

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 83/09**

Dated: 31<sup>st</sup> July, 2009

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson  
Hon'ble Mr. A.A. Khan, Technical Member

**IN THE MATTER OF:**

**Central Coalfields Ltd.  
Darbhanga House  
P.O. Darbhanga House  
P.S. Kotwali  
District Ranchi, Jharkhand**

..... **Appellant**

***Versus***

**DLF Power Ltd.  
DLF Galleria  
12<sup>th</sup> Floor, Phase-IV  
DLF City, Gurgaon  
Haryana - 122 002**

..... **Respondent**

**Counsel for the Appellants(s) : Mr. Anip Sachthey  
Mr. Mohit Paul**

**Counsel for the Respondent(s): : Mr. S. Ganesh, Sr. Advocate  
Mr. Amit Dhingra  
Mr. Harpreet S. Popli  
Mr. Manu Seshadri  
Mr. S. Shrivastava**

**Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson**

**JUDGMENT**

1. The Central Coalfields Ltd. is the Appellant herein. The present Appeal has been filed as against the tariff order passed by the State Commission of Jharkhand on 7/3/08.

2. The chronological events and facts leading to this Appeal are given below:

3. The Appellant is engaged in the business of raising and selling coal through its various mining leasers situated in the State of Jharkhand. It is also a bulk consumer of electricity. It requires electricity for its various mining operations. Since it is affected by persistent power shortage, the Appellant decided to have a captive power plant to get uninterrupted power supply. Accordingly, the DLF Power Ltd., the Respondent herein was selected for setting up the captive power plants at Rajrappa and Giddi in Jharkhand State.

4. On 8/2/93, the Appellant entered into a Power Purchase Agreement (PPA) with DLF Power Ltd., the Respondent. The Agreement laid down a formula for fixing the tariff. As per the formula, the Respondent shall furnish documentary evidence in support of the actual capital cost to be accepted by the Appellant for fixing the tariff. The Rajrappa power plant was commissioned in the year 1999 and the unit at Giddi was commissioned in the year 2000. It was agreed that for the first year, the tariff to be fixed as Rs. 1.20 per unit and the revision

of the said tariff from the second year onwards is permissible on the basis of the variations in capital cost.

5. The Appellant requested the Respondent DLF Power on numerous occasions to furnish the plant-wise and item-wise details of capital cost incurred by it for the purpose of fixing the tariff from the second year, and, the Respondent DLF Power have furnished some documents to the Appellant. The Appellant could not assess the tariff on the basis of the available documents. Therefore, the Appellant approached the State Commission on 14/1/04 and filed an application for fixing the tariff. Then the State Commission demanded details of the capital expenditure from the Respondent. In pursuance of the said demand, the details and documents were furnished by the Respondent to the Commission. During pendency of the said application before the State Commission, the Respondent DLF also filed a Petition before the State Commission on 6/4/04 for fixing the capital expenditure. The State Commission disposed of both the applications on 4/12/04. In this Order, the capital cost of the two projects incurred by DLF, the Respondent herein was determined by the State Commission as Rs. 72.34 crores in respect of Giddi and Rs. 67.45 crores in respect of Rajrappa, and on the said capital cost, the rate of tariff was also

determined by the State Commission fixing the tariff at Rs. 3.30 per kwh(unit). Not satisfied with that order, the Appellant filed an Application for review before the State Commission which in turn, dismissed the same on 28/2/05.

6. Challenging these Orders dated 4/12/04 and 28/2/05, the Appellant filed Appeal No. 166/05 before this Tribunal, on the ground that the capital cost fixed in respect of the two power plants is erroneous and consequently, the determination of tariff is wrong, in as much as the same has been done merely on the basis of the incomplete particulars furnished by the Respondent DLF Power.

7. This Tribunal, by the Final Order dated 11/5/06, after hearing the submissions of both sides, held that the said Appeal is not maintainable as the State Commission has neither the authority, nor the jurisdiction to fix the tariff between the parties, namely the consumer the Appellant and the generator, the Respondent and the Act provides jurisdiction to the State Commission only to settle the dispute between the licensee and the generating company, and not the consumer and the generator as in this case. However, the Tribunal without disturbing the said Order of the State Commission on that

ground, held that the State Commission, as an expert arbitral Tribunal, could resolve the dispute as referred to it by the parties and as such, the Order can be construed to be an arbitral award in terms of the PPA entered into between the parties and as such it has all the force of an arbitral award. On the strength of the said observation, the Appeal was dismissed on 11.5.2006.

8. The above-said Order dated 11/5/06 was challenged before the Supreme Court by both the parties. The DLF Power Ltd., the Respondent herein filed a Civil Appeal No. 3109/06 and the Appellant Central Coalfields Ltd. (CCL) filed an Appeal No. 3561/09. Both matters were admitted by the Supreme Court.

9. Then both the matters were taken up together, and arguments were heard. During the hearing, the Supreme Court felt that during the pendency of the Appeal, it would be better to have the capital cost fixed by an independent agency first and then to have the tariff determined by the State Commission and after receipt of the said tariff Order, the Appeals before Supreme Court could be disposed of. Both the parties were agreeable for this course. Accordingly, on 11/7/07, the Supreme Court through the interim order during the pendency of the two

Appeals before it, directed that M/s. Ernst & Young, an Accounting firm will determine the capital cost in respect of the two power plants after verification of the records, and then to send the Report to the State Commission and thereafter, the State Commission will determine the tariff on the basis of the capital cost fixed by the Agency and then the State Commission shall send the tariff order to the Supreme Court, in order to enable it to hear the parties and decide the issues in the Appeals.

10. In pursuance of this Order, M/s. Ernst & Young took up the assignment and verified the records and fixed the capital cost and sent a Report to the State Commission on 26/12/07. On the basis of the said Report fixing the capital cost, the State Commission passed an Order dated 7/3/08 determining the tariff for the two power plants and sent the Report to the Supreme Court as directed by it earlier. While determining the tariff, the State Commission consisting of two Members i.e. the Chairperson and the Technical Member was not able to take a uniform view and therefore, both the Chairperson and the Member (Technical) separately determined the tariff. Ultimately, by invoking the veto power conferred on him under Section 92(3) of the Act, the Chairperson of the State Commission finally determined the tariff by

the Order dated 7/3/08 and sent the copy of the Tariff Order to the Supreme Court.

11. After receipt of the said Order, the Supreme Court took up those two appeals for final disposal. At that juncture, the Appellant CCL filed an Application before the Supreme Court on 28/11/07 in the Appeal pending seeking for cancellation of fixation of the capital cost of the two power plants by the Agency, and also the tariff rates determined by the State Commission, on the ground that the fixation of capital cost by M/s. Ernst & Young as well as determination of tariff by the State Commission was done without giving an opportunity to the Appellant and on the ground that the capital cost fixed by M/s. Ernst & Young was highly inflated and the tariff fixed by the State Commission was on the higher side and for the remand of the matter for fresh consideration.

12. On hearing the Learned Counsel for the parties, the Supreme Court, without going into the merits of the matter, thought it fit to direct the Appellant to file an Appeal as against the tariff order dated 7/3/08 before this Tribunal for proper evaluation as a technical body. Accordingly, the Supreme Court, by the Order dated 1/4/09 directed

the Appellant to file an Appeal as against the Order passed by the State Commission dated 7/3/08 before the Tribunal. The Supreme Court further ordered through the same order that during the pendency of the Appeal before this Tribunal, the Appellant was permitted to pay the tariff @ Rs. 2.07 per kwh for both the Rajrappa and Giddi power plants and should continue to make the said payment till final disposal of the Appeal by the Tribunal.

13. The Supreme Court further ordered requesting this Tribunal to dispose of the said Appeal on merits within two months from the date of filing the Appeal. The Supreme Court also made it clear that it does not express any opinion on the merits of the matter and that all the questions are left open to the parties to be decided by the Tribunal. In accordance with the said direction, the present Appeal has been filed by the Appellant. This Tribunal entertained the Appeal and took up the matter for final disposal. Both the Counsels were heard at length.

14. The Ld. Senior Counsel for the Appellant while assailing the Tariff Order passed by the Jharkhand State Commission on 7/3/08 has urged the following contentions:



i) Even though the Supreme Court directed both M/s. Ernst & Young and the State Commission to determine the actual capital cost and the tariff on the basis of the formula given in the PPA, has simply fixed the capital cost and the tariff without considering the terms of PPA and without giving an opportunity to the Appellant both while fixing the capital cost as well as while determining the tariff. As per Clause 1.18.2 of the PPA, the Respondent DLF shall furnish documentary evidence in support of the capital cost and the same has to be accepted by the Appellant CCL before the fixation of tariff. But this mandatory clause provided in the PPA has not been followed. Admittedly, copies of the documentary evidence which was submitted by the Respondent DLF in support of the actual capital cost to the agency have not been furnished to the Appellant. The agency Ernst & Young also did not give opportunity to the Appellant to verify with regard to the veracity of the documents submitted to them. Therefore, the Report fixing the capital cost by the agency is not in compliance with the PPA as directed in the interim Order dated 11/07/07 passed by the Supreme Court. Therefore, the capital cost report is vitiated.

ii) The State Commission, after receipt of the Report of the Agency fixing the capital cost proceeded to determine the tariff without giving

an opportunity of hearing the Appellant, by issuing notice to the Appellant. Though the proceedings before the State Commission are judicial proceedings under Section 95 of the Electricity Act (EA) and the State Commission is vested with all the powers of the civil court under the CPC under Section 94 of the EA, the State Commission has not followed the required procedure by not issuing notice to the Appellant to enable it to make its comment on the Reports of the agency as per the PPA. Therefore, the Tariff Order also is not sustainable.

iii) There are vital variations among the opinions given by the Chairperson and the Technical Member of the Jharkhand State Commission and ultimately, the Chairperson, by invoking veto powers fixed the tariff which is on the higher side without following the formula given in the PPA. Due to these lacunae, both the capital cost report as well as the tariff order suffer from illegality. When these grounds were urged before the Supreme Court, it accepted the submissions of the Appellant relating to lack of opportunity as well as the non-observance of mandatory procedures by the agency as well as the State Commission and thought it fit to direct the Appellant to file an Appeal before this Tribunal in order to challenge the said Orders. On these grounds which were appreciated by the Supreme Court, both the tariff

order passed by the State Commission as well as the Report of the Agency have to be set aside and suitable directions have to be given, so as to ensure that the exercise of determining the capital cost is made by M/s. Ernst & Young in terms of the PPA, after supplying all the documents to the Appellant for their acceptability and after fixing the capital cost, the tariff has to be determined afresh by the State Commission.

15. In refuting the above contentions, the Learned Senior Counsel for the Respondent DLF Power would make the following reply:

i) The Supreme Court, in its interim Order dated 11/7/07 categorically mentioned that there is a need for verification of the capital expenditure, and as such, the task of verification has to be assigned to reputed Cost Accountants and consequently appointed M/s. Ernst & Young, as agreed by both the parties for the purpose of verification of capital expenditure and after its verification, the State Commission has to determine the tariff on the basis of the said capital cost and thereupon send it to the Supreme Court for the purpose of disposal of the Appeals. It is clear from the Order that neither the Agency nor the State Commission was expected to perform any

adjudicatory function like issuing notice and hearing the parties while fixing the capital cost and the tariff in respect of the two power plants in question. As such, the question of failure to observe the principles of natural justice would not arise. Further, the Supreme Court fixed a time-frame of two months for completion of the whole exercise by the State Commission and for sending a Report to the Supreme Court for disposal of the Appeal, which would indicate that no such notice to the parties was contemplated either by the Agency or by the State Commission. Further, all the documents furnished to the agency have already been furnished to the Appellant, and with those documents only, the Appellant had earlier approached the State Commission for fixing the capital cost and tariff. Therefore, the Appellant cannot complain that the documents have not been furnished to the Appellant before fixation of the capital cost. As a matter of fact, the Appellant CCL themselves admitted in the Application before the State Commission that they were not able to assess the capital cost or fix the tariff on the basis of the documents furnished by the Respondent DLF to the Appellant as it had no expertise to do the same. Therefore, it cannot be complained that no documents have been furnished.

ii) Though there are some differences between the Chairperson and the Technical Member of the State Commission with regard to tariff fixation, the Chairperson has given a clear comment over the remark of dissent recorded by the Technical Member by stating that the dissent by the Technical Member is not valid since the said fixation is not in accordance with the Supreme Court directions and also the PPA. The Chairperson has thus, correctly invoked the veto powers and passed the tariff determination under the formula of the PPA in the light of the Supreme Court directions. Therefore, this Order was perfectly valid.

iii) The Learned Counsel for the State Commission, in his justification of the State Commission would make elaborate submissions and reasons explaining that the impugned Order passed by the State Commission is perfectly valid and the same is in accordance with the PPA and is as per the directions of the Supreme Court.

16. We have heard the Learned Counsel for the parties at length and we have also perused the Orders and records submitted by the parties and also given our anxious consideration to the contentions urged by both the sides.

17. The grievances expressed by the Ld. Senior Counsel for the Appellant CCL are two-fold:

a) The Agency, M/s. Ernst & Young determined the actual capital cost only on the basis of the documents supplied by M/s. DLF the Respondent herein, without making copies of those documents available and also without inviting any comments or inputs from the Appellant and as such, the Report of the Agency is vitiated.

b) The State Commission determined the tariff only on the basis of the Report submitted by M/s. Ernst & Young. The State Commission did not give opportunity to the Appellant to give comments about the report submitted to the Agency. Further, there is no concurrence in the views of the Chairperson and the Technical Member of the State Commission regarding tariff determination. Both of them separately determined the tariff and both the determinations are at great variance with each other. The final determination made by the Chairperson is not in accordance with the PPA and therefore, this tariff order is also vitiated.

18. On these grounds, the Learned Senior Counsel for the Appellant is praying for setting aside the Order impugned as well as the Report of the Agency and seeking for direction to the Agency as well as the State Commission to repeat the exercise of determination of capital cost as well as determination of tariff in terms of the PPA afresh after giving full opportunity to the Appellant.

19. We will now discuss about each of the above two issues:

i) The first contention urged by the Ld. Counsel for the Appellant is that M/s. Ernst & Young without inviting comments or inputs from the Appellant or without giving copies of the documents to the Appellant submitted by the Respondent to the Agency, determined the capital cost which lacks credibility.

ii) Firstly, it shall be pointed out that the Appellant was a party to the Interim Order of the Supreme Court dated 11/7/07 giving the interim directions for the fixation of capital cost by the Agency and also for tariff determination by the State Commission. In that Order, the Supreme Court has categorically expressed its view that the capital cost has to be verified by reputed Chartered Accountants who have got experience and expertise in the matter. In view of the above, the

Supreme Court appointed M/s. Ernst & Young as an independent agency and directed it to fix the capital cost incurred by the Respondent on the basis of the required documents made available to it. The further direction is that M/s. Ernst & Young, after preparation of the Report fixing the capital cost shall submit the same to the State Commission, which in turn, shall decide about the tariff within two months and send the said Tariff Order to the Supreme Court.

iii) The relevant observations of the Order dated 11/7/07 are as follows:

**“During the course of the hearing of the Appeal, it appeared to us that there is a need for verification of the capital cost incurred up to the commissioning of the Appellant’s power plants at Rajrappa and Giddi. For this purpose, the reputed cost accountants have to do the verification and for this purpose, we have required the parties to suggest the names..... We have considered the names suggested. We direct that let the cost accounts wing of M/s. Ernst & Young, Chartered Accountants determine the actual capital cost, based on the formula for the PPA between Central Coalfields Ltd. and M/s. DLF Power Ltd. for the**



**aforesaid two plants. Copies of the Report of the cost accounts wing shall be given to the parties and also submitted to the State Commission.**

**On receipt of the Report, the Commission shall determine the tariff as per terms of the PPA between the parties for the two power plants. Needless to say that for the purpose of verification, necessary data and information and information shall be made available to the cost accounts wing as may be required. Within a period of two months from the date of receipt of the Report from the cost accounts wing, the State Commission shall determine the tariff. Copies of the Tariff Order shall be issued to the parties and shall also be submitted before this Court. Call these matters in February 2008.”**

20. The above Order would clearly indicate that the Hon'ble Supreme Court virtually directed both the Agency and the State Commission to fix the capital cost and tariff and to send their respective Reports to the Supreme Court within the time-frame to enable the Supreme Court to decide the issues arising out of the same while disposing of the Appeals

pending before the Supreme Court. Admittedly, the Appellant was a party to this Order. This Order was passed with the consent of the parties.

21. Despite knowing about the nature of the above Order and also the time-frame fixed by the Supreme Court, the Appellant did not bother to provide any input to M/s. Ernst & Young as directed by the Supreme Court, not did the Appellant contact the Agency to verify the development of the process of calculation of capital cost. If the Appellant wanted to give any inputs or data to the Agency, they were free to provide the same. This however, was not done by the Appellant. When such is the case, how can there be a complaint that the Agency did not give opportunity to the Appellant, either to give inputs or to verify the veracity of the documents submitted by the Respondent?

22. It was repeatedly contended by the Learned Senior Counsel for the Appellant that without furnishing the copies of the documents to the Appellant, as provided under Clause 1.18.2 of the PPA the Respondent sent the same to the Agency which in turn fixed the capital cost only on the basis of those documents. This contention is quite strange. In fact, the Appellant CCL itself admitted both before the State

Commission and before the Supreme Court that even though the documents were furnished by the Respondent DLF to the Appellant, the Appellants were not able to assess the capital cost and fix the consequent tariff due to lack of expertise on their part, and therefore, they approached the State Commission. The relevant portions of the said admission made by the Appellant in the Application filed on 14/1/04 praying for fixation of tariff are given below:

**“These power houses were commissioned in the year 1999-2000 respectively. The tariff revision has to be done keeping in view the provisions of the agreement, but in view of the lack of expertise in assessing the capital cost incurred and consequently the tariff, we have not been able to fix the final tariff. The firm has submitted certain documents as proof of their capital expenditure, but we are not able to assess the reasonableness of these documents to be genuine and acceptable proof for the capital cost, which has put us in a stalemate situation on the issue.”**

23. Similarly, the Appellant repeated the very same words in its Application filed before the Supreme Court on 28/11/08 while challenging the tariff order as well as the capital cost. Thus the Appellant themselves have declared in their application both before the

State Commission and the Supreme Court that they were not able to assess the veracity of the documents furnished by the Respondent DLF to the Appellant and that was why the Appellant approached the State Commission for fixing the capital cost as well as the tariff. In the above statements made by the Appellant, there is a clear admission that they can neither assess the documents nor do they have the requisite expertise to assess the capital cost and fix the tariff. In other words, the Statements referred to above would clearly indicate two aspects, which have been admitted by the Appellant themselves which are as follows:

- a. The documents giving the details of the capital cost incurred by the DLF were already furnished by it to the Appellant CCL.
- b. The Appellant has no expertise to assess those documents.

24. When that being so, the Appellant CCL cannot contend that the Respondent DLF without furnishing copies to the Appellant, submitted these documents only to the Agency. It cannot also be complained that the Agency did not seek comments from the CCL with regard to the veracity of those documents.

25. Besides these, there are some more documents which would indicate that all the required documents have already been furnished to the Appellant by the Respondent DLF. In the letter dated 31/7/02 and another letter dated 5/2/03 sent to the Appellant CCL by the Respondent DLF, it has been specifically stated that DLF has furnished all the information and data to the Appellant which were required. Furthermore, the Appellant CCL itself earlier engaged its sister concern CMPDIL to prepare the capital cost and tariff report. The CMPDIL has received all the documents furnished by the Respondent DLF, as demanded by the Appellant. The same is even mentioned in the Report of CMPDIL. As a matter of fact, a perusal of the Report of M/s. CMPDIL dated 30/11/01 makes it quite evident that the documents were made available by the Respondent DLF to CMPDIL in order to fix the capital cost as requested by the Appellant. Therefore, it is not correct on the part of the Appellant to complain that the documents were not at all furnished. As mentioned earlier, the records would reveal that the Respondent DLF had fully complied with the obligations under Clause 1.18.2 of the PPA.

26. It is not in dispute that the Hon'ble Supreme Court felt that an expert body alone can fix the capital cost and therefore, it appointed the

independent Agency which has got the requisite expertise to correctly assess and fix the capital cost with the consent of both the Appellant and the Respondent. It is clear from this that the Supreme Court never indicated anything about the opportunity to be given to the Appellant by the expert agency before making the assessment of the capital cost. Further, the Agency was first approached by the DLF through a letter informing the Agency about the Supreme Court Order and requested the Agency to accept the assignment.

27. As a matter of fact, in the Supreme Court Order dated 11.7.2007, it has been specifically stated that if M/s. Ernst & Young did not accept the assignment within two weeks, the said assignment shall be given to another Agency, namely the Neyveli Lignite Corporation as suggested by the Appellant itself. It is a fact that on receipt of the letter by DLF, along with the Order of the Supreme Court, the Agency agreed to accept the assignment and immediately commenced the process of verification. As a matter of fact, after accepting the assignment, the officials of the agency came to the Office of the Respondent and inspected all the documents required to be perused which were made available to it by the Respondents. The details of the capital cost as well as the documents required to assess the capital cost could be furnished only

by the captive power plant namely the Respondent DLF, which is expected to possess all those materials. Even though the Supreme Court gave the time of two weeks to M/s. Ernst & Young for accepting the assignment and in the event of their not accepting the assignment, the same was to be given to the Neyveli Lignite Corporation, the firm/agency suggested by the Appellant, the Appellant did not take any interest to verify as to whether the independent agency, namely Ernst & Young accepted the assignment of assessment at all as per the Orders of the Supreme Court. Similarly, the Appellant never bothered to approach the Agency either to produce their documents or to know about the process of development in the matter of assessment. The Supreme Court's interim Order giving the assignment was passed on 11/7/07. Within two weeks, the agency M/s. Ernst & Young accepted the assignment and prepared a Report and filed the same before the State Commission on 19/12/07.

28. Between 11/7/07 and 19/12/07, i.e. in a period of five months, the Appellant did not care to take any step either to approach the Agency either to help the Agency in their assessment or to produce their own documents. Why there was the long silence on the part of the Appellant? There is no explanation.

29. At any rate, the Supreme Court never gave any direction to the independent Agency which is an expert body to give notice to the Appellant before fixing the capital cost. Hence, the question as to whether the Agency's Report is vitiated due to the failure of the Agency to give opportunity to the Appellant will not arise at all. The first contention would consequently fail.

30. In regard to the second point, the Learned Senior Counsel for the Appellant while pointing out the various infirmities found in the impugned Order has strenuously contended that no opportunity had been given by the State Commission to the Appellant by issuing notice before determination of tariff. Even at the outset, it shall be stated that in spite of the receipt of the copy of the Report fixing the capital cost submitted by the Agency and despite of having known that the Capital Cost Report has already been submitted by the Agency before the State Commission, the Appellant did not bother to approach the State Commission either to assist the Commission in fixing the tariff or to make any submission of grievance with reference to the Report of the Agency.



31. There is no dispute in the fact that even before filing of the Report dated 19/12/07 before the State Commission, a copy of the Report had been served on the Appellant as well as the Respondent as directed by the Hon'ble Supreme Court. Both of them have not approached the Commission raising any objections to the Report. So far as the Respondent is concerned, it has no grievance whatsoever against the Report from the beginning till date. So far as the Appellant is concerned, it has expressed grievance against the Report of the agency not before the State Commission, but only before the Supreme Court and that too long after the submission of the tariff order in the Supreme Court. As stated earlier, having received a copy of the Report; having known about the fact of the Agency having submitted its Report before the State Commission and having the full knowledge about the fixing of the time-frame of two months for determining the tariff as per the Order of the Supreme Court, the Appellant simply kept silent till the tariff Order was passed by the State Commission on 7/3/08. Even thereafter, only after a lapse of 11 months i.e. on 28/11/08, the Appellant, for the first time, through its application filed in the Appeal pending before the Supreme Court, chose to challenge the capital cost report as well as the Tariff Order passed by the State Commission. Why there was that long silence? No explanation.

32. At the risk of repetition, it has to be pointed out that the Supreme Court, in its Order dated 11/7/07 has categorically mentioned that there is a necessity for verification of capital expenditure through the expert body and on the basis of the said verification, there is a need for fixing the fresh tariff by the State Commission. Only in the light of the said observation, the Supreme Court appointed M/s. Ernst & Young as the Expert Body and directed them to verify the capital cost of the two power plants, and on the basis of the said capital cost fixed by the Agency, the State Commission was to fix the tariff. Admittedly, this is an Interim Order during the pendency of the Appeals by the parties. The wordings contained in the said Order passed by the Supreme Court would clearly indicate that the said Order was passed to facilitate Supreme Court to dispose of the Appeals pending in the Supreme Court after considering the capital cost report submitted by the Agency and the tariff Order passed by the State Commission.

33. There was a specific direction in the Supreme Court's interim Order dated 11.7.2007 to the effect that the State Commission has to determine the tariff on the basis of the capital cost verified by the Agency. This means that the State Commission has simply to accept

the Report of the Agency for the purpose of determining the tariff. As stated earlier, the capital cost report was not objected to by any of the parties before the State Commission. Even otherwise, if any party does raise any objection on the said Report, the State Commission may not reject the Report on the objection raised by the party since the duty of the State Commission is to work out the power tariff only on the basis of the capital cost and it cannot go into the validity of Capital Cost Report submitted by the Technical expert body, nominated by the Supreme Court. In other words, it is clear from the interim Order of the Supreme Court that neither the Agency nor the State Commission were directed to perform any adjudicatory functions by hearing both the parties while fixing the capital cost or determining the tariff. On the other hand, the Supreme Court specifically directed both the Agency and the State Commission to send their respective Reports to the Supreme Court to enable the Supreme Court to finally decide the issues and dispose of the Appeals.

34. A perusal of the Order dated 11/7/07 would make it evident that it is nothing but a direction seeking the assistance from two expert bodies namely M/s. Ernst & Young and the State Commission, in order to decide the issues which arise in the Appeals pending before the

Supreme Court. In other words, the purpose of this Order is to get the Report from both the expert bodies so that all the questions relating to the fixation of capital cost and determination of tariff could be gone into by the Supreme Court itself in the pending Appeals. This is clear from the fact that the Supreme Court expressly directed the State Commission to finalise the Tariff and to send its Tariff Order within two months to the Supreme Court for passing further Orders and further directed the Registry of the Supreme Court to post these Appeals before the Bench immediately after receipt of the said Tariff Order. Therefore, the question of failure of the State Commission to issue notice to the parties or the failure on the part of the Agency to verify with the Appellant, in regard to the veracity of the documents, would not arise. If the Supreme Court wanted the full opportunity to be given to both parties by the Agency as well as by the State Commission, then it would not have fixed an extremely tight deadline, by giving two months time for completion of the whole exercise and for finalization of the tariff report. Therefore, the second contention regarding the lack of opportunity would also fail.

35. Much was said about the dissent between the Chairperson and the Technical Member of the State Commission with regard to tariff

fixation. The Chairperson in his Order has made a clear comment regarding the dissent recorded by the Technical Member stating that the said dissent is not valid, since the same was not in accordance with the terms of the PPA as well as in accordance with the directions of the Supreme Court. A reading of the separate Order passed by the Chairperson would reveal that he has correctly invoked the veto power under Section 92(3) of the Act and passed the Final Order fixing the tariff for the two plants by taking into consideration the formula enumerated in the PPA, and also the directions given by the Supreme Court. As a matter of fact, the Technical Member who made a dissenting note, would fix the tariff on the basis of the notification of the Central Commission and other foreign elements. On the other hand the Supreme Court's direction was that the tariff should be determined on the basis of the Report of the capital cost and on the terms of the PPA. The Chairperson felt that any other consideration for fixing the tariff on the basis of the irrelevant documents would amount to violation of the Orders of the Supreme Court.

36. That is why, on having noticed that the tariff determined by the Technical Member was fixed on the basis of Government guidelines/CERC notification, which was not in accordance with the

PPA, the Chairperson of the State Commission gave detailed reasons for differing with the views of the Technical Member and fixed the tariff in accordance with the terms of PPA and the Supreme Court's direction which is as under:

**"I differ from the views of Member(Tech.) on the determination of tariff for Rajrappa and Giddi plants of DLF for the second year onward for the reasons detailed below.**

**The Member(Tech.) has pointed out that the original calculation made by the Commission itself was incorrect as it was not in accordance with the orders of the Hon'ble Supreme Court. It is a fact and matter of record that the Member (Tech.) was himself a party to the approval of the earlier order and he had also signed the tariff order. Further, the order of the Commission could not have been as per the orders of the Hon'ble Supreme Court as the Commission's order was issued in December 2004 and amended/reviewed in February 2005 whereas the order of the Hon'ble Supreme Court was issued only in July 2007.**

**The issue that was raised before and decided by the Hon'ble Supreme Court was that to determine the actual CAPITAL COST of both the plants based on the formula for the Power Purchase Agreement between Coal India Ltd. and M/s. DLF Power Company Ltd. by M/s. Ernst & Young and to report to the State Commission apart from the parties. On receipt of the report, the Commission shall determine the tariff as per the terms of the Power Purchase Agreement between the parties for the two power plants.**

M/s. Ernst & Young have worked out the capital costs for both the plants as directed by the Hon'ble Supreme Court. Now, the Commission has to determine the tariff as per the terms of Power Purchase Agreement (PPA) between the parties for the two power plants. Power Purchase Agreement (PPA) has laid down the methodology and conditions for the tariff determination which has to be followed and not the regulations of the Commission. Clause 1.18.2 of the Power Purchase Agreement (PPA) lays down that the annual charges have to be worked as per the guidelines issued by CEA/Government of India till the time of commissioning of the plants. The changes issued subsequently by CEA/Government of India were also admissible while working out the annual charges.

It is noticed that Member (Tech.) has adopted the regulations issued by CERC in 2001 and 2004. The agreement does not mention about adoptability of these regulations. The agreement mentions only "guidelines issued by CEA/Government of India". Accordingly, the return on equity which was 16% as per Government notification when the plants were commissioned is required to be adopted. Since neither CEA nor Government of India has issued any changes to that notification, the same has to be adopted.

Similarly, Return on Equity (ROE) at the rate of 16% cannot be restricted to 30% of the equity as per CERC's regulation because no such restriction has been imposed or mentioned in the CEA/Government of India's notification or in the PPA. The incentive has to be worked out as provided in the PPA itself.

The Member (Tech.) has mentioned that depreciation was not admissible on lease finance. Depreciation is provided on the cost of assets and not on the capital finance. M/s. Ernst & Young have determined the capital cost of each

of the plants which represents the cost of the assets in each of the plants. The depreciation has to be provided on the value of the assets as worked out by M/s. Ernst & Young. The rate of depreciation when the projects were commissioned was 7.84% as per the notification issued by Government of India which has not been changed by it till date. As such the same rate has to be adopted.

Accepting the report of M/s. Ernst & Young on capital cost and adopting the terms of determination of tariff of PPA with above remark in view the tariff has been calculated at paragraph 8 of the order.

Since the earlier tariff order was approved by a quorum of two members and presently as on date there are only two Members in the Commission, this order too has been gone through and prepared by the same two Members. As both the Members have different approach and arrived at different result, but it has to be decided by majority of votes, I as per the power vested on me under Section 92(3) of the Electricity Act 2003, as the Chairman, the tariff for both the plants of M/s. DLF Power Company Limited has been given in my order and the same is reproduced below:

Financial Year	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08
Tariff for Rajrappa (Rs./Unit)	Rs. 3.4581 (1 <sup>st</sup> July 2000-March 31,2001)	Rs. 3.2983	Rs. 3.1956	Rs. 2.9483	Rs. 2.8594	Rs. 2.9010	Rs. 2.9498	Rs. 2.9961
Tariff for Giddi (Rs./Unit)	Not applicable	Rs. 3.6142 (1 <sup>st</sup> June 2001-March 31, 2002)	Rs. 3.4620	Rs. 3.1630	Rs. 3.0374	Rs. 3.0945	Rs. 3.1408	Rs. 3.1846



**Accordingly, I approve the above tariff for both the plants. The Tariff Order as above and place alongside be issued as per the direction of the Hon'ble Supreme Court.”**

**“Sd/-  
Chairman  
4/3/2008”**

37. The above Order shows that the Chairperson finally determined the tariff as per the guidelines issued by the Government of India as provided in Clause 1.18.2 of the PPA by using the veto powers vested with him under Section 92(3) of the EA. The Chairperson also mentioned in the Order that the approach of the Technical Member in adopting the regulation issued by CERC in 2001 and 2004 while fixing the tariff was inappropriate as the Agreement does not mention about the adoptability of these regulations. The Chairperson while determining the tariff adopted the guidelines issued by the CEA and the Government of India as provided in the PPA accepting the Report of M/s. Ernst & Young on capital cost. Therefore, this Order is perfectly in consonance with the directions of the Supreme Court, since it is truly based upon the formula mentioned in the PPA as well as based on the Report of M/s. Ernst & Young. As such, there is no infirmity or defect warranting any interference with the impugned Order passed by the State Commission.

38. It is contended by the Ld. Senior Counsel appearing for the Appellant that the Supreme Court in its final order dated 1/4/09 directing the Appellant to file an Appeal before this Tribunal, has already accepted the submissions made on behalf of the Appellant in respect of lack of opportunity before the Agency, as well as the State Commission. This contention is strenuously opposed by the Counsel for the Respondent that the said submission made by the Ld. Senior Counsel for the Appellant is factually incorrect. In order to verify about the same, it is appropriate to refer to the final order passed by the Supreme Court dated 1/4/09:

**“2. CCL’s case is that the Cost Accounts Wing of M/s. Ernst & Young only on the basis of the documents supplied by DLF have carried out the exercise of determining the actual capital cost of the two power plants without even asking for any comments or any inputs from CCL while working out the actual capital cost. Grievance is that the report was based solely on the basis of the documents supplied by DLF, copies of which were also not made available to CCL. M/s. Ernst & Young have determined the capital cost of the two power plants at Giddi at Rs. 72.34 crores and for Rajrappa determined the actual capital cost of Rs. 67.45 crores. On receipt of the report from the Cost Accounts Wing of M/s. Ernst & Young, State Commission determined the tariff cost. The Commission consisted of two members; one was the Chairman and the other was the Member (Technical). Both of them separately determined the tariff for the subsequent year after the first year based on the actual**

capitalization cost supplied by the Cost Accountants. It is submitted that the two determinations are at great variance from each other.

3. It is submitted that the international norms for actual capitalization cost for power has not been kept in view. It is pointed out that the actual capitalization cost arrived at is apparently highly excessive, purportedly based on the inflated figures supplied by DLF without supplying copies to CCL.

4. Learned Counsel for the appellant CCL submitted that the basis of tariff fixation is erroneous and in any event a statutory forum is available to question correctness of the report, which can be availed.

5. On the other hand learned counsel for the DLF submitted that M/s. Ernst & Young are internationally reputed financial consultants. There is no substance in the objections raised by CCL.

6. We are inclined to accept the submissions of learned counsel for the CCL that the complex process of evaluation is involved in fixing the tariff and it would be in the interest of parties challenge, if any, to the report is made before the prescribed authority. That being so, we dispose of the appeals with the direction that in case CCL files appeal within four weeks from today, the same shall be considered by the Appellate Tribunal in accordance with law. The Appellate Tribunal is requested to dispose of the appeal on merits within a period of two months from the date of filing. All questions are left open to be decided without the question of limitation relating the filing of appeal. It is

**stated that CCL is paying Rs. 2.07 of KWH for both Rajrappa and Giddi for the second year after commissioning in July, 2000 for Rajrappa and in April, 2001 for Giddi. CCL shall continue to make the payment. We make it clear that by providing interim protection we have not expressed any opinion on the merits of the case.”**

**“Sd/-  
(Dr. Arijit Pasayat)**

**Sd/-  
(Lokeshwar Singh Pant)**”

39. A reading of the above Order would reveal that though the Supreme Court referred to the grievances expressed by the Appellant with regard to lack of opportunity before the Agency as well as the State Commission, the Supreme Court has neither given any finding over the same nor has accepted the submissions relating to the grievance expressed by the Ld. Counsel for the Appellants. On the other hand, the Supreme Court referred to the submission made by the Learned Counsel for the Appellant to the effect that a statutory forum would be the appropriate authority to go into the merits of the impugned Order as the determination of tariff would involve complex process of evaluation and having accepted the said submission, the Supreme Court observed in the order that it would be better for the Appellate Tribunal, a Statutory Technical Forum to deal with these questions

since the complex evaluation which is involved in the fixation of tariff could be better dealt with and therefore, it directed the Appellant to file the Appeal before this Tribunal. Thus, it is clear that the Supreme Court did not accept any of the submissions made by the Ld. Counsel for the Appellant relating to its grievances, but it only accepted the submissions made by the Counsel for the Appellant that the Tribunal would be the proper authority to go into the question of correctness of the Capital Cost Report as well as the tariff order. The very fact that the Supreme Court has clearly mentioned that all the questions are left open to the parties to raise them before the Tribunal and that they are not giving any opinion with reference to the merits of the matter would show that no finding has been given by the Supreme Court with reference to the various points urged by the Learned Counsel for the Appellant before the Supreme Court as against the manner or the procedure adopted by the Agency in the fixation of capital cost as well as the State Commission in determining the tariff.

40. On going through the entire Order, it is clear that the tariff determination made by the Chairperson of the State Commission was on the basis of the capital cost report submitted by the Agency and also on the basis of the terms of the PPA. We have heard the Learned

Counsel for both the parties at length. The Ld. Senior Counsel for the Appellant has not indicated anything by quoting specific reasons to show that either the Report of the Agency or the Report of the State Commission would suffer from any specific infirmity. In view of the same, we reject both the contentions of the Learned Counsel for the Appellant. Accordingly, we confirm the tariff order passed by the State Commission and direct the parties to comply with the said order.

41. All outstanding arrears payable by the Appellant to the Respondent, DLF Power Co. Ltd. arising out of this Judgment along with delayed payment charges in terms of PPA be liquidated in twelve equal monthly instalments from the date of issue of this Judgment.

42. In the result, the Appeal is dismissed as it is devoid of merits. No costs.

**(A.A.Khan)**  
**Technical Member**

**(Justice M.Karpaga Vinayagam)**  
**Chairperson**

Dated: 31<sup>st</sup> July, 2009

REPORTABLE / NON-REPORTABLE