

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram: Shri S.Jayaraman, Member
Shri V.S.Verma, Member

Date of hearing: 12.1.2012

Petition No.272/2010

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

Petitioner: Damodar Valley Corporation (DVC)

Respondents: Department of Energy, Government of West Bengal and others

Parties present: Shri M.G.Ramachandran, Advocate, DVC
Ms. Swapna Seshadri, Advocate, DVC
Shri A.Biswas, DVC
Shri D.K.Aich, DVC
Shri P.Bhattacharya, DVC
Shri R.B.Sharma, Advocate, JSEB,
Ms. Poonam Verma, Advocate, BSAL
Shri Amarendra Sharan, Sr.Advocate, SAIL-BSL
Shri Rajiv Shankar Dwivedi, Advocate, SAIL-BSL
Shri Somesh Jha, Advocate, SAIL-BSL
Shri B.P.N.Singh, SAIL-BSL
Shri S.K.Francis, SAIL-BSL

Record of Proceedings

The learned counsel for the petitioner submitted that in terms of the directions of the Commission during the hearing on 17.11.2011, comparative statements containing additional information and cross reference linking the objections of the consumers to the claims made by the petitioner have been duly filed and copy served on the consumers/respondents.

2. The learned proxy counsel for Bhaskar Shrachi Alloys Ltd (consumer respondent, BSAL) prayed for adjournment of the hearing on the ground of personal difficulty of the Counsel appearing in the matter.

3. The learned counsel appearing for the respondent No. 4, JSEB submitted that the application for additional capitalization for the period 2006-09 has been filed in terms of the observations of the Appellate Tribunal for Electricity in paragraph 51 of its judgment dated 10.5.2010 in Appeal No. 146/2009. Referring to various paragraphs of its reply dated 2.11.2011, the learned counsel submitted that the claims for additional capital expenditure for 2006-09 made by the petitioner in respect

of thermal and hydro generating stations may be considered in terms of the comments made there under. In addition to this, the learned counsel submitted as under:

- (i) In the case of Maithon HPS, the claim of the petitioner for ₹2.40 lakh for 2004-05 and ₹51.42 lakh for 2005-06 for capitalization has not been approved by the Commission and the same may be rejected.
- (ii) The additional capital expenditure for ₹11.23 lakh for 2006-07, ₹15.23 lakh for 2007-08 and ₹15.41 lakh for 2008-09, included in the capital cost towards the share of Dam, may not be allowed, since proper details and justification in respect of the same has not been furnished.
- (iii) As regards the additional capital expenditure claimed for 2006-09 in respect of the different Transmission and Distribution Systems, the following has been submitted:
 - (a) The additional capital expenditure for 2007-08 as furnished by the petitioner towards Transmission A to N stage is in variance with the information furnished in Form-9 in respect of various transmission systems.
 - (b) The claims for additional capital expenditure of ₹2928.41 lakh for 2004-05 and ₹9746.58 lakh for 2005-06 in respect of Transmission A to N stage, has not been approved by the Commission and hence do not fall within the purview of the petition.
 - (c) As regards Transmission-Main Division, only those assets considered for additional capitalization may be allowed, subject to the deduction of the gross value of replaced assets in line with Note 2 of Regulation 53 of the 2004 Tariff Regulations.
 - (d) As regards, O&M Expenses claim on actuals for the thermal generating stations, the petitioner has failed to submit proper justification in respect of the claims and hence may not be allowed.
 - (e) The petitioner seeks relaxation of the provisions of the 2004 Regulations for consideration of O&M Expenses. If the prayer of the petitioner is allowed, there would be no sanctity to the norms specified by the Commission under the 2004 Regulations.
 - (f) In terms of Section 61 (d) of the Electricity Act, 2003, the interest of the consumers' need to be safeguarded while permitting the recovery of cost of electricity in reasonable manner. Tariff is a composite package and each package should not be tested individually on the grounds of unreasonableness. Power to relax may not be exercised to render the tariff unreasonable, but only to consider the technical objections, if any, which would not affect either parties to the proceedings.

(g) The Commission had already considered the claim of the petitioner towards the pension and gratuity fund, and the same has also been upheld by the Appellate Tribunal for Electricity *vide* its judgment dated 10.5.2010 in Appeal No. 146/2009. Hence, the claim of the petitioner may not be allowed.

4. The learned Sr. Counsel appearing for the consumer respondent, SAIL-BSL filed his submissions on the question of maintainability of the petition and submitted as under:-

(i) The petition is not maintainable, as no provision exists either in the Electricity Act, 2003 or in the 2004 Tariff Regulations of the Commission to consider the deferred elements of tariff. Hence, the petition is liable to be dismissed in the absence of the relevant provisions under the Act or the regulations.

(ii) The claim of the petitioner towards disallowance of additional capitalization for the period 2004-09 was considered by the Commission *vide* its order dated 6.8.2009 in Petition No. 66/2005 (on remand) and only the amounts of ₹1725.96 lakh for 2004-05 and ₹6252.05 lakh for 2005-06 respectively which were allowed by the Commission. This order has been upheld by the Appellate Tribunal for Electricity *vide* its judgment dated 10.5.2010.

(iv) The claim of the petitioner for additional capitalization in respect of those assets which were earlier disallowed by the Commission for want of proper justification and confirmed by the Tribunal may not be considered. The jurisdiction of the Commission having been exhausted and the Tribunal having upheld the same, the matter has attained finality and cannot be reopened by the petitioner. The petition is barred by the principle of *constructive resjudicata* and is not maintainable.

(v) Through this petition, the petitioner seeks to reopen the earlier order of the Commission and the Tribunal, which had attained finality, despite the fact that the matter is *sub-judice* before the Hon'ble Supreme Court, by way of Civil Appeals.

(v) Though the Code of Civil Procedure, 1908 is not strictly applicable to the proceedings before the Commission, the doctrine of *res-judicata* would be applicable in the present case.

(vi) The petition is liable to be dismissed with exemplary costs as it amounts to abuse of the process of court.

5. On a specific query by the Commission as to whether the consumer, SAIL-BSL is a license holder of a distribution license, the learned counsel clarified that it has been granted a distribution license. The Commission directed the consumer, SAIL-BSL to file the said details along with relevant particulars on affidavit.

6. The learned counsel for the petitioner clarified as under:-

(i) The petitioner has been granted the liberty by the Commission *vide* its order dated 6.8.2009 to claim the said amounts in accordance with law and the petitioner has confined its claim only to the deferred elements for additional capitalization in terms of the liberty granted by this Commission and, therefore, the principle of constructive *res-judicata* would not be applicable.

(iii) The petitioner has not raised any of the issues which are *sub-judice* before the Hon'ble Supreme Court.

(iv) The full details and justifications for relaxation of actual O&M expenses incurred and the actual operation norms with relaxation norms in terms of the 2004 Tariff Regulations, including the justification regarding pay-revision and pension, have been duly furnished for consideration of the Commission.

7. The consumer respondent, SAIL-BSL is directed to furnish the said particulars at paragraph 5 above, on or before 7.2.2012.

8. The matter shall be listed for hearing of the consumer respondent, BSAL on 16.2.2012.

By order of the Commission

Sd/-
(T. Rout)
Joint Chief (Law)