damodar valley power consumers' association

CIN : U74900WB2014NPL202387
Regd. Office : Ideal Centre, 4th Floor
9 AJC Bose Road, Kolkata - 700 017

Date: 20.02.2024

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

Ref: Draft Central Electricity Regulatory Commission (Terms and Conditions of Tariff), Regulations, 2024 for the tariff period from 01.04.2024 to 31.03.2029.

Sub: Filing of Comments/ Suggestions on the Draft Central Electricity Regulatory Commission (Terms and Conditions of Tariff), Regulations, 2024 for the tariff period from 01.04.2024 to 31.03.2029.

Sir,

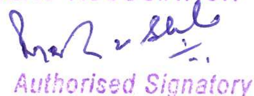
With reference to the above, the Association of Damodar Valley Power Consumers' Association (DVPCA) is filing the Comments/Suggestions on the Draft Central Electricity Regulatory Commission (Terms and Conditions of Tariff), Regulations, 2024 for the tariff period from 01.04.2024 to 31.03.2029 notified by Hon'ble CERC by Public Notice dated 04.01.2024. Further, vide Notice dated 30.01.2024, the Hon'ble Commission has extended the timeline for submission of comments/suggestions till 20.02.2024.

DVPCA which represents the interests of Industrial consumers of West Bengal in the command area of DVC requests Hon'ble CERC to kindly consider the comments attached hereto, in the interest of justice and equity.

Thanking you,

Yours faithfully

For DAMODAR VALLEY POWER
CONSUMERS' ASSOCIATION



Authorised Signatory

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

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<u>Comments on Draft Central Electricity Regulatory Commission (Terms and Conditions of Tariff), Regulations, 2024 for the tariff period from 01.04.2024 to 31.03.2029</u>

Central Electricity Regulatory Commission (**Hon'ble CERC** or **Hon'ble Commission** or **Ld. CERC**) by way of Notification bearing ref. no. L-1/268/2022/CERC had issued Draft Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2024 for the tariff period from 1.4.2024 to 31.3.2029 (**draft CERC Regulations 2024** or **draft Regulations**).

Under powers conferred under Section 178 of the Electricity Act, 2003 (36 of 2003) read with Section 61 thereof, Hon'ble CERC has prepared the draft notification of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2024 for the tariff period commencing from 01.04.2024. Under sub-section (3) of Section 178 of the Act read with Electricity (Procedure for Previous Publication) Rules, 2005, the Hon'ble Commission vide Notice dated 04.01.2024 has invited comments/suggestions/objections from the stakeholders and interested persons on the provisions of draft Regulations. Further, vide Notice dated 30.01.2024, the Hon'ble Commission has extended the timeline for submission of comments/suggestions till 20.02.2024.

Damodar Valley Power Consumers Association (hereinafter referred to as the 'Objector' or 'DVPCA') being the association of industries, represents the interest of member industrial houses receiving power from Damodar Valley Corporation in West Bengal.

Furthermore, DVPCA is a company incorporated under Section 8 of the Companies Act, 1956 with the object, inter alia, "to promote, protect and safeguard the rights, interest of electricity consumers in Eastern India by every legitimate means." The Appellant is a collective body representing the interests of its members who are HT consumers of DVC. 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.

DVPCA has examined the draft Regulations, and it submits the detailed comments/ suggestions/ objections over the same keeping in mind the key macroeconomic indicators along with issues and challenges that the power sector at large is exposed to.

1. Gross Calorific Value of Primary Fuel

Proposed Clause –

*60. Gross Calorific Value of Primary Fuel: (1) The gross calorific value for computation of energy charges as per Regulation 64 of these regulations shall be done in accordance with '**GCV as Received'**;*

Provided that the generating station shall have third party sampling done at the billing end and the receiving end through an agency certified by the Ministry of Coal and ensure recovery of compensation as per Fuel Supply Agreement(s) and pass on the benefits of the same to the beneficiaries of the generating station;

Provided further that in the absence of any third party sampling through an agency certified by the Ministry of Coal, the GCV shall be considered on the basis of 'as billed' by the Supplier less:

i. Actual loss in calorific value of coal between as billed by the supplier and as received at the generating station, subject to maximum loss in calorific value of 300 kCal/kg for Pit-head based generating stations or generating stations with Integrated mine and 600 kCal/kg for Non-Pit Head based generating stations.

No loss in calorific value between 'GCV as billed' and 'GCV as received' is admissible for generating stations procuring coal from Integrated mines or through the import of coal.

Comments:

- To safeguard the Generating companies from the impact of GCV loss in transit, the computation of Energy Charge Rate (ECR) is on the basis of **GCV received**. However, the very purpose of having Third party sampling at both the ends is to gauge the impact of GCV loss so as to ensure recovery of compensation and passing on the benefits to the beneficiaries of the generating company.

  The second proviso which provides for the reliance on GCV billed basis in the absence of third party sampling report is incomplete for the reasons that there may be a scenario wherein a Generating company may choose to not conduct GCV sampling at receiving point on a periodic basis and it may keep on claiming the GCV loss on a normative basis as provided for in the second proviso.

  For illustration, if the actual GCV loss is 400 Kcal/ kg from billed to receiving point (non-pit head), the generating company knowing that it would be entitled to GCV loss of 600 Kcal/ kg may choose to not conduct the third party sampling done by an agency certified by Ministry of Coal.

  The Objector humbly submits that the introduction of second Proviso may lead to foul play as the generating company would get a leeway in terms of relaxation in GCV. Thereby, the **Objector proposes that the Second proviso may be removed**.

- Notwithstanding to the submissions made in the preceding paras, the Objector submits that the normative GCV loss of 300 kCal/ kg and 600 kCal/ kg is significantly high.

  For pit-head stations, since the coal is produced and utilized at the same location, there should not be any loss of GCV. Moreover, it is the purview of the generator to ensure that the GCV as billed shall be equivalent to GCV as received.

In case of non-pit head stations, the GCV loss to be allowed can be maximum up to 300 kCal/kg which is equivalent to grade slippage by one grade. Allowing GCV loss to a level of 600 kCal/kg accounts for grade slippage by 2 grades, which is unreasonable and should not be allowed. Due to this, beneficiaries would end up paying coal price for higher GCV grade whereas actual grade of coal received/utilized at the plant would be lower by two grades. This is likely to put up a huge financial burden on the beneficiaries.

GCV loss of up to 300 kCal/kg may maximum be allowed under any condition for non-pit-head stations.

2. Interest During Construction (IDC) and Incidental Expenditure during Construction (IEDC)

Proposed Clause:

(1) Interest during construction (IDC) shall be computed considering the actual loan and normative loan after taking into account the **prudent phasing of funds up to actual COD**:

Provided that IDC on normative loan corresponding to excess equity over 30% of funds deployed shall be allowed only in case the actual infusion of equity on a quarterly basis is more than 30% of total funds deployed on a pari-passu basis.

(5) If the delay in achieving the COD is attributable either in entirety or in part to the generating company or the transmission licensee or its contractor or supplier or agency, in such cases, IDC and IEDC due to such delay may be disallowed after prudence check either in entirety or on pro-rata basis corresponding to the period of delay not condoned vis-à-vis total implementation period and the liquidated damages, if any, recovered from the contractor or supplier or agency shall be retained by the generating company or the transmission licensee, in the same proportion of delay not condoned vis-à-vis total implementation period.

[Note: For e.g.: In case a project was scheduled to be completed in 48 months and is actually completed in 60 months. Out of 12 months of time overrun, if only 6 months of time overrun is condoned, the allowable IDC and IEDC shall be computed by considering the total IDC and IEDC incurred for 60 months and allowed in the proportion of 54 months over 60 month period.]

Provided that in case of activities like obtaining forest clearance, NHAI Clearance, approval of Railways, and acquisition of government land, where delay is on account of delay in approval of concerned authority, in such cases maximum condonation shall be allowed up to 90% of the delay associated with obtaining such approvals or clearances.

Comments:

In cost plus route, the project is awarded to multiple contractors and hence the SCOD is fixed as per the assurance given by such contractors on timely completion of project. Further, the Tariff Regulations do not provide for any timelines in respect of project completion. Hence the IDC and IEDC were allowed only upto SCOD. Relaxation upto actual COD will defeat the very purpose and project developers will not be motivated to complete on time. **Hence 'Upto SCOD' should be retained.**

As far as delay in project commissioning due to statutory clearances is concerned, it is submitted that the reliance must be placed by the Central Commission as to how conscious were the efforts made by

the Generating/ Transmission companies in order to obtain statutory clearances. CERC in the past has also observed on similar grounds. Further, approving condonation to the extent of 90% of delay would lead to double jeopardy for beneficiaries – project not commissioned on time and cost hike due to delay in completion of the project.

Year on year, it has been seen that the implementing agencies have got through the time overruns on account of statutory delays. Even CERC has in some of its Orders has appreciated that these delays could have been restricted if the approvals were sought more assertively instead of merely through written correspondence. In view of the same, the generating/ transmission company as an implementing agency must be held equally responsible for the delay. To strike a balance between, it is submitted that **the overruns must be approved on a case to case basis**.

3. Return on Equity

Proposed Clause:

30. Return on Equity: (1) Return on equity shall be computed in rupee terms, on the equity base determined in accordance with Regulation 18 of these regulations.

(2) Return on equity for existing project shall be **computed at the base rate of 15.50%** for thermal generating station, transmission system including communication system and run-of- river hydro generating station and at the base rate of 16.50% for storage type hydro generating stations, pumped storage hydro generating stations and run-of- river generating station with pondage;

(3) Return on equity for new project achieving COD on or after 01.04.2024 shall be computed at the **base rate of 15.00% for the transmission system**, including the communication system, at the base rate of 15.50% for Thermal Generating Station and run-of-river hydro generating station and at the base rate of 17.00% for storage type hydro generating stations, pumped storage hydro generating stations and run-of-river generating station with pondage;

………………………

Provided that return on equity in respect of additional capitalization beyond the original scope, including additional capitalization on account of the emission control system, Change in Law, and Force Majeure shall be computed at the base rate of one-year marginal cost of lending rate (MCLR) of the State Bank of India plus 350 basis points as on 1st April of the year, subject to a ceiling of 14%;

Comments:

The Explanatory Memorandum to the draft Regulations provides that Rate of RoE is derived from the Capital Asset Pricing Model (CAPM), which was used during formulation of Tariff Regulations, 2014 and 2019 as well. CAPM calculates the required Return of a Security as a function of the risk-free rate, the market returns and the beta of the security. The Explanatory Memorandum provides the following formula and parameters for the RoE computation using CAPM:

Required (or expected) Return = Risk Free Rate (Rf) + (Market Return (Rm) – Risk Free Rate (Rf)) x Beta;

We observe that the Commission has inconsistently analysed the risk and return of the securities for the power sector. While the Commission has rightly used the latest 5 years' data to assess the current market risk, it seems to have used 31 years' data set to measure the market return, which is not factually correct and not clearly disclosed in the explanatory memorandum. We believe that the market return should also be based on the latest 5 financial year's data to match the base for the risk assessment. We also note that the Commission has not shared any specific values or sources for the data used for the RoE computation for conventional power projects, making it difficult for stakeholders to verify the accuracy of the calculation.

Consequently, we conducted an independent computation for the expected return for the upcoming control period for conventional power projects. Our analysis considered the risk-free rate, market return, and beta, utilizing data from the RBI's Weekly Statistical Supplement and day-to-day values of the BSE Sensex for a more comprehensive understanding.

- **Risk Free Rate (Rf):**

To compute the risk-free rate, CERC has taken into account the average yield on 10-year Government securities (G-Sec) for the period from April 2022 to March 2023. CERC has determined the risk-free rate as 7.35%. The graph below illustrates the month-wise values considered by CERC.

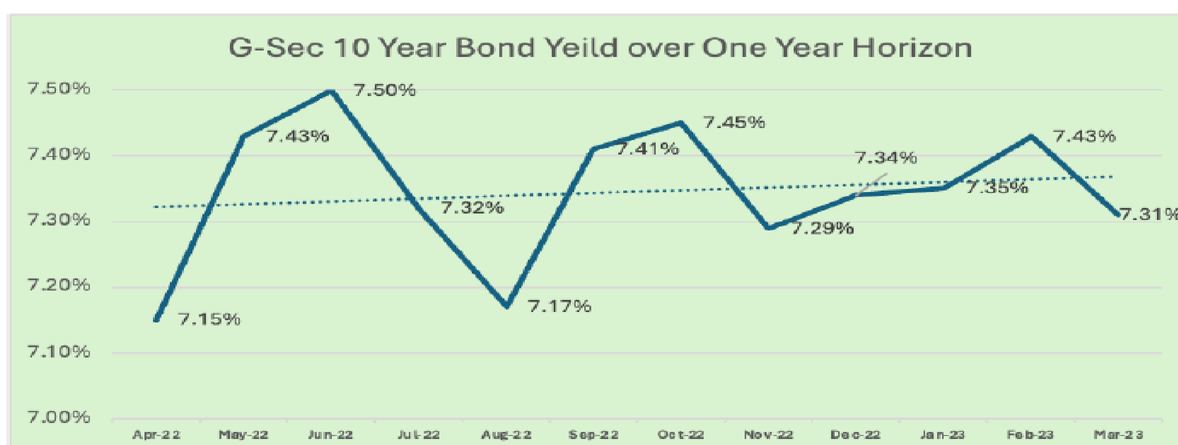


Figure 7: Ten-Year Government Securities Yield Trend

Source: Explanatory Memorandum, CERC Tariff Regulations, 2024

For our independent analysis, we have taken into account the weekly G-Sec values provided by the RBI in their Weekly Statistical Supplement. After averaging these weekly values over the period from April 2022 to March 2023, the resulting risk-free rate is calculated to be 7.35%. The table below displays the weekly values as notified by the RBI.

10-Year G-Sec Par Yield (April 2022 – March 2023)						
Month	**Week -1**	**Week -2**	**Week -3**	**Week -4**	**Week -5**	**Average**
Apr-22	6.86%	7.13%	7.22%	7.17%	7.15%	7.11%
May-22	7.46%	7.34%	7.38%	7.37%		7.39%
Jun-22	7.49%	7.55%	7.59%	7.49%		7.53%
Jul-22	7.42%	7.42%	7.43%	7.42%	7.32%	7.40%
Aug-22	7.32%	7.32%	7.26%	7.20%		7.28%
Sep-22	7.23%	7.12%	7.24%	7.40%	7.41%	7.28%

10-Year G-Sec Par Yield (April 2022 – March 2023)						
Month	**Week -1**	**Week -2**	**Week -3**	**Week -4**	**Week -5**	**Average**
Oct-22	7.47%	7.47%	7.50%	7.41%		7.46%
Nov-22	7.48%	7.32%	7.32%	7.32%		7.36%
Dec-22	7.22%	7.30%	7.28%	7.33%	7.34%	7.29%
Jan-23	7.38%	7.44%	7.35%	7.39%		7.39%
Feb-23	7.25%	7.33%	7.37%	7.39%		7.34%
Mar-23	7.40%	7.42%	7.35%	7.32%	7.31%	7.36%
Average						**7.35%**

Source: RBI Weekly Statistical Supplement

- **Risk Premium (Rm)/ Market Returns:**

CERC has adopted the average annual growth rate of the BSE Sensex from FY 1992 to FY 2023 as the baseline for the risk premium rate. The graph below illustrates the annual growth rates of the BSE Sensex considered by CERC.

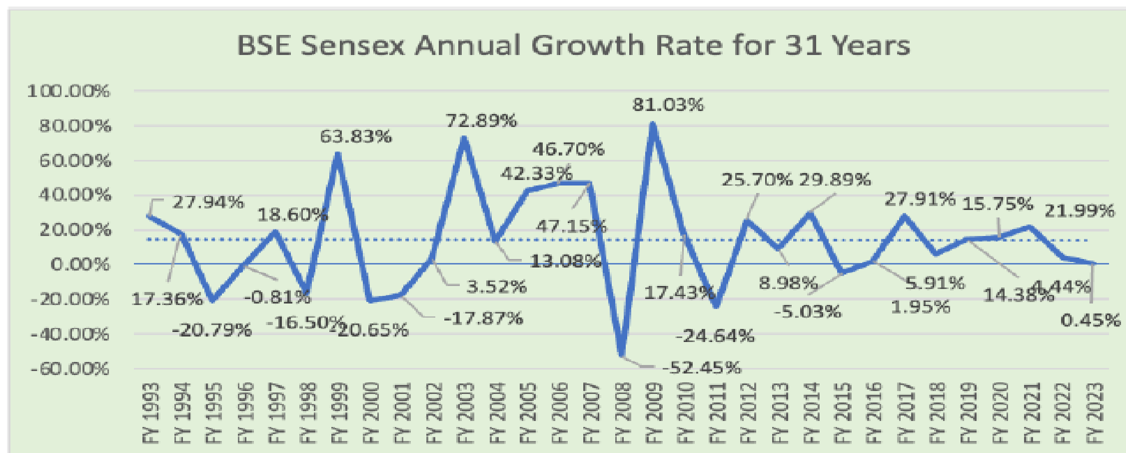


Figure: Yearly Market Return Trend

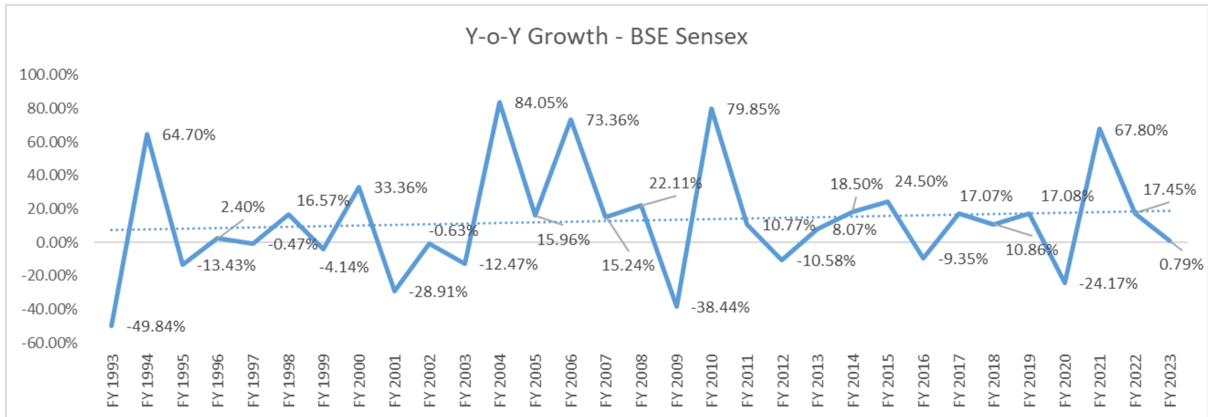
Source: Explanatory Memorandum, CERC Tariff Regulations, 2024

In our evaluative model, we aimed for a more thorough comprehension of the market dynamics by capturing the day-to-day values of the BSE Sensex spanning FY 1993 to FY 2023. To calculate the annual growth rate of the market, we assessed the percentage variation between the opening value on the first day of the financial year and the closing value on the last day of the financial year. For example, in computing the returns for FY 1993, we considered the opening value on April 2, 1992, and the closing value on March 31, 1993. The annual values and growth rates are meticulously outlined as under:

FY	Opening Date	Sensex Points	Closing Date	Sensex Points	% Growth in the year
FY 1993	02-Apr-92	4547	31-Mar-93	2281	-49.84%
FY 1994	02-Apr-93	2294	31-Mar-94	3779	64.70%
FY 1995	04-Apr-94	3767	31-Mar-95	3261	-13.43%
FY 1996	03-Apr-95	3288	29-Mar-96	3367	2.40%

FY	Opening Date	Sensex Points	Closing Date	Sensex Points	% Growth in the year
FY 1997	02-Apr-96	3377	31-Mar-97	3361	-0.47%
FY 1998	01-Apr-97	3339	31-Mar-98	3893	16.57%
FY 1999	01-Apr-98	3901	31-Mar-99	3740	-4.14%
FY 2000	01-Apr-99	3750	31-Mar-00	5001	33.36%
FY 2001	03-Apr-00	5071	30-Mar-01	3604	-28.91%
FY 2002	02-Apr-01	3491	28-Mar-02	3469	-0.63%
FY 2003	01-Apr-02	3483	31-Mar-03	3049	-12.47%
FY 2004	01-Apr-03	3038	31-Mar-04	5591	84.05%
FY 2005	01-Apr-04	5599	31-Mar-05	6493	15.96%
FY 2006	01-Apr-05	6507	31-Mar-06	11280	73.36%
FY 2007	03-Apr-06	11343	30-Mar-07	13072	15.24%
FY 2008	02-Apr-07	12812	31-Mar-08	15644	22.11%
FY 2009	01-Apr-08	15772	31-Mar-09	9709	-38.44%
FY 2010	01-Apr-09	9746	31-Mar-10	17528	79.85%
FY 2011	01-Apr-10	17555	31-Mar-11	19445	10.77%
FY 2012	01-Apr-11	19463	30-Mar-12	17404	-10.58%
FY 2013	02-Apr-12	17430	28-Mar-13	18836	8.07%
FY 2014	01-Apr-13	18891	31-Mar-14	22386	18.50%
FY 2015	01-Apr-14	22455	31-Mar-15	27957	24.50%
FY 2016	01-Apr-15	27955	31-Mar-16	25342	-9.35%
FY 2017	01-Apr-16	25302	31-Mar-17	29621	17.07%
FY 2018	03-Apr-17	29738	28-Mar-18	32969	10.86%
FY 2019	02-Apr-18	33031	29-Mar-19	38673	17.08%
FY 2020	01-Apr-19	38859	31-Mar-20	29468	-24.17%
FY 2021	01-Apr-20	29505	31-Mar-21	49509	67.80%
FY 2022	01-Apr-21	49869	31-Mar-22	58569	17.45%
FY 2023	01-Apr-22	58531	31-Mar-23	58992	0.79%
5-Year CAGR	02-Apr-18	33031	31-Mar-23	58992	15.60%
10-Year CAGR	01-Apr-13	18891	31-Mar-23	58992	13.49%
15-Year CAGR	01-Apr-08	15772	31-Mar-23	58992	9.88%

The calculated yearly returns for the period FY 1993 – FY 2023 is depicted in the graph below.



Source: Mercados Analysis

Based on the comprehensive analysis of the BSE Sensex in aforementioned graphical representation (CERC and Association's), it is evident that the annual growth rate of the BSE Sensex exhibits variability over the specified period. **However, CERC has not disclosed its methodology or offered any illustrative examples to explain the derivation of these values as without access to the underlying data, stakeholders are encountering challenges in grasping the concept and its mechanics**.

- **Beta Calculation:**

In order to derive the Beta, CERC mandates the use of the most recent five-year dataset for calculating the leveraged beta value, facilitating the determination of the average cost of equity. However, CERC has not provided specific details regarding the values or clarified the timeframe, whether it pertains to the latest five financial years' data or the most recent five years' data from the month the EM (Explanatory Memorandum) was notified.

In our modeling approach, two distinct datasets were employed for beta computation. Initially, we assessed the BSE Power Index from its inception date. Subsequently, we examined the returns of major power companies involved in both generation (thermal and hydro energy) and transmission operations.

- **Explanation of our Model:**

In developing our model, we have crafted distinct scenarios to assess the sensitivity of each component within the CAPM method. These four scenarios have been strategically formulated to enhance our understanding of the projected returns for power utilities.

Scenario -1:

Risk Free Rate considered – 7.35%

Risk Premium considered (CAGR latest 5 financial years of the BSE Sensex) – 15.60%

Beta –

To compute the beta, the returns of major power companies, in the generation (thermal and hydro energy) and transmission business, was considered for the period FY 2019 – FY 2023.

The expected returns calculated for each company is shown in the table below,

Particulars	Covariance	Variance	Beta	Rf	Rm	Re
PGCIL	8.29E-05	0.0002	0.5428	7.35%	15.60%	**11.83%**
Tata Power	1.58E-04	0.0002	1.0351	7.35%	15.60%	**15.89%**
JSW Energy	1.23E-04	0.0002	0.8066	7.35%	15.60%	**14.01%**
Torrent Power	1.02E-04	0.0002	0.6678	7.35%	15.60%	**12.86%**
Reliance Power	9.36E-05	0.0002	0.6134	7.35%	15.60%	**12.41%**
Adani Power	1.84E-04	0.0002	1.2069	7.35%	15.60%	**17.31%**
Jai Prakash Power	8.56E-05	0.0002	0.5607	7.35%	15.60%	**11.98%**
Rattan Power	8.16E-05	0.0002	0.5346	7.35%	15.60%	**11.76%**
NTPC	9.74E-05	0.0002	0.6384	7.35%	15.60%	**12.62%**
Adani Energy Sol.	1.25E-04	0.0002	0.8164	7.35%	15.60%	**14.09%**
SJVN	7.01E-05	0.0002	0.4595	7.35%	15.60%	**11.14%**
NLC	9.81E-05	0.0002	0.6427	7.35%	15.60%	**12.65%**
NHPC	8.48E-05	0.0002	0.5559	7.35%	15.60%	**11.94%**

Scenario -1 analysis suggests that the expected returns for most companies are below 15%, except for Tata Power and Adani Power, which stand out as exceptions.

Scenario -2:

Risk Free Rate considered – 7.35%

Risk Premium considered (CAGR latest 5 financial years of the BSE Sensex) – 15.60%

Beta –

To compute the beta, the BSE Power Index was considered for the period FY 2019 – FY 2023.

The expected returns calculated is mentioned in the table below,

Particulars	BSE Power
Covariance	0.0001
Variance	0.0002
Beta	0.7249
Rf	7.35%
Rm	15.60%
Re	**13.33%**

It can be inferred from the table that the expected return while considering BSE Power Index for the latest 5 financial years (FY 2019 – FY 2023) is less than the value mentioned by CERC in its Explanatory Memorandum (15.5%).

Scenario -3:

Risk Free Rate considered – 7.35%

Risk Premium considered (CAGR latest 10 financial years of the BSE Sensex) – 13.49%

Beta –

To compute the beta, the BSE Power Index was considered for the period FY 2014 – FY 2023.

The expected returns calculated is mentioned in the table below,

Particulars	BSE Power
Covariance	0.000098
Variance	0.00012
Beta	0.8349
Rf	7.35%
Rm	13.49%
Re	**12.47%**

The expected Return on Equity is 12.47%.

Scenario -4:

Risk Free Rate considered – 7.35%

Risk Premium considered (CAGR latest 15 financial years of the BSE Sensex) – 9.88%

Beta –

To compute the beta, the BSE Power Index was considered for the period FY 2009 – FY 2023.

The expected returns calculated is mentioned in the table below,

Particulars	BSE Power
Covariance	0.000161
Variance	0.00018
Beta	0.9072
Rf	7.35%
Rm	9.88%
Re	**9.65%**

The expected return of the market is 9.65%.

Our analysis shows a significant difference in the expected return for conventional power projects compared to the Hon'ble Commission's proposal of 15.50%. Our analysis suggests that the expected return should be reduced from 15.50% to the range of 12%-13% (at least 12%). We respectfully request the Hon'ble Commission to reconsider the expected return for conventional power projects for the upcoming control period FY 2019-24 based on the current market scenario of risk and return.

- Furthermore, as discussed in preceding section, in several cases, the delays are attributable to lack of timely clearances, forest approvals, etc. which require constant and rigorous follow up. While CERC in its Tariff Orders has appreciated that such delays could have been restricted if the approvals were sought more assertively instead of merely through written correspondence. However, it is trite to state that it is not always possible for the Hon'ble Commission to ascertain as to whether the adequate efforts were made at the senior level to get the clearances. Therefore, though impact of delay on account of uncontrollable factors may be allowed, it should only be compensatory in nature, therefore, the additional Capital Cost owing to the overrun should be considered as a normative loan and be treated accordingly.

4. Computation and Payment of Energy Charge for Thermal Generating Stations and Supplementary Energy Charge for Coal or Lignite based Thermal Generating Stations

Proposed Clause:

(4) In case of part or full use of an alternative source of fuel supply by coal based thermal generating stations other than as agreed by the generating company and beneficiaries in their power purchase agreement for the supply of contracted power on account of a shortage of fuel or optimization of economical operation through blending, the use of an alternative source of fuel supply **shall be permitted to generating station up to a maximum of 6% blending by weight**.

Provided that in such case, prior permission from beneficiaries shall not be a precondition, unless otherwise agreed specifically in the power purchase agreement:

Comments:

Blending directions by Ministry of Power (MoP) issued from time to time during the period FY 2019-24 was on account of extraordinary events arising out of disruption in coal/ lignite supply/ demand scenario. Lately, MoP circular dt: 25.10.2023 allows for blending @ 6% which is applicable only upto March 2024.

Further, during FY 2022-23, the Short term (IEX) market prices went abnormally high. Further, the Coal production by the state run companies was not adequate either to fulfil the requirements of Thermal power sector within the country. Owing to coal crunch in the country, Ministry of Power (MoP) had to intervene and allow blending of imported coal for domestic coal based Thermal power plants in the country. The situation was aggravated even more owing to the disruptions in the international fuel market scenario which was not relaxing either; Such global crisis of fuel had impacted spot coal, gas and other energy commodity prices.

The Spot market prices (Short-term Market exchanges) were observed to stabilize during the period of later half of FY 2022-23 to FY 2023-24. While the Long-term Contracts were not dependent on Short term and international commodity prices however, owing to the sporadic evolution of Short term markets, procurement through Long term PPAs grew at a lower rate compared to Short term purchases. This had led to subdued growth in consumption of coal. However, as and when the Spot market prices went significantly high, the demand of power under the Long term PPA increased which led increased requirement of domestic coal. This has led to the coal crunch necessitating import of coal to meet our Long term power requirements. During the entire period of FY 2022-23 and FY 2023-24, MoP has advised/ directed the domestic Coal based thermal gencos to blend the imported coal with the domestic coal in order to serve the Load demand.

In order to further support the above argument in respect of domestic coal supply-demand, the reference is drawn to the Ministry of Coal (MoC), Government of India (GoI) Notification dated 20.05.2022 (ref File No. 17014/2/2021-EA) wherein the emphasis was laid on the domestic coal demand based on which the Medium term coal production targets were estimated. The relevant extracts of the Medium Term Coal Projections identified is shown as under:

/EA

	Medium Term Coal Projections						(in MTs)
	2019-20	2020-21	2021-22	2022-23	2024-25	2027-28	2029-30
Overall Coal Demand	956	906	980	1,029	1,134	1,313	1,448
Of which							
Coking Coal	102	95	84	97	111	137	148
Non-Coking	853	811	896	932	1,023	1,176	1,300
Overall Coal Demand	956	906	980	1,029	1,134	1,313	1,448
Of which							
Demand for Coal in Power	695	621	700	735	810	938	1,034
Demand for Coal in Non-Power	261	285	280	294	324	375	414
Domestic Coal Supply	707	691	765	974	1,304	1,456	1,511
Of which							
CIL	582	574	608	700	1,000	1,090	1,130
SCCL	62	49	66	70	80	90	100
Captive and other Mines	63	69	91	204	224	276	281
Imported Coal	249	215	210	186	172	173	170
Of which							
Coking Coal	52	51	51	56	62	68	75
Non-Coking	197	164	159	130	110	105	95

In accordance with the above, it could be observed that the projections for the domestic coal supply is sufficient to meet the domestic coal demand from FY 2024-25 onwards. Furthermore, the reliance is also placed on the reducing trend of the Imported coal (especially non-coking) which further supports our contention that the Low cost domestic coal is expected to be sufficient for the upcoming control period FY 2024-29.

Furthermore, last 10 years' data depicting the growth in despatch of coal to thermal gencos is shown as under:

Despatch of Coal to thermal power and coal consumption/off-take during last ten years (Qty. in MT)						
Years	Coal Despatch					
	Power (Utility)	Growth (%) of Power (Utility)	Power (Captive)	Growth (%) of Power (Captive)	Total Offtake	Growth (%)
2013-14	394.529		54.423		572.06	
2014-15	435.438	10%	62.263	14%	603.772	6%
2015-16	483.124	11%	34.645	-44%	632.442	5%
2016-17	490.987	2%	44.057	27%	645.978	2%
2017-18	519.582	6%	65.906	50%	690.003	7%
2018-19	567.645	9%	76.780	16%	732.794	6%
2019-20	534.256	-6%	77.153	0%	707.176	-3%
2020-21	528.945	-1%	45.786	-41%	690.884	-2%
2021-22	671.702	27%	38.158	-17%	819.213	19%
2022-23	732.48	9%	52.647	38%	877.369	7%

It could be observed that the notable growth recorded during the FY 2021-22 and FY 2022-23 is on a significantly higher side. The same may be attributed to the unexpected growth in Electricity demand during the FY 2021-22 and FY 2022-23. In view of the eccentric growth during the last few years, the

Coal-demand projections made by the MoC (till FY 2029-30) seems to be on course to fulfil the thermal sector coal requirements.

Furthermore, Coal India Ltd. (CIL), an apex producer of Coal within the country vide its Action Plan for FY 2023-24 has envisioned certain steps that would be crucial for enhanced coal production in order to meet the Coal demand within the country. Notable points are indicated as under:

- Coal Trading platform: CIL has been working towards the establishment of online trading platform/ exchange which shall provide for easy coal availability in the market.
- Commercial mining: The commercial coal mines auction has been witnessing significant private participation. During FY 2023-24, CIL expects that 25 coal mines will be allocated for the commercial mining.
- Coal Evacuation: As logistics is a critical aspect of the coal supply chain, MoC has taken up Coal logistics policy/ Plan for efficient transport of coal
- Outsourcing of Coal mines: TO enhance Coal production and bring efficiency, CIL has been outsourcing Coal mines to MDO for operationalization of coal mines/ blocks.

In view of the above, the Objector apprehends that the ambitious targets to increase the Coal production in accordance with the increasing Coal demand undertaken by the MoC, GoI shall ease out the burden on thermal gencos within the country.

Therefore, imposing blending directions @6% without the explicit direction of Ministry of Power would impose a huge financial burden on end users. The Objector submits that such Clause shall be removed.

5. Sharing of gains due to variation in norms

Proposed Clause:

(2) The financial gains by the generating company or the transmission licensee, as the case may be, on account of controllable parameters shall be shared between the generating company or transmission licensee and the beneficiaries or long term customers, as the case may be on an annual basis. The financial gains computed as per the following formulae in the case of generating stations other than hydro generating stations on account of operational parameters as shown in Clause (1) of this Regulation shall be shared in the **ratio of 1:1 between the generating stations and beneficiaries**.

Comments:

It is humbly submitted that the Hon'ble Commission may stipulate the details of methodology of sharing of gains in the Regulations as there are lot of disputes on how gain alone can be shared. Especially in respect of DVC Gencos, the beneficiaries (command area consumers of Jharkhand and West Bengal) have never received any sort of benefit arising out of gains arising due to variation in norms.

In order to ensure that the beneficiaries are not kept devoid of their rightful dues and to avoid any ambiguity, it is proposed that the Hon'ble Commission while approving the True up for the Control period may kindly approve the Gains arising out of variation in operational norms and accordingly adjust the same in the Trued up ARR.

Furthermore, it is also proposed that 2/3rd of gain may be allowed to pass through to the beneficiaries instead of 1:1 sharing as provided in the draft Regulations.

6. Capital Cost

Proposed Clause:

19.(5) For Projects acquired through NCLT proceedings, the following shall be considered while approving Capital Cost for determination of tariff:

(a) For projects already under operation, historical GFA of the project acquired or the acquisition value paid by the generating company, whichever is lower;

(b) For considering the historical GFA for the purpose of Sub-Clause (a) above, the same shall be the capital cost approved by the appropriate commission till the date of acquisition;

Provided that in the absence of any prior approved cost of an Appropriate Commission, the Commission shall consider the same on the basis of audited accounts subject to prudence check;

Provided further, that in case additional capital expenditure is required post acquisition of an already operational project, the same shall be considered under the provisions of Chapter 7 of these Regulations;

Comments:

For the Projects acquired through NCLT process, the draft Regulations are left open ended.

At the outset, Capital cost to be considered for approval of existing projects under NCLT shall be the lower of Net GFA and acquisition cost which should be considered as GFA (reinstated) for the purposes of Tariff determination. However, it must be said that the draft Regulations are silent on the following aspects:

1. The modalities for the consideration of debt: equity ratio for the reinstated GFA is not provided
2. Computation of depreciation would be on the reinstated GFA however, the basis of consideration of Rate of depreciation in case, the reinstated GFA is based on acquisition value is not provided.
3. Since the acquired project cost in most cases would not have lived its useful life, the approach for the consideration of accumulated depreciation is not provided.
4. Moreover, it needs to be mentioned that subjecting the recovery of the Tariff based on the acquired value would dishearten the investor as the returns out of the acquired value would be linked to the Equity corresponding to the reinstated GFA.

It is humbly submitted that the Hon'ble Commission may delve into the issues attributable to the Tariff recovery attributable to the project acquired through NCLT proceedings. Further, the details of the NCLT project (including Resolution plan) must be shared along with the petition.

7. Additional Capitalization on account of Revised Emission Standards:

Proposed Clause:

(4) After completion of the implementation of revised emission standards, the generating company shall file a petition for determination of tariff. Any expenditure incurred or projected to be incurred and admitted by the Commission after prudence check based on the reasonableness of the cost and impact on operational parameters shall form the basis of the determination of tariff.

Comments:

The draft Regulations provide an enabling mechanism for admitting the claim towards Additional Capitalization towards Emission Control Systems. However, since such expenditure is passed onto the consumers, it is reasonable to verify as to whether the generating company is in compliance of the Emission standards stipulated by the MoEF&CC. Therefore, it is suggested that the following proviso be introduced:

> *"The application shall be accompanied by a certificate issued by the concerned PCB in compliance of the MOEFCC standards"*

8. Depreciation

Proposed Clause:

(12) In case the date of operation of the emission control system is subsequent to the date of completion of the useful life of generating station commercial operation of the generating station or unit thereof, depreciation of ECS shall be computed annually from the date of operation of such emission control system based on the straight line method, with a salvage value of 10% and **recovered over ten years or a period mutually agreed by the generating company and the beneficiaries, whichever is higher.**

Comments:

Post completion of useful life of a thermal generating unit, any approval of additional capitalization must be followed in context of the residual life of such unit. The Objector apprehends that post useful life, there lies as uncertainty as to how long the unit will be operational. In order to ensure that the consumers are not unduly burdened out of additional capital expenditure towards Emission Control systems, it is essential that the Residual Life Assessment or any other studies be carried out to ascertain that the generating unit would last atleast for the 10 years during which depreciation is proposed to be recovered. Therefore, it is suggested that the following proviso be introduced:

> *"Provided that the generator shall furnish the details of RLA studies / any other supporting studies assuring further life availability of the Station (Unitwise), along with the petition filed for approval of tariff"*

Further, there would be instances where the Residual life is less than 10 years at the time of notification of revised Emission norms; for such thermal generating units, CERC may consult MoEF&CC to seek relaxation in meeting compliance to emission norms. This is proposed to ensure that the financial burden on account of incurring expenditure towards Emission control systems do not outweigh the environmental benefits associated with the installation of ECS.

9. Transit and Handling Losses

Proposed Clause:

For coal and lignite, the transit and handling losses shall be as per the following norms: -

Thermal Generating Station	Transit and Handling Loss(%)
Pit head	0.20%
Non-pit head - Rail	0.80%
Non-pit head multi-modal transportation (using two or more than two mode of transport involving multiple trans-shipments)	**1.00%**

Provided that in the case of pit-head stations, if coal or lignite is procured from sources other than the pit-head mines which is transported to the station through rail, transit and handling losses applicable for non-pit head stations shall apply;

Provided further that in case of imported coal, the transit and handling losses applicable for pit-head station shall apply.

Comments:

The prevailing CERC Tariff Regulations 2019 provide for the normative Transit and Handling losses for Non pit head stations at 0.8% which applies for multi-mode transportation only. Therefore, new provisions for multi-modal transportation inferior to the currently prevailing levels must not be approved. The Objector proposes the following losses for approval:

Pithead : 0.2%

Non pithead – rail : 0.5%

Non pithead multimode : 0.8%

10. Normative Annual Plant Availability Factor

Proposed Clause:

(a) **85% for all thermal generating stations, except those covered under clauses (c), (c), (d) & (d)**

(b) 80% for coal and lignite based generating stations completing 30 years from COD as on 31.03.2024

(c) For the following Gas based Thermal Generating Stations of NEEPCO:

…………………………

(d) Lignite fired Generating Stations using Circulatory Fluidized Bed Combustion (CFBC) Technology and Generating stations based on coal rejects:

1. First Three years from the date of commercial operation – 68.50%

2. After completion of three years of the date of commercial operation - 75%

Comments:

As per the Explanatory Memorandum to the draft Regulations, Plant Availability factor (PAF) recorded during the period FY 2018-23 is above the 85% norm (as prescribed under the CERC Tariff Regulations 2019) for most of the thermal generating plants. It goes without saying that the retention of 85% as normative PAF (NAPAF) is skewed keeping in mind that the cost associated with the generating stations is less. Not passing the impact of higher operational efficiency (higher NAPAF) to beneficiaries shifts the balance of interests in favour of the generating companies.

It is proposed that the NAPAF be approved at levels considering the ageing of the thermal generating unit which would be commensurate with the operational degradation which the plant would be exposed to over its useful life. Accordingly, it is proposed that the NAPAF levels be approved as under:

For plants older than:

20 years: 85.00%

15 years: 86.00%

10 years: 87.5%

less than 10 years: 90.00%

11. Gross Calorific Value of Primary Fuel

Proposed Clause:

(2) The generating company shall provide to the beneficiaries of the generating station the details in respect of GCV and price of fuel i.e. domestic coal, imported coal, e-auction coal, lignite, natural gas, RLNG, liquid fuel etc., as per the Form 15 prescribed at Annexure-I (Part I) to these regulations:

Provided that the additional details of the weighted average GCV of the fuel on a received basis used for generation during the period, the blending ratio of the imported coal with domestic coal, and the proportion of e-auction coal shall be provided, **along with the bills of the respective month**;

Provided further copies of the bills and details of parameters of GCV and price of fuel such as domestic coal, imported coal, e-auction coal, lignite, natural gas, RLNG, liquid fuel, details of blending ratio of the imported coal with domestic coal, the proportion of e-auction coal shall also be displayed on the website of the generating company.

Comments:

The CERC Tariff Regulations 2019 also provide likewise for any thermal generating company. However, it has been widely observed especially for Damodar Valley Corporation (DVC) that it has not been complying to the above provision despite the Tariff Regulations explicitly providing for the same. Owing to such practices of non-compliance during the FY 2019-24 period, the transparency in the cost

recovery process is lost. The beneficiaries of DVC are worried as to whether the GCV and price claimed towards Coal cost are in reality a reflection of the billed GCV and price.

The Objector strongly submits that such acts of non-compliance must be dealt with iron hand. To deter the generating companies from non-compliance to the Regulatory provision, it is proposed that a penalty be imposed on a generating company/ unit in the form of reduction in Rate of RoE by 1%.

12. Special Provisions relating to Damodar Valley Corporation – Contribution to Sinking Fund

Proposed Clause:

(2) The following special provisions shall apply for the determination of tariff of the projects owned by 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.

Comments:

DVC for its Generating stations has been claiming Contribution towards Sinking fund in addition to the AFC items allowable as per the CERC Tariff Regulations 2014/ 2019. Furthermore, Ld. CERC 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 Objector'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, the Objector wishes to state that since DVC is being allowed Contribution to sinking fund; the admissibility of Depreciation and Interest Expenses should 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 is imperative to ensure that DVC is 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 been allowing '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 Objector'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' as per the CERC Tariff Regulations 2024 has resulted in double allowance of loan repayment. The Hon'ble CERC has been sanctioning such double allowance after selectively referring to the following:
  - Section 40 of DVC Act, 1948
  - APTEL's Judgment dated 23.11.2007 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, the Objector 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

    F1. 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 self-same 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 Tariff Regulation 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."*

In view of the above submissions, the Objector submits that Depreciation being of the nature of double allowance to the DVC Generating stations should not be allowed to the DVC Gencos. Further, the Consumer Associations have challenged the admissibility of Sinking fund before the Ld. APTEL against a plethora of CERC Orders for DVC Gencos. In view of the above, it is most respectfully submitted that the Funds under Section 40 of the DVC Act should be subjected to the outcome of Appeals pending before Ld. APTEL and the same should form the past of CERC Tariff Regulations 2024 subject to outcome of pending Appeals only.

13. Special Provisions relating to Damodar Valley Corporation - Rate of Depreciation

Proposed Clause:

(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 the computation of depreciation of projects of DVC.

Comments:

The Objector submits that C&AG has not specified any Depreciation Rate under Section 40 of the DVC Act. It appears that CERC has been allowing higher depreciation to DVC as per its claim without 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, under 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 23rd 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 past CERC orders for DVC Gencos as well as current exercise of formulation of Tariff Regulations 2024 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.

14. Special Provisions relating to Damodar Valley Corporation - Subsidiary activities

Proposed Clause:

(v) Expenses towards subsidiary activities as per Hon'ble Supreme Court Judgement in Civil Appeal No. 4289 of 2008.

Comments:

The allowance of cost of subsidiary activities as a pass-through in tariff as per the draft Regulations is based on a misinterpretation of Sections 32 and 34 of the DVC Act. The Ld. CERC ought to have appreciated that the said provisions do not sanction that the cost of the 'subsidiary activities' is to be recovered through electricity tariff. **Further, the Ld. CERC has ignored the fact that Sections 41 and 51 of the 2003 Act read with Section 61 thereof do not admit of any extraneous cost unconnected with electricity activity to be recovered as part of consumer tariff**.

The Hon'ble Supreme Court, vide judgment dated 23.7.2018, passed in Civil Appeal Nos. 4289/2008, titled Bhaskar Shrachi Alloys Limited & Ors. Vs. DVC & Ors. dismissed the Civil Appeals preferred from the above mentioned remand order dated 23.11.2007 passed by the Hon'ble Tribunal with respect to FY 2006-09. It may be relevant to mention that while dismissing the Civil Appeals, the Hon'ble Supreme Court was conscious of its "limited jurisdiction under Section 125 of the 2002 Act". The fact that the Hon'ble Supreme Court was only examining the issues from the viewpoint of 'substantial questions of law', in accordance with the mandate of Section 125 of the Electricity Act 2003, is borne out from the following observations in the judgment dated 23.7.2018:

> *"33. The learned Appellate Tribunal has also taken the view that having regard to the provisions of Section 79 of the 2003 Act it, is CERC which would be the "Appropriate Commission" for determination of tariff inasmuch as the Damodar Valley Corporation is a corporation owned and, controlled by the Central Government. The detailed inputs to arrive at the aforesaid conclusion have been duly considered by us.* ***On such consideration, we are of the view that the above conclusion recorded by the learned Appellate Tribunal is neither unreasonable nor irrelevant so as to warrant our interference, particularly, in exercise of the limited jurisdiction under Section 125 of the 2003 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 concemed.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.***
>
> ***60. A careful consideration of the reasoning adopted by the learned Appellate Tribunal would not disclose any such error so as to warrant interference of this Court. No error or fallacy, ex facie, is disclosed in the reasoning adopted so as to justify interference under Section .125 of the 2003 Act."***

Furthermore, in one of the Order dated 7.8.2013, Ld. CERC determined the generation tariff in respect of DVC's Maithon HPS. With respect to subsidiary activities, the Ld. CERC pertinently observed as follows:

> *"Share of subsidiary activities*

> *73. Since, the petitioner's claim for O&M expenses towards share of subsidiary activity in form-15B of the petition has already been considered in the O&M expenses allowed to the generating station, the additional O&M expenses claimed on this count has been rejected."*

It is submitted that the inclusion of an extraneous expense “subsidiary activities” forms the part of O&M Expenses and the need for separate admissibility of the same is not warranted.

15. Operations and Maintenance Expenses

Comments:

- **Wage Revision**

It is submitted that O&M may be allowed in the similar manner as it has been allowed in the existing Regulation. Further, to assess the impact of wage revision, if the actual O&M Expenses is less than normative O&M Expenses as admissible under the Tariff Regulations 2024, then the impact of Wage revision should not be additionally allowed.

Secondly, if the actual O&M Expenses are higher than normative O&M Expenses, then the wage revision should be allowed to the extent of difference between normative and actual O&M Expenses or actual impact of wage revision whichever is lower. This shall ensure that the generating company/ Transmission Licensee are not unduly benefitted.

- **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 has claimed normative O&M Expenses and Additional O&M Expenses for FY 2014-19 and FY 2019-24 control periods.

The Objector submits that the norms for O&M Expenses as prescribed in the draft Regulations have been formulated keeping mind the actual O&M Expenses for the period FY 2017-23 from various Central Sector Generating Companies. Based on the submissions made, the norms for O&M expenses are approved giving due consideration to the requirements of various generating companies.

The normative O&M expenses approved in the Tariff Regulations (2004/2009/2014/2019/ 2024) are 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 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 2022-23.

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**

To draw a comparison of actual O&M Expenses vs normative O&M Expenses for the preceding years, the Objector 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 the Objector:

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
		-	-	-	-	-		
(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

SN.	Particulars	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
(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).

The Objector 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 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%**

Particulars	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
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. The Objector 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. Ld. CERC in the latest batch of Orders for DVC Gencos for the FY 2019-24 has relied upon the similar rationale 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 in the Tariff Regulations 2024 specify that O&M Expenses would not be permissible beyond normative O&M Expenses (except the impact of Wage revision) as it is not a means for unjust enrichment.