challenged this issue of FERV of Rs. 3.06 Crore in any of its Appeal.

139. The final tariff order dated 24th May' 2019 was issued by the Commission after considering all the relevant facts including actual FERV permissible under applicable MPERC Tariff Regulations. Therefore, the claim of the petitioner in the subject petition with respect to FERV is not considered in this order."

254. The issue for consideration in this Appeal (Appeal No. 49 of 2020) is the disallowance of ₹3.06 crores claimed by the Appellant towards Foreign Exchange Rate Variation (FERV) on interest pertaining to Foreign Currency Convertible Bonds (FCCBs), specifically for the period ending 31.03.2015 and forming part of the FY 2014-15 accounts. The Commission disallowed the said amount solely on the ground that it was not claimed in the original final tariff petition for FY 2014-15 in Petition No. 72 of 2015, or in the subsequent Appeal challenging that order.

255. The Appellant has explained that the amount in question was inadvertently omitted during tariff filings, as it pertained to the interest component on FCCBs paid on 31.03.2015, which fell after the commercial operation date (COD) of Unit II (20.02.2015). The computation submitted to the Commission inadvertently accounted only for the interest till COD, and this omission was unintentional. The Appellant has further submitted that the Commission did not dispute the correctness or the actual incurrence of the said ₹3.06 crores, nor was any question raised regarding its prudence or admissibility under the relevant Tariff Regulations.

256. On the other hand, Respondent No. 2 has argued that the Appellant did not raise this claim in any of the earlier proceedings, including Petition No. 72 of 2015 (final tariff for FY 2014-15), Petition No. 41 of 2017 (true-up for FY 2015-16), or Petition No. 05 of 2019 (true-up for FY 2016-17). According to the Respondent, the Commission has already accounted for permissible FERV in its tariff determination based on applicable regulations, and the belated attempt to revise the claim must be rejected.

257. The central question is not whether the claim was earlier raised, but whether the claim represents a genuine, prudently incurred expense, and whether its disallowance results in a regulatory unfairness that defeats the statutory scheme of full cost recovery. The admitted facts are:

- The Appellant incurred a liability of ₹3.06 crores towards interest on FCCBs on 31.03.2015.
- The Commission has not questioned the genuineness, quantum, or legal admissibility of the said amount under the Tariff Regulations.
- The disallowance is solely on procedural grounds, namely, the claim not being part of the original final tariff proceedings.

258. Regulation 29 of the MPERC Tariff Regulations, 2012 allows the generating company to recover FERV-related expenses annually based on the actuals reflected in the audited accounts. Moreover, this Tribunal notes that in a prior case involving the same Commission (***MB Power v. MPPMCL and Ors., Petition No. 68 of 2016***), the Commission itself had clarified that FERV is to be accounted on actuals as per audited accounts, irrespective of scheduling delays.

259. Further, regulatory jurisprudence emphasizes substance over form. The fact that the amount was mistakenly omitted from earlier submissions should not bar its consideration, particularly when the expenditure is otherwise admissible, duly incurred, and verifiable through records. Procedural lapses that are neither mala fide nor indicative of falsification ought not to lead to financial injustice, especially in a regulated tariff framework.

260. In the absence of any finding that the Appellant acted imprudently or that the interest payment was not incurred, the disallowance on mere technical grounds cannot be sustained.

261. In view of the above discussion, we find that the Appellant's claim of ₹3.06 crores towards FERV on FCCB interest as on 31.03.2015 merits acceptance. The Commission has not disputed the genuineness, necessity, or regulatory admissibility of the expense. The omission in earlier proceedings was inadvertent and subsequently clarified.

262. **Therefore, the disallowance on account of procedural lapse is arbitrary and liable to be set aside. Accordingly, the Commission is directed to allow the amount of ₹3.06 crores towards FERV as part of the capital cost for the purposes of tariff determination in the next exercise. This issue in the Appeal No. 49 of 2020 is allowed to this limited extent, the Appellant is not entitled to claim it retrospectively.**

APPEAL NO. 341 OF 2019

263. The Appellant has raised the following issues in Appeal No. 341 of 2019:

i. Disallowance of additional capitalization towards procurement of assets of Amelia (North) Coal Mine and payment of Additional Premium on coal received is unjustified,

ii. Disallowance of O&M expenses of the transmission line and bay is unsustainable,

iii. Disallowance of recovery of pro-rated expenses of operating the Project from beneficiaries of 92.5% capacity on account of supply of 7.5% of concessional power under the PPA dated 06.09.2011 is unjustified,

iv. Disallowance of additional capitalization on account of land which was part of original scope of work

264. Out of the above four (4) issues, the issue nos. i., ii. and iii. are already covered above by the Appeal No. 244 of 2017.

265. The additional claim of the Appellant in this Appeal (Appeal No. 341 of 2019-issue no. iv. above) is regarding the payment of the statutory levy.

266. The Appellant had sought an amount of Rs. 1.46 Lac towards statutory levy against the land procured towards additional capitalization. However, this amount has been disallowed on the ground that it was an excess of the cost of land of Rs. 37 Crores that was originally allowed by the Board. It is most respectfully submitted that this amount may be allowed, being in the nature of payment towards statutory dues.

267. The MPPMCL submitted that the Commission has disallowed additional capitalization on account of land. The Commission has examined the issue in

detail and given a detailed and reasoned order for rejecting part of the claim, which was claimed in excess.

268. In light of the ruling of the Commission, MPPMCL submitted that the amount claimed by the Appellant was in excess of the amount towards land in the original scope of work. Therefore, the order of Commission is completely justified and calls for no interference by this Hon'ble Tribunal on the issue.

269. It is therefore submitted that in light of the submissions made herein above, this Tribunal may be pleased to reject the contentions made by the Appellant in the Appeal and dismiss the instant Appeal.

<u>Analysis and Conclusion on Statutory Levy (Appeal No. 341 of 2019)</u>

270. The State Commission has held that:

> *"52. The petitioner filed additional capitalization during FY 2016-17 under three major heads i.e. Land, BTG and Balance of Plant. The additional capitalization under each of the aforesaid heads has been examined separately as given below:*
>
> ***Land:***
>
> *(i) The petitioner claimed capital addition of Rs. 0.01 Crore against payment on account of land tax to panchayat. The petitioner mentioned that this is a statutory payment and same has been claimed as additional capitalization within the Cut-off date. The petitioner filed a copy of Challan of Rs. 13,720/- and Rs. 1,32,518/- for the payment to Panchayat against diversion of 0.350 Ha. and 2.799 Ha. respectively in this regard.*

(ii) In Commission's order dated 24th May' 2017 in Petition No. 72 of 2015, the original scope of work of the Nigrie Power Project was considered as Rs. 11,700 Crore based on the resolution of Board of Directors dated 30th May' 2015.In Para 137 of aforesaid Commission's order, it has been explicitly mentioned that the details of various works filed by the petitioner during proceedings of Petition No. 72 of 2015 are taken on record to check any further additional capitalization to be claimed by the petitioner in future. In Form 5B filed with the subject petition, the petitioner has filed the break-up of the project cost of Rs. 11700 Crore as approved by the Board of the Company.

(iii) The Commission observed that as per revised estimate, the cost of land is Rs. 37.00 Crore which has already been capitalized by the petitioner and allowed by the Commission as on 31st March' 2016. Therefore, the additional capitalization towards land filed by the petitioner is over and above the cost under the original scope of work.

(iv) Earlier, vide true-up order dated 20th July' 2018 for FY 2015-16, the Commission had not considered the cost of land over and above the cost of land approved by the BoD under original scope of work. Aggrieved with the aforesaid order, the petitioner filed an Appeal before Hon'ble Appellate Tribunal for Electricity as Appeal No. 293 of 2018 wherein the disallowance of cost of land is also one of the issues raised in Appeal.

(v) In view of the above, the Commission has observed that the aforesaid additional capitalization on account of acquisition of land claimed by the petitioner is in excess of the amount

> *towards land in original scope of work. Therefore, taking a consistent approach, the Commission has not considered the additional capitalization claimed in the subject petition towards land in this order."*

271. The Appellant in the present Appeal has challenged the rejection of its claim for additional capitalisation of ₹1.46 lakhs, incurred towards statutory levy related to land, on the ground that the said amount was in excess of the ₹37 crore already approved by the Board of Directors towards land cost. The Appellant has contended that this additional amount constituted statutory dues paid to the local Panchayat in respect of diversion of land for project purposes, and that the same was an integral and unavoidable component of land acquisition expenditure. The Appellant submitted copies of the challans to the Commission, evidencing payment of ₹13,720 and ₹1,32,518 respectively for diversion of 0.350 hectares and 2.799 hectares of land, and asserted that the expenditure was incurred within the cut-off date and was thus capitalizable.

272. On the other hand, the Commission has taken the view that the cost of land as per the revised estimate (₹37 crore) had already been capitalised and allowed up to 31.03.2016, and that the amount claimed by the Appellant in the present petition was over and above the approved scope. The Commission, relying upon its earlier order dated 24.05.2017 in Petition No. 72 of 2015 and subsequent orders, held that no further cost under the head "land" would be allowed in excess of the originally approved cost. Consequently, the additional ₹1.46 lakhs was disallowed.

273. Respondent No. 2 supported the Commission’s stand and submitted that the Appellant's claim had been duly examined and rejected with reasoned justification. It was argued that there was no infirmity in the Commission’s decision since the additional claim exceeded the land cost previously approved by the Board and no regulatory head permitted further capitalisation under the applicable Regulations.

274. Upon perusal of the record and consideration of the rival submissions, this Tribunal is of the considered view that the Commission has erred in mechanically applying the ceiling of ₹37 crore as a rigid cap on land-related capital expenditure without assessing the nature and necessity of the claimed amount. The Tribunal notes the following:

- Statutory Character of the Levy: The amount of ₹1.46 lakhs represents statutory payments made to the Panchayat for land diversion. Such levies are mandatory under local land laws and not discretionary in nature. Statutory dues of this kind are closely linked to lawful acquisition and use of the land, and thus form an essential precondition for putting the project assets to use.
- Eligibility under Tariff Regulations: The Tariff Regulations permit inclusion of all justifiable and prudently incurred expenses up to the cut-off date in the capital cost, provided they are directly associated with project implementation. The payment of statutory levies for land diversion clearly falls within this scope. The fact that the amount is nominal and backed by documentary evidence further underscores its reasonableness.
- Board Approval is not a Regulatory Bar: The Commission appears to have treated the Board-approved cost of ₹37 crore as a statutory ceiling, overlooking that such approvals serve as internal financial estimates and are not binding limitations under the Tariff Regulations. Regulatory

treatment must be governed by the nature of the expense and its nexus to the capital asset, rather than rigid adherence to administrative budgets.

- Lack of Prudence Check: There is no finding by the Commission that the Appellant acted imprudently or that the amount was incurred in breach of any regulatory or contractual stipulation. Disallowance on the sole ground of exceeding a budgetary head without assessing the necessity or propriety of the expense amounts to mechanical decision-making and fails the test of a reasoned quasi-judicial order. Excluding a minor and justified statutory payment while allowing the main cost would lead to inequitable and inconsistent regulatory treatment.

275. In light of the above, the Tribunal finds that the amount of ₹1.46 lakhs claimed by the Appellant towards statutory dues for land diversion is a legitimate capital expenditure that is eligible for capitalisation under the applicable Regulations. The Commission’s rejection of the said claim on a procedural or quantitative threshold, without undertaking a prudence assessment or examining the statutory character of the expense, is arbitrary and unsustainable.

276. **Accordingly, the Commission is directed to allow the said amount of ₹1.46 lakhs towards land-related statutory dues as part of the additional capitalisation for the relevant period.**

Conclusion

Appeal No. 244 of 2017:

Issue No. 1: The decision of the State Commission is set aside on the count of disallowance of 50% of the cost incurred till the extended timeline, i.e., up to

31.08.2014, the Appellant is allowed 100% of the cost incurred corresponding to the period up to 31.08.2014.

Issue No. 2: The deduction of Rs. 120.77 crores from the capital cost towards presumed LDs is set aside.

Issue No. 3: The disallowance of O&M expenses for the dedicated transmission line, despite its capital cost being admitted, is unjustified. The Impugned Order, on this count, is set aside. The Commission shall allow the O&M expenses incurred by the Appellant for the said transmission line while computing working capital.

Issue No. 4: The disallowance of Rs. 295 per MT towards Additional Levy for FY 2014-15 is consistent with the Tribunal's earlier judgment in Appeal No. 257 of 2015. However, since a Civil Appeal is pending before the Hon'ble Supreme Court, the Appellant is at liberty to seek appropriate relief depending on the outcome of the said appeal.

Issue No. 5: The matter is remanded to the Commission for a fresh determination on the admissibility of such components as part of working capital, after considering the statutory framework and the Appellant's cost records. The State Commission is directed to decide the issue afresh after hearing the contesting parties, within three months from the date of this judgment.

Issue No. 6: The issue is remanded to the Commission to verify the correctness of the FERV allocation, after hearing the contesting parties and obtaining necessary information in addition to the material placed on record and Form 5B of the tariff petition, and to pass appropriate orders giving detailed reasons for its allocation.

Appeal No. 293 of 2018

Issue of disallowance of claim towards FERV: We find merit in the Appellant's grievance that the Commission acted erroneously in disallowing the differential FERV amount without assigning any reasons or conducting a prudence check, as envisaged under the applicable Regulations, and therefore the Appellant is entitled to recover the FERV costs as per actuals, duly reflected in its audited financials.

Issue of disallowance of claim for Additional Capitalization w.r.t. statutory dues: The disallowance of ₹37 lakhs towards statutory dues under additional capitalisation is set aside. The Commission is directed to allow the said amount as part of the capital cost while undertaking the next tariff exercise.

Appeal No. 49 of 2020

277. **Issue of disallowance of claim towards FERV:** The disallowance on account of procedural lapse is arbitrary and liable to be set aside. Accordingly, the Commission is directed to allow the amount of ₹3.06 crores towards FERV as part of the capital cost for the purposes of tariff determination in the next exercise. This issue in the Appeal No. 49 of 2020 is allowed to this limited extent, the Appellant is not entitled to claim it retrospectively.

Appeal No. 341 of 2019

Issue of Statutory Levy: The Commission is directed to allow the said amount of ₹1.46 lakhs towards land-related statutory dues as part of the additional capitalisation for the relevant period.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal Nos. 244 of 2017, 293 of 2018, 341 of 2019 and 49 of 2020 have merit and are allowed. The impugned orders of the State Commission are set-aside.

MPPMCL is liable to make the payments within three (3) months in accordance with the conclusion made hereinabove.

Further, the State Commission shall pass the consequential orders on the issues remanded hereinabove.

The Captioned Appeal and pending IAs, if any, are disposed of in the above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 14th DAY OF JULY, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

REPORTABLE / ~~NON-REPORTABLE~~
pr/mkj/kks