

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 279/2010

Subject: Determination of tariff of Mejia Extension Unit-4 during the period from 1.4.2006 to 31.3.2009.

Date of Hearing: 17.1.2012

Coram: Dr. Pramod Deo, Chairperson
Shri S. Jayaraman, Member

Petitioners: Damodar Valley Corporation (DVC), Kolkata

Respondents: Department of Energy, Government of West Bengal
Department of Energy, Government of Jharkhand
West Bengal State Electricity Distribution Co. Ltd.
Jharkhand State Electricity Board, Ranchi
Ministry of Power, Government of India

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
Shri Apoorva Mishra, Advocate, BSAL
Ms. Deepika Kolia, Advocate, BSAL
Shri Amarendra Sharan, Sr. Advocate, SAIL-BSL
Shri Rajeev Shankar Dwivedi, Advocate, SAIL-BSL
Shri Rajeev Ranjan, Advocate, SAIL-BSL
Shri B.N.P Singh, SAIL-BSL

RECORD OF PROCEEDINGS

During the hearing, the learned Sr. Counsel for the respondent consumer SAIL-BSL, mainly submitted that the petition cannot be considered as Form-5B of the petition has not been filed in accordance with the provisions of Regulation 3(1) of the Central Electricity Regulatory Commission (Procedure for making of application for determination of tariff, publication of application and other related matters) Regulations, 2004. Referring to certain judgments of the Hon'ble Supreme Court, he submitted that *'If a statute provides a certain procedure, then such procedure has to be followed in the same manner as provided'*. The learned counsel further submitted that in terms of the principles of statutory interpretation, "If two expressions, ie 'may' and 'shall' are used in the same statute then the word 'shall' imposes an obligation or the exercise of that power is compulsory, whereas the word 'may' confers a discretionary

power". He submitted that the said regulation of the Commission which require the filing of Form-5B, has its own requirements and the same cannot be read or imported from the details in Form-9 of the petition and thus the petitioner has failed to comply with the directions contained in the said regulation. He reiterated that the jurisdiction of the Commission cannot be invoked unless and until the petitioner submits the information as per the formats prescribed by the Commission.

2. The learned counsel for the consumer, BSAL submitted as under:

- (a) Pursuant to Commission's order dated 8.12.2010, the petitioner has filed its amended tariff petition only on 22.12.2010, though the generating station was commissioned on 13.2.2005. Therefore, the petitioner is not entitled to claim any carrying cost.
- (b) The petition is not maintainable as it is impossible to verify the information in Form-5B the capital cost in Form-9 and additional capitalization since these is two different concepts. The petitioner should be directed to file Form-5B with all particulars and in default, the petition should be rejected. Even if a project is given on turnkey basis, other non-EPC work, construction and pre-commissioning expenses, overheads, (items 5, 6 and 8 of Form 5B) should be available.
- (c) On the issues of additional capitalization, depreciation, return on equity and interest on working capital, the petitioner has not responded to the objections made by this respondent in paragraphs 26 to 34, paragraphs 42, 43 and 58 to 60. Hence, the said submissions should be accepted.
- (d) It has been admitted by the petitioner that in Form No.6 at Page 17 of the amended petition that the entire capital cost, incurred by it was financed from its internal accruals as equity and no loan was taken for Mejia Unit-4. No submissions were made by the petitioner either in the original tariff petition or the amended petition or the additional affidavits filed on 14.12.2011 and 11.8.2011 respectively. Since, the petitioner has not taken any loan even at the corporate level towards construction at Mejia Unit-4 and has specified in Form-5B that Interest During Construction (IDC) or Financing Charges (FC) is not applicable, the petitioner is stopped from claiming IDC at such a belated stage.
- (e) The petitioner is entitled to O&M Expenses in accordance with the 2004 Tariff regulations for 2004-2005 which is to be escalated by 4% per year. All other excess claims should be disallowed. Certain share of corporate level expenses has already been accounted for in the earlier tariff order dated 6.8.2009 and the same, if allowed would amount to double allowance.
- (f) DVC in the footnote to its balance sheet for 2008-09 has submitted that 40% of the arrear pay on account of the sixth Pay Commission was payable during 2008-09 and the balance 60% during 2009-10. Since, the 60% of pay arrears is payable during 2009-10, the same is outside the purview of the present petition. Hence, only 40% of the said claim, subject to prudence check, should be considered.

- (g) The submissions of the petitioner as regards Pension and Gratuity fund are incorrect. From the balance sheet of DVC in respect of Mejia Unit-4 as on 31.3.2006, it is noticed that there were 39 employees only. The present generating unit was commissioned on 13.2.2005 and hence the provision for gratuity (before 5 years) and pension (before 10 years) do not arise. The Commission may exercise prudence check, after a complete copy of actuarial valuation report is filed by the petitioner.
- (h) The Commission may allow interest on working capital at the prevailing short term prime lending rate of State Bank of India as on 1.4.2005, since Mejia Unit-4 was declared under commercial operation on 13.2.2005. This issue has not responded to by the petitioner in its written submissions.
- (i) The Hon'ble Commission vide its letter dated 8.12.2010 had directed the petitioner to modify its petition for determination of tariff for Mejia Unit-4 from the date of commercial operation and in compliance, the petitioner has filed its additional submission on 23.12.2010, wherein the tariff formats for the period 2004-09 were filed. Hence, the contention of the petitioner that tariff is to be determined for the period from 1.4.2006 to 31.3.2009 is contrary to the directives of the Commission. In case no relaxation is sought for by the petitioner, then it needs to be explained as to why actual values have been inserted instead of normative values.
- (j) The Commission may exercise stringent prudence check on the filings/ information submitted by the petitioner, prior to the determination of tariff.

3. The learned counsel for the respondent, JSEB submitted as under:

- (a) There is cost over-run involved in the project as much as in the break up of the capital cost for Mejia Unit-4, there is variation in the total capital cost (including IDC & FC) and the total capital cost (excluding IDC & FC), which was not allowed by CEA while granting the Techno-Economic appraisal of the project.
- (b) There is also time over-run involved in the project, as the schedule for completion was 30 months from the 'zero date of contract' and the 'zero date' was to be reckoned from the 'date of issuance of the letter of acceptance' which was 26.3.2002. As the project was delayed, the claimed for liquidated damages by the petitioner may be indicated in the petition. Any amount that has been recovered as 'liquidated damages' may be considered towards reduction of the capital cost of the project.
- (c) The petitioner has adopted a notional debt-equity ratio of 70:30 for the purpose of calculation of tariff for Mejia Unit-4. It is observed from Form - 13, that the petitioner has taken the actual gross loan of ₹770.95 crore during the year 2004-2005 for the project, whereas the capital cost of the project as on 31.3.2005 was only ₹700.51 crore. Thus, the entire capital cost of the project has been financed through debt and no equity was actually

deployed by the petitioner for the project. Hence, the Commission may consider 100% debt and no equity for the project.

- (d) In terms of Section 61(d) of the Electricity Act, 2003, it is for the petitioner to demonstrate that tariff as a whole claimed by it is reasonable.
- (e) The prayer of the petitioner to allow O&M expenses by relaxing the provisions of the regulations by exercise of power under Regulation 13 of the 2004 Tariff Regulations, if allowed, would result in an unreasonable benefit to the petitioner. Hence, the same may be ejected.

4. In response to the above, the learned counsel for the petitioner, clarified as under:

- (a) The petitioner in its petition has clearly indicated that the EPC contract was given to M/s BHEL on turnkey basis and in a turnkey contract, where consolidated payment (as a package) is made, the increase or decrease in the prices/costs of the sub-items would have no impact on the consolidated package price. Therefore, the break up of various sub-items in Form-5B in a detailed manner is of no relevance. However, as the detailed break-up of items were called for, the details of the break up of items has been given in Page 20 to 21 (Items 1 to 71) in Form-9 filed on 23.12.2010. These details were inadvertently submitted in Form-9, instead of in Form-5B. Further, the petitioner has also given all the relevant values in Form-5D of the amended petition which is the relevant form for generators executing generating projects on turnkey basis. Therefore, all the particulars have been submitted for the prudence check of the Commission.
- (b) As regards time and cost overrun, the amount of ₹723.704 crore does not include IDC and FC and the capital cost is ₹700 crore as on the date of the commercial operation (without IDC and FC). The petitioner is entitled to incur further expenditure of ₹723 crore as per approval of the CEA, in accordance with the 2004 Tariff Regulations and the same is subject to prudence check. Further, the delay of one month and 18 days as shown in Form-5B is on account of various other reasons relating to the multiple contractors/agencies involved in the work and the petitioner has not claimed any remedy for the delay in execution/completion of such works.
- (c) The petitioner has claimed O&M expenses in accordance with the 2004 Tariff Regulations based on the judgment of Hon'ble Appellate Tribunal which had interpreted the provisions of the DVC Act, 1948. The petitioner is entitled to claim O&M expenses on subsidiary activities, on common offices. The petitioner has claimed arrears on account of pay revision consequent to the 6th Pay Commission recommendations.
- (d) As regards pension and gratuity, the petitioner has claimed the balance amount, which the Commission had apportioned for Mejia Unit-4.

- (e) There contention of the respondents/consumers that the entire project was funded by equity deserves no merit. The weighted average interest which the Commission had determined in accordance with the 2004 Tariff Regulations in respect of the actual loan taken, has been applied to the notional loan. Further, no amount has been borrowed for the capital cost in respect of Mejia Unit-4 as the borrowing was made at the corporate level which is apportioned for many other purposes.
 - (f) The Station Heat Rate claimed for the years 2006-2007, 2007-08 and 2008-09 is strictly as per the 2004 Tariff Regulations, as could be observed from the details filed in the amended petition.
 - (g) The petition has been filed in terms of the 2004 Tariff Regulations and the directions of the Commission and the same may be considered for determination of tariff.
5. The Commission after hearing the parties, reserved orders in the petition.

By Order of the Commission

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