

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
APPELLATE JURISDICTION

APPEAL NO 146 OF 2009

IN THE MATTER OF:

Appeal against the order dated 6.8.2009 passed by the Central Electricity Regulatory Commission in Petition No. 66 of 2005 determining the tariff of the Appellant for the period 1.4.2006 to 31.3.2009 pursuant to the decision of the Hon'ble Tribunal dated 23.11.2007 passed in Appeal No. 273 of 2006.

AND

IN THE MATTER OF:

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

VERSUS

1. Central Electricity Regulatory Commission
3rd and 4th floor, Chanderlok Building,
Janpath, New Delhi - 110001
2. Department of Energy,
Government of West Bengal,
Secretariat, Kolkata -
West Bengal
3. Department of Energy,
Government of Jharkhand,
Secretariat, Ranchi-
Jharkhand
4. West Bengal State Electricity Distribution Company Limited
(Previously West Bengal State Electricity Board)
Vidyut Bhawan, Block `DJ'
Sector-11, Salt Lake City,
Kolkata - 700091
5. Jharkhand State Electricity Board,
Energy Building, HEC Dhurwa,
Ranchi - 834 004
6. Union of India,
Through the Secretary,
Ministry of Power,
Shram Shakti Bhawan,
New Delhi - 110 001
7. Bhaskhar Shrachi Alloys Limited
8/1, Middleton Row,
Kolkata - 700071
8. Maithon Alloys Limited
3-F, East India House,
20, British Indian Street,
Kolkata -700 069

.....Respondents

APPEAL UNDER SECTION 111(1) OF THE ELECTRICITY ACT, 2003

MOST RESPECTFULLY SHOWETH:

1. DETAILS OF APPEAL:

The present Appeal is being filed under Section 111 of the Electricity Act, 2003 (hereinafter called the "Electricity Act") against the order dated 6.8.2009 passed by the Central Electricity Regulatory Commission (hereinafter called the 'Central Commission'), in petition No 66 of 2005 whereby the Central Commission has purported to implement the order dated 23.11.2007 passed by this Hon'ble Tribunal in Appeal No. 273 of 2006 and determine in the De-nova proceeding the generation and transmission tariff of the Appellant, Damodar Valley Corporation (hereinafter referred to as "DVC") for the tariff period 1.4.2006 to 31.3.2009.

2. The impugned order was downloaded by the Appellant from the website of the Central commission on 7th August, 2009

3. THE ADDRESS OF THE APPELLANT FOR SERVICE IS SET OUT HEREUNDER:

- i) Damodar Valley Corporation,
DVC Towers, VIP Road,
Kolkata -700 054
- ii) Name and Address of the Counsel,
Swapna Seshadri & Anand K. Ganesan, Advocates,
C-31, Friends Colony (East), New Delhi - 110065.
Phone: 011-26926102, 011-26831065
Fax: 011-26322657
Email: swapnaseshadri@gmail.com, anand.kganesan@gmail.com

4. THE ADDRESS OF THE RESPONDENTS FOR SERVICE OF ALL NOTICES IN THE APPEAL ARE AS SET OUT HEREUNDER:

- (i) Central Electricity Regulatory Commission
3rd and 4th floor, Chanderlok Building,
Janpath, New Delhi - 110001
- (ii) Department of Energy,
Government of West Bengal,
Secretariat, Kolkata
West Bengal
- (iii) Department of Energy,
Government of Jharkhand,
Ranchi
- (iv) West Bengal State Electricity Distribution Company Limited
(Previously West Bengal State Electricity Board)
Vidyut Bhawan, Block 'DJ'
Sector-11, Salt Lake City,

Kolkata - 700091

- (v) Jharkhand State Electricity Board,
Engineering Building, HEC Dhurwa,
Ranchi - 834 004
- (vi) Union of India,
Through the Secretary
Ministry of Power,
Shram Shakti Bhawan,
New Delhi - 110 001
- (vii) Bhaskar Shracchi Alloys Limited
8/1, Middleton Row,
Kolkata - 700071
- (viii) Maithon Alloys Limited
3-F, India House,
20, British India Street,
Kolkata -700 069

5. JURISDICTION OF THE APPELLATE TRIBUNAL

The appellant declares that the subject matter of the appeal is within the jurisdiction of this Tribunal.

6. LIMITATION.

The order dated 6.8.2009 was communicated to the appellant on 7.8.2009, when the Appellant downloaded the order from the web site of the Central Commission. The appellant declares that the present appeal has been filed within 45 days of the communication of the impugned order and thereby is within the period of limitation as specified in Section 111(2) of the Electricity Act, 2003 (hereinafter called 'the Electricity Act').

7. FACTS OF THE CASE

- A. The Appellant, Damodar Valley Corporation (hereinafter referred to as either the Appellant or the 'DVC', as the case may be) is a statutory body specially constituted under the provisions of the Damodar Valley Corporation Act, 1948 (hereinafter referred to as the 'DVC Act') a Central Act and a Special legislation dealing with the development of Damodar Valley. A copy of the DVC Act is attached hereto and marked as Annexure 'A'.
- B. The Respondent No. 1, is the Central Commission constituted under the Electricity Act with functions, inter alia, as provided in Sections 61, 62, 64 and 79 of the Electricity Act.

- C. The Damodar Valley falls partly in the territory of the State of West Bengal and partly in the State of Jharkhand (previously Bihar). The Respondents 2 and 3 are the State Governments of West Bengal and Jharkhand wherein the Damodar Valley is situated. The Respondents 4 and 5 are the Electricity utilities in the respective States of West Bengal and Jharkhand undertaking the functions of distribution and retail supply of Electricity. DVC is functioning under the control of Respondent No 6, the Government of India (hereinafter called the Central Government). Respondents 7 and 8 are consumers of DVC in the Damodar area and had participated in the proceedings before the Central Commission.
- D. Section 12 of the DVC Act provides for the functions of the DVC and it reads as under:

“12. Functions of the Corporation:

The functions of the Corporation shall be -

- (a) the promotion and operation of schemes for irrigation, water supply and drainage,*
- (b) the promotion and operation of schemes for the generation, transmission and distribution of electrical energy, both hydroelectric and thermal.*
- (c) the promotion and operation of schemes for flood control in the Damodar river and its tributaries and the channels, if any, excavated by the Corporation in connection with the scheme and for the improvement of flow conditions in the Hooghly river,*
- (d) the promotion and control of navigation in the Damodar river and its tributaries and channels, if any,*
- (e) the promotion of afforestation and control of soil erosion in the Damodar Valley, and*
- (f) the promotion of public health and the agricultural, industrial, economic and general well-being in the Damodar Valley and its area of operation”.*

- E. DVC has multifarious functions in the Damodar Valley. DVC has the obligation to undertake development of Damodar Valley, which falls in the provinces of West Bengal and Jharkhand. The activities of DVC are not restricted to generation and sale/supply of electricity. The functions of the DVC include promotion and operation of schemes for irrigation, water supply and drainage, flood control and improvement of flow conditions in the Hooghly river, navigation in the Damodar river and its tributaries and channels, afforestation and control of soil erosion in the Damodar Valley and promotion of public health and agricultural,

industrial, economic and general well being in the Damodar Valley under its areas of operation.

- F. Thus, DVC is engaged in number of activities which are not commercial in nature and where no significant revenue accrues to DVC. DVC cannot generate required revenue from the users of service in regard to schemes such as drainage, flood control, navigation, afforestation and control of soil erosion or the promotion of public health and general well being in the Damodar Valley. The main revenue earning activity performed by DVC is generation and sale of power.
- G. DVC is, therefore, undertaking various activities in a comprehensive manner for the betterment of Damodar Valley and using the revenues earned from various sources including and in particular from generation and sale of electricity for the above varied purposes for which DVC has been established. In the context of various functions specified in Section 12 of the DVC Act, DVC performs services which are undertaken in other parts of the States of West Bengal and Jharkhand by the Governments and Government bodies, Central, State or Municipal. DVC is essentially undertaking these activities for the benefit of the two participating State Governments, namely the Governments of West Bengal and Jharkhand. DVC, therefore occupies a special position.
- H. It undertakes operations for the benefit of West Bengal and Jharkhand; it is not a commercial organization; many of the activities of DVC are akin to the activities undertaken by the Governments, Central, State or Municipal; the benefits of the operation of DVC are to the States of West Bengal and Jharkhand. The financial implications of providing capital sharing, profit or deficit are to the account of the three participating Governments as well as matters concerning the depreciation, reserves and other funds are to be considered in the above background. The role of the Central Government is also to be considered with the objective of the DVC to benefit the Damodar Valley and thereby the State of West Bengal and Jharkhand.
- I. Prior to the coming into force of the Electricity Act, 2003, the tariff of DVC for electricity was determined by DVC under section 20 of the DVC Act. The tariff so determined by DVC was to cover the expenditure of DVC relating to electricity activities as well as the subsidiary and social activities such as Social Integration Projects, Soil Conservation activities, Multi-purpose Dams, Afforestation etc. excluding only Flood Control and Irrigations mandated to be undertaken by DVC under the provisions of the DVC Act.

- J. DVC had been operating since its constitution under the DVC Act as per the provisions contained in the DVC Act read with the applicable provisions of the electricity laws, namely, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. In terms of section 58 of the DVC Act the provisions of the DVC Act had a superseding effect over other laws.
- K. The Electricity Act came into force on 10th June, 2003. Section 14, proviso-4 of the Electricity Act read as under:

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

- L. In terms of the above, DVC is deemed a licensee and is not required to obtain a licence under the Electricity Act for the purposes of carrying on its functions under the DVC Act of generation, transmission and distribution of electrical energy and for the sale of such electrical energy to consumers in the Damodar Valley.
- M. Pursuant to the coming into force of the Electricity Act, the tariff of DVC for the first time came to be regulated by the Appropriate Regulatory Commissions under the provisions of the Electricity Act. DVC being in a unique position of undertaking all electricity activities as an integrated utility, namely, generation, transmission and distribution of electricity, the different activities of DVC came to be regulated by different Regulatory Commission. The generation and transmission of electricity by DVC came to be regulated by the Central Commission under Section 79 of the Electricity Act. The distribution and retail supply activities of DVC came to be regulated by the Regulatory Commissions of West Bengal and Jharkhand under section 86 of the Electricity Act in respect of the areas falling under the territory of West Bengal and Jharkhand respectively.
- N. DVC being an integrated utility and a substantial part (above 95%) of the electricity Revenue Requirements of DVC being related to generation and transmission activities, the tariff is determined by the Central Commission is to be the input cost for a further determination of distribution and retail supply tariff of DVC by the respective Commissions of West Bengal and Jharkhand for the command areas of DVC falling within the respective states.

- O. In terms of the above provisions, DVC filed a petition being Petition No. 66 of 2005 before the Central Commission for determination of the Revenue Requirements and Generation and Transmission tariff of DVC.
- P. By order dated 21.6.2005, the Central Commission permitted DVC to charge its existing tariff provisionally, subject to final determination of tariff of the DVC. A copy of the order dated 21.6.2005 passed by the Central Commission in Petition No.66 of 2005 is attached hereto and marked as **Annexure B**. The existing tariff of DVC was the tariff notified by DVC in terms of Section 20 of the DVC Act effective 1.9.2000. A copy of the tariff schedule so notified is attached hereto and marked as **Annexure C**.
- Q. Thereafter By order dated 3.10.2006; the Central Commission decided the tariff for generation and transmission of electricity by DVC and directed that the tariff so determined was to be made effective from 1.4.2006 and effective till 31.3.2009. A copy of the order dated 3.10.2006 passed by the Central Commission in Petition No.66 of 2005 is attached hereto and marked as **Annexure D**.
- R. The order dated 3.10.2006 passed by the Central Commission did not consider the statutory status of DVC, the provisions of the DVC Act mandating DVC to undertake various multifarious activities and the revenues to be allowed to DVC under the provisions of the DVC Act which are not inconsistent with the provisions of the Electricity Act. In addition to the above, the Central Commission did not consider various legitimate claims and expenditure of the DVC, including the additional capitalization, Operation and Maintenance expenses to the full extent including Pension and Gratuity contribution, the interest on capital over and above the return on equity in terms of Section 38 of the DVC Act, other revenues to be allowed under Part IV of the DVC Act, the appropriate Debt Equity Ratio, the expenditure on subsidiary activities of DVC other than irrigation and flood control. The order passed by the Central Commission substantially reduced the revenue requirements of DVC to be considered for recovery through tariff on account of non consideration of the above and other aspects.
- S. Aggrieved by the order dated 3.10.2006 passed by the Central Commission, DVC had filed an appeal being Appeal No. 273 of 2006 before this Hon'ble Tribunal. During the pendency of the appeal by interim orders dated 6.12.2006, 15.1.2007 & 26.2.2007, this Hon'ble Tribunal was pleased to restrain the State Regulatory Commissions of West Bengal and Jharkhand from passing final orders in the

determination of distribution and retail supply tariff of DVC based on the order dated 3.10.2006. The copies of the interim orders passed by this Hon'ble Tribunal is attached hereto and marked as **Annexure E (colly)**.

- T. In terms of the above and during the pendency of the appeal there was no fresh determination of the retail supply tariff and DVC had continued to (a) charge the consumers in the Damodar Valley the existing tariffs which DVC had earlier notified effective 1.9.2000 by virtue of the powers vested in DVC under Section 20 of the DVC Act; and (b) DVC had also been supplying electricity to the Respondents 4 and 5 on the pre-existing tariff and not based on the tariff determined by the Central Commission vide order dated 3.10.2006.
- U. After detailed hearing of all the parties, the Hon'ble Tribunal by judgment and order dated 23.11.2007 allowed the Appeal No. 273 of 2006 filed by DVC and with specific reference to various aspects of the Revenue Requirements of the DVC mentioned in the judgment and order directed the Central Commission to de novo determine the revenue requirements and generation and transmission tariff of DVC in terms of the principles laid down by the Hon'ble Tribunal in the said judgment and order dated 23.11.2007. A copy of the order dated 23.11.2007 passed by the Appellate Tribunal in Appeal No 273 of 2006 is attached hereto and marked as **Annexure F**.
- V. The operative part of the judgment and order dated 23rd November, 2007 passed by this Hon'ble Tribunal read as under:

113. In view of the above are the subject appeal No.273 of 2006 against the impugned order of the Central Commission passed that on 3rd October 2006 is allowed to the extent described in this judgment and we remand the matter to the Central Commission for de novo consideration of the Tariff Order dated 3rd October 2006 in terms of our findings and observations made hereinabove and according to the law. Appeal No. 271, 272 and 275 of 2006 and No. 8 of 2007 also disposed of, accordingly.

- W. In the judgment and order dated 23 November 2007 this Hon'ble Tribunal specifically dealt with the claims related to the following aspects to be allowed as a part of the Revenue Requirements of DVC.
- (i) The provisions of Part IV of the DVC Act providing for various expenditure and appropriations by DVC to be necessarily taken into account by the Central Commission while determining the revenue requirements of DVC. These include:

- a. Section 30- Liabilities of Participating Governments to provide capital to the Corporation
- b. Section 31- Payments by participating Governments on specified date the capital required.
- c. Section 32 - expenditure on objects other than irrigation, power and flood control;
- d. Section 33 - allocation of expenditure chargeable to project on main objects, namely irrigation, power and flood control;
- e. Section 37 - disposal of profits and deficit;
- f. Section 38 - payment of interest on capital;
- g. Section 39 - interest charges and other expenses to be added to an receipts taken for reduction of capital cost;
- h. Section 40 - provision for depreciation and reserve and other funds etc.

(Reference paras 29, 90 & 91 of the Judgment and order dated 23rd November, 2007 of the Hon'ble Tribunal)

- (ii) the Additional Capitalization claimed by DVC including the capital cost of Mejia generation unit No 4 which came into commercial operation on 28.2.2005 and the Respondents 2 to 8 and other consumers of DVC having the benefit of supply of electricity from the said station. This was not considered by the Central Commission in the earlier order dated 3.10.2006. **(Reference Para 112 - B of the Judgment and order dated 23rd November, 2007 of the Hon'ble Tribunal)**
- (iii) the Pension and Gratuity contributions disallowed by the Central Commission to the extent of 40% (the Central Commission had restricted such contribution to 60%) to be allowed **(Reference para 112 D of the Judgment and order dated 23rd November, 2007 of the Hon'ble Tribunal);**
- (iv) the excess equity contributed by the participating governments over 50% to be considered as an interest-bearing debt **(Reference**

para 112 A -16 and E 13 of the Judgment and order dated 23rd November, 2007 of the Hon'ble Tribunal);

(v) the expenditure incurred by DVC in the discharge of its functions (subsidiary activities) under Section 12 of the DVC Act on objects other than irrigation and flood control to be allowed as a part of the revenue requirements of DVC to be recovered from the tariff on the generation and supply of electricity (Reference para 112 E 12 of the Judgment and order dated 23 November 2007 of the Hon'ble Tribunal);

(vi) The interest on capital as provided in section 38 of the DVC Act to be considered; (Reference para 16 of the judgment and order dated 23rd November, 2007 of the Hon'ble Tribunal);

(vii) The operation and maintenance (O&M) expenses to be considered by allowing the escalation of 4% provided for in the Tariff Regulations. (Reference para 112 GH 5 of the Judgment and order dated 23rd November, 2007 of the Hon'ble Tribunal);

(viii) Depreciation to be allowed as per the provisions of the DVC Act (Reference para 112 F of the Judgment and order dated 23 November 2007 of the Hon'ble Tribunal);

X. Aggrieved by the above order dated 23.11.2007 passed by the Hon'ble Tribunal, the Central Commission has filed a Second Appeal being Civil Appeal No. 4289 of 2008 before the Hon'ble Supreme Court of India. A number of others had also approached the Hon'ble Supreme Court by way of Second Appeals being Civil Appeals No. 804 of 2008, 971-973 of 2008, 4504-4508 (D. NO 9309) of 2008, D. NO 10324 of 2008 and 1914 of 2008. In these Second Appeal, the Hon'ble Supreme Court has, however, specifically rejected the grant of any interim order of stay of the order dated 23rd November 2007 passed by the Hon'ble Tribunal. The copies of the orders passed by the Hon'ble Supreme Court rejecting the grant of the stay for by the above appellants in the second appeal including the Centre Commission are attached hereto and marked as **Annexure G**.

However, the issue regarding interpretation of DVC Act 1948 & Electricity Act 2003 specially with regard to Section 14 of Electricity Act 2003 is pending for decision before the Hon'ble Supreme Court of India.

- Y. In or about 28.04.2009, the Central Commission initiated the process of de novo determination of the tariff of the DVC in terms of the direction passed by the Hon'ble Tribunal in the order dated 23.11.2007. By the time the Central Commission began the do novo determination of tariff after the refusal of the Hon'ble Supreme Court to grant any interim order, the following developments had taken place:
- (i) the Tariff period 1.4.2006 to 31.3.2009 for which the de-novo proceedings were required to be held and the revenue requirements of DVC was to be determined was over and the Central Commission was in a position to consider the revenue requirements process taking into account the actual expenditure incurred by DVC and not merely based on projections estimates etc. to be considered in case where the revenue requirements are to be determined for a future period;
 - (ii) During the period between 1st April, 2006 to 31st March, 2009, DVC had undertaken substantial additional capitalisation (in addition to the additional capitalisation relating to Mejia generating unit 4 declared commercial operation during the previous period). The Revenue Requirements of such additional capitalisation could also be considered and taken into account while determining the Revenue Requirements of DVC for the tariff period in issue;
 - (iii) The revision in the Employees Expenses due to the implementation of the Sixth Pay Commission report had taken place and this has resulted in increased remuneration as well as increased contribution to the pension and gratuity fund, effective 1st January, 2006, which include the tariff period 1.4.2006 to 31.3.2009. Accordingly, there is a substantial increase forming part of the O & M expenses to be included in the Revenue Requirements of DVC; and
 - (iv) At the close of the tariff period i.e. 31.3.2009 when the O & M expenditure actually incurred is taken into account the actual additional O & M expenditure incurred beyond the control of DVC particularly on old vintage generating units were also to be considered.

- Z. In the facts and circumstances mentioned above, DVC filed in Interlocutory Application being No. 19 of 2009 placing before the Central Commission the details of the additional capital expenditure incurred by the DVC during a tariff period 1st April, 2006 to 31st March, 2009 and the additional O & M expenses and liabilities towards the employees costs on account of revision of employee's pay, pension and gratuity contribution actually incurred and paid by DVC. By the above Interlocutory Application, DVC prayed before the Central Commission that the revenue requirements on account of the above aspects may also be taken into consideration while deciding the petition. A copy of the IA No. 19 of 2009 filed by DVC in Petition No. 66 of 2005 is attached hereto and marked as **Annexure H**.
- AA. DVC in the application, IA No. 19 of 2009 filed before the Central Commission had submitted that the Closing Balance of Fixed Assets as on 31st March, 2006 may be considered as basis for determining Capital Cost as on 1st April, 2006 as per the process earlier accepted by the Hon'ble Commission in Petition No. 66 of 2005. DVC had also placed before the Central Commission the accounts of DVC as upto 31.03.2008 duly audited by the Comptroller & Auditor General and the provisional accounts for the year 2008-09, so that the Central Commission could duly consider the actual accounts in the determination of the revenue requirements and tariff for the period 1.4.2006 to 31.3.2009.
- BB. By the impugned order dated 6.8.2009, the Central Commission while purporting to implement the order dated 23.11.2007 passed by the Hon'ble Tribunal has not really given effect to the decision of this Hon'ble Tribunal in many of the aspects which were specifically directed to be considered by the Central Commission in the de-novo proceedings. The obvious and glaring omissions on the part of the Central Commission in implementing the decision of this Hon'ble Tribunal, briefly stated, are as under:
- (i) the additional capitalisation of Mejia generating unit No. 4 has been deferred for consideration by directing the DVC to separately approach the Centre Commission. However, admittedly this Hon'ble Tribunal had dealt with the above aspects, considered the submissions of DVC in the earlier proceedings in Appeal 273 of 2006 that the Central Commission had wrongly disallowed the claim on the above additional capitalisation and had specifically directed the Central Commission to consider the same. The deferment is in the teeth of the direction of the Hon'ble Tribunal as under:

“B. Disallowance of additional capitalization for the period 2004-2009

The Central Commission at para 50 of the impugned order has observed that the “the petitioner corporation has not claimed any additional capitalization for the period 2004-2009.” However the records submitted by the Appellant show that a sum of Rs. 767.45 crores and Rs. 181.14 crores have been shown to be capitalized during 2004-05 and 2005-06 respectively. In order to get the relief on this account, the Appellant may bring out the above omission to the notice of the Central Commission who may appropriately dispose of the matter in terms of law. The appeal is accordingly allowed on this count.”

- (ii) There is therefore no justification whatsoever and there is no rational in postponing the consideration of the additional capitalisation of Mejia Unit 4 while deciding the tariff for 1st April, 2006 to 31st March, 2009. This is more particularly so when DVC had made available all the requisite particulars in regard to the above generating unit to the Central Commission. Further during the de-novo proceeding the Central Commission did not at any time pass any order to the effect that the additional capitalization of Mejia Unit 4 will not be considered in the proceedings in Petition No. 66 of 2005.
- (iii) Other additional capitalisation during the period 2006-2009 has not been considered at all and has been deferred as in the case of Mejia Unit No. 4. This is also in violation of the decision of the Hon’ble Tribunal.
- (iv) The interest on capital to be allowed in terms of Section 38 of the DVC Act. In this regard, the Hon’ble Tribunal has directed as under:

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

The Central Commission has completely ignored the direction of the Hon’ble Tribunal and has not allowed any interest under Section 38 of the DVC Act as a part of the tariff of DVC;

- (v) In Para A-16 of the Order dated 23rd November, 2007, the Hon'ble Tribunal has clearly stated

Quote

“.....excess of equity if any over the equity earning ROE @ 14% shall be considered as Interest Bearing Debt. For example, if the actual debt equity ratio comes to 40 : 60, ROE would be available on 50% portion of the equity and interest would be available on 10% portion of equity and 40% loan, as reduced by repayments.”

Unquote

For the Capital Cost having been contributed by DVC as equity, the Hon'ble Tribunal has allowed 14% return up to 50% and return at the interest rate for excess equity over 50% as invested by DVC. To put it in another way, the Hon'ble Tribunal has allowed return on 100% equity invested by DVC as on 31.3.2006 but have considered different slabs of 50% and above 50% with differential rates of return. The Hon'ble Tribunal has also categorically stated that only the actual loan portion will be reduced by repayments as the issue of repayments does not arise in respect of excess equity invested. The capital cost in regard to the projects of pre-1992 period to be apportioned as per the debt equity ratio of 50:50 and as the entire capital cost having been contributed by DVC being equity, the balance capital cost in excess of 50% should be treated as loan and DVC should be held to be entitled to interest on such amount considered as loan.

The Central Commission has considered the capital base as on 31.3.2006 as Rs. 3378 crores. This does not include the additional capitalization. Even considering Rs. 3378 crores as Capital Base, and after deducting Rs. 1281 crores on account of Equity, Rs. 2097 crores has not been considered as Debt. Instead Rs 356 crores only has been considered as Notional Loan as on 1.4.2006, which is the direction in para 112 A 1-16 of this Hon'ble Tribunal decision dated 23.11.2007 .

Further, while the Central Commission has considered the debt equity ratio of 50:50, it however, has adopted a new methodology of treating the balance 50% as loan being repaid substantially before 1st April, 2006. The Central Commission had proceeded on the basis that the depreciation allowed to DVC during the period up to 31st March, 2006 is sufficient to repay such deemed notional loan. The Central Commission had not itself applied the above

concept of depreciation being treated as repayment of loan for any of the electricity utilities which are regulated by the Central Commission namely NTPC, Powergrid, NHPC, NEEPCO while dealing with the period up to 31st March, 2004.

In addition to the above, even in the order dated 3.10.2006 passed by the Central Commission the above concept was not applied and the Central Commission had considered substantial part of the amount as loan capital. There was therefore no justification whatsoever for the Central Commission to consider and apply a new methodology to deny DVC the servicing of the notional loan capital.

The decision of the Central Commission equating the depreciation towards loan repayment is contrary to the consistent judgments and orders of the Hon'ble Tribunal that depreciation cannot be equated with loan repayment. The above issue stands settled by the decisions of the this Hon'ble Tribunal in the judgment and orders dated 16.3.2009 passed in Appeals No. 133/08, 135/08, 136/08 & 148/08 and order dated 13.6.2007 passed in Appeals No. 139 to 142 etc. of 2006 and also the decision of the Hon'ble Supreme Court of India in the case of Delhi Electricity Regulatory Commission v. BSES Yamuna Power Limited & Others, (2007) 3 SCC 33.

- (vi) Pension and Gratuity Fund contributions has not been allowed to be fully recovered in the tariff related to the tariff period 1.4.2006 to 31.3.2009 despite the order of the Hon'ble Tribunal. In para 112 D-5, the Hon'ble Tribunal decided as under:

“D.5 In view of the above we find it unreasonable to allocate 40% of the burden on DVC. We are of the opinion that entire expenditure, as determined after prudence check by the Commission, is to be borne by the consumers.”

- (vii) The Central Commission has directed the recovery of the 40% of such contribution in the next tariff period from 1.4.2009 onwards over a period of 5 years without any carrying cost purporting to avoid tariff shock but when actually the Central Commission has proceeded to reduce the tariff for the period 1.4.2006 to 31.3.2009. There being no tariff shock to the consumers as the tariff is being actually reduced, there was no occasion for the Central Commission to postpone the recovery of the Pension and Gratuity Fund contrary to the directions of the Hon'ble Tribunal.

CC. In addition to the above, other obvious and glaring error in the impugned order dated 6.8.2009 of the Central Commission as under:

- (i) the non consideration of the matters contained in the Interlocutory Application No. 19 of 2009 filed by the DVC relating to increased pay, pension and gratuity (besides the additional capitalisation of Mejia unit 4) along with the tariff determination process leading to the passing of the impugned order dated 6 August 2009. There was no reason or justification for postponing the consideration of the matters raised in the Interlocutory application and directing the DVC to file a separate petition for the same, when all the relevant details and particulars were available to the Central Commission in regard to the aspects mentioned above. This is particularly so when the tariff determined by the Central Commission will become an input tariff for the State Commissions of West Bengal and Jharkhand to decide the distribution and retail supply tariff. The input tariff determined without taking into account all the relevant expenditure will not be a correct representative and real tariff for the two State Commissions to proceed in the matter. Furthermore, the tariff period 1.4.2006 to 31.3.2009 was over by the time the Central Commission considered the Revenue Requirements.
- (ii) Interest on working capital has not been considered as per the Tariff Regulations, 2004 which provides as under:

“Rate of interest on working capital shall be on normative basis and shall be equal to the short-term Prime Lending Rate of State Bank of India as on 01.04.2004 or on 1st April of the year in which the generating station or a unit thereof is declared under commercial operation, whichever is later. Interest on working capital shall be payable on normative basis notwithstanding that the generating company has not taken working capital loan from any outside agency”.

The Central Commission has contrary to the above applied only uniform rate of 10.25% for the entire tariff period despite DVC having given the applicable short term prime lending rate of State Bank of India for different period of 1.4.2006 to 31.3.2009, which works out 11.38%, 12.50% and 12.94% for the tariff year 2006-07, 2007-08 and 2008-09 respectively.

- (iii) The interest on working capital has been considered taking into account fuel cost of 1.4.2004 instead of 1.4.2006 and further the

additional fuel cost during the tariff period has not been considered.

- (iv) The O & M expenses pertaining to the Transmission system below 132 Kv has not been taken into consideration in the final determination at Para 78 of the impugned order despite the finding in favour of the Appellant at Para 59. An amount of Rs. 4917 crores for 2006-07; Rs. 5114 crores for 2007-08 and Rs. 5318 crores for 2008-09 has not been considered.

By the order dated 6.8.2009, the Central Commission has reduced the revenue requirements of DVC substantially by not considering the servicing of various expenditure legitimately incurred by DVC. The statements attached hereto give details of the quantum of expenditures not considered by the Central Commission and its impact on the revenue requirements of DVC for the period 1.4.2006 to 31.3.2009. The statement along with detail working sheet of the above impact is attached hereto and marked as **Annexure I**.

- DD. It is submitted that the reductions in the revenue requirements of DVC effected by the Central Commission is in the region of Rs. 4706 crores. Instead of considering the legitimate claim of Rs. 8483 crores as given in the statement attached hereto as Annexure I, the Central Commission has considered less than 50%, namely only Rs. 3777 crores. This will seriously prejudice the ability of the DVC to undertake the various activities mandated to be undertaken by DVC under the provisions of the DVC Act including the various social sector activities. The expenditure of DVC has increased substantially on account of expansion programmes undertaken by DVC and also the substantial revision in employees cost on account of implementation of Sixth Pay Commission Recommendations. However, the Central Commission has postponed the consideration to a latter date of the additional capitalisation and also the employees cost revision which have already been implemented by DVC and has meanwhile reduced the tariff of DVC much lower than what DVC has already billed and recovered.
- EE. Aggrieved by the order dated 6.8.2009, DVC is filing the present appeal before the Hon'ble Tribunal. A copy of the order dated 6.8.2009 passed by the Central Commission is attached hereto and marked as **Annexure-J**.

8. (i) FACTS IN ISSUE (SUMMARY)

- A. Additional capitalization of Mejia Unit No 4 not considered;

- B. Other Additional capitalization during the tariff period 1.4.2006 to 31.3.2009 not considered;
- C. Increased O & M expenses on account of revision of pay, pension, and gratuity as a result of the implementation of the Six Pay Commission recommendation not considered;
- D. Postponement of the recovery of 40% of the pension and gratuity contribution (which is the contribution made without including the pay revision);
- E. The capital cost funded by equity in excess of 50 % not considered as interest bearing debt as on 1.4.2006;
- F. Interest on capital as per section 38 of the DVC Act not allowed;
- G. Interest on working capital not considered as per the Tariff Regulations, 2004 both in regard to rate and inclusion of appropriate fuel cost;
- H. O & M expenses allowed for Transmission System below 132 KV not considered; and
- I. Expenses incurred on subsidiary activities and other aspects not considered;

(ii) QUESTIONS OF LAW

The following questions of law arise in the present appeal:

- A. Whether the Central Commission has correctly implemented the judgment and order dated 23.11.2007 passed by this Hon'ble Tribunal in Appeal No.273 of 2006?
- B. Whether the Central Commission was justified in adding reasoning to its earlier order dated 3.10.2006 in the present impugned order, which reasoning is contrary to the finding of the Hon'ble Tribunal in the order dated 23.11.2007?
- C. Whether the Central Commission is justified in not considering the additional capitalisation for Mejia 4 unit at this stage of tariff determination?
- D. Whether the Central Commission was justified in equating cumulative depreciation amount recovered during the past period till 31.3.2006 towards adjustments as loan repayment?

- E. Whether the Central Commission has correctly implemented the decision of this Hon'ble Tribunal by staggering the recovery of Pension and Gratuity fund over five years and consequently reducing the tariff of DVC, when the Hon'ble Tribunal had only directed that there should not be any tariff shock to the consumer, i.e, increase in tariff to the consumers?
- F. Whether the Central Commission was justified in law in postponing the recovery of Pension and Gratuity Fund and that too without carrying cost, when there will be no tariff shock to the consumers as the Central Commission has proceeded to reduce the tariff of DVC ?
- G. Whether the Central Commission was justified in deferring the consideration of the Interlocutory Application filed by DVC for considering the additional capitalisation and the revision in employees cost due to implementation of the Sixth Pay Commission Recommendations, which was on the basis of actual data and for the retrospective period?
- H. Whether the Central Commission was justified in not allowing the interest on capital as per Section 38 of the DVC Act?
- I. Whether the Central Commission has considered the interest on working capital, both in regard to the rate of interest to be applied and in regard to fuel costs to be included as per the Tariff Regulations, 2004.
- J. Whether the Central Commission was right in ignoring and not dealing with additional O & M expenses claimed by the DVC based on actual data and giving justification in the interim application filed.
- K. Whether the Central commission was justified in not considering the expenses on subsidiary activities and other aspects incurred by the DVC.
- L. Whether the Central Commission was justified in not considering the actual data submitted by DVC, despite the submissions of DVC and the principle settled by the Hon'ble Supreme Court of India that the determination of tariff ought not to be postponed very long?

9. GROUNDS RAISED WITH LEGAL PROVISIONS:

NON IMPLEMENTATION OF THE DECISION OF THE HON'BLE TRIBUNAL

- A. The Central Commission erred in not correctly and fully implementing the order dated 23.11.2007 passed by the Hon'ble Tribunal in Appeal No. 273 of 2006. The Central Commission has not implemented many aspects as decided and directed by this Hon'ble Tribunal to be implemented in the de-novo determination of tariff of DVC by the

Central Commission. The Hon'ble Tribunal had allowed the appeal filed by the DVC on specific aspects namely the additional capitalisation of Mejia Unit 4, inclusion of 100% of the contribution to pay, pension and gratuity, the capital contributed in excess of 50% to be treated as interest bearing debt and to be serviced as such, interest on capital as provided in section 38 of the DVC Act and the expenses on subsidiary activities other than flood control and irrigation to be included in the revenue requirements of Power and had directed the Central Commission to de novo consider the same in the Revenue Requirements of DVC for the tariff period 1.4.2006 to 31.3.2009.

- B. The impugned order passed by the Central Commission is in gross violation of the well settled principles that court or authority cannot go into the legality or validity of the decisions of the Appellate Authority and is required to implement such decisions notwithstanding any contrary view it may have. The only course open is for the aggrieved person to agitate the matter in the higher forum. In the present case the Central Commission (though not an aggrieved person under section 125 of the Electricity Act) had filed the second appeal before the Hon'ble Supreme Court and in the second appeal the interim orders of stay sought for was specifically rejected.
- C. The Central Commission has also not followed the binding precedents of this Hon'ble Tribunal and the Hon'ble Supreme Court in passing the impugned order and has proceeded to equate Depreciation amount as equivalent to repayment of loan. The Hon'ble Supreme Court in the case of Delhi Electricity Regulatory Commission v. BSES Yamuna Power Limited & Others, (2007) 3 SCC 33 has considered the aspect in the context of Electricity Regulations and authoritatively laid down the principles concerning the nature of the claim of Depreciation. The Hon'ble Tribunal has also consistently held that depreciation cannot be equated with loan repayment. The above issue stands settled by the decisions of this Hon'ble Tribunal in the judgment and orders dated 16.3.2009 passed in Appeals No. 133/08, 135/08, 136/08 & 148/08 and order dated 13.6.2007 passed in Appeals No. 139 to 142 etc. of 2006.
- D. The Central Commission has purported to give new reasoning in the impugned order dated 6.8.2009 for the decision made in the earlier order dated 3.10.2006 which order stands set aside by the Hon'ble Tribunal in the order dated 23.11.2007. The Central Commission has

purported to reiterate that details of the Additional capitalization of Mejia Unit 4 was not available when the Petition No 66 of 2005 was considered leading to the passing of the order dated 03.10.2006 even after the Hon'ble Tribunal had recorded in the order dated 23.11.2007 that such details were available on records. Further the Central Commission has purported to give detailed justification for the non consideration of contribution to pension and gratuity to the extent of 40% in the earlier order dated 3.10.2006 after the Hon'ble Tribunal had found the same to be erroneous and directed the consideration of 100% of such contribution. The above purported reasoning also achieve significance as the Central Commission has postponed the consideration of the above claims in the impugned order dated 6.8.2009 and thereby depriving DVC of the benefit of the claims in the revenue Requirements as at present.

- E. The Central Commission erred in adding reasoning to the order dated 3.10.2006, which reasoning did not find any mention in the said order passed by the Central Commission. The Central Commission has observed that the 40% of the Pension and Gratuity Fund was directed by the Central Commission to be borne by DVC due to the transition period of two years allowed to DVC. The above is an erroneous statement by the Central Commission as in the earlier order dated 3.10.2006, the Central Commission had given no justification whatsoever for not allowing the 40% of the Pension and Gratuity Fund. With regard to the transition period, the Central Commission had clearly observed that the same was to avoid retrospective determination of norms and parameters which would be impossible for DVC to achieve with retrospective effect. The Central Commission has erred in at this stage adding reasoning to the order dated 3.10.2006 passed, which order has been found to be incorrect by this Hon'ble Tribunal.

POSTPONING THE DECISIONS ON IMPORTANT ASPECTS OF REVENUE REQUIREMENTS

- F. The Central Commission has failed to decide the Revenue Requirements of the DVC in a comprehensive manner and has without any rationale or justification postponed the consideration of important aspects such as (a) the additional capitalization of Mejia Unit 4 and other additional capitalization during the period 1.4.2006 to 31.3.2009 and the impact of additional payments made by the DVC effective 1.1.2006 on account of implementation of the recommendation of the Sixth Pay Commission. The above were actual

financial outflow to DVC and ought to have been considered along with other Revenue Requirements for the tariff period 01.04.2006 to 31.03.2009.

- G. The Central Commission was required to decide the Revenue Requirements of DVC in a comprehensive manner by considering all relevant aspects in one go particularly in the context of
- (i) the tariff period for which the revenue requirements was being decided namely 1.4..2006 to 31.3.2009 was over by the time the de-novo proceedings were held by the Central Commission and the impugned order was made;
 - (ii) the tariff to be determined by the Central Commission would be an input tariff for the two State Commissions of West Bengal and Jharkhand and therefore they should have the final Revenue Requirements of DVC before proceeding with the determination of the distribution and retail supply tariff; and
 - (iii) the DVC having already recovered the tariff from the consumers and the other purchasers of electricity such as the Respondents 4 to 8 any adjustment to be made on the basis of Revenue Requirements should be decided by the Appropriate Commissions in one go instead of multiple stages.
- H. The Central Commission has failed to appreciate that the process adopted by the Central Commission of postponing the decision on important aspects of additional capitalization, deferment of consideration of 40% of the contribution made to the pension and gratuity and additional amount paid on account of the implementation of the recommendation of the Sixth Pay Commission (the liability to be considered in the Revenue Requirements being otherwise not in dispute) would result in complete chaos and multiple proceedings which would be totally inappropriate besides seriously affecting the financial position of the DVC. The result of the above if given effect to would be as under:
- (i) as per the Revenue Requirements decided by the Central Commission the two State Commissions would determine the distribution and retail supply tariff and enforce them for adjustment in the amount already collected by the DVC from the consumers and similar would be the case of recovery from the Respondents 4 and 5.

- (ii) as the Central Commission had not determined all the revenue requirements of DVC the distribution and retail supply tariff will be at the much lower range than what is applicable if all the revenue requirements are properly considered;
 - (iii) the consumers and Respondents 4 and 5 will proceed to effect adjustment in the tariff paid by them during the period 1.4.2006 to 31.3.2009 based on the distribution and retail supply tariff that may be determined by the State Commissions or the tariff determined by the Central Commission based on the above;
 - (iv) the Central Commission will then take up the consideration of the items postponed and decide on the increase in the tariff to be allowed in respect of the period 1.4.2006 to 31.3.2009;
 - (v) the State Commission will then decide on the additional tariff to be allowed based on the decision of the Central Commission;
 - (vi) the DVC then will recover the additional amounts due for the tariff period 1.4.2006 to 31.3.2009 from the consumers and purchasers of electricity from DVC during the next tariff period with interest;
 - (vii) thus DVC will give substantial adjustment in the amount already collected as tariff in the first instance and thereafter at a later stage collect the same amount with interest;
 - (viii) there will therefore be a complete roller coaster of repayment of the amount already collected and there after collecting the same with the carrying cost or interest;
- I. The process which has been adopted by the Central Commission is totally inconsistent and contrary to -
- (i) the National Electricity Policy notified by the Central Government in exercise of powers under Section 3 of the Electricity Act, 2003 which is binding on the Central Commission as provided in Section 61(1) and Section 79 (4) of the Electricity Act, 2003 which, inter alia, reads as under:

“4. Uncontrollable costs should be recovered speedily to ensure that future consumers are not burdened with past costs. Uncontrollable costs would include (but not limited to) fuel costs, costs on account of inflation, taxes and cess,

variations in power purchase unit costs including on account of hydro-thermal mix in case of adverse natural events.”

- (ii) the recent decision of the Hon'ble Supreme Court involving the Central Commission in the case of Uttar Pradesh Power Corporation Limited v. NTPC Limited (2009) 6 SCC 235. The Hon'ble Supreme Court has held that the utilities ought not to delay to claim tariff on the basis of actual figures after the tariff period is over and that the process of tariff determination ought not to be postponed causing undue delay as it would affect the general body of consumers.

- J. Despite the above clear position, the Central Commission has not considered the additional capitalisation and the revision in employees cost actually incurred by DVC in the determination of tariff and postponing the same to a later date.

ADDITIONAL CAPITALISATION NOT CONSIDERED

- K. The Central Commission has wrongly not considered the additional capitalisation towards Mejia 4 unit which was claimed by DVC to be allowed in its tariff. This is despite the clear order of this Hon'ble Tribunal holding that the said claim of DVC has been omitted to be considered by the Central Commission in its earlier order dated 3.10.2006. The Hon'ble Tribunal had specifically directed the Central Commission to consider such claims of DVC which was earlier omitted to be considered. There is no justification or rationale whatsoever for not considering the impact of the above additional capitalisation of Mejia Unit 4 and other additional capitalisation during the period 1.4.2006 to 31.3.2009 at the present stage.
- L. The Central Commission has wrongly not considered the additional capitalization on other aspects during the period 1.4.2006 to 31.3.2009, despite the particulars and details of such additional capitalizations having been furnished to the Central Commission by DVC.

INTEREST ON CAPITAL UNDER SECTION 38 OF THE DVC ACT

- M. The Central Commission erred in totally ignoring the direction of this Hon'ble Tribunal to consider the implication of Part IV of the DVC Act and in particular allow interest on capital to DVC in terms of section 38 of the DVC Act. The Central Commission has not dealt with the issue at all despite the clear decision of the Hon'ble Tribunal and

also the specific submission made by DVC in the proceedings before the Central Commission.

LOAN CAPITAL BEING ADJUSTED AGAINST DEPRECIATION OF THE PAST PERIOD

- N. The Central Commission erred in holding that the loan capital arising out of the apportionment of the total capital between debt and equity at 50:50 as per decision of the Hon'ble Tribunal is with reference to the total capital cost as on 1 April 2006 and not with reference to any previous date. Accordingly the total capital cost as on 1.4.2006 was to be apportioned without any implication of the accumulated depreciation taken by DVC during the past period and particularly during the period before the coming into force of the Electricity Act.
- O. The Central Commission erred in reducing the loan of DVC for the purposes of servicing in the tariff, by adjusting the loan against the cumulative depreciation allowed over the assets of DVC for the past period. The Central Commission has equated depreciation against loan repayment despite the consistent orders and the principle settled by this Hon'ble Tribunal in the judgment and orders dated 16.3.2009 passed in Appeals No. 133/08, 135/08, 136/08 & 148/08 and order dated 13.6.2007 passed in Appeals No. 139 to 142 etc. of 2006 and also the decision of the Hon'ble Supreme Court of India in the case of Delhi Electricity Regulatory Commission v. BSES Yamuna Power Limited & Others, (2007) 3 SCC 33, wherein it has been settled that depreciation cannot be equated against loan repayment. Contrary to the above principle, the Central Commission has now proceeded to assume loan repayment to the extent of depreciation recovered.
- P. The Central Commission erred in assuming the depreciation recovered in the past by DVC is for adjustment in repayment of loan, when such practice was admittedly not followed by the Central Commission at any time prior to the year 2004. The practice followed by the Central Commission in treating depreciation towards loan repayment for tariff determination for the period 2004-09 has also been set aside by and this Hon'ble Tribunal. In such circumstances, there was no occasion for the Central Commission to treat depreciation towards loan repayment, especially for the period prior to the year 2004 when no such practice was followed by the Central Commission for any of the utilities.

PAY REVISION

- Q. The Central Commission erred in not considering the financial outflow to DVC on account of revisions on implementation of the Sixth Pay Commission recommendation given effect to from 1.1.2006 onwards and postponing the consideration of the same.

PENSION AND GRATUITY CONTRIBUTIONS

- R. The Centre Commission has completely misconceived the order of the Hon'ble Tribunal in regard to the deferment of contribution to pension and gratuity in the event of that being the tariff shock. The Central Commission has failed to appreciate that the Hon'ble Tribunal had stated that while Pension and Gratuity Fund was to be fully allowed to be recovered in the tariff, the Central Commission may, in case there is an increase in tariff and consequent tariff shock, stagger the recovery of such Pension and Gratuity Fund over a period of time. The Central Commission has however, while proceeding to reduce the tariff of DVC, postponed the recovery of Pension and Gratuity Fund over five years and that too without providing any carrying cost. There was no occasion for the Central Commission to postpone the recovery of Pension and Gratuity Fund when there was no tariff shock to the consumers.
- S. The Central Commission has failed to appreciate that there was no occasion to postpone the impact of the revision in employees cost due to the implementation of the Sixth Pay Commission Recommendations. The Central Commission erred in not considering such expenditure and postponing the decision on the same while proceeding to reduce the tariff of DVC. The decision of the Central Commission has the anomalous effect of giving refund to the consumers presently while retrospectively recovering the same from the consumers when the additional capitalisation and employees cost revision is allowed to be recovered in tariff. There is no reason for the Central Commission to undertake such multiple process of tariff determination and enforcement, when the entire details are available with the Central Commission for the tariff determination to be undertaken in a consolidated manner.

INTEREST OF WORKING CAPITAL

- T. The Central Commission erred in applying the interest rate at the uniform 10.25% for the entire tariff period instead of applying the

interest rate applicable from time to time as provided in Tariff Regulations, 2004 namely prime lending rate of State Bank of India.

- U. The Central Commission erred in not including the Fuel Costs prevalent at the beginning of the tariff period 1.4.2006 and thereafter at the relevant year instead of adopting the fuel cost as on 1.4.2004 for the purposes of determining the working capital allowable to DVC during the tariff period.

O & M EXPENDITURE

- V. The Central Commission erred in not allowing O & M expenses for Transmission System below 132 KV despite clear finding in favour of the Appellant in the impugned order at Paragraph 59.
- W. The Central Commission has failed to appreciate DVC has been operating and maintaining old units whose useful life have also expired, and there is no comparable benchmark available in any other power plant of the country. This Central Commission has been fixing progressive efficiency norms for those old plants of DVC from 2006-07 onwards (in its Order dated 3.10.2006), assuming old plants of DVC undertaking of comprehensive refurbishment/ Residual Life Assessment based R & M during the interim period. However, due to fast growing load profile in the DVC Command Area, DVC could not afford to shut down any of these old plants for such comprehensive refurbishment activities in the interest of the consumers in its Command Area. In the meanwhile, with further aging of vintage power plants of DVC over these years and particularly in absence of economic viability of major R&M of these old units, the operation and maintenance expenses to arrest capacity de-rating have considerably gone up. The implication of such higher O&M expenses in these old plants is much lower, when compared to the tariff implication of huge R&M Expenses as per expert studies already made under the PIE (Partnership-in-Excellence) programme directed by MOP. These units involve additional O & M Expenses and it is not possible to operate and maintain such old units within the norms prescribed in the Tariff Regulations. The Tariff Regulations allow relaxation of O & M Expenses to these old generating stations. Accordingly, the Central Commission ought to have allowed the following amount as additional O & M Expenses restricted to the old units as per the statement attached hereto.

<u>Year</u>	<u>Amount (Rupees)</u>
2006-07	122.67

2007-08	62.86
2008-09	163.60

Due to implementation of Partnership-In-Excellence (PIE) Programme by the Ministry of Power, Govt. of India under which NTPC was the Partner for DVC, Action Plans for Short Term and Medium/Long Term were chalked out for DVC. Under the Short Term Action Plan of PIE Programme, the PIE Team of DVC and NTPC inducted best maintenance practices in the old Plants of DVC. Due to this Short Term benefit from improvement of most of the Operational Parameters could be achieved during the year 2006-07. But the same Short Term benefits could not be maintained further during the years 2007-08 and 2008-09 in absence of implementation of Medium/Long Term Action Plan with comprehensive Refurbishment/RLA based R&M of these old Power Plants of DVC due to rising power deficit in its command area, particularly due to immuned load of DVC in respect of the Core Sector consumers viz. Railways, Steel, Coal etc. As a result with more aging of these Plants and due to operation of these old Plants at higher level during the year 2006-07 on Short Term basis, the stability of these old Plants went further down resulting in increase in the number of unforeseen forced outage hours with consequent higher consumption of coal, oil as well as higher percentage of auxiliary consumption. These old Plants are being operated in the greater interest of the consumers and are required to be kept operational till the new capacities of DVC under construction are mostly commissioned. Central Electricity Authority (CEA) has also advised RLA based R&M and Life Extension Programme for these old Units in phases. In the above backdrop, DVC's contention before the Hon'ble Central Commission at Para 14 of its Submission dated 11th May, 2009 that these old Units are not possible to be operated and maintained within the norms prescribed in the Tariff Regulations is fully justified and the above Physical Operational Norms which have gone adverse over the norms fixed by the Hon'ble Central Commission in 3rd October, 2006 i.e. during the mid-year 2006-07 need to be considered at actuals as per Annual Accounts audited by the Comptroller & Auditor General of India. Physical parameters not achieved by plants are as per the statement attached hereto.

		2006-07		2007-08		2008-09	
		Allowed	Actual	Allowed	Actual	Allowed	Actual
BTPS	PLF (%)					75	62.54
	SHR(Kcal/kwh)	3250	3290	2900	3281	2700	3025
	AEC(%)			10.25	10.46	10	10.57

	SFC(ml/kwh)					2	2.799
DTPS	PLF (%)			67	54.07	74	62.68
	SHR(Kcal/kwh)			2940	2945	2820	2934
	AEC(%)			10.7	10.8		
	SFC(ml/kwh)			2.85	4.83	2.4	6.33
MTPS	PLF (%)					80	75.78
	SFC(ml/kwh)	3.5	3.925			2	3.74

- X. The Central Commission has failed to appreciate that DVC had to take comprehensive insurance of its plants at a significant amount for the first time during the period 2007-08 due to substantial increase in the risk profile of DVC Power Plants due to factors on account of financial (including lenders covenants), natural calamities, law and order issues and other strategic safeguard measures. The above is beneficial to the consumers as it protects the consumers from any future tariff shock in the event of any substantial loss arising out of damage or destruction of the power plants. There was no such large insurance taken during the past period 1998-99 to 2002-03, the base years adopted by the Hon'ble Commission for determination of O&M expenses for the period 1.4.2006 to 31.3.2009. The amount of such expenditure for the years 2006-07, 2007-08 and 2008-09 are as under:

<u>Year</u>	<u>Amount (Rupees)</u>
2006-07	Nil
2007-08	8.69
2008-09	6.03

EXPENDITURE ON SUBSIDIARY ACTIVITIES AND OTHER ASPECTS

- Y. The Central commission erred in not considering the expenses incurred on the subsidiary activities despite specific direction contained in the decision of the Hon'ble Tribunal

REDUCTION IN THE REVENUE REQUIREMENTS

- Z. The Central Commission erred in substantially reducing the tariff and the cash flow available to DVC, when DVC has given the full details and the proposed expenditure to be incurred by DVC for the expansion in electricity generation and also various multifarious social sector activities to be undertaken by DVC such as flood control, afforestation, soil conservation etc. There was no occasion for the Central Commission to reduce the cash flow to DVC at the present stage, only to be allowed to be recovered with retrospective effect from a future date.

- AA. The Appellant craves leave to add to the grounds mentioned above and submits that the above contentions are in the alternative and without prejudice to one another.
- 10. MATTERS NOT PREVIOUSLY FILED OR PENDING WITH ANY OTHER COURT.**
- The appellant has not filed any other suit, appeal or has initiated any other legal proceeding against the impugned order dated 6.8.2009 passed by the Central Commission.
- 11. GROUNDS FOR SUCH RELIEF (S) AND THE LEGAL PROVISIONS, IF ANY, RELIED UPON**
- As in Para 9 above
- 12. DETAILS OF INTERIM APPLICATION, IF ANY, PREFERRED ALONG WITH APPEAL.**
- DVC is filing a separate application seeking interim orders of day of the operation of the order dated 6.8.2009 passed by the Central Commission. It is submitted that the order dated 6.8.2009 seriously prejudices the revenue requirements of DVC. It is also submitted that the Central Commission has not properly implemented the decision and direction of this Hon'ble Tribunal in terms of the order dated 23.11.2007 which are seriously prejudiced DVC. It is also submitted that the Central Commission, while determining the tariff for the period 2006 to 2009, has not considered the additional capital expenditure incurred by DVC for the said period. The Central Commission has also not considered the revision of employees cost due to implementation of the Sixth Pay Commission. It is submitted that if the order dated 6.8.2009 passed by the Central Commission is permitted to be implemented, DVC would suffer serious and irreparable loss and prejudice.
- 13. DETAILS OF APPEAL/S, IF ANY PREFERRED BEFORE THIS APPELLATE TRIUBNAL AGAINST THE SAME IMPUGNED ORDER/DIRECTION, BY RESPONDENTS WITH NUMBERS, DATES AND INTERIM ORDER, IF ANY PASSED IN THAT APPEAL.**
- N.A.
- 14. DETAILS OF INDEX**
- An index containing the details of the documents to be relied upon is enclosed.
- 15. PARTICULARS OF FEE PAYABLE AND DETAILS OF BANK DRAFT IN FAVOUR OF PAY AND ACCOUNTS OFFICER, MINISTRY OF POWER, NEW DELHI.**

In respect of the fees of appeal.

Name of the Bank. SBI Branch Manicktala Civic Centre payable at New Delhi. DD Nos.525771, 525772 & 525773 Dated 24.08.09.

16. LIST OF ENCLOSURES.

- Annexure A:** A copy of the DVC Act.
- Annexure B:** A copy of the order dated 21.6.2005 passed by the Central Commission in Petition No.66 of 2005
- Annexure C:** A copy of the tariff so notified in the year 2000.
- Annexure D:** A copy of the order dated 3.10.2006 passed by the Central Commission in Petition No.66 of 2005
- Annexure E:** Copies of the interim orders dated 6.12.2006, 15.1.2007 & 26.2.2007 passed by this Hon'ble Tribunal
- Annexure F:** A copy of the order dated 23.11.2007 passed by the Appellate Tribunal in Appeal No 273 of 2006
- Annexure G:** Copies of the orders passed by the Hon'ble Supreme Court rejecting the grant of the stay
- Annexure H:** A copy of the IA No. 19 of 2009 filed by DVC in Petition No. 66 of 2005
- Annexure I:** A copy of the statement along with detail working sheet
- Annexure J:** A copy of the order dated 6.8.2009 passed by the Central Commission

17. WHETHER THE ORDER APPEALED AS COMMUNICATED IN ORIGINAL IS FILED.

Yes

18. WHETHER THE APPELLANT IS READY TO FILE WRITTEN SUBMISSIONS/ARGUMENTS BEFORE THE FIRST HEARING AFTER SERVING THE COPY OF THE SAME ON RESPONDENTS.

Yes

19. WHETHER THE COPY OR MEMORANDUM OF APPEAL WITH ALL ENCLOSURES HAS BEEN FORWARDED TO ALL RESPONDENTS AND ALL INTERESTED PARTIES, IF SO, ENCLOSE POSTAL RECEIPT/COURIER RECEIPT IN ADDITION TO PAYMENT OF PRESCRIBED PROCESS FEE.

No

20. ANY OTHER RELEVANT OR MATERIAL PARTICULARS/DETAILS WHICH THE APPELLANT DEEMS NECESSARY TO SET OUT:

N.A.

21. RELIEFS SOUGHT.

In view of the facts mentioned in para 7 above, points in dispute and questions of law set out in para 8 and the grounds of appeal stated in para 9, the appellant prays for the following reliefs:

- (a) Allow the appeal and set aside the order dated 6.8.2009 Passed by the Central Commission to the extent challenged in the present appeal.
- (b) Pass such other Order(s) and this Hon'ble Tribunal may deem just and proper.

Dated at Kolkata this 24th day of August, 2009

Drawn by
M.G. Ramachandran

Counsel for Appellant

Appellant

Settled by
Mr. G.E. Vahanvati
Attorney General for India

DECLARATION BY APPELLANT

The appellant above named hereby solemnly declare(s) that nothing material has been concealed or suppressed and further declare(s) that the enclosures and typed set of material papers relied upon and filed herewith are true copies of the original.

Verified at Kolkata on this 24th day of August, 2009.

APPELLANT

Counsel for Appellant

VERIFICATION

I, Prabir Kumar Chaudhuri S/o Late Kalikinkar Chaudhuri aged about 56 years, working as Deputy Chief Engineer, Tariff Cell in the office of Commercial Department, Damodar valley Corporation, resident of F/4B, Parvati Vihar, Big Bazar, 52/6 VIP Road, Kolkata - 700 059, do hereby verify that the contents of paras 1 to 7 and 10 to 20 are based on the records of the appellant maintained in the ordinary course of business and believed by me to be true and paras 8, 9 and 21 are believed to be true on legal advice and that I have not suppressed any material facts.

Date:24-8-2009

Place:Kolkata

Appellant/Authorized Officer

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
APPELLATE JURISDICTION
APPEAL NO OF 2009**

IN THE MATTER OF:

Damodar Valley CorporationAppellant

VERSUS

Central Electricity Regulatory Commission & Others .Respondents

AFFIDAVIT

I, Prabir Kumar Chaudhuri, son of Late Kalikinkar Chaudhuri, aged about 56 years, resident of F/4B, Parvati Vihar, Big Bazar, 52/6 VIP Road, Kolkata - 700 059, do hereby solemnly affirm and state as under:

1. I say that I am Deputy Chief Engineer, Tariff Cell working in the Damodar Valley Corporation and am conversant with the facts of the present case. I say that competent and authorized to swear the present affidavit.
2. I say that I have read the contents of the above appeal filed by the appellant against the order dated 6.8.2009 passed by the Central Commission and I have understood the contents of the same. I say that the contents of the above appeal filed by the Appellant are based on the records of the Appellant maintain in the normal course of business and believed by me to be true. The Legal submissions contained therein are based on advice received and believed by me to be true.
3. I say that the Annexures to the Memorandum of appeal are the true and correct copies of their original.

DEPONENT

VERIFICATION

I, the deponent above-named, do hereby verify the contents of the above affidavit to be true to the best of my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified at Kolkata on this 24th day of August, 2009

DEPONENT