

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 272/2010

Subject: Determination of deferred elements tariff for the period from 1.4.2006 to 31.3.2009.

Date of Hearing: 17.11.2011

Coram: Dr. Pramod Deo, Chairperson
Shri S.Jayaraman, Member
Shri V.S.Verma, Member
Shri M.Deena Dayalan, Member

Petitioner: Damodar Valley Corporation, Kolkata

Respondents: Department of Energy, Government of West Bengal, Department of Energy, Government of Jharkhand, West Bengal State Electricity Distribution Company Ltd, Jharkhand State Electricity Board, Union of India, Ministry of Power, New Delhi.

Parties present: Shri M.G.Ramachandran, Advocate, DVC
Ms. Swapna Seshadri, Advocate, DVC
Shri D.K.Aich, DVC
Shri A. Biswas, DVC
Shri R.B.Sharma, Advocate, JSEB
Shri Amit Kapur, Advocate, BSAL
Ms. Poonam Verma, Advocate, BSAL
Shri Krishan Raana, Advocate, BSAL
Shri Gautam Shroff, Advocate, BSAL
Shri Shyamal Sarkar, Advocate, BSAL
Shri Rajesh Gupta, Advocate, BSAL
Shri Apoorva Mishra, Advocate, BSAL
Shri M.Prahladha, BSAL
Shri Amarendra Sharan, Sr. Advocate, SAIL-BSL
Shri Rajiv Shankar Dwivedi, Advocate, SAIL-BSL
Shri S.K.Kujur, SAIL-BSL
Shri Ajay Kumar, SAIL-BSAL
Shri B.N.P.Singh, SAIL-BSL
Shri Paramanand Sharma, SAIL
Shri Bhushan Rastogi, BRPL

RECORD OF PROCEEDINGS

During the hearing, the learned counsel for the petitioner submitted as under:

(a) The instant petition has been filed claiming deferred elements of tariff for 2004-09 pursuant to the order of the Commission dated 6.8.2009, wherein

liberty was given to the petitioner to approach the Commission in respect of assets/items not considered for capitalisation.

(b) Additional information as sought for by the Commission has been filed in five volumes and copy served on the respondents/beneficiaries. Reply has been filed by the consumer respondent, M/s BSAL.

(c) The consumer respondents have raised issues pertaining to smaller items / minor assets (related to technical validation) and it is suggested that the petitioner may be given liberty to give file a comparative chart containing additional information and cross reference linking the objections of the consumers to the claims made by the petitioner, in order to demonstrate the validity of the said claims.

(d) There is an element of additional capitalisation for the period from 1.4.2004 to 31.3.2006 which was earlier considered and rejected by the Commission for want of justification for each of the generating station. However, the petitioner has approached the Commission with detailed justification, based on the liberty granted by the Commission.

(e) As regards additional capital expenditure for the period from 1.4.2006 to 31.3.2009, complete details of the nature of capitalisation with full justification have been submitted by the petitioner. Some of the issues raised by the respondents/consumers pertain to capitalisation of certain items without de-capitalisation of assets. The details of de-capitalisation of these assets/items for capitalisation have already been submitted by the petitioner in the additional information filed before the Commission.

(f) As regards claim on account of Pay revision based on the sixth pay Commission recommendations, the details of the payments made during 2007-08 and 2008-09 on this count has been provided. Also, in line with the Commission's order dated 6.8.2009, 60% of pension contribution during 2006-09 has been claimed, which may be considered.

(g) As regards O&M expenses, claim for additional O&M expenses have been made on account of higher security expenses (not considered earlier) due to law and order, higher insurance charges (mega insurance), environmental issues (Pollution and Ash evacuation), amortisation of revenue expenditure over a period of five years, and towards older units which had outlived their useful life, with full details proper justification.

(h) Additional submissions as sought for by the Commission has been filed on 18.3.2011 and copy served on the respondents/consumers. Permission to file comparative chart giving details

(i) As regards objections raised on expenditure incurred for CISF, it is submitted that the demand made by CISF need to be given to them for security of the generating station and hence cannot form part of the O&M expenses. These are necessary contributions made to CISF which cannot be considered as minor assets.

(j) The HT consumers before the Commission are not beneficiaries, since beneficiaries are person who get bulk supply of power for onward distribution.

However, the objections of the HT consumers and the reply of the petitioner may be considered by the Commission at the time of disposal of the petition.

2. The learned Sr. Counsel for the respondent consumer, SAIL-BSL made his submissions on the maintainability of the petition, as under:

(a) The Commission in exercise of its power under Section 79(1)(a) of the Electricity Act, 2003, had determined the tariff of the generating stations of the petitioner for 2004-09 by order dated 3.10.2006.

(b) The determination of tariff along with impact of revision of pay, pension contribution, O&M expenses, etc have all been considered and decided by the Commission by its order dated 3.10.2006. This was again considered and disposed of by the Appellate Tribunal on appeal, by its judgment dated 23.11.2007, which on remand was disposed of by the Commission by its order dated 6.8.2009. On appeal against this, the Tribunal has disposed of the same on 10.5.2010 in Appeal No.146/2009. The issues raised are presently pending before the Hon'ble Supreme Court on appeal, and the petitioner by this petition has now sought the determination of the issues by this Commission which are pending before the said Court.

(c) The issues which have already been considered and rejected by the Commission for want of justification cannot be raised by the petitioner in the present petition by providing new justification. The jurisdiction of the Commission cannot be invoked by the petitioner since all aspects have been considered and rejected /allowed partially by the Commission. The petitioner cannot re-agitate the issues again and again.

(d) The petitioner has not indicated the provision of the Regulation under which the present application has been filed. The petitioner cannot seek the re-determination of tariff for 2004-09 which had already been approved by the Commission.

(e) The prayer of the petitioner is not admissible since the principle of *res judicata* / *constructive res judicata* would apply in the instant case. Matters which have attained finality cannot be re-opened, except on the ground of an error apparent on the face of the record. The petitioner has not pointed out to any error in the order and hence cannot now seek the re-determination of tariff of its generating stations through this petition.

(f) In terms of the principles laid down in Order II, Rule 2 of the Civil Procedure Code, a composite claim should have been filed by the petitioner at the first instance. The claim of the petitioner is covered by the '*doctrine of finality*' and the petition filed under Section 79(1)(a) of the Act, is not maintainable.

(g) This respondent may be given liberty to file its written notes of the arguments within two weeks.

3. The learned counsel for the respondent, BSAL referred to the nature of filings dated 18.3.2011 and the claims made by the petitioner and prayed that the Commission may exercise prudence check on the same before allowing the same for capitalisation. Referring to the voluminous documents filed by the petitioner and the prayer for submissions of a comparative chart, the learned counsel manly submitted as under:

- (a) Some of the claims made by the petitioner including assets like 'chair for beauty parlour' etc are unreasonable and the petitioner should not have prayed for capitalisation of such assets. The staff of the Commission may be requested to exercise stringent prudential check of such items /assets prior to consideration for capitalisation.
- (b) Since the tariff of the generating stations/transmission systems had already been determined by the Commission for the years 2004-05 and 2005-06, claims for the said years cannot be considered.
- (c) In terms of the order dated 6.8.2009 of the Commission in Petition No. 66/2005, the Commission had elaborately discussed the claims of the petitioner in respect of its various projects for the period 2004-06 and had disallowed the capitalisation of most of the items for want of justification (the learned counsel pointed out the same in order dated 6.8.2009). The capitalisation of these assets for the said period cannot be claimed by the petitioner, since no liberty was granted to the petitioner to approach the Commission again, with justification for capitalisation of these assets.
- (d) The petitioner has also not indicated the relevant provision/orders under which the present claims have been made for the years 2004-05 and 2005-06. The order of the Commission dated 6.8.2009 had been confirmed by the Appellate Tribunal for Electricity. Hence, capitalisation of the claims for 2004-06 cannot be considered, except in cases where liberty had been given to the petitioner by order dated 6.8.2009 to seek capitalisation with proper justification.
- (e) As regards additional capitalisation claim for 2006-09 towards employee cost, revision of pay as per sixth pay commission recommendations, pension and gratuity contribution, Commission may consider the following:
 - (i) The salutary principle of linking costs incurred by utility to the efficiency / performance level of the employees, as laid down by the Tribunal in its judgment dated 26.5.2006 (Siel-v-PSERC (2007 ELR (APTEL) 931) may be considered while determining the employee cost for the projects of the petitioner.
 - (ii) Section 33 of the DVC Act 1948 (Part IV-Finance, Account and Audit) provides the methodology for allocation of the total capital expenditure chargeable to a project, between the three main objects, namely, irrigation, power and flood control. Similarly, Sections 34 and 35 of the said Act provides for the sharing of such allocated expenditure between the various participating governments. The petitioner has not disclosed such details in the petition. Without apportionment of the head office expenses to each of the main objects, claims including pay revision in respect of the employees not connected with the power system, has been preferred.
 - (iii) As per sixth pay Commission recommendations, 40% of the arrear pay is payable during the year 2008-09 and the balance is payable during 2009-10. However, the total liability of pay revision has been accounted for the year 2008-09 by the petitioner which is not permissible.
 - (iv) The expenditure towards salary, wages in respect of Unit Nos, 4, 5 & 6 of Mejia TPS may not be considered in this petition since tariff for Mejia Unit

No. 4 is to be considered in Petition No. 279/2010 and Unit Nos. 5 and 6 do is not connected to this petition.

(v) The interest income earned by the petitioner on investment of pension & gratuity fund may be directed to be furnished by the petitioner and the said amounts shall be adjusted against the respective years of the claim.

(vi) All claims made should be composite and the consequences for the delay in filing the petition/additional information by the petitioner shall be considered by the Commission in the order.

4. Due to paucity of time, the submissions of the learned counsel for BSAL could not be completed.

5. The prayer of the petitioner for filing a comparative chart as in paragraph 1(c) above is allowed and the same may be filed on or before 23.12.2011 with advance copy to the respondents/consumers, who may file their responses, with copy to the petitioner, on or before 5.1.2012. The consumer respondent, SAIL-BSL is also permitted to file its short notes of arguments as prayed for, with copy to the petitioner. Pleadings are to be completed by the parties prior to the next date of hearing.

6. Matter shall be listed for final hearing on 12.1.2012.

Sd/-
T.Rout
Joint Chief (Law)