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**JCADVC/CERC/JULY/01/2023-24** **Date : 31.07.2023**

To,
The Secretary,
Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi- 110001

**Ref: Approach Paper on the Terms and Conditions of Tariff Regulations for the Tariff period 1.4.2024 to 31.3.2029.**

**Sub: Filing of Comments/ Suggestions on the Approach Paper on Terms and Conditions of Tariff Regulations for the Tariff Period 1.4.2024 to 31.3.2029.**

**Sir,**

With respect to above subjected matter, the Association of DVC HT Consumers of Jharkhand (JCADVC) is filing the Comments/ Suggestions on the Approach Paper on Terms and Conditions of Tariff Regulations for the Tariff Period 1.4.2024 to 31.3.2029 notified by Hon'ble CERC by Public Notice dated 26.05.2023 read with Addendum dated 03.07.2023.

JCADVC which represents the interests of Industrial consumers of Jharkhand in the command area of DVC requests Hon'ble CERC to kindly consider the comments attached hereto and allow it to participate and make additional submission and produce additional details and documentations during the course of formulation of Tariff Regulations for FY 2024-29 period, in the interest of justice and equity.

Thanking you

Yours faithfully
for **Association of DVC HT Consumers of Jharkhand (JCADVC)**

**Joint Secretary**
**(Pramod Agarwal)**

**Enclosures:** 3 hard copy + 1 soft copy (via email)

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# Comments on CERC Approach Paper on Tariff Regulations for FY 2024-29 Control period

Central Electricity Regulatory Commission (CERC) by way of Notification No. No. L-1/268/2022/CERC has issued Approach Paper on Terms and Conditions of Tariff Regulations for Tariff period 1.4.2024 to 31.3.2029 (Approach Paper). Under powers conferred under Section 178 of the Electricity Act, 2003 (36 of 2003) read with Section 61 thereof, Central Electricity Regulatory Commission is required to notify Tariff Regulations only after carrying out the due public consultation process. The Approach Paper has been issued to initiate discussions on various aspects of tariff determination and soliciting inputs of the stakeholders. With reference to the above notification, CERC dated 03.07.2023 has also issued an Addendum to the Approach Paper.

Association of DVC HT Consumers of Jharkhand (hereinafter referred to as the 'Objector' or 'JCADVC' or 'Respondent') being the association of industries, represents the interest of member industrial houses receiving power from Damodar Valley Corporation in Jharkhand.

Furthermore, JCADVC was incorporated/ formed on 26.02.2010 and registered as a consumer association in the name of "Association of DVC HT Consumers of Jharkhand" with the Central Electricity Regulatory Commission vide letter No. 2/7(22)/2009-Policy/CERC dated 26.02.2013. The Objector Association has been vocal with regard to the developments in the areas of Generating and Transmission tariffs approved/ adopted by CERC, framing of Regulations, etc.

JCADVC has examined the Approach Paper, and it submits the detailed comments/ suggestions/ objections to the Approach paper keeping in mind the key macroeconomic indicators along with issues and challenges that the power sector at large is exposed to.

**1. Proposed Clause - General:**

*2.4 ….Key aspects have been considered while preparing this Approach Paper*

*1) Attracting fresh Investments to meet the growing demand.*

*2) Preserving and augmenting existing capacities – Incentivising life extension, R&M, and efficient old generating stations.*

*3) Providing the necessary push so that the same encourages private investments through Assured Returns, Mitigation of Risk Perception and Regulatory Certainty.*

*4) De-risking construction - Removal of current Bottlenecks faced during project execution, especially for Hydro Stations.*

*5) Incentivising efficient plant operations and sustainable development.*

**Comments:**

One of the key aspects that has been considered by CERC in this Approach Paper is to maximize the potential of existing generation capability within the country and further an effort has been put up to ensure 24x7 power supply at affordable rates to end consumers, which is in concurrence with the ethos of the Electricity Act 2003.

Lately, due to various extraneous factors which were beyond the control of the Generating company, the Power purchase cost to the beneficiaries has become exorbitantly high. Hence, an attempt has been made by CERC through this approach paper to optimize the cost of power and at the same time incentivizing efficient operations and sustainable development.

**2. Proposed Clause - General:**

*2.5 ….However, it is imperative that the focus be on efficient plant operations; and norms for old as well as new generating stations, need to be evaluated.*

*The objective of moving towards sustainable generation mix can be achieved by incentivising generation with a lower carbon footprint, such as hydro generating stations, while also incentivising efficient operations of thermal generating stations including gas-based power plants*

**Comments:**

It is submitted that gas based stations are currently not operational due to its high cost of fuel. Going ahead, it seems difficult for gas prices to drop drastically, at least for the next Control Period. Keeping this thing in mind, the focus for incentivizing the power stations can be more on Hydro Stations than gas generating stations. Due to high fuel cost, there is very less that can be done for these stations to operate. Hence, gas stations can be used only for Ancillary services till such time the gas prices are way above normal. If there is reduction seen in the prices in the coming future, CERC may come up with an amendment in the Regulations to incentivize and promote gas based plants in the Country.

DVC for its retail business meets more than 80% of its power requirements from its own generating stations. To garner efficient operations from DVC's gencos at a sustainable cost, the operational norms for the plants operating at relaxed norms must be revisited so as to dis-incentivize the unsustainable and non-economical generation.

3. **Proposed Clause – General:**

Further, it can be argued that increasing variability in demand requires more flexibility in generation with frequent ramp up and ramp down requirements, which may lead to degradation of operational norms, and therefore such an impact needs to be considered while determining the norms.

It is therefore important that appropriate mechanisms be provided so that not only the norms can be made more efficient, but the generating companies are also incentivized to generate economically without compromising on regulatory certainty

**Comments:**

It is submitted that the sole purpose of the Approach Paper shall not be to incentivize the generating companies so that they run efficiently. It shall also focus on penalty mechanism for generators so that they can be penalize as and when performance parameters are not met. A two pronged penalty mechanism may be devised with stringent penal norms to newer plants and less stringent norms to older plants in the Regulations so that generating companies are kept on their toes to perform and operate in a sustainable and efficient manner.

It is submitted that the focus shall be more on improving PLFs and generation from the existing and upcoming capacity to meet the overall demand of the Country.

4. **Proposed Clause - General:**

It is also observed that due to the increasing number of assets whose tariff needs to be determined under the Regulated Tariff Mechanism (RTM), the tariff determination process has become complex and cumbersome.

Further, considering the future growth that is required to sustain the economy, the tariff determination process is required to be simplified and aligned with future requirements. Therefore, simplification of the tariff determination process is the core idea that shall drive the terms and conditions of tariff determination for the period FY 2024-25 to FY 2028-29.

**Comments:**

It is a welcome move to simplify the Tariff mechanism in the next Control Period so that investors and consumers both have a clarity of the expected tariffs and regulatory uncertainty can be mitigated.

However, considering that the Generation plants/ units whose Tariff is determined under Section 62 of the Act are muddled with so many distinct features that the Tariff determination based on a norm based approach would not fulfill the expectations of most generating companies. **Accordingly, it is expected**

**that the prevailing Tariff determination approach may be retailed by the Ld. CERC. However, the norm based approach for Tariff determination may be relooked upon in the next Control period.**

**5. Proposed Clause – Approach for Tariff determination:**

1. Existing projects

a) For existing generating stations/transmission systems that have been in operation for more than five years as on 31.03.2024, the capital cost as on 01.04.2024 is proposed to be considered for the determination of the tariff for FY 2024-25. Based on the norms to be specified in the CERC Tariff Regulations 2024, Annual Fixed Charges (AFC) for the first year of the next tariff period, i.e., FY 2024-25 are proposed to be determined. The AFC components for the base year (FY 2024-25) can be determined individually and then clubbed under the following two categories.

1) AFC excluding O&M expenses

2) O&M expenses

Once the above two major components of AFC are determined for FY 2024-25 (Base Year), the above two components for the rest of the years of the tariff period shall be determined for the project based on specified indexation.

b) The indexation specified can be with regard to the previous year, i.e., AFC component as computed for the N th year/AFC component as computed for the N-1 th year.

c) Post expiry of each tariff period, the Commission shall call upon relevant data (on weighted average rate of interest and Interest on Working Capital, Working Capital) and revise only the indexation factor pertaining to "AFC excluding O&M component" approved at the time of tariff determination for each Project for each year. There shall be no revision to the indexation with regard to O&M expenses pertaining to the past tariff period.

d) Through the same exercise, the Commission can also specify the indexation factor, for the above two categories for the next tariff period (2029-2034).

e) The Commission may issue a combined Order specifying the station wise revised indexation factor and based on the revised indexation of the past tariff period, generating station or transmission licensees can refund/recover the differential amount as done presently.

f) Further, in case any additional capitalization is incurred or is required, the petitioner may file a separate petition seeking approval of capital expenditure, and once such capital expenditure is allowed, the variation on account of additional capitalization on the AFC can be serviced by first computing the impact on the AFC and then adjusting the same through the same indexation mechanism as specified above. Such an adjustment can be carried out from the date of capitalization of such additional capitalization. The various possible options of allowing additional capitalization post COD have been discussed in detail in Section 4 of this Approach Paper.

g) For future tariff periods, the AFC of the existing projects, including servicing of additional capitalization shall continue to be governed as per the CERC Tariff Regulations, 2024.

h) Energy Charges are already allowed based on normative performance parameters and actual fuel costs and are proposed to be continued.

**Comments:**

Based on the nature of expenses, it is a wise move to bifurcate the AFC parameters to two components namely:

- AFC excluding O&M expenses
- O&M expenses

It is submitted that the indexation should be allowed based on the benchmarking study for both the parameters depending upon the various factors at play like market conditions, etc. For e.g. O&M expenses can be allowed to continue with the increase in CPI and WPI indices.

**Likewise, the other component may also be escalated based on the benchmarking study comprising of all the generating stations (Section 62 and Section 63) in the country.**

## 6. Proposed Clause – R&M:

In view of the inherent benefits of undertaking R&M as against going for fresh capital investment, the current provisions may be continued. Further, utilities that opt for a special allowance for the first year of the tariff period shall have to continue with the same for the rest of the tariff period. Comments and suggestions are sought from stakeholders on continuation of the existing provisions and on the above suggestion of continuing with Special Allowance, if opted at the beginning of the tariff period for the rest of the tariff period.

**Comments:**

It is submitted that CERC needs to conduct a study of the R&M activities that have carried out by generators in the past and the map the benefits derived from them. If it is evident that R&M activities have really helped en-masse reaping benefits from generating companies, then CERC may continue to keep such provisions. It is therefore necessary for CERC to come up with relevant data for decision making as to whether or not R&M activities are to be kept in the new Regulations.

**It is submitted that R&M is an additional burden to the beneficiary and therefore it is necessary to ascertain that such activities are done in the benefit of the consumers. Cost benefit analysis may be done of all R&M activities done in the past 5-10 years.**

## 7. Proposed Clause – Forest Clearance:

In view of the same, delays on account of forest clearances can also be considered for inclusion as uncontrollable factor provided that such delays are not attributable to the generating company or the transmission licensee. Comments and suggestions are sought from stakeholders on continued inclusion of delay on account of land acquisition as an uncontrollable factor and on the further inclusion of delay on account of forest clearances as an uncontrollable factor.

**Comments:**

Provided that Forest clearance is in the hands of the forest department does not make it as an uncontrollable factor. Generators/Transmission companies needs to ascertain before taking up a project that whether a forest clearance can be sought for a particular area of not. If there is no chance of getting a forest clearance, then delay in getting a forest clearance cannot be accounted as uncontrollable factor.

Further, enough forest clearances have been sought from developers in the past and therefore developers are aware of the tentative time which is taken to achieve a forest clearance and such time can be accounted for in the commissioning of the project rather than claiming as an uncontrollable factor.

It is therefore submitted that only those factors that are beyond everyone's control may be allowed as uncontrollable factors.

**8. Proposed Clause – Additional Capitalization**

For generating stations that have already crossed the cut-off date as on 31.03.2024, the additional capitalization for such generating stations can be considered as per the following.

1. Thermal Generating Stations – Based on the analysis of actual additional capitalization incurred by such generating stations in the past (15-20 years) and co-relating such expenses to different unit sizes such as 200/210 MW series, 500/660 MW Series and different vintages (5-10, 10-15, 15-20, 20-25 years post COD), a special compensation in the form of yearly allowance may be allowed based on unit sizes and vintage, which shall not be subject to any true up and shall not be required to be capitalized.

2. Hydro Generating Stations – As each hydro generating station is unique owing to various factors, additional capitalization of such generating stations may not be

benchmarked as can be done for thermal generating stations. However, in the case of a specific hydro generating station, the additional capitalisation is recurring in nature, and hence station wise normative additional capitalisation may be approved in the form of special compensation which shall not be subject to any true up and shall not be required to be capitalised

3. While determining such special compensation for a thermal or hydro generating station, costs incurred towards works presently covered under Regulation 26 to Regulation 29, wherever applicable, may not be included as these expenses may be allowed separately.

4. Further, any items that cost below Rs. 20 lakhs that may be in the nature of minor items such as tools and tackles, and those pertaining to Capital Spares may be allowed only as part of O&M expenses and may not be considered as part of additional capitalisation in case of both thermal and hydro generating stations.

5. Further, discharge of liabilities of works already admitted by the Commission as on 31.03.2024 may be allowed as and when such liability is discharged

**Comments:**

It is submitted that special compensation may be allowed only if the same is going to be beneficial to beneficiaries. Therefore, a Cost benefit analysis should be conducted to evaluate the admissibility of the special compensation to generator.

Furthermore, on completion of the activity, true-up shall be done so as to assess how much benefit was actually achieved against the estimated before and accordingly adjustment in cost/tariff shall be passed on to the consumers. Incentive/penalty mechanism should also be put in place for such additional capitalization.

**9. Proposed Clause - Capital Spares**

Therefore, if the same can be projected with some degree of predictability, the same may be allowed on a normative basis along with O&M expenses. Alternatively, instead of including all such capital spares as part of normative O&M expenses, recurring and low value spares below Rs. 20 lakh may be made part of normative O&M expenses, while for capital spares with a value in excess of Rs. 20 lakh, utilities may submit the same on a case to case basis for reimbursement with appropriate justification for the Commission's consideration.

Comments and suggestion are sought from stakeholders on the above suggested approach and alternatives, if any, to streamline the approval process for spares.

**Comments:**

Capital spares can be allowed on normative basis based on standard quantum of spares that are required by any generating unit. The norms can be separate for different size of the unit and fuel used by the unit for generation.

The limit of 20 lakhs may be very high for a particular unit and may be very less of another unit. Hence, general limit for capital spares may not be specified for all plants, instead the limit be specified based on the unit size of the generating station for which Tariff determination exercise is undertaken.

**10. Proposed Clause – Rate of Interest on Loan**

To simplify the approval of interest on loans, the weighted average actual rate of interest of the generating company or transmission licensee may be considered instead of project specific interest on loans. Further, the cost of hedging related to foreign loans be allowed on an actual basis, without allowing any actual FERV

Comments and suggestions are sought from stakeholders on the above suggestions and alternatives, including in respect of treatment of FERV/cost of hedging.

**Comments:**

It is submitted that the Interest rates may not be linked to the actual weighted average interest rate of the generating company/transmission company. **Actual weighted average interest rate of the generating company/transmission company also embeds the inefficiencies of the Generating company in picture**

**and therefore the normative interest rate may be considered by linking it with the prevailing MCLR rate in the market.**

**11. Proposed Clause – Rate of Return on Equity**

The formula for computing the return on equity based on CAPM is as under:

$Re = Rf + \beta \times (Rm - Rf)$

Where: Rf = risk-free rate

β = equity beta Rm-

Rf = equity market risk premium

There are different ways of estimating the above parameters. However, the following approaches are proposed for the estimation of the above parameters:

Keeping in view the international approaches to regulated rates of return, the average 10-year GOI securities rate over a one-year horizon may be considered a risk free rate

Keeping in view the international approaches, daily data on the SENSEX and BSE Power Index for the latest 5 years may be considered for equity beta estimation

Keeping in view the international approaches, the MRP reflecting the historical returns for a period of 30-years or beyond instead of the existing practice of considering 20 years may be considered for MRP estimation. Alternatively, MRP may be computed using any other method, including the Survey Method.

**Comments:**

It is submitted that generation and transmission business is a regulated business and therefore the returns in this business shall also be regulated. The approach of CERC to determine rate of RoE linked to the capital asset pricing model is appropriate. However, the rate shall not be completely market driven and may be allowed at a discount rate at which the business is operated in the market.

Further, it is submitted that the market indices may not reflect the correct picture as the companies with other business are also participating in the market. Therefore, CERC may derive RoE based on the approach given in the approach paper but ultimate provide a discount on the derived number so that the Regulated tariff mechanism system is intact.

Furthermore, it is essential that the Equity Beta is computed by assigning proper weights to SENSEX and Power Markets Index (maybe 50:50) and the same must be depicted in the Statement of Reasons to the upcoming Tariff Regulations 2024.

**12. Proposed Clause – Useful Life extension**

The useful life of coal based thermal generating stations and transmission sub-stations may be increased to 35 years from the current specified useful life of 25 years. As the need for higher repairs will still be

required, the current dispensation of allowing a special allowance or provision of R&M may be continued after 25 years.

**Comments:**

Special Dispensation may be allowed after 25 years' subject to Cost benefit analysis and prudence check. Also True-up of this special dispensation may also be done so as to account for any benefit/ loss that has accrued and the same be appropriated in the Tariff.

**13. Proposed Clause - NAPAF**

In view of the above, the existing norms of NAPAF may need review by considering past years' PAF, the procurement of coal from alternate sources, other than designated fuel supply agreements, changes in hydrology, etc.

Further, it is observed that current Regulations, although specifies the mechanism for computing PAF of storage based hydro generating stations, do not specify a methodology for computing PAF of Run-of River (ROR) Plants. There is a need to specify a mechanism for the same, and based on such a specified mechanism, the current NAPAF value may need reconsideration.

One option can be to re-introduce the methodology that was being adopted in the CERC Tariff Regulations, 2004. Based on Regulation XI (b) under Chapter 3 of the Tariff Regulations, 2004, the methodology can be specified as follows

In case of purely run-of-river power stations, declared capacity means the ex-bus capacity in MW expected to be available from the generating station during the day (all blocks), as declared by the generating station, taking into account the availability of water, optimum use of water and availability of machines;

Comments and suggestions are sought from stakeholders on the above suggested option and any other methodology that can be considered for the computation of plant availability for ROR based hydro generating plants

**Comments:**

It is submitted that ensuring coal availability is the responsibility of the Generator. MoP has also come up with the guidelines for keeping minimum coal stock for efficient operation of the plant. PPAs also have provision for alternate fuel sources when primary sources are not available. Therefore, it is submitted that non-availability of coal should not be termed as Force Majeure event and has to be seen on a case to case basis. Therefore, actual PAF shall be calculated without excluding forced shutdown of plant due to non-availability of coal.

Energy sector has evolved over the last 20 years from the enactment of the Act. It is high time that clear roles and responsibilities are defined for each of the stakeholder so that the sector operates in an efficient manner.

Merely terming an event as Force Majeure or Change in Law just because the Fuel supply is affected by extraneous events does not elicit the event being beyond the control of the generating company and transmission company. Such contention has to is not acceptable and needs case to case evaluation.

**Generators cannot always get away with the reasons for non-availability of fuel each time, they are guided by terms of the PPA and FSA (if applicable). Stakeholders in the power sector needs to ascertain some responsibility rather than merely claiming compensation for their inability to deliver.**

### 14. Proposed Clause – Operational parameters

1. Station Heat Rate – To be approved on a case-to-case basis.

2. Auxiliary Energy Consumption – 10%

3. Secondary Fuel Oil Consumption – 2ml/kWh

4. NAPAF – 75% (First three years from COD) and 80% thereafter

In view of no compelling reasons to amend the same, the existing norms for such plants may be continued in the next tariff period.

Comments and suggestions are sought from stakeholders on the above proposal.

**Comments:**

It is submitted that CERC shall do away with the mechanism of determining norm on case to case basis and therefore once a norm is defined for particular set of units, the same shall be applicable to all units. Bifurcation can be made on the basis of the age of the units. Age beyond 25 years can have separate norms than the one with less than 25 years.

**Hence, SHR, Aux, SFOC and NAPAF shall be determined through norms and no relaxation may be provided in any case. Similarly, more relaxed norms may be decided for vintage units without any relaxation.**

### 15. Proposed Clause – Decommissioning and disposal of assets

One approach could be that the net profit/loss post decommissioning and disposal of assets may be adjusted in one go from the beneficiaries, duly factoring in the un-recovered depreciation admissible under the Tariff Regulations.

In view of the above, comments and suggestions are sought from stakeholders on the possible approaches to recover or refund the impact of decommissioning costs in case the generating stations/transmission systems are decommissioned before the completion of their useful lives, if such decommissioning is done in compliance of a statutory order or due to technological obsolescence duly approved by RPC.

**Comments:**

It is submitted that net profit/loss post decommissioning and disposal of assets may not be adjusted from the beneficiaries. As the de-commissioning is being done due to technological obsolescence duly approved by RPC, **any unrecovered cost due to sudden de-commissioning may not be adjusted in the tariff of beneficiaries as it shall be borne by the generating company**.

**16. Funds under section 40 of the Damodar Valley Corporation Act, 1948**

DVC for its Generating stations has been claiming Contribution towards Sinking fund in addition to the AFC items allowable as per the prevailing CERC Tariff regulations 2019. Furthermore, Central Commission has been periodically allowing Contribution to Sinking fund to DVC Gencos since the first Control Period FY 2004-09.

It is humbly mentioned that CERC Tariff Regulations 2014 and 2019 provides for the Special provisions relating to Damodar Valley Corporation (DVC) under Regulation 53 and Regulation 72 respectively. The relevant extracts of the said Regulations is reproduced hereunder:

> *"**72. Special Provisions relating to Damodar Valley Corporation:** (1) Subject to clause (2), this Regulation shall apply to determination of tariff of the projects owned by Damodar Valley Corporation (DVC).*
>
> *(2) The following special provisions shall apply for determination of tariff of the projects owned by DVC:*
>
> > *(i) Capital Cost: The expenditure allocated to the object 'power', in terms of sections 32 and 33 of the Damodar Valley Corporation Act, 1948, to the extent of its apportionment to generation and inter-state transmission, shall form the basis of capital cost for the purpose of determination of tariff:*
> >
> > *Provided that the capital expenditure incurred on head office, regional offices, administrative and technical centers of DVC, after due prudence check, shall also form part of the capital cost.*
> >
> > *(ii) Debt Equity Ratio: The debt equity ratio of all projects of DVC commissioned prior to 01.01.1992 shall be 50:50 and that of the projects commissioned thereafter shall be 70:30.*
> >
> > *(iii) Depreciation: The depreciation rate stipulated by the Comptroller and Auditor General of India in terms of section 40 of the Damodar Valley Corporation Act, 1948 shall be applied for computation of depreciation of projects of DVC.*
> >
> > ***(iv) Funds under section 40 of the Damodar Valley Corporation Act, 1948: The Fund(s) established in terms of section 40 of the Damodar Valley Corporation Act, 1948 shall be considered as items of expenditure to be recovered through tariff."***

The Consumer Association has raised the issue with respect to disallowance of Contribution to Sinking Find at various forums.

Vide Order dated 03.07.2023 in Petition No. 573/GT/2020 in respect of Durgapur Steel Thermal Power Plant, CERC has allowed Sinking Fund Contribution as an 'Additional Claim' to DVC. At the outset, it is pertinent to state the relevant background facts:

- DVC raised funds by issuing Bonds in open market from time to time for undertaking capital expenditure. Such Bonds carry a coupon rate of interest which is paid periodically to the Bond subscribers. The 'principal amount' raised from Bond subscribers is repaid at the time of

redemption. In order to have a sufficient corpus at the time of redemption, DVC transfers/ contributes a certain amount annually to a fund: 'Sinking Fund, for Redemption of Bonds. Such contribution is allowed as a pass-through in tariff. It may be relevant to mention that allocation/ transfer of a part of its revenue to the sinking fund is not treated as an expenditure of DVC for income tax purposes.

- **Double Allowance**: It is JACDVC's case that there is 'Double Allowance' of the principal Bonds' amount repayable to subscribers at the time of redemption on account of the following two tariff elements claimed by DVC as pass-through in tariff:
    - Contribution to Sinking Fund for repayment of Bonds' amount to subscribers at the time of redemption;
    - Depreciation on capital assets created by utilizing the Bonds' amount.

  By way of instant submission, JCADVC wishes to state that since DVC is being allowed Contribution to sinking fund; the admissibility of Depreciation and Interest Expenses needs to be revisited.

- **Loan Repayment through Depreciation**: Ld. CERC in the similar Orders as above failed to appreciate that the purpose of allowing a 'non-cash' cost item hike Depreciation as a pass-through in tariff is to provide the Generator with funds to repay loan (actual or normative). Accordingly, depreciation had been deemed as loan repayment in the Tariff regulation of the Ld. CERC. Despite, CERC has proceeded to allow both Sinking Fund Contribution as well as Depreciation (on assets funded through Bonds). Under the cost-plus tariff regime introduced by the Electricity Act 2003 - which permits only 'reasonable cost of electricity to be allowed as a pass-through in tariff - any double allowance of a cost element is manifestly unreasonable, arbitrary and contrary to Section 61 tariff principles.
- In line with Section 61 tariff principles, the Tariff Regulations notified by CERC for different control periods have consistently provided for repayment of capital by a generating company through the mechanism of Depreciation allowed as a pass-through in tariff and recovered as part of Annual Fixed Charges. In this regard, the following SOR to Tariff Regulations 2009 may kindly be noted:

  > *"16.3 The word 'depreciation ' is interpreted differently by different stakeholders and professionals. From accounting point of view, in line with the Accounting standard issued by the Institute of Chartered Accountants of India, 'Depreciation' is measure of the wearing out, consumption or other loss of value of a depreciable asset arising from use, efflux of time or obsolescence through technology and market changes'. It reflects annual consumption of capital asset in use. From Investor's point of view, depreciation is a non-cash expense which reduces tax burden but generates internal cash for further investment. From engineering point of view, depreciation means decline in capability or loss of value in an asset over time of usage. From Economist's point of view, economic depreciation over a given period is the reduction in the remaining value of. the future services. Under certain circumstances, such as unanticipated increase in the price of the services generated by an asset, its value may increase rather than decline. Depreciation is then negative. So far as the Income Tax is concerned, it is designed in the fiscal policy of the Government to give incentives to certain category of entities for furtherance of investments.*

***Regulators have two view points on depreciation. One view is depreciation is the refund of capital subscribed, and the other view is depreciation is a constant charge against an asset to create a fund for its replacement***

*16.4 While determining the tariff, the Regulators have to ensure that: (i) capital is refunded to the investors over estimated life of assets, i.e. refund of capital; (ii) capital invested in the regulated business is allowed sufficient return so. that the investors find the business attractive enough to invest, i.e. return on investment; and (iii) reasonable amount of operation and maintenance expenses is allowed, i.e. reimbursement of O&M expenses. And one of the major components of capital deployed is loan.* ***As such it is important for the Commission to ensure availability of sufficient cash flow in the hands of the utilities to take care of the loan repayment obligation.*** *For the control period 2004-09, the Commission took care of this cash flow requirement by allowing AAD, in case normative depreciation amount is not sufficient to meet the loan repayment obligations.*

***16.8 ...Providing higher rate depreciation in initial period of project will give some comfort to the investors towards repayment of their loan****. At the same time it will reduce the interest burden of the consumers and tariff will be reduced once the loan is repaid on account of reduced depreciation available over the balance useful life of the plant.*

***16.12 ... However, in power sector the practice of considering depreciation towards the repayment of loan has been in vogue for quite sometime and has come to stay....***

*16.13 In a regulatory environment, the Commission has to protect the interest of the consumers while determining tariff and at the same time it is to be seen that the investors are having sufficient liquidity and revenue to meet their commercial commitment. Apart from paying regular dividend to the shareholders, the utilities should have sufficient liquidity to cater to the loan repayment obligation.* ***The Commission is aware of the burden of repayment of loan that will accrue over the initial years of the project life****. Linking depreciation to the useful life of the assets may not provide sufficient cash flow to the utilities to meet their loan repayment obligation. Normally, the projects are having a debt component of 50% to.70% and are repayable over a period of 12 years.* ***If higher depreciation is allowed over a period of initial 12 years, the debt repayment obligation can easily be met by the utilities.*** *Once the loans are repaid, the benefit of reduced tariff should go to the consumers.*

*16.14 Accordingly, the Commission feels that the loan repayment period be treated as 12 years for all normative loans and accordingly this repayment period of 12 years be linked to depreciation. For 12 years during which the loan capital would be refunded to the investors in the form of depreciation, the rate of depreciation shall be as specified in appendix-III of the regulation and thereafter the remaining depreciable value shall be spread over the balance useful life of the assets"*

- Proviso to Regulation 9(6) of Tariff Regulations, 2014: Consistent with the scheme sanctioning loan/ debt repayment through Depreciation, the proviso to Regulation 9(6) of the 2014 Regulations excludes capital assets funded through Government grants from calculation of Capital

Cost "for the purpose of computation of interest on loan, return on equity and depreciation". Since a generator does not have to repay the Government grant, it is only appropriate that Depreciation - which is meant for debt repayment — is not allowed on assets created through (non-repayable) grants. The relevant proviso to Regulation 9(6) of the CERC Tariff Regulations, 2014 is set out for ready reference:

> *“Provided that any grant received from the Central or State Government or any statutory body or authority for the execution of the project which does not carry any liability of repayment shall be excluded from the Capital Cost for the purpose of computation of interest on loan, return on equity and depreciation”*

- Similarly, under the 2019 Regulations, it is provided as follows:

> *“19. Capital Cost:*
>
> *(1) -(4)……………………….*
>
> *(5) The following shall be excluded from the capital cost of the existing and new projects:*
>
> *(a)to(d) ……………………….*
>
> *(e) Any grant received from the Central or State Government or any statutory body or authority for the execution of the project which does not carry any liability of repayment."*

Since there is no 'repayment obligation' in case of Government grant, the 2014 and 2019 Tariff Regulations have advisedly disallowed depreciation on assets funded through such grants. Such disallowance conforms to the twin objectives of permitting only reasonable cost as pass-through in tariff, and ensures protection of consumers' interest. Needless to add, allowance of depreciation without a corresponding repayment obligation would have been manifestly unreasonable and detrimental to. consumers' interest, apart from resulting in unjust enrichment of the Generator.

Given the above noted regulatory dispensation, it is submitted that in order to avoid 'Double Allowance' of loan repayment, it was imperative to ensure that DVC was not allowed any depreciation, on the assets created with funds raised by issuing Bonds as repayment of Bond is being, admittedly provided through Sinking Fund Contribution.

- **Sinking Fund is not an Additional Tariff Element**: For that the Ld. CERC has allowed 'Sinking Fund Contribution' as an additional/ special tariff element to DVC over and above what is allowable to other generating companies subject to its jurisdiction. There is no sanction in law for
allowance of any special/additional tariff element to DVC. It is JCADVC's case that like all other generators, DVC is entitled to allowance of loan repayment either through 'Depreciation' or 'Sinking Fund Contribution'.
The allowance of both 'Depreciation' and 'Sinking Fund Contribution' has resulted in double allowance of loan repayment. The impugned order has sanctioned such double allowance after selectively referring to the following:
    - Section 40 of DVC Act, 1948

• APTEL's Judgment dated 23T 1.2007 in Appeal Nos. 271, 272, 273, 275 of 2006 and 8 of 2007

• Supreme Court's Judgment in Bhaskar Shrachi Alloys Ltd. v. DVC in Civil Appeal No. • 971-973/2007 [2018) 8 SCC 281]

• APTEL's judgment dated 17.5.2019 in Maithan Alloys Ltd. v. CERC (Appeal No, 17/2014) and Batch.*"*

- It is submitted that neither Section 40 of the DVC Act nor any of the judgments can sanction a double allowance of a cost item (loan repayment) incurred' once. Such double, allowance would be manifestly contrary to Section 61 tariff principles and, therefore, cannot be countenanced in law by selectively referring to Section 40 and/ or judicial pronouncement. In the following submissions, JCADVC seeks to highlight the erroneous premise adopted by CERC for endorsing double allowance of Bonds' repayment.

- **Section 40 of DVC Act:** For that the Ld. CERC has failed to appreciate the meaning and scope of Section 40 of the DVC Act, 1948 in the context of the provisions of the Electricity Act, 2003. Section 40 of the DVC Act reads as follows:

  ***"40. Provision for depreciation and reserve and other funds***

  *1) The Corporation shall make provision for depreciation and for reserve and other funds at such rates and on such terms as may be specified by the Auditor-General of India in consultation with the Central Government.*

  *2) The net profit for the purposes of section 37 shall be determined after such provision has been made."*

  - Evidently, the above quoted Section 40 only requires DVC to "make provision for depreciation and for reserve and other funds " as per rates and terms decided by C&AG. Section 40(1) is in the nature of an obligation imposed on DVC by its parent statute. Further, sub-section (2) stipulates that only after making the said provisions, "net profit" for the purpose of Section 37 shall be determined.
  - There is nothing under the said provision to suggest that such provisions/ reserves/funds have to be allowed as an additional tariff element or even as a tariff element. In fact, Section 40 does not deal with electricity tariff at all.
  - Section 40 only lays down the manner in which the "net profit" of DVC shall be calculated for the 'sole' purpose of its distribution to the participating government in terms of Section 37, as and when DVC decides to distribute profits to them. Section 37 reads as follows:

  ***"37. Disposal of profits and deficit***

  *1) Subject to the provisions of sub-section (2) of section 40, the net profit, if any, attributable to each of the three main objects, namely, irrigation, power and flood control, shall be credited to the participating Governments in proportion to their respective shares in the total capital cost attributed to that object.*

  *2) The net deficit, if any, in respect of any of the objects shall be made good by the governments concerned in the proportion specified in sub-section (1)..."*

- By ensuring that the distributable "net profit" (for the purpose of Section 37) shall be calculated after making provisions for depreciation, reserves and funds as per directives of C&AG, the legislative intent to ensure that DVC keeps with it sufficient funds for the specified purposes before transferring any profit to the participating Governments. By incorporating such a mechanism in the parent statute, the Parliament intended to provide an additional measure of financial viability to DVC.

- The limited scope of Section 40 is further exemplified by the fact that for the purpose of its audited accounts, DVC's net profit is computed like that of any other company. Specifically, it may be pointed out that DVC does not book Sinking Fund contribution as an expense in its Profit & Loss Statement; as such contribution does not denote any expense, but merely an allocation of a certain amount from its revenues for a particular purpose, namely repayment of bonds at the time of their maturity. It may not be out of place to mention that Section 43 of the DVC Act expressly provides that DVC "shall be liable to pay any taxes on income levied by the Central Government in the same manner and to the same extent as a company"

- Furthermore, DVC appears to have never transferred the profits (or returned the capital) to the participating Governments and, therefore, Sections 37 and 40 of the DVC Act may have never been followed in practice. In this regard, .it may be useful to cite the following observation of this Hon'ble Tribunal in Judgment dated 23.11.2007;

  *“"A-14 The DVC Act provides for infusion of capital by the participating Governments and for payment of interest thereon.* ***The DVC Act does not categorize such capital as borrowings and there is no reference about repayment of such capital to the participating Governments****. It is difficult to assume a commercial organization running solely on borrowed funds. Lenders invariably prescribe for a margin money to be invested by the borrower also. In our opinion the capital infused by the participating Governments is in the nature of equity capital and for the purpose of determination of tariff, same would be eligible for return on equity, as may be permitted by the Tariff Regulations 2004.”*

- **APTEL's Judgment dated 23.11.2007**: For that the Ld. CERC has misconstrued the findings of this Hon'ble Tribunal in the judgment dated 23.11.2007, passed in Appeal No. 273/2006 & Batch. With respect to the said judgment, the following background facts may kindly be noted:
  - A batch of appeals were preferred from DVC's first tariff order dated 3.10.2006, passed by the Ld. CERC for FY 2006-09 in Petition No. 66/ 2005. In the said order, the Ld. CERC had allowed Depreciation at the rate notified under the applicable CERC Tariff Regulations, 2004. In other words, DVC was treated at par with other Generators with respect to applicable Depreciation rate.
  - In Appeal No. 273/ 2006, preferred by DVC from the tariff order dated 3.10.2006, DVC sought depreciation at the rate specified by C&AG under Section 40 of the DVC Act. It was DVC's contention that the C&AG notified rate of depreciation was higher than what was prescribed under the 2004 Regulations.
  - This Hon'ble Tribunal, vide Judgment dated 23.11.2007, was pleased to allow (higher) depreciation to DVC at rates specified by C&AG under Section 40 of DVC Act. It may be

noted that no other issue with respect to Depreciation (much less the issue of whether Depreciation on assets funded through Bonds amounts to Double Allowance of Bonds' repayment in the wake of Sinking Fund Contribution being separately allowed) was ever raised or decided by this Hon'ble Tribunal in the judgment dated 23.11.2007. The fact that only the issue of Depreciation Rate was involved in Appeal No. 273/ 2006 was also pointedly mentioned in Judgment dated 10.5.2010 passed by this Hon'ble Tribunal in Appeal No. 146/ 2009, which had been subsequently filed by DVC against revised tariff order dated 6.8.2009. In para 74 of the Judgment dated 10.5.2010, this Hon'ble Tribunal had pertinently observed that "In the earlier appeal, the only issue was the rate of Depreciation."

- The fact that this Hon'ble Tribunal was only examining the limited issue of whether DVC was entitled to Depreciation at rates prescribed under the 2004 Regulations or at rates specified by C&AG under Section 40 of DVC Act, is evident from the following paragraphs of APTEL's Judgment dated 23.11.2007:

  *"**F. Depreciation Rate***
  *F.l Section 40 of DVC Act provides for the Comptroller and Auditor General of India (C&AG) to prescribe depreciation, reserve and other funds' in consultation with the Central Government. The aforesaid provision neither quantifies nor limit the rate of depreciation to be allowed.*
  *F2. **The Appellant has claimed depreciation at rate prescribed by the C&AG** and submits that all along till the Electricity Act, 2003 came into effect, it has been factoring the prescribed depreciation rate In formulating the tariff. It is relevant to point out that the Act does not make any provision for factoring rate of depreciation in tariff determination. **Thus, in our opinion, the DVC Act insofar as the depreciation is concerned is not inconsistent with the Act and shall continue to apply to the corporation.***
  *F3. The depreciation, jn respect of useful life of a substantial portion of generation capacity of DVC being aged out and redeemed, leaves little or no impact on the tariff of such plants. However, the impact of depreciation on the Tariff of the balance generating capacity shall be significant as the rate of depreciation prescribed by the C&AG is higher than what is fixed by the Regulations, 2004. For the aforesaid reason, it is essential for the Central Commission to carryout reasonable assessment of the capital cost of each power plant individually at COD (if the authentication of approved cost is not available/traceable) and apply the prescribed rate of depreciation for each successive year since then to arrive at adjusted fixed cost for each plant, for consideration in tariff determination. The depreciation is to be allowed and computed only on aggregate sum of gross capital asset of each plant qualifying for the depreciation and not regardless of it.*
  *F4. **We, therefore, direct the Central Commission to adopt rate of depreciation as prescribed by C&AG for computation of tariff for the asset based** on the principle outlined above while keeping in view our remarks in respect of Debt-Equity ratio in para 112(A) above."*

- It needs to be emphasized that this Hon'ble Tribunal' allowed for Depreciation at the rates specified by C&AG under Section 40 of the DVC Act only because the same was not found to be inconsistent with the Electricity Act, 2003 and was, therefore, saved by virtue of the fourth proviso to Section 14 of the Electricity Act, 2003. The relevant extract from APTEL's judgment dated 23.11.2007 may kindly be noted:

  > *"10. In view of the aforesaid provision,* ***DVC has been authorized to make provision for depreciation and for reserve and other funds at such rates as fixed by the Auditor General of India*** *in consultation with the Central Government.* ***It needs to be noted that in the Act of 2003, there is no provision relating to depreciation. Therefore, Section 40 is not inconsistent with the Act of 2003.*** *As per Section 62 of the Act of 2003 read with fourth proviso to Section 14 thereof, the appropriate Commission is required to determine tariff in accordance with the provisions of the Act of 2003, which includes the provisions of the DVC Act that are not inconsistent therewith (Act of 2003). The CERC however, by framing Regulations created a conflict between Section 40 of the DVC Act and the Regulation 21(ii) of the Regulations.*
  >
  > *11. In case the Parliament, while enacting the Act of 2003, wanted the Rules and Regulations framed thereunder to prevail over provisions of the DVC Act which were inconsistent therewith, it would have expressly stated so.' That's, however, is not the case. The Parliament did not confer such a privilege to the Rules and Regulations framed under the Act of 2003 so as to nullify the statutory provisions of the DVC Act.* ***The operation of Section 40 and other provisions cannot be curtailed by Regulations framed by the CERC. Such of the Regulations which are restricting the operation of the provisions of the DVC Act that are not inconsistent with the provisions of the Act of 2003 must be ignored as the Regulations or Rules cannot prevail over the legislation****"*

- Notably, Section 40 of the DVC Act was held to be "not inconsistent with the Act of 2003" because the 2003 Act did not contain a "provision relating to depreciation". The lack of inconsistency and the consequential application of Section 40 was also, articulated in para 82 of APTEL's Judgment dated 23.11.2007 as follows:

  > *""82. The Second set of the provisions namely Sections 12(b), 30, 31, 34, 35, 37 to 42 and 44 of the DVC Act, referred to before are the ones* ***which can be read along with the (Electricity) Act without being inconsistent and repugnant to the Act and both can be given effect to****…."*

- The fact that on the issue of Depreciation, DVC's grievance was only confined to the 'Rate of Depreciation' is also borne out from the Grounds of Appeal raised by DVC before this Hon'ble Tribunal.
- In view of the above, it is submitted that the Ld. CERC has ignored the following aspects of this Hon'ble Tribunal's judgment of 23.11.2007:
  - The judgment dated 23.11.2007 only held that the Depreciation Rate specified by C&AG under Section 40 of the DVC Act would be considered for the purpose of DVC's tariff.

        - The issue of Double Allowance of Bonds' amount through i) Sinking Fund contribution and ii) Depreciation on assets funded through Bonds was neither raised nor considered by this Hon'ble Tribunal in the Judgment dated 23.11.2007.
        - The application of Section 40 of DVC Act was upheld only because there was found to be 'no inconsistency' with the Electricity Act, 2003 and, therefore, it was observed in para 82 of APTEL's judgment dated 23.11.2007 that Section 40 "can be read along with the (Electricity) Act without being inconsistent and repugnant to the Act and both can be given effect to
    - Having regard to the scope of this Hon'ble Tribunal's Judgment of 23.11.2007 (with respect to depreciation rate), it was imperative to ensure that Section 40 of the DVC Act was not given an interpretation which would bring it in conflict with the Electricity Act, 2003.
    - The Ld. CERC ought to have appreciated that the subject Double Allowance was in violation of Section 61 tariff principles and the same could not be saved by invoking Section 40 of DVC Act. More specifically, the Double Allowance entails recovery of a single cost element (namely repayment of Bonds) twice over and, therefore, strikes at the root of Section 61 principles which, inter alia, mandate -
        - Reasonable cost of electricity to be allowed in tariff.
        - Tariff to reflect cost of supply of electricity
        - Protection of consumers' interest
    - The prevention of Double Allowance of Bonds' amount could alone ensure conformity of Section 40 with Section 61 of the Electricity Act, 2003. Section 40 could not have been given an interpretation which violates Section 61 (or any other provision of Electricity Act), as the pre-condition for application of Section 40 was that it can be "read along with the Electricity Act without being inconsistent and repugnant" to it.
    - It is noteworthy than in the revised tariff order dated 6.8.2009, the Ld. CERC allowed Sinking Fund contribution only because the same had been allowed by this Hon'ble Tribunal vide judgment dated 23.11.2007 (without noticing that the corresponding expenditure i.e. bonds repayment was already being met through depreciation). In fact, the Ld. CERC pertinently observed in the Order dated 6.8.2009 as follows:

        *"76. It is noticed from the books of accounts of the petitioner that the sinking fund has been created out of appropriation of profits and has not been considered as expenditure. However, in line with the decision of the Appellate Tribunal, tariff has been calculated considering sinking fund as expenditure."*

    - It is trite that a cost item can be allowed as a pass-through only if the consumers receive some benefit therefrom. Since the cost item representing repayment of debt (through Bonds) taken for benefit of consumers is being met through Sinking Fund contribution, there is no corresponding cost item which justifies the allowance of Depreciation on assets funded through Bonds. In U.P. Power Corporation Limited v. UPERC (2016) ELR 0259, the Hon'ble Tribunal pertinently observed:

*“"11. It is true that the prior period expenses claimed by the Appellants were duly audited expenses in the statutory audit of the Appellants but the word "audited" only means that the expenditure has been vouched for and the State Commission is further required to consider or check whether the consumer has received any benefit from such expenditure...."*

- **Fallacy of 'Additional Tariff Element' Argument:** There was nothing in this Hon'ble Tribunal's judgment of 23.11.2007 to support DVC's contention that Sinking Fund contribution is an 'additional tariff element' over and above what is allowed to other Generators. Section 40 of the DVC Act was never construed by this Hon'ble Tribunal as permitting Sinking Fund contribution as an additional tariff element, and the same would be evident from the following extracts of the judgment dated 23.11.2007:

  *“.6 ....DVC has submitted that section 20 of the DVC Act falls in a category wherein the provisions' which are in direct conflict with the* ***provisions of section 61, 62, 64, 79 and 86 of the Act and cannot be harmonized at all. Hence, in such cases provisions of the Act shall prevail****.*

  *E.7 Section 61 of the Act clearly recognizes the authority of the principles and methodologies specified by the Central commission for determination of tariff applicable to generating companies and transmission licensees. In our opinion, if there arises any inconsistency between the provisions of the DVC Act and the Regulations made under the Act with regard to determination of tariff for electricity they may be harmonized in such a manner that It satisfies both the DVC Act as well as the Regulations made under the Act. This has been elaborately dealt with in our findings earlier.*

  *E. 9 From the above provisions, we are of the opinion that the tariffs for supply of electricity by DVC are to be', determined by the Appropriate Commission* ***in terms of the provisions of the (Electricity) Act....***

  *[Note: Para E.5 also quotes the entire Section 61 with special emphasis on "recovery of, the cost of electricity in a reasonable manner]*

  *E.14 The Appellant has submitted that certain provisions of the DVC Act, particularly under Part IV dealing with Finance, accounts and Audit* ***can always be read harmoniously with the provisions of the Act and both can be given effect to without there being any inconsistency or repugnancy.***

  *E.15 As regards sinking funds which is established with the approval of Comptroller and Accountant General of India vide letter dated December 29, 1992 under the provision of Section 40 of the DVC Act* ***is to be taken as an item of expenditure to be recovered through tariff, as brought out in para 82 earlier.”***

  With respect to the above quoted paragraphs of this Hon'ble Tribunal's judgment of 23.11.2007, it is submitted as follows;

  - This Hon'ble Tribunal emphasized that DVC's tariff would be determined in accordance with Section 61 of the Electricity Act.
  - Para E.14 quoted, above reveals that DVC, itself, was seeking application of Part IV of DVC Act (which also contains Section 40) because it was of the view that it

can be given effect' to along with Electricity Act and "without there being any inconsistency or repugnancy".

- Allowance of Sinking Fund contribution as an 'additional tariff element' is not supported by any observation in the Judgment dated 23.11.2007. Further, such additional tariff element, itself, would be inconsistent under the Electricity Act contention is contrary to its own stand in para E.14 above; as such contention necessarily entails 'double allowance' of Bonds' amount and consequential "inconsistency" and "repugnancy" with Electricity Act (Section 61).
- Therefore, allowance of both Sinking Fund Contribution and Depreciation for the selfsame cost, namely repayment of Bonds' amount would be impermissible even as per DVC's stand recorded in the judgment of 23.11.2007. It may not be out of place to mention that in para 7 of said judgment (Anil Dev Singh, J. opinion), this Hon'ble Tribunal pertinently held;

> *“"7. Suffice it to say that the provisions of the DVC Act that are inconsistent with the Act of 2003* ***have been rendered inoperative*** *and the provisions which are not inconsistent with the DVC Act have to be given their full sway."*

- In para E.15 of the judgment dated 23.11.2007, only recovery of Sinking Fund contribution had been allowed as a pass-through in tariff, and there is no discussion on whether or not Depreciation can also be claimed on assets funded through Bonds' amount. In other words, the subject issue of 'double allowance' was not the subject matter of consideration before this Hon'ble Tribunal.
- Allowance of Sinking Fund Contribution, as well as Depreciation on assets funded through Bonds, would also be in the teeth of the observation in para E. 13:

> *"As regards the liability arising under Section 38 of the DVCA Act on account of interest on capital provided by each of the participating Governments, we have to keep in mind that the total capital to be serviced has to be equal to the value of the operating assets when they are first put to commercial use "*

- The Ld. CERC ought to have appreciated that if this Hon'ble Tribunal's judgment of 23.11.2007 was construed as sanctioning both Sinking Fund contribution, as well as Depreciation (for assets funded through bonds), it would render such judgment self-contradictory and irreconcilable with the above quoted observation.

- **Supreme Court's Judgment dated 23.7.2018 [(2018) 8 SCC 281]:** For that the Ld. CERC failed to appreciate that the Hon'ble Supreme Court's judgment dated 23.7.2018 did not deal with the issue of double allowance of Bonds repayment.
  - In the said Civil, Appeal, the only depreciation related issue was confined to the Depreciation Rate applicable to the DVC and the same is revealed by the Grounds taken by the industrial consumers/ appellants before the Supreme Court:

    *"**Depreciation rate as per DVC Act and not Tariff Regulations***

*That the Tribunal erred in law as well as in facts in allowing DVC to claim average depreciation of 6.69% allegedly under section 40 of the DVC Act instead of 3.06% prescribed under in the Tariff Regulations*
*That the Tribunal failed to appreciate that DVC in its various pleadings claimed depreciation as per the Central Commission Regulation, which was accepted by One Member bench and also by the Central Commission in its final tariff order dated 3.6.2006, recording no objection of the DVC to the rate of depreciation."*

- Consistent with the pleadings before it, the Hon'ble Supreme Court only dealt with the issue of 'Depreciation Rate'. The subject issue of 'Double Allowance' was never raised by any party before the Supreme Court. In exercise of its jurisdiction under Section 125, the Supreme Court chose not to interfere with APTEL's decision to allow Depreciation at rates specified by C&AG under Section 40 of DVC Act.

*"57. Insofar as the questions under the last two issues at (g) and {h) above are concerned, the same have already been dealt with in the present order.* ***Of the remaining heads of tariff fixation, it appears that so far as the "depreciation rate" and "sinking fund" is concerned it is the provisions of Section 40 of the 1948 Act which have been held to be determinative.*** *We have gone through the reasoning adopted by the learned Appellate Tribunal in this regard. Having clarified the manner in which the fourth proviso to Section 14 of the 2003 Act has to be understood, we do not find the reasoning adopted by the learned Appellate Tribunal on the issues relating to "depreciation" and "sinking fund" to be fundamentally flawed in any manner so as to give rise to a substantial question of law requiring our intervention/interference under Section 125 of the 2003 Act."*

- It is noteworthy that there is no observation/finding in Supreme Court's judgment dated 23.7.2018 to support any of the following propositions;
  - that the issue of 'Double Allowance' was considered by Supreme Court; or
  - that Sinking Fund contribution was allowed as an 'additional tariff element

- **Supreme Court's Judgment dated 3.12.2018 ((2020) 6 SCO 795]:** The Hon'ble Supreme Court's judgment in DVC v/s CERC [Civil Appeal No. 4881/ 2010; arising out of this Hon'ble Tribunal's judgment dated 10.5.2010] further establishes that in the first round of litigation (arising out of CERC's tariff order dated 3.10.2006), the issue of whether depreciation can be treated as loan repayment was never raised by DVC. Only after the matter was remanded back to CERC, the consequent CERC Order dated 6.8.2009 was challenged on the issue of depreciation as loan repayment.
  - It may be noted that the Hon'ble Supreme Court referred to the past proceedings in the first round of litigation including the judgment dated 23.7.2018 passed in Bhaskar Shrachi. After noting the issues raised in the first round, the Hon'ble Supreme Court found that

the contentious issue of treatment of depreciation towards loan repayment had not been raised by DVC previously and the same had, therefore, attained finality.

- In view of the above, it is submitted that the Ld. CERC ought to have appreciated that
  - Its treatment of depreciation as loan repayment had been upheld by APTEL on merits, vide Judgment dated 10.5.2010.
  - DVC's challenge to such treatment before the Supreme Court had failed.

  Therefore, it is reiterated that allowance of depreciation on assets funded through bonds - when repayment of bonds is being ensured through sinking fund contribution — amounts to double allowance of loan repayment (debt raised through issuance of bonds)

- **Special provisions for DVC under the Tariff Regulations:** The Ld. CERC failed to appreciate that Regulation 72 of the 2019 Regulations cannot be construed as sanctioning a double allowance, as such an interpretation would render the said Regulation ultra vires the Electricity Act, 2003. In this regard, it is submitted as follows:
  - The "Special Provisions" with respect to DVC override the 'general provisions' for recovery of capital cost (debt repayment) through Depreciation to the extent such recovery is being ensured through Sinking Fund contribution. Both 'General' and 'Special' provisions cannot apply to a given situation, especially when it would be opposed to cost plus regime of tariff determination. In GUVNL v/s Essar Power Ltd. (2008) 4 SCC 755, the Hon'ble Supreme Court pertinently observed:

    *"28. Section 86(l)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law."*

  - Sub-regulation (1) of Regulation 72 makes the applicability of 2014 Tariff Regulations "subject to" the "Special Provisions" under sub-regulation (2). In other words, the. general 2014 Regulations have to yield to the special provisions under Regulation 53 (2). In PNGRB vi Indraprastha Gas Ltd (2015) 9 SCC 209, the Hon'ble Supreme Court explained the meaning of the expressions "subject to" as follows:

    *"24. In South India Corpn (P) Ltd. v. Board of Revenue, the Constitution Bench has ruled that the expression "subject to" in the context* ***convey the idea of a provision yielding to another provision*** *or other provision to which it was made subject.,.."*

  - Even otherwise, it is quite evident that both 'General' and 'Special' provision cannot be simultaneously applied - as is clearly borne out from other special provisions relating to debt-equity ratio, depreciation rate etc. under Regulation 72(2). Admittedly, DVC claims debt-equity ratio and depreciation etc. under the special dispensation in Regulation 72(2) – and not under the general dispensation under Regulations 19 and 27, which is applicable to other generators.
  - The past Orders of CERC allowing Contribution to Sinking Fund to DVC Gencos has not considered detailed submissions advanced on behalf of DVPCA. It is reiterated that the Ld. CERC has relied on this Hon'ble Tribunal's Judgment of 23.11.2007 and Supreme

Court's Judgment of 23.7.2018 without appreciating that in the relevant proceedings, the issue of Double Allowance was not the subject-matter of adjudication.

- The Orders of CERC does not deal with the central issue of Double Allowance of Bonds' amount in the form of 'Depreciation', when Sinking Fund Contribution is being allowed to meet Bonds' repayment. Despite noticing DVPCA's principle contention in the Orders, the Ld. CERC has shied away from adjudicating upon the same. It is noteworthy that the Ld. CERC has nowhere held that the allowance of Depreciation as well as Sinking Fund Contribution does not amount to double allowance of the same cost element, namely repayment of amounts raised by issuance of Bonds. In other words, DVPCA's principal contention that both 'Depreciation' and 'Sinking Fund Contribution' are allowed to a generator to meet the same cost, namely, loan repayment, has not been countered/ rejected by CERC in the impugned order. Although the Ld. CERC has noted the submissions of the parties certain sections of its past Order, however, Ld. CERC noting certain observations from this Hon'ble Tribunal's judgment of 23.11.2007 and 17.5.2019, as well as Hon'ble Supreme Court's judgment of 23.7.2018 had concluded to allow the Contribution to Sinking Fund as sought by DVC.

- **Denial of 'Interest on Capital' under Section 38 of DVC Act:** Double allowance of a cost incurred once is antithetical to the cost-plus tariff regime under the 2003 Act. It deserves mention that in the past tariff proceedings, DVC has been denied Interest on Capital under the DVC Act - which would have resulted in a different kind of double allowance of Return on capital deployed (and which is provided through Interest on Loan and Return on Equity under the Tariff Regulations). In this regard, it may be relevant to refer to the following past developments pertaining to DVC's Tariff determination for FY 2006-09.
  - Section 38 of DVC Act provides for Interest on Capital to participating Governments and treatment thereof as DVC's expenditure:

    > ***"38. Payment of interest****: The Corporation shall pay interest on the amount of capital provided by each participating Government at such rate as may, from time to time, be fixed by the Central Government and such interest shall be deemed to be part of the expenditure of the Corporation."*

  - Citing Section 38, DVC claimed Interest on Capital in the first tariff petition (66/ 2006) filed before CERC. DVC's contention was recorded in the tariff order dated 3.10.2006, passed in Petition No. 66/ 2006.

    It needs to be emphasized that despite Section 38 of the DVC Act, the Ld. CERC did not allow Interest on Capital to DVC. Such disallowance was upheld by this Hon'ble Tribunal and the Hon'ble Supreme Court.
  - In Appeal No. 273/ 2006 preferred by DVC against tariff order dated 3.10.2006, DVC impugned the disallowance of Interest on Capital. However, this Hon'ble Tribunal, vide Judgment dated 23.11.2007, did not allow any Interest on Capital to DVC and held as follows:

> *"E.13 As regards the liability arising under section 38 of the DVC Act on account of interest on capital provided by each of the participating Governments, we have to keep in mind that the total capital to be serviced has to be equal to the. value of operating assets when they are first put to commercial use. Subsequently, the loan component gets reduced on account of repayments while equity amount remains static.* ***As per the scheme of the determination of tariff, as per Tariff Regulations 2004, the recovery is in two forms; either by way of ROE or by way of interest on loans. We direct the Central Commission to ensure that capital deployed in financing operating assets is getting fully serviced either through Return on Equity or interest on loan*** *(including on the equity portion not covered as part of equity eligible for Return of Equity)."*

Needless to add, once the total capital representing the "value of operating assets" is being serviced through "Return on Equity" and "Interest on Loan", DVC's claim for Interest on Capital would have amounted to an additional return on that very capital - resulting in another instance of double allowance - and the same was, therefore, rightly, rejected by the Ld. CERC, as well as this Hon'ble Tribunal. In other words, DVC's contention that it is entitled to any special/ additional tariff element in the form of Interest on capital was unequivocally rejected and DVC was subjected to the same tariff dispensation as any other generator. It may be relevant to mention that DVC did not prefer an Appeal from this Hon'ble Tribunal's judgment of 23.11.2007.

- The revised Tariff Order issued by CERC dated 6.8.2009 (pursuant to APTEL judgement dated 23.11.2007) was again challenged by DVC in the matter of Interest on Capital. The same was again rejected in accordance with the observations made in APTEL judgement dated 23.11.2007.
- It may be relevant to mention that in Appeal No. 146/ 2009 before this Hon'ble Tribunal, DVC had also relied on judgment of the Hon'ble Supreme Court in DERC v. BSES Yamuna Power Ltd. (2007) 2 SCC 33 to contend that depreciation is not meant for loan repayment. However, the said contention was rejected in the following words:

> *"78. The Learned Senior Counsel for the Appellant relied upon the judgment of the Supreme Court in 2007 (3) SCC 33 DERC Vs BSES Yamuna Power Ltd. & Ors. The facts of this case has no application - to the present case especially when the Supreme Court itself in the said decision observed that the said judgment is confined to that case alone and that the judgment should not be construed to apply for all times."*

**JCADVC submits that since the admissibility of Contribution to Sinking find is already established through a plethora of Orders/ judgements, Depreciation being of the nature of double allowance to the DVC Generating stations should not be allowed to the DVC Gencos. Likewise, the interest component should also be adjusted to the extent to which Contribution to sinking fund less Depreciation.**

**17. Proposed Clause – Rate of Depreciation/ Useful life extension**

In view of the above, a depreciation rate may be specified considering a loan tenure of 15 years instead of the current practice of 12 years. Further, additional provisions may also be specified that allow lower rate of depreciation to be charged by the generator in the initial years if mutually agreed upon with the beneficiary(ies).

Comments and suggestions are therefore sought from stakeholders on the above proposal and any modifications required, if any.

**Comments:**

- It is submitted that useful life of unit/transmission asset is way beyond 25 years as it can be observed. Usually thermal unit has a useful life of 30 to 35 years till it starts deteriorating. Similarly, for hydro stations the life is beyond 40 years. Keeping in view of these parameters, it is submitted that the useful life can be revised to 35 years for generating units and transmission assets.

  Hence the depreciation and repayment of loan can be increased to 18 years instead of 12 years so that the front loading of tariff may be reduced.

- Furthermore, in case of DVC, the Ld. CERC in the Tariff Orders for FY 2019-24 has allowed depreciation at rates higher than prescribed rates under the applicable Tariff Regulations. In this regard, it is submitted as follows:
  - DVC claimed depreciation at rates higher than that prescribed under the Tariff Regulations, 2014. The following statement provides a comparison of the item-wise depreciation rates prescribed under the Tariff Regulations, 2014 with the depreciation rates claimed by DVC (and allowed by CERC):

| Particulars | Tariff Regulations 2014 | Depreciation Rates as per DVC's Depreciation Rate Schedule | | | | |
|---|---|---|---|---|---|---|
| | 2014-19 | 2014-15 | 2015-16 | 2016-17 | 2017-18 | 2018-19 |
| Land & Land Rights | 0.000% | 0.000% | 0.000% | 0.000% | 0.000% | 0.000% |
| Buildings | 3.34% | 3.020% | 3.020% | 3.020% | 3.020% | 3.020% |
| Roads Bridges & Railway Sidings | 3.34% | 3.020% | 3.020% | 3.020% | 3.020% | 3.020% |
| Power House Plant & machinery | 5.28% | 7.840% | 7.840% | 7.840% | 7.840% | 7.840% |
| Substation Equipment | 5.28% | 7.840% | 7.840% | 7.840% | 7.840% | 7.840% |
| Switch Gear | 5.28% | 7.840% | 7.840% | 7.840% | 7.840% | 7.840% |
| Tower Poles & Fixtures | 5.28% (NA*) | 7.840% | 7.840% | 7.840% | 7.840% | 7.840% |
| Other Assets | 5.28% | 12.770% | 12.770% | 12.770% | 12.770% | 12.770% |

- A brief statement giving details of Weighted Average Rate of Depreciation (WAROD) claimed by DVC in the tariff petition and allowed by CERC in the impugned order is as follows:

| FY | Petition* | Impugned Order** |
|---|---|---|
| 2014-15 | 7.803% | 7.803% |
| 2015-16 | 7.803% | 7.803 % |
| 2016-17 | 7.803% | 7.803% |
| 2017-18 | 7.871% | 7.871% |
| 2018-19 | 7.872% | 7.872% |
| 2019-24 | ___ | 7.872% |

* Form 11 and 12 of the DVC Petition for PHS for FY 2019-24 period
** As per CERC Order for PHS for the FY 2019-24 period

- Regulations 53(2)(iii) and 72(2)(iii) of the Tariff Regulations 2014 and Tariff Regulations 2019 provide for a special provision, with respect to depreciation rate applicable to DVC. The identically worded Regulations provides as follows:

  *"**Depreciation**: The depreciation rate stipulated by the Comptroller and Auditor General of India in terms of section 40 of the Damodar Valley Corporation Act, 1948 shall be applied for computation of depreciation of projects of DVC."*

- It is JCADVC's case that C&AG has not specified any depreciation rate under Section 40 of the DVC Act. Apart from Form 11 & 12, DVC did not furnish any other document with respect to higher depreciation rates claimed by it.
- It appears that CERC did not undertake any prudence check and allowed higher depreciation to DVC as per its claim; without even requiring DVC to furnish the C&AG Notification in terms of Section 40 of the DVC Act.
- It is noteworthy that in Petition No. 205/GT/2020 filed by DVC in respect of Mejia TPS Unit-4 (210 MW), DVC had filed certain Additional Information in compliance with RoP dated 25.5.2021 issued' by CERC in the said, petition. In para 10.13 of the said Additional information, DVC made the following submissions with respect to its claim for depreciation:

  *"**10.13 Documentary evidence against Depreciation claimed for FY 2014-19 period***

  *The Petitioner humbly submits that, depreciation is computed as per GOI Notification dated.29.03.1994 (i.e. amendment of Ministry of Power, Government of India notification No. S.0.93(E) dated 23"'' January 1992) and is attached as Annexure-14. DVC humbly requests this Hon'ble Commission to consider DVC's claim as already stated in the Original Petition and allow the depreciation as claimed in the petition for the 2014-19 period."*

- From the above, it is evident that DVC is claiming higher depreciation in terms of Notification dated 29.3.1994 issued by the Ministry of Power under the Electricity

(Supply) Act, 1948. The said Notification was issued by the Central Government in exercise of its power under Section 43-A (2), Section 68 (1) and Section 75A(3) of the Electricity (Supply) Act, 1948. The said provisions are set out hereunder for ready reference:

> ***"43A. Terms, conditions and tariff for sale of electricity by Generating Company.***
> *(1)…….*
> *(2) The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms . regarding operation and the Plant Load Factor as may be laid down by the Authority and in accordance with the rates of depreciation : and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in the Official Gazette*
> ***68. Charge of depreciation by Board-*** *(1) The Board shall provide each year for depreciation such sum calculated in accordance with such principles as the Central Government may, after consultation with the Authority, by notification in the Official Gazette, lay down from time to time.*
> ***75A. Annual reports and accounts of Generating Company. -***
> *(2) .......*
> *(3) For the purpose of preparing the statement of accounts referred to in sub-section (2), the depreciation to be provided every year shall be calculated at such rate as may be specified by the Central Government, by notification in the Official Gazette, in accordance with the provisions of section 43A."*

- DVC's reliance on the Central Government's Notification dated 29.3.1994 - is erroneous, as the said Notification ceased to have effect following the repeal of Electricity (Supply) Act, 1948 by virtue of Section 185 of the 2003 Act. In any event, the said Notification was neither specific to DVC nor was issued by C&AG in terms of Section 40 of the DVC Act. However, these important aspects have been ignored in the CERC orders for DVC Gencos and the depreciation rates claimed by DVC has been approved mechanically and without any discernible prudence check.

**It is suggested that the Ld. CERC may revisit on the applicability of the Rate of depreciation for DVC Gencos and consider it same as that for other Central sector gencos in the absence of relevant C&AG notification**.

**18. Proposed Clause – O&M Expenses**

O&M norms may be specified under the following two categories.

1. Employee Expenses

2. Other O&M Expenses comprise Repair and Maintenance and Administrative and General Expenses

Therefore, the above suggestion may also be seen from the perspective that these expenses have historically been allowed as one expense, and any change in the methodology as suggested above may

result in unnecessary complications. Alternatively, to give effect to the impact of pay/wage revision, 50% of the actual wage revision can be allowed on a normative basis.

**Comments:**

- It is submitted that O&M may be allowed in the similar manner as it has been allowed in the existing Regulation. Further, it is submitted that the impact of pay revision may be allowed on the basis of sharing and may not be entirely passed through to the beneficiary.
- It is observed that usually generating companies and transmission companies are profit making companies as almost 100% of the cost is passed on to the beneficiaries. On the other hand, beneficiaries are not able to recover this cost from consumers due to various regulatory interventions and political influence. Hence it is generally observed that distribution licensees are loss making companies.
- Wage is revision is an activity of the Company to rewards its employees with revised pay. It is submitted that instead of passing on the entire cost to the beneficiary, 50% of the impact shall be funded through internal sources of the generating company or through the RoE which is earned by the Company. Due to passing of such cost the burden is always borne by Distribution Licensee and therefore operational performance of the Licensees gets affected. Hence impact of wage revision may not be treated as uncontrollable activity and shall be shared in ratio 50:50 between generators and distribution licensee.
- Alternately, to assess the impact of wage revision, the difference between the actual (excluding impact of pay revision) O&M Expenses and normative O&M Expenses y-o-y be computed. Further, if actual (excluding impact of pay revision) O&M Expenses is less than normative O&M Expenses, the Surplus may be used to compensate for the Pay revision impact and rest of the balance (Surplus – Pay revision impact) may be provided over and above the normative O&M Expenses.

- **Additional expenses claimed by Petitioner are integral part of O & M expenses and need not be considered separately**
    - For the specific case of DVC, over the previous Control periods, it has been claiming Additional O&M Expenses over and above normative O&M Expenses. The additional O&M Expenses usually includes items such as follows:
        - Share of savings in interest cost due to loan restructuring
        - Interest & Contribution on Sinking Fund (As per section 40, Part IV of DVC Act)
        - Share of P&G
        - Share of Common Office Expenditure
        - Expenses towards Ash Evacuation
        - Mega Insurance
        - Share of Subsidiary Activities
    - It is humbly submitted that Generating companies such as DVC have been claiming normative O&M Expenses and Additional O&M Expenses for FY 2014-19 and FY 2019-24 control periods.
    - Regulation 29 and 35 of the Tariff Regulations 2014 and 2019 respectively provide normative O&M expenses which were formulated and prescribed after considering the actual O&M expenses of all generating stations under the control and jurisdiction of the

Hon'ble CERC. It is noteworthy that the Hon'ble CERC, before approving the Tariff Regulations for any control period had sought data (including data in respect of O&M expenses) in pre-defined templates from all generating companies such as NTPC, DVC, NLC, etc. After considering the submissions made by NTPC, DVC, NLC, etc. the norms for O&M expenses are approved after giving due consideration of the requirements of various generating companies.

- The normative O&M expenses approved in the Tariff Regulations were therefore sacrosanct for all generating companies and they must have therefore been allowed O&M expenses based on their unit size and the normative O&M expense limit prescribed in the Tariff Regulations.
- Such expense items as additionally claimed by DVC in the view of JCADVC are in the nature of O&M expenses and were anyways part of normative O&M expenses. Such expense items are:

| Expense Item | Nature of Expenses |
|---|---|
| Pension and Gratuity Expenses | Part of Employee Expenses |
| Pay Revision Expenses | |
| CISF Security expenses | Part of R&M and A&G expenses |
| Expenditure for subsidiary activities | |
| Mega Insurance expenses | |
| GST on O&M | Part of O&M expenses itself |

It is further elaborated that the expense items claimed additionally such as Pension and Gratuity Expenses, Pay Revision Expenses, CISF Security expenses, Expenditure for subsidiary activities, Mega Insurance expenses, GST on O&M expenses are all included in "Employee Benefit Expenses" and "Operation and Maintenance and General Administration Charges" schedules provided in Audited Accounts for FY 2014-15 to 2020-21.

- Given the above, there is no apparent requirement for any separate consideration of these additional expenses as claimed by DVC time and again.

- **Actual O & M expenses as per books of account (including additional expenses) are lower than Normative O & M expenses**
  - JCADVC has worked out the Actual O&M Expenses as per audited accounts which is the sum total of the "Employee Benefit Expenses" and "Operation and Maintenance and General Administration Charges" schedules provided in audited accounts for FY 2014-15 to 2020-21 duly reducing select expense items which are not part of O&M expenses for making a like to like comparison with the considerations made in the Tariff Regulations. The following table depicts the manner in which the 'Actual O&M expenses as per audited accounts' have been arrived at by JCADVC:

| SN. | Particulars | 2014-15 | 2015-16 | 2016-17 | 2017-18 | 2018-19 | 2019-20 | 2020-21 |
|---|---|---|---|---|---|---|---|---|
| (A) | Employee Benefit Expenses (a) | 820 | 967 | 1,267 | 1,590 | 1,092 | 1,403 | 1,331 |
| (B) | O&M and Gen. admin charges (b) | 934 | 1,177 | 1,323 | 1,696 | 1,332 | 1,457 | 1,392 |

| SN. | Particulars | 2014-15 | 2015-16 | 2016-17 | 2017-18 | 2018-19 | 2019-20 | 2020-21 |
|---|---|---|---|---|---|---|---|---|
| | | - | - | - | - | - | | |
| (i) | Less: Rebates and discounts | 48 | 109 | 112 | 105 | 126 | 115 | 94 |
| (ii) | Less: Brokerage and Commission | 3 | 3 | 8 | 23 | 30 | 22 | 12 |
| (iii) | Less: Provisions for loss on fixed assets | 4 | 2 | 65 | 43 | - | - | 11 |
| (iv) | Less: Provisions for doubtful claims & advances | 46 | 13 | - | - | - | 1 | 0 |
| (v) | Less: Provisions for obsolescence | 0 | 0 | 0 | 1 | 0 | 48 | 0 |
| (vi) | Less: Provisions for doubtful debts | 2 | 7 | 91 | 417 | 83 | 93 | 0 |
| (vii) | Less: Water Charges as they are to be allowed separately | 0 | 204 | 60 | 58 | 60 | 123 | 155 |
| (viii) | Less: Ash Evacuation and Utilization Expenses | 132 | 121 | 163 | 116 | 80 | 119 | 150 |
| (ix) | CISF Security expenses as they are to be allowed separately | NA | NA | NA | NA | NA | 244 | 300 |
| **(C)** | **Total Deduction (i to ix)** | **236** | **459** | **500** | **762** | **380** | **763** | **723** |
| | | | | | | | | |
| **(D)** | **O&M Expenses (A +B -C)** | **1,518** | **1,685** | **2,090** | **2,524** | **2,045** | **2,097** | **2,000** |

- The rationale for reducing select expense items from the Gross O&M Expenses are provided below:
  - Rebates and discounts – the same pertain to distribution business and generally is to be reduced from the revenue from sale of power.
  - Brokerage and Commission – the same is generally shown as part of interest and finance
  - charges.
  - Provision for loss on fixed asset – it is not part of O&M expenses as defined in the Tariff
  - Regulations.
  - Provision for doubtful claims and advances - it is not part of O&M expenses as defined in the Tariff Regulations.
  - Provision for obsolescence – it is not part of O&M expenses as defined in the Tariff
  - Regulations.
  - Provision for doubtful debts – the same pertains to distribution business; it is not part of O&M expenses as defined in the Tariff Regulations.
  - Water Charges – Water charges are to be allowed separately as per the Tariff Regulations 2014 and 2019 and hence the same have been reduced to make a like to like comparison.
  - CISF Security Expenses – Security charges are to be allowed separately as per the Tariff Regulations 2019 and hence the same have been reduced to make a like to like comparison
  - Ash Evacuation Expenses - it is not part of O&M expenses as defined in the Tariff Regulations, 2014 (SOR).

- JCADVC has made a comparison of the actual O&M expenses as per books of accounts (including the expense heads claimed additionally) vis-à-vis the normative O&M expenses approved by CERC/ claimed by DVC (for BTPS A) for its Generation and T&D Business for FY 2014-19 and FY 2019-21.
  The table below demonstrates that the actual O&M expenses of the Petitioner for FY 2014-21 period including the expense heads claimed additionally are ~90% of the normative O&M expenses claimed by DVC for the corresponding period.

| Particulars | 2014-15 | 2015-16 | 2016-17 | 2017-18 | 2018-19 | 2019-20 | 2020-21 |
|---|---|---|---|---|---|---|---|
| Total Expenditure on O&M expenses as per Audited Accounts | 1,518 | 1,685 | 2,090 | 2,524 | 2,045 | 2,097 | 2,000 |
| Normative O&M Expenses allowed by the Tariff Regulations | 1,905 | 2,028 | 2,283 | 2,347 | 2,419 | 2,198 | 2,214 |
| **Actual O&M Expenditure as a % of Normative O&M Expenditure (per year)** | **79.7%** | **83.1%** | **91.6%** | **107.6%** | **84.5%** | **95.4%** | **90.4%** |
| **Actual O&M Expenditure as a % of Normative O&M Expenditure (for the control period FY 2014-19)** | **90.7%** | | | | | | |

- Thus, it is evident that the actual expenses are already entirely covered by the normative O&M expenses prescribed by the Tariff Regulations 2014 and 2019 and there had been no case to consider for the claimed raised by DVC towards additional expense heads such as Pension and Gratuity Expenses, Pay Revision Expenses, CISF Security expenses, Expenditure for subsidiary activities, Mega Insurance expenses, GST on O&M expenses.
  DVC time and again has attempted to seek unjust enrichment by claiming these expenses over and above the normative O & M expenses as per Tariff Regulations.
  JCADVC respectfully submits that DVC/ generating company must not be allowed O&M expense in excess of the normative O&M expenses.

- As per the framework of the Tariff Regulations, the O&M expenses cannot be a means for unjust enrichment of the generating companies and the intent of the Regulations is to limit such expense within the norms specified. The relevant extract of the SOR to the Tariff Regulations, 2014 is reproduced below:

  **"Commission's Views**

  *29.21 In response to the suggestion that the O&M expenses should be partly normative and partly on the basis of actual according to controllable and uncontrollable items,* ***the Commission observes that O&M expenses are***

***controllable in nature and a generating station is expected to limit these expenses within the norms specified.****"*

- In line with the above comments, Ld. CERC in the latest batch of Orders for DVC Gencos for the FY 2019-24 has relied upon the similar philosophy to arrive at the decision of admissibility of O&M Expenses for the FY 2014-19 period (True up) and FY 2019-24 period (MYT).

**The Ld. CERC must therefore clarify in the upcoming Tariff Regulations that O&M Expenses would not be permissible beyond normative O&M Expenses as it is not a means for unjust enrichment.**

**19. Non-Tariff Income**

4.21 Sharing of Gains

Regulation 60 of the CERC Tariff Regulations 2019, allows sharing of gains on account of the following:

1. …………….

3. Non-Tariff Income – The net income to be shared in the ratio of 50:50.

**Comments:**

The Approach Paper has not attempted to revise Non-tariff Income and seeks to retain Non-tariff Income as stipulated in the prevailing Regulations 2019.

- As far as DVC's case is concerned, it is humbly submitted that DVC is a vertically integrated organization wherein all its Generation, Transmission and Distribution business are integrated into one and the Tariff determined by CERC in respect of its Generation business along with integrated Transmission and Distribution business is considered as an input cost by SERCs (JSERC and WBERC) to determine the retail Tariffs.
- DVC in the past has been taking a stance wherein the issue of Non-tariff income from its Generation, Transmission and Distribution business is not admitted to be a pass through in Tariff (CERC determined AFC for gencos, T&D as well as Retail Tariff by SERCs):
- The above aspect has been observed by the Ld. JSERC in the Order dated 19.04.2017 in Case 02 of 2016, the relevant extracts of which are as follows:

> *"**5.51 The Commission observed that the Petitioner has claimed non-tariff income only to the extent of the Delayed Payment Surcharge (DPS)**. Further, the NTI, as reflected in the audited annual accounts, was in excess of the non-tariff income as claimed by the Petitioner. **The Commission also notes that DVC, being a vertically integrated organisation, also carries out the business of generation and transmission of electricity besides distribution. Accordingly, the Commission directed the Petitioner to submit information on non-tariff income, as per audited accounts, segregated into generation, transmission and distribution business**.*

*5.52 The Petitioner, in its reply, submitted that apart from DPS, there is no other NTI attributable to the distribution business. The reply of the Petitioner is stated below:*

> *"…DVC is a vertically integrated organization and has got generation, transmission and distribution activity in the entire Damodar Valley Area spread over in the state of Jharkhand and West Bengal. Therefore, DVC maintains its accounts which is integrated and covers all the aforesaid activities and also some other activities as mandated in DVC Act 1948. The accounting procedure followed by DVC is also approved and audited by Comptroller & Auditor General of India.*
>
> *It is, however, confirmed that other than Delay Payment Surcharge (DPS), there is no other Non-Tariff Income (NTI) under the distribution business of DVC and year-wise amount of DPS, as NTI has already been furnished to the Hon'ble Commission…."*

***5.53 The Commission has taken note of the fact that entire capital expenditure of the Petitioner is attributable to the generation and transmission business as the Petitioner does not claim any capital expenditure for the distribution business**. Accordingly, the non-tariff income, other than the Delayed Payment Surcharge, may be attributable to the generation and transmission business.*

*5.54 **However, the Commission also notes that non-tariff income attributable to the generation and transmission business ultimately impacts the end-use consumer as the costs (net of any revenue) for generation and transmission business become the input costs for distribution business which drive the retail tariffs applicable for the end-consumer.** Hence, the Commission directs the Petitioner to submit, within one month of notification of this Order, whether such non-tariff income has been accounted for in costs for the generation and transmission business of the Petitioner. Based on the justification provided by the Petitioner, the Commission may take an appropriate view on the same and pass suitable Orders to the effect.*

*5.55 Accordingly, at the moment, the Commission approves the non-tariff income pertaining to delayed payment surcharge as Rs.7.65 Cr, Rs.12.22 Cr, Rs.24.26 Cr, Rs.1.89 Cr & Rs.7.63 Cr, respectively for the aforementioned years based on actuals."*

- The Ld. JSERC in the above para expressed that the Non-tariff Income pertaining to the DVC Generation, Transmission business needs to be curled out as the same would translate into the Cost of Retail tariff. As on date, only an insignificant part of Non tariff Income gets pass through in the Retail Tariff ARR of the JSERC/ WBERC Orders.
- While the provision on sharing of Non-tariff Income has been introduced in the CERC regulations 2019, it is already in existence in almost all of the State Regulations. The non-tariff income derived from all the sources incidental to Generation/ Transmission business is to be adjusted from the ARR of the generating company or the licensee. As such, instead of sharing of such income in the ratio of 50:50, full benefit of the same should be passed on to the beneficiaries.
- Alternately, Non-Tariff Income can also be divided in two parts – one which is incidental to the business – such as Income from Sale of scrap, Income from statutory investments etc, and second where income is dependent upon the effort put in by the generator/transmission licensee for

generating non-tariff income, such as Income from rent of land or building, rental from contractors, Income from advertisement etc.

**It is suggested that the income coming under the first part should be reduced 100% from the ARR of the Generating plants/Transmission licensee, while income from the second part should be shared in 75:25 ratio in favor of long term beneficiaries.**

**20. Proposed Clause - Differential Norms - Servicing Impact of Delay**

While dealing with various generation as well as transmission petitions in the past, it has been observed that in several cases the delays are attributable to lack of timely clearances, forest approvals, etc. which require constant and rigorous follow up. In most of these cases, it has been observed that these delays could have been restricted if the approvals were sought more assertively instead of merely through written correspondence. It is observed that it is always not possible for the Commission to ascertain if adequate efforts have been made at the senior level to get the clearances. Therefore, though impact of delay on account of uncontrollable factors may be allowed, in order to encourage rigorous pursuit of such approvals, even if delay beyond SCOD is condoned for any reasons, some part of the cost impact (Say 20%) corresponding to the delay condoned may be disallowed.

**Comments:**

This is a significant move by the Ld. CERC.

The observation of the Ld. CERC across various Generating companies on account of time and cost overruns does depict that there is lack of effort at the end of developer/ Genco. Although, the few attributes are deemed uncontrollable, however the financial impact on account of such event is aggravated due to non-aggressive approach of the Project developer/ Genco or the Implementing agency. This has resulted into long spells of delay resulting into increased IDC and IEDC which affects the Tariff. **In such regard, the additional Capital Cost owing to the overrun should be considered as a normative loan and be treated accordingly.** As pointed out by the CERC, the resultant Tariff to cover the financial impact of overrun must only be compensatory in nature.

**21. Proposed Clause - Operational Norms – Inefficient Generating Stations**

For those generating stations that have not been operating efficiently in the past and for which the Commission has been considering actual achievements to fix relaxed norms, in the interest of limited resources, such relaxation of norms may need re-consideration. This is necessary as the coal/lignite is limited resource that needs to be consumed efficiently and can be re-allocated to more efficient plants. Comments and suggestions are sought from stakeholders on the option to do away with relaxed norms currently allowed on the basis of actual performance for various efficiency norms of generating stations

**Comments:**

It is a welcome move to do away with the relaxation of norms and re-allocate the fuel which is scarce to the plants that can operate in better efficient conditions. It is submitted that over the years, enough

dispensation through R&M and other capex has been claimed and recovered by generating companies to upgrade their performance. However, even after incurring such huge capex, the generating company is not able to deliver on the operational parameters then in such case, the power stations should be directed to be discontinued and the coal allocated to such plant may be assigned to other efficient plants which are not operational due to unavailability of coal.

Furthermore, there has been instances wherein the Generating company has claimed significant Additional Capitalization during the life of the project without meeting the Normative Parameters. This has resulted into the generating company reaping the benefits of the Additional Capitalization without obliging to the set operational parameters.

Such plants operating under relaxed norms is due to the poor upkeep of the generating station which results into higher ECR (due to poor SHR) and subsequently higher emissions.

Owing to stringent emission norms stipulated by MoEF&CC and State Pollution Control Boards, such plants are expected to invite more additional Capitalization to meet the emission norms and further result into resource drain.

For illustration, DVC's Generating station Durgapur Thermal Power Plant ECR and PAF for the past 6 years us depicted below:

| DTPS | FY 2017 | FY 2018 | FY 2019 | FY 2020 | FY 2021 | FY 2022 |
|---|---|---|---|---|---|---|
| ECR | 2.60 | 2.92 | 3.29 | 3.77 | 3.78 | 3.88 |
| PAF | 53% | 61% | 60% | 56% | 88% | 30% |

The above mentioned plant is already operating at a relaxed norm as per CERC Tariff Regulations 2014 and 2019 respectively. Only once in the past 6 years, it has been able to meet its NAPAF (74%). Furthermore, the ECR of the said plant is also on a deteriorating trend.

In view of the above performance, the Ld. CERC has also disallowed the claim of Special Allowance claimed by DVC's DTPS for the FY 2019-24 period and has noted as under:

> *"206. The matter has been considered.* ***It is observed that the Petitioner has claimed substantial additional capital expenditure during the periods 2014-19 and 2019-24, and has also claiming relaxed operational norms in accordance with the 2019 Tariff Regulations, and the same has also been allowed by the Commission, after prudence check****. As discussed in paragraphs 57, 58 and 59 above, of this order, the Special Allowance claimed by the Petitioner for the generating station claimed is not allowed."*

**In view of the above, it is essential that the old plants such as above operating at relaxed norms be evaluated based on the Cost benefit accrued and in the current hour may require reconsideration.**