

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

Appeal no. 293 of 2014 and
Appeal no. 279 of 2014

Dated: 23rd March, 2016

Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of:

Appeal no. 293 of 2014

1. **M/s. Anjaney Ferro Alloys Ltd.**
P.O. – Mihijan,
Distt. – Jantara – 815 354
Jharkhand
2. **Shivam Iron & Steel Co. Ltd.**
Kalyani Apartment, Tah Complex
1st Floor, Giridih – 815 301
Jharkhand
3. **Bihar Foundry & Castings Ltd.**
Main Road, Ranchi – 834 001
4. **Balaji Electrsteels Ltd.**
203-B, N.P. Centre,
New Dakbunglow Road,
Patna – 800 001

...Appellants

Versus

1. **Jharkhand State Electricity Regulatory Commission**
2nd Floor, Rajendra Jawan
Bhawan-cum-Sainik Bazar
Main Road, Ranchi – 834 001
- ...Respondent No.1**

2. **Damodar Valley Corporation** ...Respondent No.2
DVC Towers, VIP Road
Kolkata – 700 054
3. **Jharkhand State Electricity Board** ...Respondent No.3
Engineering Building
HEC Dhurwa
Ranchi – 834 004

Counsel for the Appellant : **Mr. Rajiv Yadav**
Mr. Rohan Makhani

Counsel for the Respondent : **Mr. Farrukh Rasheed for R-1**

Mr. M.G. Ramachandran,
Ms. Anushree Bardhan,
Ms. Ranjitha Ramachandran for R-2

Mr. Himanshu Shekhar
Mr. Aabhas Parimal for R-3

Appeal no. 279 of 2014

M/s. Dayal Steel Ltd.
74/12, Bhurkunda Main Raod
Ramgarh – 829 122, Jharkhand ...Appellant(s)

Versus

1. **Jharkhand State Electricity Regulatory** ...Respondent No.1
Commission
2nd Floor, Rajendra Jawan
Bhawan-cum-Sainik Bazar
Main Road, Ranchi – 834 001
2. **Damodar Valley Corporation** ...Respondent No.2
DVC Towers, VIP Road
Kolkata – 700 054

Counsel for the Appellant : Mr. Krishan Kant Dubey
Mr. Sanjay Kumar Dubey
Mr. Suraj Samdarshi
Mr. S.K. Dubey
Ms. Suchi Singh
Mr. Pramod Kumar

Counsel for the Respondent : Mr. Farrukh Rasheed for R-1

Mr. M.G. Ramachandran,
Ms. Anushree Bardhan,
Ms. Ranjitha Ramachandran for R-2

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

The Appeal No. 293 of 2014 is filed by (i) M/s. Anjaney Ferro Alloys Ltd., (ii) Shivam Iron & Steel Co. Ltd., (iii) Bihar Foundry & Castings Ltd. and (iv) Balaji Electro steels Ltd. (**hereinafter referred to as “Appellants”**) under Section 111 of the Electricity Act, 2003 against the Impugned Order dated 04.09.2014 passed by the Jharkhand State Electricity Commission (**hereinafter referred to as “State Commission” or “Respondent No.1”**) whereby the State Commission has provisionally determined the Annual Revenue Requirement (**“ARR”**) and Retail Tariff of Damodar Valley Corporation (**hereinafter referred to as “Respondent No. 2”**) for MYT period FY 2013-14 to FY 2015-16 for supply of power within the Respondent No. 2's command area falling

within the State of Jharkhand. The Appellants are the companies incorporated under the provisions of the Companies Act, 1956 and are completely engaged in the manufacturing of ferro alloys and steel products and are HT consumers of Respondent No. 2. The Appeal No. 279 of 2014 is filed by M/s Dayal Steel Limited (**hereinafter referred to as “Appellant”**) under Section 111 of the Electricity Act, 2003 against the Impugned Order dated 04.09.2014 passed by the Jharkhand State Electricity Commission (**hereinafter referred to as “State Commission”**) whereby the State Commission has determined the Annual Revenue Requirement (**“ARR”**) and Retail Tariff of Damodar Valley Corporation (**hereinafter referred to as “Respondent No. 2”**) for Multi Year Tariff period FY 2013-14 to FY 2015-16 for its command area in the State of Jharkhand. The Appellant herein is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at Bhurkunda Main Road Ramgarh, Jharkhand and is executing its business activities related to manufacture of ferro alloys and steel products. The Appellant is depending on the power supply by the Respondent No. 2 since it is a HT consumer of the Respondent No. 2 within its command area.

2. Since the issues/disputes in both these Appeals i.e. Appeal No. 293 of 2014 and Appeal No. 279 of 2014 are similar and arisen from the same Impugned Order dated 04.09.2014 passed by the State Commission, we are deciding both these Appeals by this common judgment.
3. Respondent No.2 i.e. Damodar Valley Corporation is the statutory corporation owned and controlled by the Government of India, Government of Jharkhand and Government of West Bengal and is engaged in generation, transmission, bulk supply and distribution of electricity and performing functions relating to irrigation, flood control, afforestation, soil conservation etc. in accordance with the provisions of Damodar Valley Corporation Act, 1948.
4. Jharkhand State Electricity Board (**hereinafter referred to as "Respondent No. 3"**) is power distributing company within the State of Jharkhand.
5. The power distribution activity of the Respondent No. 2 is confined to industrial HT consumers, receiving power at 33 KV and above in its command area. Further, Respondent No.2 undertakes sale of

electricity to Jharkhand State to Respondent No.3 in the State of Jharkhand. The Respondent No.2 also sales electricity to licensees etc. under command area on bilateral terms, as well as on the power exchange. Its generation and transmission functions are spread over two States i.e. States of Jharkhand and West Bengal and therefore its generation and transmission tariff is determined by the Central Electricity Regulatory Commission (“**CERC**”) under Section 79 (1)(b) of the Electricity Act, 2003.

6. The Central Commission determines generation and transmission tariff of the Respondent No.2 which serves as input cost to the State Commission for determination of the distribution and retail tariff of the Respondent No.2 and Respondent No.3.
7. Aggrieved by the Impugned Order dated 04.09.2014 passed by the State Commission determining thereby the ARR and retail tariff of the Respondent No.2 for FY 2013-14 to FY 2015-16 for supply of power within the command area falling under the Respondent No.2 within the State of Jharkhand, the Appellants as HT consumers of the Respondent No.2 have filed this Appeal.

Facts of the Appeal

8. The Appellants' main contention in both the Appeal is merely on the issue relating to the State Commission while passing the Impugned Order has not carried out the requisite prudence check which has been left to be undertaken at the stage of final true up of the tariff and the lack of prudence check on the part of the State Commission has resulted into determination of excessive tariff as alleged by the Appellants. The significant issues as contested in both the above Appeals are briefly discussed as follows:

Fixed charges

- (a) It is submitted by the Appellants that the State Commission has not undertaken any prudence check while determining Fixed charges for Respondent No. 2's old and new generating stations for FY 2013-14 to FY 2015-16 which is evident from the relevant paras of the Impugned Order as reproduced below;

"6.47 For the projections of fixed charges for FY 2014-15 and FY 2015-16, since CERC has not finalised the tariff for the DVC's generating stations for the period 2014-19, the Commission

provisionally approves the fixed costs for FY 2014-15 and FY 2015-16 same as that for FY 2013-14 subject to true-up based on the subsequent orders of CERC. For new stations, the fixed costs as per the petitioner's admission have been considered subject to final approval by CERC."

In view of the above, the Appellants stated that it demonstrates that the State Commission has mechanically accepted the Fixed charges of the Respondent No.2 and further alleged that the Fixed charges as allowed by the State Commission in the Impugned Order dated 04.09.2014 exceed the Fixed charges claimed by the Respondent No.2 in its tariff petition filed before the Central Commission for the control period 2014-19.

- (b) The Appellants pointed out that an excess sum of Rs. 376.13 crores and Rs. 79.02 crores for FYs 2014-15 and FY 2015-16 respectively have been allowed as Fixed charges in the Impugned Order passed by the State Commission over and above the Fixed charges claimed by Respondent No.2 for the period FYs 2014-19, as part of its tariff petitions filed before the Central Commission, as detailed hereunder;

FY 2014-15

Figures in Rs. crores

Station	2013-14	2014-15		
	Annual Fixed Cost Approved by CERC in 2009-14 Tariff Orders	Annual Fixed Cost Allowed by JSERC in Impugned Order	Annual Fixed Cost claimed by DVC in Petitions filed before CERC for 2014-19 period	Excessive Allowance
	(a)	(b)	(c)	(c-b)
Bokaro TPS	456.81	456.81	321.67	-135.14
Chandrapura TPS	286.52	286.52	269.00	-17.52
Durgapur TPS	274.39	274.39	229.53	-44.86
Mejia Units 1 to 3	540.98	540.98	394.93	-146.04
Mejia Unit 4	242.85	242.85	188.53	-54.32
Panchet HPS	27.89	27.89	27.49	-0.40
Tilaiya HPS	8.57	8.57	8.01	-0.57
T&D system	517.68	517.68	540.39	22.71
Total				-376.13

FY 2015-16

Figures in Rs. crores

Station	2013-14	2014-15		
	Annual Fixed Cost Approved by CERC in 2009-14 Tariff Orders	Annual Fixed Cost Allowed by JSERC in Impugned Order	Annual Fixed Cost claimed by DVC in Petitions filed before CERC for 2014-19 period	Excessive Allowance
	(a)	(b)	(c)	(c-b)
Bokaro TPS	456.81	456.81	368.15	-88.66
Chandrapura TPS	286.52	286.52	305.18	18.66
Durgapur TPS	274.39	274.39	265.84	-8.55
Mejia Units 1 to 3	540.98	540.98	442.29	-98.69
Mejia Unit 4	242.85	242.85	204.78	-38.07
Panchet HPS	27.89	27.89	36.98	9.09
Tilaiya HPS	8.57	8.57	8.76	-0.19
T&D system	517.68	517.68	644.69	127.01
Total				-79.02

- (c) The data in respect of Fixed charges claimed by the Respondent No.2 for FY 2014-15 and FY 2015-16 relied by the Appellants has been carved out by the Appellants from the summary sheets submitted by the Respondent No. 2 along with tariff petitions filed before the Central Commission.
- (d) As per the Appellants, by adopting Fixed charges for FY 2013-14, the State Commission has burdened its consumers with excessive Fixed charges recovery to the tune of Rs. 376 crores in the FY 2014-15 and Rs. 79.02 crores for FY 2015-16 which should not have been imposed upon its consumers, had the State Commission had exercised requisite prudence check while determining the provisionally retail tariff for the relevant period.
- (e) In respect of the Energy Charges, the State Commission vide its Impugned Order dated 04.09.2014 accepted the Respondent No.2's submissions without any requisite scrutiny which is evident from the following quoted para of its Impugned Order;

“The Commission has considered the Energy charges rate for FY 2013-14 as per the submissions made by the Petitioner for FY 2013-14 subject to true-up based on the audited data”.

- (f) As per the Appellants, the State Commission has erred by considering the escalation factor of 6.62% in respect of coal cost, as against lower escalation rate as notified by the Central Commission vide its Regulations 2014-19 for domestic as well as imported coal.
- (g) This Central Commission's Regulation, 2014-19 ought to have been considered by the State Commission while approving Energy charges payable to Respondent No.2. The Appellants further stated that the Central Commission is yet to determine the generation tariff for the said control period and the State Commission should have before proceeding to fix Retail Tariff either waited for the Central Commission to come out with its final tariff or in the alternate, factored the likely impact of the above mentioned 2014-19 Regulations of the Central Commission so as to arrive at Realistic provisional tariff chargeable by the Respondent No. 2 pending final determination thereof.
- (h) As per the Appellants, the operational norms as laid down by the Central Commission vide its 2014-19 Regulations for generating companies are stringent as compared to those applicable under its erstwhile 2009 Regulations and as such, the benefit of such norms should have been extended to its consumers while determining provisional tariff.

- (i) In support of the above argument, the Appellants have submitted the following illustration bringing out the comparison of the operational norms of the Central Commission's 2009-2014 vis-a-vis 2014-19 Regulations as applicable to Respondent No.2's generating stations;

Generating Station	NAPLF		Secondary Fuel Oil	
	2009-14	2014-19	2009-14	2014.19
Bokaro TPS	75%	80%	2.0 ml/kwh	1.5 ml/kwh
Chandrapur TPS	60%	80%	3.0 ml/kwh	1.5 ml/kwh
Durgapur TPS	74%	80%	2.4 ml/kwh	2.4 ml/kwh
Mejia TPS	82%	85%	2.0 ml/kwh	1.0 ml/kwh

Generating Station	Station Heat Rate	
	2009-14	2014.19
Mejja Unit 1 to 3, 4, 5 & 6	2500 kCal/kWh	2450 kCal/kWh
Mejja Unit 7 & 8	2425 kCal/kWh	2375 kCal/kWh
Durgapur Steal TPS	2425 kCal/kWh	2375 kCal/kWh

- (j) Similarly even for the auxiliary energy consumption as specified in the earlier Regulations 2009-14 vis-a-vis the current Regulations 2014-19 of the Central Commission, there has been a considerable reduction in respect of the generating stations of the Respondent No. 2. Had the Tariff Regulations 2014-19 of the Central

Commission been considered, it would have given relief even on account of the auxiliary energy consumption to the end consumers.

- (k) The Appellants further mentioned that the treatment of non-tariff income should have been done in accordance with the State Commission Regulations 2010 which provides for a dispensation for treatment of non-tariff income which is defined as income relating to the licensed business other than from tariff (wheeling and retail supply) and in this regard, the State Commission should have made deduction of the revenue of non-tariff income from other business of the Respondent No. 2 from the ARR in calculating the revenue requirement of Respondent No.2 which as per the Appellants has not been complied with.
- (l) Another issue brought out in the above Appeal is regarding the working capital which in the opinion of the Appellants, the State Commission arbitrarily approved the Respondent No.2's working capital requirements at the rate of 1% of the revenue from the sale of power which is contrary to the stipulations of the State Commission Regulations, 2010.
- (m) Lastly, the Appellants submitted that the State Commission ought to have directed the Respondent No.2 to file independent accounts in respect of its distribution business in the State of Jharkhand since

the Respondent No.2 does not maintain separate accounts of expenditure in respect of distribution operations in Jharkhand and West Bengal.

9. After going through the facts of the case as brought out in the present Appeals, we find that the following need to be decided by us in the present Appeal;

- (i) Whether the State Commission was justified in reducing the power allocation from old units and substituting by allocating the power from new units of the Respondent No. 2 to the Appellants?**
- (ii) Whether the State Commission was justified in provisionally approving the Respondent No.2's ARR as well as the retail tariff for the relevant control period for which final generation tariff (input tariff) is yet to be determined by the Central Commission?**
- (iii) Whether the State Commission can omit to exercise requisite prudence check while provisionally determining the ARR and retail tariff on the ground that detailed examination of all the disputed issues on the merits shall be considered at the stage of truing up?**

10. We have heard at length Mr. Rajiv Yadav and Mr. Krishan Kant Dubey, learned counsel for the Appellants and Mr. Farrukh Rasheed, learned counsel for the State Commission and Mr. M G Ramachandran, learned counsel for the Respondent No.2 and considered their written submissions and the arguments putforth by the rival parties before us and our observations are discussed hereunder.
- a) The Appellants are aggrieved by unjustified, arbitrary reduction in the quantum of power allocated from the Respondent No. 2's old stations for servicing the command area consumers which in their opinion is arbitrary and without any rational basis and would be detrimental to the interest of the consumers since tariff from these generating stations was comparatively lower. Furthermore, the State Commission has without any justification provided for a higher allocation from the Respondent No. 2's new plants for which the cost of generation would be significantly higher in comparison of cost of generation for old units. This unsubstantiated increase/decrease in allocation from the Respondent No.2's new generating stations and old generating stations respectively for its firm consumers bears testimony to the adhocism and absence of the requisite prudence check on the part of the State Commission.

As alleged by the Appellants, it has been pointed out by the Appellants that over the year, the share of command area consumers in allocation from the Respondent No.2's old stations is being progressively reduced and there has been substantial increase in allocation from new units of the Respondent No.2 for the command area consumers which is financially impacting severely the command area consumers.

- b) The Appellants stated that the State Commission has allowed fixed charges in its Impugned Order dated 04.09.2014 without exercise of any prudence check and critical scrutiny of the details provided by the Respondent No.2 and in support of the same, the Appellants have cited the relevant portion of the Impugned Order as reproduced below: -

“6.44 Also, for the plants MTPS unit 7 & 8, DSTPS Unit 1 & 2 and KTPS Unit 1 & 2, the Commission has considered the annual fixed cost as per the Petitioner's submission as the Tariff Orders for these stations is yet to be passed by CERC in accordance with the CERC Tariff regulations. As per Regulation 5(4) of the CERC (Terms and Conditions of Tariff) (First Amendment) Regulations, 2011:

“(4) Where application for determination of tariff of an existing or a new project has been filed before the Commission in accordance with clauses (1) and (2) of this regulation, the Commission may consider in its discretion to grant provisional tariff upto 95% of the annual fixed cost of the project claimed in the application subject to adjustment as per proviso to clause (3) of this regulation after the final tariff order has been issued:

Provided that recovery of capacity charge and energy charge or transmission charge, as the case may be, in respect of the existing or new project for which provisional tariff has been granted shall be made in accordance with the relevant provisions of these regulations.”

6.45 *As the Petitioner has submitted that the fixed charges of these stations have been considered as per the mutually agreed tariff rate and all these bi-laterally agreed rates are less than 95% of the annual fixed cost claimed by the Petitioner in the Petition submitted before the CERC, the Commission has considered the submission made by the Petitioner, subject to True-up based on the Tariff Orders of the CERC.*

6.46 *Further, the Commission has considered the projected running days as well as the PAFY same as that submitted by the Petitioner.*

6.47 *For the projection of fixed charges for FY 2014-15 and FY 2015-16, since CERC has not finalised the tariff for the DVC's generating stations for the period 2014-19, the Commission provisionally approves the fixed costs for FY 2014-15 and FY 2015-16 same as that for FY 2013-14 subject to True-up based on the subsequent Orders of CERC. For new stations, the fixed costs as per the Petitioner's submission have been considered subject to final approval by CERC.”*

c) The Appellants questioned the determination of Fixed charges by the State Commission in its Impugned Order dated 04.09.2014 which was solely on the ground that it was stated by Respondent No. 2 to be lower than 95% of the Annual Fixed Cost claimed by Respondent No.2 in its petition filed before the Central Commission for determination of generation tariff and the said approach of the State Commission has evidently ignored the fact that in its petitions

pending before the Central Commission, the Respondent No. 2 has unjustifiably claimed such elements of fixed cost as has been previously disallowed by the Central Commission, as well as this Tribunal in other generating stations of the Respondent No.2. The Appellants also pointed out that the State Commission has even ignored the fact that the Respondent No. 2 has already availed the maximum 90% in respect of its old stations as depreciation and its normative loan balance has become nil in these old stations and these important aspects should have been factored into while computing Fixed charges by the State Commission.

- d) It was also pointed out by the Appellants that the “interest on working capital” claimed by the Respondent No.2 was rejected by the Central Commission in respect of Respondent No.2’s other generating stations, however, the same has been allowed by the State Commission in its Impugned Order without any prudence check and even allowed higher fixed charges as claimed by Respondent No.2 on the basis of erroneous submission. The Appellants further added that had the State Commission prudently examined the contents of Respondent No.2 tariff petitions before the Central Commission, the admissibility of interest on working capital would have been questioned by this State Commission and it

could have arrived at provisional Fixed charges payable to Respondent No. 2 on the basis of relevant cost parameters which could be admissible. The Appellants further stated that by adopting the Fixed charges for the FY 2013-14, the State Commission has already burdened consumers in its command area with excess Fixed charges to the tune of Rs. 376 crores in FY 2014-15 and Rs. 79.02 crores in FY 2015-16. Needless to add that such excessive Fixed charges would not have been claimed from the consumers, had the State Commission exercised a requisite prudence check while determining provisional retail tariff of the Respondent No. 2 for the control period.

- e) The Appellants further alleged that even in respect of the energy charges, the State Commission has accepted the submissions of the Respondent No. 2 as it is without undertaking any prudence check and in support of the same, they have cited following paragraphs of the Impugned Order:-

“6.39 The Petitioner has considered the energy charge rate for the DVCs own generating stations based on the applicable CERC formula and past trends of ECR. The Petitioner also submits that it is also importing coal from abroad in order to mitigate fuel shortage.

.....
.....

6.49 The Commission has considered the energy charge rate for FY 2013-14 as per the submission made by the Petitioner for FY 2013-14 subject to True-up based on the audited data. Further, for FY 2014-15, the Commission has considered the escalation factor of 6.62% as per the CERC Order for escalation in coal cost for competitive bidding applicable as on 1st April 2014. As the rates for FY 2015-16 are not available and the Petitioner can claim any increase in input costs through the fuel cost pass through mechanism, the Commission has not considered any escalation for FY 2015-16.”

- f) The Appellants have also contested the higher escalation factor as considered by the State Commission which in turn has resulted into exorbitant energy charges which would put additional financial burden on the consumers in the command area. Appellants submitted that the State Commission ought to have allowed lower energy charges in line with reduction of cost for the imported coal and there was no apparent justification for the State Commission for considering the escalation factor of 6.62%.
- g) As regards Non-Tariff Income, the Appellants alleged that the State Commission has failed to undertake any prudence check and has mechanically accepted the Non-Tariff Income as proposed by the Respondent No.2 and have cited the relevant findings of Impugned Order in this regard as under;

“6.70 For FY 2013-14, the Commission has approved the non-tariff Income as submitted by the Petitioner. For FY 2014-15 and FY 2015-16, the Commission has approved the non-tariff income

after considering a 5% escalation factor over the approved income for FY 2013-14 subject to true up based on actual.”

- h) The State Commission has approved Non-Tariff Income for the relevant control period without noticing and factoring in the figures of Non-Tariff Income earned by the Respondent No.2 in the past years in respect of its other business activities.

- i) The Appellants further submitted that the Respondent No.2 is engaged in the business of power trading and having some joint venture companies and therefore the revenue earned from these business activities must be utilised for reducing Respondent No.2's ARR. Such non-consideration of the non-tariff income of the Respondent No. 2 by the State Commission in its Impugned Order has resulted into the fixation of a higher provisional tariff than what would have been arrived at after factoring into income from these business activities of the Respondent No. 2. The State Commission ought to have examined the income earned by the Respondent No. 2 from these business activities as Non-Tariff Income and the same should have been reduced from its ARR projections.

- j) The Appellants stated that since the Respondent No.2 is the statutory body with multifarious functions including (i) power generation, transmission and distribution (ii) flood and control (iii) irrigation and Section 41, 51 of the Electricity Act, 2003 mandated Respondent No.2 to maintain separate accounts for each of its business establishments, despite the clear meaning and the statutory requirements, Respondent No. 2 always resisted maintenance of separate activity linked financial statements, on the ground that its accounts are audited by the Comptroller and Auditor General of India (CAG). The Appellants further pointed out that the Respondent No. 2 does not even maintain separate accounts of the expenditure in respect of its distribution operations in Jharkhand and West Bengal. The Appellants submitted that maintaining separate accounts is necessary to evaluate the expenses such as pension and gratuity contribution, sinking fund contribution, non-tariff income etc. In view of this, the Appellants submitted that the State Commission ought to have directed Respondent No.2 to file independent accounts in respect of its diverse business establishments and distribution business in the State of Jharkhand.

- k) The learned counsel for the Respondent No. 2 contested the submissions made by the Appellants regarding allocation of power and stated that the allocation of power from the pooled generators comprising “old generating stations and new generating stations” of Respondent No.2 is done in prudent manner in maintaining quality and reliability of the power being supplied to its consumers in the Damador Valley area and it has many other considerations such as the consumer load pattern, line capacities, transmission congestion avoidance, maintenance/breakdown period etc. Respondent No. 2 supplies power to the beneficiaries/licenses beyond the Damador Valley periphery only after fulfilment of the demand of consumers in the entire command area of the Respondent No.2. The power supply agreement between the Distribution Licensees and consumers is related with the contract demands of the respective consumers and not connected with any particular generator or unit thereof as already settled by the State Commission while passing the earlier order dated 22.11.2012. The estimated energy available in Respondent No.2's owned generating stations for MYT control period on projections basis is made on the following criteria (i) plant shut down (long/short considering maintenance schedule of the plants) (ii) availability of fuel supply (iii) past trend of the power

supply position in terms of energy requirement vis-à-vis energy available in the system. As per the Respondent No.2, the power allocation is prudently done by the State Commission keeping in view all the relevant factors without depriving the consumers of any cheaper source for power as alleged and even the merit order has been properly considered.

- l) As regards the Appellants' allegation of considering higher Fixed charges as taken in the ARR, the Respondent No. 2 submitted that the State Commission had adopted the provisional tariff for the present subject to necessary adjustment on account of final true up for maintaining supply to the consumers in the licensed area of Respondent No. 2 pending the final determination of tariff of the Respondent No. 2 by the Central Commission.
- m) Respondent No. 2 further stated that tariff petition for MYT 2013-16 was submitted on projection basis under MYT framework in terms of the relevant provisions of State Commission's Regulations, 2010 and was based on available inputs at that point of time which is the tariff determined by the Central Commission for the relevant period.
- n) It has also been contended by the Respondent No. 2 that the mismatch of the fixed charges claimed vis-a-vis that allowed by the

State Commission vide its Impugned Order, as alleged by the Appellants is incorrect since the State Commission has determined only the provisional tariff pending the decision of the Civil Appeal by Hon'ble Supreme Court.

- o) Respondent No. 2 clarified that the allocation of the Fixed charges as considered in ARR is after consideration of apportionment of power from its pooled generators (old generating stations and new generation stations taken together). The electricity from the above stations is also supplied by the Respondent No. 2 to West Bengal State Electricity Distribution Company Ltd. and these beneficiaries had agreed to a provisional tariff pending such final tariff determination by the Central Commission and the same would be subject to adjustments after the final tariff is determined. In absence of provisional tariff, the consumers will not be able to avail the electricity from the above units.
- p) The Respondent No. 2 further stated that the Fixed Charges being claimed from the Appellants are on provisional basis only and upon final tariff determination, this would be adjusted and any refund, if necessitated would be payable to the Appellants in accordance with the prevailing Regulations.

- q) Regarding computation of energy charges and application of escalation factor, the Respondent No. 2 submitted that it was on the basis of the projected energy rates for different thermal power stations/units and the projected data was arrived at based on financial model prepared by Respondent No. 2 which was also submitted by the Respondent No. 2 before the State Commission along with the MYT proposal. Even the actual energy charges for different thermal generating stations/units were submitted by the Respondent No. 2 before the State Commission for the FY 2013-14. Any projection based on such actual energy charges ought to be trued up in terms of the prevailing regulatory practice after the end of the financial year and will be adjusted as per the prevailing Regulations of the State Commission and further mentioned that coal data in the requisite format as prescribed by the Central Commission in respect of thermal stations of the Respondent No. 2 have been put on the website since January 2013 in terms of the Central Commission's Regulations as amended from time to time.
- r) As regards the escalation factor of 6.62% as considered while computing the energy charges, the Respondent No. 2 stated that it has been carried out in accordance with the prevailing Regulations. Moreover, there is also provision in the State Commission's

Regulations 2010 for interim adjustment of Fuel Cost and Power Cost Adjustment.

- s) On the issue of Non-Tariff Income, the Respondent No.2 stated that this has already been settled by the State Commission while passing the provisional tariff order for Respondent No.2 on 22.11.2012. Accordingly, the State Commission has dealt with this issue in the Impugned Order. In view of this, it is wrong to say that the State Commission has considered it erroneously.
- t) As regards interest on working capital, the Respondent No. 2 stated that it had filed the tariff petition under MYT framework in terms of the relevant provisions of the State Commission's Regulations, 2010 which states as under:-

"Para 6.1 The Aggregate Revenue Requirement for the Licensee, for each year of the Transition Period, shall contain the following items:

- a) Cost of power procurement;*
- b) Transmission & Load Dispatch charges;*
- c) Operation and Maintenance expenses;*
- d) Return on Equity;*
- e) Interest on Working Capital;*
- f) Interest on Loans;*
- g) Interest on Consumer Security Deposit;*
- h) Depreciation;*
- i) Income Tax;*
- j) Foreign Exchange Rate variation;*

- k) Lease Charges;*
 - l) Less: Non-Tariff Income;*
 - m) Less: Income from Other Business; and*
 - n) Less: Receipts on account of cross subsidy surcharge and additional surcharge from open access customers.*
- u) Since the State Commission has rightly complied with its Regulations, 2010 while computing the interest on working capital, the Respondent No. 2 has contested the allegation of the Appellants on this account and stated it is wrong and untenable.
- v) The learned counsel for the State Commission submitted that the scope of the Impugned Order is with regard to the determination of ARR for MYT 2013-16 on provisional basis and approval of provisional retail tariff for supply of power within the command area falling under Respondent No.2 in the State of Jharkhand. Since the Impugned Order dated 04.09.2014 of the State Commission is a provisional in nature, learned counsel for the State Commission stated that all the allegations levelled by the Appellants in the present Appeals are not tenable as this State Commission is yet to determine the final retail tariff.
- w) Learned counsel for the State Commission stated that all the issues raised in the present Appeals have been dealt with appropriately in

the Impugned Order dated 04.09.2014 passed by the State Commission and these Appeals merit dismissal by the Tribunal.

11) After having carefully perused the submissions and considered the arguments of the rival parties, our decisions on all the issues brought out in the both the Appeals are as under:-

- a) On the specific issue of reduction in power allocation from the old generating stations and higher allocation of power from the new stations of the Respondent No.2 to the Appellants resulting into higher financial burden in view of the higher tariffs of the new stations, we are of the considered opinion that such changes in the allocation are highly essential from time to time keeping in view the dynamics involved such as planned maintenance schedules of various generating stations, availability of fuel supply, past trend of power supply position, energy requirement vis-à-vis energy available in the system, load pattern, line capacities, network congestion etc. It is never open to the consumers to go for a cherry picking. We know clearly that the old generating stations having a low capital cost, low loan servicing, return on lower equity and having adequate fuel linkages and sourcing of fuel from cheaper

sources would definitely be of advantage to its consumer due to its low tariff.

We appreciate that every consumer would like to have energy supplied from old generating stations since the tariff would be much lower. But the State Commissions are required to have their own analysis keeping in view the various factors already discussed above and maintain the balance between supply and demand. We, however, noticed that the Respondent No. 2 was directed to ensure uninterrupted supply to its consumers and only the surplus power was allowed to be sold to outside licensed area as decided by the State Commission in its earlier order dated 22.11.2012 vide para 4.29 which is reproduced below: -

“4.29 The Commission is of the view that DVC should ensure uninterrupted supply to its own consumers falling within the Damodar valley area. Only the surplus power may be sold by the Petitioner outside the licensed area.”

- b) The most important aspect which clearly takes care of the reasonable tariff is the merit order operation which ensures quantum of utilisation because if the tariff is higher, it would not come in the merit order and hence, would not be scheduled. We do not accept this allegation that the Appellants have been denied

cheaper source of power supply as the State Commission has carried out the power allocations keeping in view the entire consumers' categories and their power requirements vis-à-vis the supply position from the various generating stations of the Respondent No.2 and its power tie ups in the shape of long term PPAs with other generators and the other relevant factors as discussed above in this case. This aspect is properly attended to by the State Commission. Hence, the issue regarding power allocation made to the Appellants from the various generating stations does not need our interference and the claim of the Appellants in the regard is rejected.

- c) On the next issue regarding calculation for Fixed charges, we observe that for the power procured from different power generating companies including its own generating stations by Respondent No.2, the Central Commission has determined in its various orders the provisional tariff which is subject to the adjustments on determination of the final tariffs. And the tariff determined by Central Commission is to be adopted by the State Commission and not open for redetermination. In this regard we

refer to Rule 8 of the Electricity Rules, 2005 which provides as under:-

“8. Tariffs of generating companies under section 79.- The tariff determined by the Central Commission for generating companies under clause (a) or (b) of sub-section (1) of section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of functions under clauses (a) or (b) of sub-section (1) of section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission.

d) In light of the same, the tariff for generating companies under Section 79 as determined by the Central Commission was not subjected to re-determination by the State Commission in exercise of its functions under Section 86 of the Electricity Act, 2003 and it is input cost to the State Commission for determining the retail tariff. There is a clear understanding that any tariff which is determined by the Central Commission is to be adopted by the State Commission without any interference. In the present case, State Commission has to determine the retail/distribution tariff in the State of Jharkhand. It is an input cost to the State Commission for its determination of distribution tariff considering the tariff orders issued/passed by these Central Commission.

- e) The Central Commission has not yet passed the tariff orders for the period commencing 01.04.2014 to 31.03.2019 based on its Regulations 2014-19 and till then the Central Commission Regulations 2009-14 to be considered as done in the earlier tariff orders to determine the provisional tariff. The refund of excess tariff if becomes admissible to the Appellants on account of final tariff determination by Central Commission based on its 2014-19 Regulations would be payable by the Respondent No.2 to the Appellant in accordance with applicable State Commission's Regulations.

In this regard we refer to the National Tariff Policy and the relevant extracts are reproduced below:-

“(h) Multi Year Tariff

- 1) Section 61 of the Act states that the Appropriate Commission, for determining the terms and conditions for the determination of tariff, shall be guided inter-alia, by multi-year tariff principles. The MYT framework is to be adopted for any tariffs to be determined from April 1, 2006. The framework should feature a five-year control period. The initial control period may however be of 3 year duration for transmission and distribution if deemed necessary by the Regulatory Commission on account of data uncertainties and other practical considerations. In cases of lack of reliable data, the Appropriate Commission may state assumptions in MYT for first control period and a fresh control period may be started as and when more reliable data becomes available.*

2)

3) *Once the revenue requirements are established at the beginning of the control period, the Regulatory Commission should focus on regulation of outputs and not the input cost elements. At the end of the control period, a comprehensive review of performance may be undertaken”.*

These Appeals are related to the MYT 2013-16 period as considered by the State Commission which is a prudent practice.

- f) We notice that the State Commission has issued Impugned Order dated 04.09.2014 for the MYT 2013-14 to 2015-16 which is subject to true up based on the final tariff to be determined by the Central Commission for the period 2014-19. The State Commission would be determining the distribution and retail supply tariff for supply of electricity by the Respondent No.2 to the consumers in its licensed area after taking into account the tariff determined by the Central Commission. The Fixed charges are essentially a part of the generation/transmission tariff and for Respondent No.2 it is to be determined exclusively by the Central Commission and the State Commission is only to adopt the same. In support of the same, para 43 of this Tribunal in its order dated 22.07.2009 in Appeal No. 85 of 2009 held as under:-

“Para 43 : In view of the above, the State Commission constituted under Section 82 in exercising powers and function under Section 86 of the Act does not have jurisdiction for determination of tariff

and regulations of generation and inter-state transmissions system of the appellant DVC. Issues A and B have been answered in favour of the Appellant.”

- g) We also observe that in the matter of true up of ARR for the FY 2006-07 to FY 2008-09, the State Commission has not undertaken the final true up as the same is subject to final decision of the Hon'ble Supreme Court in Civil Appeal No. 4881/2010. As the matter involves the refund of excess amount billed and collected by the licensees during the aforesaid period, it would be appropriate to undertake the final true up exercise after the Hon'ble Supreme Court decides the Civil Appeal No. 4881/2010. We also feel that this approach would ensure that the final true up need not be subsequently revisited after the Hon'ble Supreme Court passes its final order on the said Civil Appeal. We also take note that the State Commission shall allow carrying/holding cost on the surplus/deficit amount arising out of the above development during the disputed period if so required, in accordance with its Regulations upon determination of the final true-up of ARR for FY 2006-07 to FY 2008-09.
- h) We are in agreement with the findings of the State Commission in its Impugned Order dated 04.09.2014 relating to this issue of

computation of Fixed charges and the Appellants' allegations on the computation of Fixed charges are not having any merits and are hereby rejected.

- i) On issue of computation of energy charges and application of escalation factor, we observed that the Respondent No. 2 has complied with the applicable Regulations and even displayed the entire coal data on its website since January, 2013 and more over there is also provision in the Tariff Regulations, 2010 of the State Commission which permit interim adjustment of fuel price and power cost and adjustment and the relevant extract is reproduced below:-

“6.59 With effect from 1st April, 2011, the Licensee shall pass on adjustments, due to changes in the cost of power generation and power procured due to changes in fuel cost, through the Fuel Price and Power Purchase Adjustment (FPPPA) formula, as specified below;

6.60 The FPPPA charge shall be applicable on the entire sale of the licensee without any exemption to any consumer;

6.61 The FPPPA charge shall be computed and charged on the basis of actual variation in fuel costs relating to power generated from own generation stations and power procured during any year subsequent to such costs being incurred, in accordance with these Regulations, and shall not be computed on the basis of estimated or expected variations in fuel costs;

6.62 The Licensee shall submit to the Commission, on an annual basis, a proposal for the FPPPA charge for the next year and

revenue billed through FPPPA charge in previous year to all consumers for each month in the year, along with the detailed computations and supporting documents as may be required for verification by the Commission;

Provided that the Licensee shall obtain the approval of the Commission prior to levying the FPPPA charge;

Provided further that the FPPPA charge applicable to each tariff category of consumers shall be displayed prominently at the cash collection centres and on the internet website of the Licensee;

Provided that the Licensee shall put up on his internet website such details of the additional power purchase cost incurred and the FPPPA charged to all consumers for each month along with detailed computations;

6.63 The formula for the calculation of the FPPPA shall be as given under:

$$\mathbf{FPPPA = (OG1+ OG2 + PPP1 + PPP2) / (Saleable Energy)}$$

Where,

OG₁ (in Rs) = *Adjustment on account of variable cost of power generated (in case of own generation)*

OG₂ (in Rs) = *Adjustment on account of fixed cost of power generated (in case of own generation)*

PPP₁ (in Rs) = *Adjustment on account of variable cost of power purchased*

PPP₂ (in Rs) = *Adjustment on account of fixed cost of power purchased*

Saleable Energy (in MU) = *Total Sales in MU + Excess Distribution loss in MU*

Where,

Total Sales = Actual energy sold in MU

Excess Distribution loss in MU= {Power Purchase (MU) – Total sales (MU)} – {(Power Purchase (MU) X (%Distribution loss Norm))}

Where,

%Distribution loss Norm = %Distribution loss level approved by the Commission for the year

Provided that FPPPA charge shall not be exceed 10% of the variable component of tariff, or such other ceiling as may be stipulated by the Commission from time to time;

Provided that any excess in the FPPPA charge over the above ceiling shall be carried forward by the Licensee and shall be recovered over such future period as may be directed by the Commission;

6.64 The FPPPA charge shall be allowed only in respect of approved power purchases by the Licensee and in respect of power purchases made in accordance with Regulation 6.37, where the approval of the Commission is not required under these Regulations.

6.65 The total FPPPA recoverable, as per the formula specified above, shall be recovered from the actual sales in “Rupees per kilowatt-hour” terms.”

In the light of the above Regulations providing for recovery of FPPPA charges and the fact that the Respondent No.2 has shared all the relevant coal data in the requisite format prescribed by the Central Commission, the contention of the Appellant on this issue is without any merit and is hereby rejected.

- j) On the issue of Non-Tariff Income including income from trading and joint ventures of Respondent No. 2, we have gone through the findings of the State Commission in its Impugned Order and observed that this issue has already been settled by the State Commission while passing the provisional tariff order for Respondent No.2 on 22.11.2012 and the relevant extract in support of the same is reproduced below;

“5.34 The Commission’s representatives verified the submission made by the Petitioner from the Accounting system (TALLY) of the Petitioner. Accordingly, the Commission approves the actual non-tariff income pertaining to delayed payment surcharge as Rs.7.65 Cr, Rs.12.22 Cr, Rs.24.26 Cr, Rs.1.89 Cr & Rs.7.63 Cr, respectively for the aforementioned years.

6.29 The Commission is of the view that the non-tariff income is a legitimate income and should be projected by the Petitioner for the purpose of determining the ARR for FY 2011-12.

6.30 However, in the absence of the projection of non-tariff income by the petitioner, the Commission based on the past trend applies a nominal growth rate of 10% over the previous year value and approves non-tariff income as Rs. 8.39 Cr. for FY 2011-12, subject to true up based on the actual data submitted for the year in the subsequent tariff petitions.

7.32 The Commission is of the view that the non-tariff income is a legitimate income and should be projected by the Petitioner for the purpose of determining the ARR for FY 2012-13.

7.33 However, in the absence of any projections of non-tariff income by the petitioner, the Commission adopted the methodology used for projecting the non-tariff income for FY 2011-12 i.e. it applied a nominal growth rate of 10% over the previous year value and projected non-tariff income at Rs. 9.23 Cr for FY 2012-13, subject to true up based on the actual data submitted for the year in the subsequent tariff petitions.”

In view of the above, it could be noted that the State Commission while deciding about the ARR for FY 2011-12 as well as ARR for FY 2012-13, it adopted the methodology of considering nominal growth rate of 10% over the previous year value based on the past trend, subject to true up based on the actual data submitted for the year in the subsequent tariff. We are in agreement with the State Commission's above approach which has been followed in the subsequent years keeping in view the circumstances of this case.

- k) As regards, interest on working capital, the State Commission in its Impugned Order dated 04.09.2014 held as under:-

“6.84 However, since the O&M cost and other expenses of the Petitioner are included in the cost of generation of power from its own stations, applying the aforementioned methodology as per the ‘Distribution Tariff Regulations, 2010’ is not possible.

6.85 Hence, the Commission has adopted the same methodology as described in the previous Tariff Order for FY 2012-13 dated 22nd November 2012. The relevant extracts of the same are discussed below:

“7.40 However, the Commission noticed that the GFA and O&M cost of the Petitioner cannot be segregated into that of pertaining to generation and transmission business and that for distribution and retail business at present. Hence, applying the aforementioned methodology for computation of IWC is not possible. Therefore, the Commission decided to continue with the methodology as applied by the Commission for truing up the ARR for FY 2006-07 to FY 2011-12 in this Order.

7.41 Accordingly, the Commission has estimated the working capital requirement for Jharkhand area to be 1% of the projected revenue from sale of power in the Jharkhand area. The interest on working capital has been estimated at the prevailing State Bank of India (SBI) Prime Lending Rate (PLR) as on April 1st of the respective year.....”

6.86 The Commission has considered Interest Rate equal to SBI PLR as on 01st April of the corresponding year. For FY 2015-16, SBI PLR is considered same as that considered for FY 2014-15.”

It is, therefore, incorrect that the State Commission has not looked into this issue carefully to explore the possibility of complying with its Regulations, 2010. The State Commission noticed that the GFA and O&M cost of the Respondent No. 2 cannot be segregated into that of pertaining to generation and transmission business and that for distribution and retail business at present. Therefore, the State Commission decided to adopt same methodology as followed in the previous years. It is observed that the State Commission was left with no other option but to adopt the methodology as followed in previous years in light of the peculiarities involved in the given case

and in our opinion, we do not consider appropriate to interfere at this stage with the findings of the Impugned Order on this issue.

- l) Now the last issue on account of non-maintenance of separate accounts for the various business activities undertaken by the Respondent No. 2 as contested by the Appellants, we have noticed that the Respondent No. 2 is declared as “deemed licensee” and undertakes generation activities in its statute as a body controlled by the Central Government, Government of West Bengal and Government of Jharkhand. Respondent No. 2 also undertakes transmission of power by way of its owned composite and integrated transmission and distribution network within the specific area spreading over the two states of West Bengal and Jharkhand and undertakes the supply of electricity to its consumers in its command area of operation as a distribution licensee. We further noticed that the annual accounts of the Respondent No. 2 are prepared in a consolidated manner encompassing all its business activities in accordance with the governing principles and are duly audited by the Comptroller and Auditors General of India which looks into every possible angle from audit point of view and certifies only if it is in order. This issue remains open for appropriate

consideration by the State Commission while deciding the true up of the petitions of the Respondent No.2 for the period under question.

Order

In view of the above, all the issues raised by the Appellants in the both Appeals are devoid of any merits and are hereby rejected. We are in agreement with the findings of the State Commission in its Impugned Order dated 04.09.2014 and are hereby upholding the Impugned Order.

No order as to costs.

12. Pronounced in the Open Court on this **23rd day of March, 2016.**

(I.J. Kapoor)
Technical Member

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REPORTABLE/NON-REPORTABLE

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(Justice Surendra Kumar)
Judicial Member