

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 373/MP/2018

Coram:

**Shri Jishnu Barua, Chairperson
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member**

Date of Order: 4th May, 2024

In the matter of:

Petition invoking Section 79(1)(b) and Section 79(1)(f) of the Electricity Act, 2003 read with Regulation 111 of the CERC (Conduct of Business) Regulations, 1999 seeking adjudication of dispute between BYPL, i.e., BSES Yamuna Power Limited and Damodar Valley Corporation.

And

In the matter of:

BSES Yamuna Power Limited
Shakti Kiran Building,
Karkardooma, New Delhi-110032

...Petitioner

Vs

Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata-700054

.... Respondent

Parties Present:

Shri Buddy Ranganathan, Advocate, BYPL
Shri Anupam Verma, Advocate, BYPL
Shri Rahul Kinra, Advocate, BYPL
Shri Aditya Ajay, Advocate, BYPL
Shri Aashwyn Singh, Advocate, BYPL
Shri Abhishek Kumar, BYPL
Shri M.G. Ramachandran, Senior Advocate, DVC
Ms. Anushree Bardhan, Advocate, DVC
Shri Aneesh Bajaj, Advocate, DVC
Shri Anukirat S. Baweja, Advocate, DVC
Shri Sameer Singh, DVC

ORDER

BSES Yamuna Power Limited (in short 'BYPL') has filed this petition seeking the following relief(s):



- a. *Admit the present Petition;*
- b. *Direct DVC/Respondent to withdraw the Bill amounting to Rs. 39 crore dated 8.5.2017;*
- c. *Direct DVC to clarify the methodology employed for apportionment of P&G liability to its various generating stations; and*
- d. *Pass any other order which this Hon'ble Commission may deem fit.*

Background facts

2. Pursuant to the unbundling, restructuring, and reform of the erstwhile Delhi Vidyut Board (DVB) and privatization of the distribution of electricity in the NCT of Delhi, BYPL [a joint venture between R-Infra and Delhi Power Company Limited (a company wholly owned by the Government of NCT of Delhi)], succeeded to the respective undertaking and business of electricity distribution in its areas of supply with effect from 1.7.2002, by operation of law. From 01.07.2002 till 31.03.2007, Delhi Transco Limited (DTL) was entrusted with the responsibility of bulk procurement and bulk supply of power in the NCT of Delhi. On 11.3.2004, the Distribution and Retail Supply License to undertake distribution and retail supply of power in its licensed area of supply was issued to BYPL by the Delhi Electricity Regulatory Commission (DERC), under Section 20 of the Reforms Act read with the 2003 Act.

3. On 24.8.2006, the DTL executed a Power Purchase Agreement (PPA) with Respondent DVC, a generating company within the meaning of Section 2(28) read with Section 79(1)(a) of the 2003 Act, for procurement of power from the various plants of DVC, which did not include Mejia Unit-5 & 6. On 31.3.2007, the DERC re-assigned all the existing PPAs from DTL to the distribution licensees operating in NCT of Delhi, including BYPL, as per the respective load profile of the Distribution companies. In view of the same, from 1.4.2007 onwards, the responsibility for arranging power for their respective areas of supply was vested in the respective distribution licensees/Discoms, including BYPL herein. Considering the fact that DVC had not commenced supply of 200 MW power from its Chandrapura TPS plant to Delhi as per



its commitments, and since DVC came forward to schedule 100 MW from its Mejia Power Station (out of the allocation of 150 MW to NR), the MOP, GOI vide letter dated 19.3.2009, decided that DVC shall immediately schedule 100 MW from Mejia Unit-6 to Delhi till further orders.

4. Meanwhile, in Petition No. 66/2005 filed by the Respondent DVC, the Commission, vide its order dated 3.10.2006, determined the tariff of its generation stations and for inter-State transmission of electricity for the period 2004-09. As regards the prayer of DVC for the creation of a Pension & Gratuity (P&G) fund in the said petition, the Commission, in the said order, decided as under:

“80. We, therefore, hold that in view of the overwhelming powers of the Central Government to issue instructions on the manner in which retirement funds are to be maintained cannot be questioned unless the instructions are shown to be violative of any statutory provision.

81. Accordingly, we approve the proposal of BYPL Corporation for creation of the fund. However, entire burden should not be passed on to the consumers. We direct that the liability in this regard shall be shared between BYPL Corporation and the consumers in the ratio of 40:60. The share of the consumers shall be recovered in three annual equal installments starting from 2006-07”

5. On an appeal filed by DVC and other parties (in Appeal No.271/2006 & batch) before the Appellate Tribunal for Electricity (APTEL), against the tariff order dated 3.10.2006, the APTEL vide its judgment dated 23.11.2007, on the issue of P&G fund, held as under:

D.3 As a general rule, once the Commission, after prudence check, has agreed with the need for funding the Pension and Gratuity Contribution funds, DVC should have been allowed to recover entire amount from the consumers through the tariff. Asking DVC to contribute out of its own resources would tantamount to denying it the return on equity as assured in terms of Tariff Regulations. However, if we look at it from the point of view of the consumers, the consumers, particularly the industrial and commercial ones, have now no option to adjust their sale price to take into consideration the need for meeting the accumulated liability. It is, therefore, an accepted fact that due to postponing of the creation of such fund, the consumers were enjoying lesser tariff than the legitimate tariff otherwise applicable to them
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D.5 In view of the above we find it unreasonable to allocate 40% of the burden on DVC. We are of the opinion that entire expenditure, as determined after prudence check by the Commission, is to be borne by the consumers.

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113. In view of the above, the subject Appeal No.273 of 2006 against the impugned order of the Central Commission passed on 3rd October 2006 is allowed to the extent described in this judgment and we remand the matter to the Central Commission for de novo consideration of the Tariff Order dated 3rd October 2006 in terms of our findings and observations made hereinabove and according to the law. Appeal No. 271, 272 and 275 of 2006 and No. 8 of 2007 also disposed of, accordingly”

6. In terms of the above directions of the APTEL, the Commission, vide its order dated 6.8.2009 in Petition No. 66/2005 *inter-alia* on the issue of P&G, observed as under:

“69. The Commission in its order dated 3.10.2006 had worked out an amount of Rs. 153449 lakh towards pension and gratuity fund and directed that 60% of the aforesaid amount be recovered from the consumers over a period of three years starting from the year 2006-07 to 2008-09. The balance 40% of the gratuity fund was to be borne by BYPL as it was allowed a transition period for two years i.e. 2004-05 and 2005-06 and BYPL was allowed to retain the surplus fund during the years. Though tariff was allowed to BYPL from 1.4.2004 due to the transition period, BYPL was allowed to recover tariff at the rates fixed by it for the period from 1.4.2004 to 31.3.2006 and thereafter at the rates allowed by the Commission by its order dated 3.10.2006. Since BYPL was allowed to recover tariff at the rates determined by it for 40% of the tariff period and retain the surplus so generated, the Commission took a conscious view that BYPL should contribute to the extent of 40% of the pension and gratuity fund out of the surplus generated during the years 2004-05 and 2005-06....

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71. It is noticed that the Appellate Tribunal while agreeing with the order of the Commission allowing transition period for two years to BYPL, has, however rejected the non-allowance of 40% of the pension contribution and observed that BYPL is entitled to recover the entire amount of pension fund from its consumers, provided that such recovery was staggered and do not create tariff shock to the consumers.

72. It could be observed from the books of accounts of BYPL that BYPL had generated a surplus amount of Rs 79487 lakh during the year 2004-05 and Rs. 188634 lakh during the year 2005-06. After adjustments on account of taxes and prior period, the surplus amount was Rs. 69044 lakh for year 2004-05 and Rs.108282 lakh for the year 2005-06. Considering the equity worked out in terms of the direction of the Appellate Tribunal and the additional capitalization allowed, the Return on equity at the rate of interest @ 14% works out to Rs.17700 lakh for 2004-05 and Rs.18000 lakh for 2005-06.

73. Accordingly, in compliance with the directions contained in the judgment of the Appellate Tribunal, it has been decided to stagger the balance 40% of the pension fund over a period of five years during the tariff period 2009-14, without any revision in the pension fund allocated in tariff for the period 2006-09...”

7. Thereafter, the Commission vide its order dated 7.8.2013 in Petition No. 276/GT/2012 (filed by DVC for determination of tariff of Durgapur TPS, Units III and IV for the period 2009-14), on the issue of P&G liability, *inter-alia*, observed as under: -

“87... the Commission had allowed BYPL to recover 60% of the admitted liability of



₹153449.00 lakh during the period 2006-09 and the balance 40% of liability during the period 2009-14 in compliance of the directions contained in the judgment of the Tribunal. In line with this, the Commission vide its order dated 8.5.2013 in Petition No. 272/2010 had allowed the recovery of an amount of ₹92069.40 lakh, being 60% of ₹153449.00 lakh towards Pension and Gratuity Fund for all its generating stations along with the tariff for the period and 2006-09 and ₹61379.60 lakh, being the balance 40% amount in five equal yearly instalments along with the tariff for the period 2009-14....

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89...the amount towards P&G liability is recoverable by BYPL in five annual equal installments during the period 2009-14 in addition to the staggered P&G contribution allowed by the Commission for the period 2006-09. Based on the approved capital cost as on 31.3.2009 vide order dated 8.5.2013 in Petition No. 272/2010, the total P&G liability has been apportioned among all the generating stations of BYPL. Accordingly, the year-wise P&G liability for this generating station, which is subject to truing-up in terms of the 2009 Tariff Regulations is worked out and allowed as under..."

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8. Subsequently, in Petition No. 138/GT/2013 filed by DVC, the Commission had approved the tariff of Mejia Units-5 & 6 for the period 2009-14 on 23.1.2015. Further, in Petition No. 115/GT/2015 filed by DVC, the Commission vide its order dated 9.2.2017, revised the tariff of Mejia TPS, Units-5 & 6 for the period 2009-14 (as determined vide order dated 23.1.2015) after truing-up exercise. Though BYPL was not made a party in these petitions, DVC had *inter-alia*, claimed the P&G contribution/liability, as on 31.3.2006 and 31.3.2009, and the Commission, in line with the methodology adopted in the above order dated 7.8.2013 (in Petition No. 276/GT/2012) observed vide order dated 9.2.2017, the following:

"99. In this background, the additional claim of BYPL towards P&G liability for the period 2009-14 based on Actuarial valuation is not allowed. However, the allocation of P&G liability pertaining to period 2004-09 has been revised by re-allocating the total P&G liability approved in order dated 7.8.2013 by taking into consideration this generating station of BYPL. Therefore, the P&G liability for the generating stations is worked out from the actuarial valuation report of the generating stations of BYPL as under..."

102. Allocation to individual generating stations have undergone change on account of addition of capacity of Mejia V and VI. For the purpose of billing if the beneficiaries are same and entitlement of power to each beneficiary does not change, then above changes are to be handled as adjustment entries, if needed, as it is felt that above sum might have been recovered under individual plants.

103. In case of changes in entitlement of power to beneficiary, then suitable claim/refund is to be made in billing with clear remarks for better understanding of concerned beneficiaries."



Submissions of the Petitioner BYPL

9. In the above background, the submissions of BYPL in this petition are as under:

a) DVC on 8.5.2017, issued an Energy bill pertaining to the revised Annual Fixed Charges (AFC) of Mejia Unit-6 for the period 2009-14, in terms of the order dated 9.2.2017 in Petition No. 115/GT/2015. A copy of the bill dated 8.5.2017 issued by DVC is annexed as Annexure P/5 to the Petition.

b) On 16.5.2017, BYPL issued a letter to DVC objecting to the said energy Bill dated 8.5.2017 and, *inter-alia* stated that: -

(i) The bill raised for Mejia Unit-6 pertains to the recovery of the remaining 40% of the P&G component, in line with the Commission's order dated 6.8.2009 in Petition No. 66/2005. In the said order, DVC was allowed 60% of the P&G liability during the period 2004-09 and the balance 40% of the liability for the said period was to be recovered from the beneficiaries during 2009-14.

(ii) As per the directions of MOP, GOI letter dated 19.3.2009, BYPL became a beneficiary of Mejia Unit-6 from April 2009 onwards. Therefore, BYPL was not liable to pay the aforementioned charges pertaining to the recovery of the remaining 40% of the P&G liability for the period 2004-09, which was to be recovered during the period 2009-14, from the beneficiaries.

(iii) BYPL was not a beneficiary for the period 2004-09, and power was not scheduled to BYPL from Mejia Unit-6 prior to April 2009. BYPL had not contributed the 60% of the P&G liability for 2006-09, as per the Commission's order dated 6.8.2009 in Petition No. 66/2005, and was also not liable to bear the remaining 40% of the P&G liability, which was to be recovered during the period of 2009-14, in five equal instalments.

(iv) In view of the above, BYPL was not liable to pay the charges as claimed by DVC and the bill raised by DVC was null and void and, hence, not payable. Therefore, the original bills were returned to DVC.

c) On 13.6.2017, BYPL again issued a letter to DVC regarding the revision of the annual fixed charges for Mejia Units-5 & 6, with reference to DVC's Bill dated 8.5.2017, and, *inter-alia*, stating that:

(i) As per the order dated 6.8.2009, 60% of the P&G component was allowed to be recovered during the period 2006-09, and the balance 40% was deferred to be recovered during 2009-14. BYPL was allocated power from Mejia Unit-6 in April 2009, as per the allocation letter dated 19.03.2009 issued by MOP.



(ii) BYPL cannot be made liable for 60% of the P&G liability for the period 2004-09, as BYPL was not a beneficiary of Mejia Unit-6 during that period. Accordingly, BYPL cannot be made liable to pay the balance of 40% of the same P&G liability as well.

(iii) On the contrary, DVC was entitled to recover the balance 40% of the P&G liability from its beneficiaries for the period 2004-09. Since BYPL cannot be made liable to pay the charges, DVC was requested to retract the issued bills, at the earliest.

d) In response to BYPL's letter dated 16.5.2017, DVC issued a letter dated 30.6.2017 to BYPL stating that:

(i) The bill was raised as per the tariff determined by this Commission by order dated 9.2.2017 for Mejia Units-5 & 6. Clause 4.1 of the PPA dated 24.8.2006 between DVC and DTL (vested to the three electricity distribution companies of Delhi and accepted by BYPL) clearly mentions that this Commission's tariff would be applicable at DVC periphery.

(ii) Thus, DVC raised the bills strictly in accordance with the tariff as determined by this Commission, year-wise, for the period 2009-14. For any further clarification on this issue, BYPL may take up the issue with this Commission. In terms of clause 6.3 of the PPA dated 24.8.2006, 95% payment must be made against the amount, if disputed within the specified frame of time.

(iii) The bill, which was returned by BYPL vide letter dated 16.5.2017, was being resubmitted along with the letter for taking necessary payment action.

e) In response to DVC's letter dated 30.6.2017, BYPL, vide its letter dated 24.7.2017, stated that DVC's letter did not address the concerns raised by BYPL, and accordingly, BYPL submitted the following:

(i) As per the MOP letter dated 19.3.2009, Delhi Discoms were allocated 100 MW power from Mejia Unit-6 (at that time BYPL's share was 27.24% of the power allocated to the NCT of Delhi).

(ii) Units-5 & 6 of Mejia TPS, were declared on 29.2.2008 and 24.9.2008, respectively. The Commission, by its order dated 6.8.2009 in Petition No. 66/2005, allowed 60% of P&G liability for the period 2004-09 and the balance 40% of the said liability during the period of 2009-14, payable in five equal yearly instalments.

(iii) In the aforesaid order dated 6.8.2009, this Commission clearly provided the methodology for recovering the balance 40% of P&G liability during the 2009-14 from the beneficiaries. As evident from Para 102 of the order dated 9.2.2017, only those beneficiaries who had



already paid 60% of the P&G liability during the period 2006-09, were liable to pay balance of 40% of the P&G liability during the period 2009-14.

- (iv) However, BYPL was allocated power with effect from 1.4.2009, and hence, there was a change in the entitlement of power from Mejia Unit-6, with effect from 1.4.2009. As per Para 103 of the aforesaid order, the suitable claim should be raised by DVC to the beneficiaries, as per their entitlement during the period 2004-09.
- (v) DVC had not issued the bill as per the methodology for recovering of P&G liability, as stipulated at Paras 102 and 103 of the order dated 9.2.2017. Hence, BYPL was not liable to pay the said amount. This Commission had categorically specified the treatment for recovery of P&G liability and there was no need for clarification from this Commission in this regard.
- (vi) Accordingly, BYPL requested DVC to issue the bill to the beneficiaries as per the year-wise entitlement during the period 2004-09, as mentioned in Para No. 102 of the order dated 9.2.2017 of the Commission. Accordingly, the bill issued by DVC regarding Mejia Units-5 & 6 was not acceptable to BYPL, and the same was null and void.

10. On 25.9.2017, DVC issued a letter to BYPL reiterating its submissions made in its letter dated 30.6.2017. On 6.7.2018, BYPL addressed a letter to this Commission seeking clarification regarding the apportionment of P&G liability allocated to Mejia Units-5 & 6 in an order dated 9.2.2017 in Petition No. 115/GT/2015. In response, the Commission, vide its letter dated 24.8.2018, issued to BYPL, observed that this Commission does not entertain such request through letters/representations addressed to it and, accordingly, directed BYPL to file an appropriate application before this Commission in terms of the provisions of the Conduct of Business Regulations, notified by the Commission.

Grounds raised by BYPL

A. Withdrawal of the arbitrary bill raised by DVC

11. BYPL has contended that it is not liable to contribute towards the P&G liability as BYPL was not being supplied power from the concerned generation station during the



period 2004-09, for which the liability has accrued and allowed by this Commission by order dated 9.2.2017, as evident below:

- a) The Commission, by order dated 6.8.2009 in Petition No. 66/2005, allowed DVC to recover 60% of P&G's liability during the period 2006-09 and the balance 40% during 2009-14 in five equal yearly instalments. However, it is noteworthy that the P&G liability to be recovered pertains to the liability as on 31.3.2006.
- b) The Commission, by its order dated 7.8.2013 in Petition No. 276/GT/2012, had allowed the year-wise P&G liability as on 31.3.2006, as well as the 40% of the difference in P&G liability as on 31.3.2009, to be recovered in five equal instalments, during 2009-14. As evident from the above, the liability of P&G relates to the period up to 31.3.2009. However, BYPL became a beneficiary of Mejia Units-5 and 6, after 31.3.2009, and as such, DVC cannot fasten any liability on BYPL, who was not a beneficiary at that relevant time.
- c) Accordingly, DVC has to recover the said amounts from the beneficiaries who were allocated the power during the concerned period (2004-09). In other words, the liability to pay the balance 40% of P&G liability during 2009-14 would only be on the beneficiaries who had already paid 60% of the liability during the period 2006-09.
- d) As per the PPA dated 24.8.2006, between DVC and DTL (now allocated to BYPL, pursuant to DERC order dated 31.03.2007), there was no power allocated to BYPL from Mejia Units-5 & 6, and it was only on 19.3.2009 when MOP directed DVC to schedule 100 MW of power to Delhi, and BYPL became a beneficiary (*27.24% of the power allocated to the NCT of Delhi at that relevant time*) of DVC's Mejia Units-5 & 6. Accordingly, BYPL cannot be made liable to pay the P&G liability for the period, i.e., from 31.3.2006 to 31.3.2009, when it was not even a beneficiary of Mejia Units-5 & 6.
- e) It is clear from the order dated 9.2.2017 that if there is a change in the entitlement of power to the beneficiaries, then a suitable claim/refund has to be made in the billing. As such, in the present case, BYPL started scheduling power from Mejia Units-5 & 6 plants from April 2009 onwards. Therefore, there exists no reason for the bills raised upon BYPL with respect to the P&G liabilities, which had accrued before the allocation and scheduling of power from Mejia Units-5 & 6 of DVC, i.e., 31.3.2009.
- f) DVC has been relying upon this Commission's order dated 9.02.2017 to claim the balance 40% of P&G liabilities for the period of 2006-09 and 2009-14. However, DVC has chosen to ignore the Commission's finding in Paragraphs 102 and 103 of the said order wherein this Commission has categorically directed DVC to revise the bills as per the change in the entitlement of power from Mejia Units-5 & 6.



g) DVC cannot rely on one part of the order and ignore the other part. The same, if permitted, would lead to absurdity. If DVC is allowed to recover the balance 40% of P&G liabilities for the period 2006-09 from BYPL, then BYPL would be paying for an expenditure that had occurred prior to the period of contract with DVC, i.e., prior to April 2009. As such, if in case DVC is allowed to recover the balance 40% of P&G liabilities for the period of 2006-09 from BYPL, then the same would be against the Tariff Policy and the law laid down by the Hon'ble Supreme Court, Appellate Tribunal, and this Commission, that tariff cannot be charged retrospectively, i.e., for the period during which BYPL was not even a beneficiary of Mejia Units-5 & 6 of DVC. The same would also unnecessarily burden the consumers of BYPL.

h) In light of the above, the Commission may direct DVC to withdraw the bill dated 8.5.2017 issued by DVC seeking the payment Rs. 39 crores on account of P&G liabilities for the period 2006-09 from BYPL, purportedly in accordance with the directions issued by this Commission vide order dated 9.2.2017 in Petition No. 115/GT/2015.

B. Allocation of P&G liabilities amongst the DVC stations

12. Without prejudice to the above contentions, BYPL has submitted that the Commission had allocated 40% of the staggered P&G liability, i.e. Rs. 114277.29 lakh, amongst various stations of DVC, as under:

"100. Further, the above P&G liability has been allocated to the various generating stations of BYPL as under: -

(Rs in lakh)

Name of station	Capital cost as on 31.3.2009	Total P&G allocated	2009-10	2010-11	2011-12	2012-13	2013-14
Bokaro TPS	58554.83	11712.05	2342.41	2342.41	2342.41	2342.41	2342.41
Chandrapura TPS	26914.05	5383.31	1076.66	1076.66	1076.66	1076.66	1076.66
Durgapur TPS	19501.48	3900.66	780.13	780.13	780.13	780.13	780.13
Mejia TPS #1 to 3	160713.11	32145.60	6429.12	6429.12	6429.12	6429.12	6429.12
Mejia TPS #5 & 6	205946.66	41193.15	8238.63	8238.63	8238.63	8238.63	8238.63
Maithon HS	5881.05	1176.32	235.26	235.26	235.26	235.26	235.26
Panchet HS	5016.79	1003.45	200.69	200.69	200.69	200.69	200.69
Tilaiya HS	263.80	52.76	10.55	10.55	10.55	10.55	10.55
T&D	88541.73	17709.99	3542.00	3542.00	3542.00	3542.00	3542.00
Total	571333.50	114277.29	22855.46	22855.46	22855.46	22855.46	22855.46



(Rs in lakh)

Mejia Thermal Power Station	2009-10	2010-11	2011-12	2012-13	2013-14
Contribution to P&G	8238.63	8238.63	8238.63	8238.63	8238.63

13. Accordingly, BYPL has submitted that it is not aware of the methodology and formulae employed by this Commission in apportioning the amount of Rs. 41193.15 lacs towards P&G liability for Mejia Units 5 & 6 of DVC. It has also submitted that there is a lack of clarity with respect to the apportionment of P&G liability to the different generating stations of DVC, and, as such, it could not ascertain the mechanism adopted by DVC to arrive at the figure of Rs. 39 crores to be paid by BYPL. BYPL, while pointing out that there must be a basis on which apportionment towards various generating stations of DVC was done since the P&G liability is in the nature of employee expenses, has submitted that the apportionment of P&G liability should be in proportionality to the number of employees. Accordingly, BYPL has prayed that this Commission may provide the basis for arriving at the apportioned figures of P&G liability for various generating stations of DVC and also to direct DVC to provide the basis of raising an invoice of Rs. 39 crores, purportedly in compliance of order dated 9.2.2017.

Hearing dated 9.5.2019

14. The Petition was admitted on '9.5.2019', and the Commission directed issuance of notice to the Respondent, with directions to the parties, to complete pleadings in the matter.

Reply of the Respondent, DVC

15. The Respondent DVC, vide its reply affidavit dated 1.10.2019, has submitted the following:

- (a) In terms of the letter dated 19.3.2009 of MOP, GOI, 100 MW of power from Mejia TPS, Unit-6 was allocated to the Delhi Distribution licensees. Accordingly, in terms of the DERC order dated 31.3.2007, 27.24 MW of power from Mejia Unit-



6 was scheduled by DVC to BYPL in March 2009. The power supply to BYPL by DVC from Mejia Unit-6 continues to date as per the revised allocation of 25.40 MW made by DERC with effect from 1.4.2014.

- (b) DVC has acted in accordance with law in supplying power to BYPL from March 2009 till 31.3.2014 from Mejia Unit-6. In accordance with the Commission's order dated 9.2.2017, DVC has raised a supplementary bill dated 8.5.2017 on BYPL, and in the said bill, DVC has claimed only the proportionate costs from BYPL, which has been permitted to be recovered as annual fixed charges from DVC's Mejia Units- 5 and 6. There is no infirmity in the claim of DVC or in the bill dated 8.5.2017.
- (c) It is denied that BYPL started procuring power from Mejia Unit-6 only in April 2009, as the supply of power from the above-generating unit started in March 2009. DVC has billed BYPL for the period 2009-14 in terms of the tariff orders passed by the Commission from time to time, corresponding to its proportionate liability.
- (d) The aspect of 40% of the P&G contribution allowed to be recovered in the period 2009-14 has to be added necessarily to the revenue requirements/ annual fixed charges for the said years and recover from all the Procurers of electricity from DVC during the said financial years notwithstanding that they may not have been the Procurers in the previous financial years. The concept of prior period income and prior period adjustments as tariff elements is specifically for the above purpose. The tariff setting will be rendered ineffective and complicated if the above principle of the tariff being a continuous process is not given effect and technical pleas raised by BYPL are accepted. The same has been upheld in a catena of judgements laid down by the Commission in *M.P. Power Management Co. Ltd. vs. Central Electricity Regulatory Commission*, *SJVN Limited vs. Punjab State Power Corporation Ltd. and Ors.* order dated 09.04.2019 in Petition No. 310/GT/2018, *Power Grid Corporation of India Limited vs. Karnataka Power Transmission Corporation Ltd. and Ors.* order dated 04.04.2019 in Petition no. 15/RP/2018, *Power Grid Corporation of India Limited vs. Himachal Pradesh State Electricity Board and Ors.* order dated 03.05.2018 passed in Petition no. 183/MP/2017.
- (e) The PPA clearly provides that the tariff determined by the Commission is payable for the supply of power by DVC to BYPL. Thus, it is clarified that the power supplied by DVC from Mejia Unit-6 in terms of the directions of the MOP, dated 19.3.2009, is also payable in terms of the tariff determined by the Commission from time to time. There cannot be any other tariff which is payable by BYPL to DVC for the supply of power except the regulated tariff determined by the Commission. Reliance is placed on *Energy Watchdog v. CERC and others: (2017) 14 SCC 80* and *PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603*.



- (f) As laid down by the Supreme Court in *Bhaskar Shrachi Alloys Ltd. v. Damodar Valley Corpn.*, (2018) 8 SCC 28, 40% of the deferred P&G contribution has to be the part of the annual fixed charges i.e. it should be a part of the revenue requirements of DVC for the period 2009-14. Further, it is a well-settled principle that tariff setting is a continuous and ongoing process as held in the case of *UPPCL v. NTPC Limited & Ors* (2009) 6 SCC 235.
- (g) The Hon'ble Supreme Court, vide its judgement dated 3.12.2018 in Civil Appeal No. 4881 of 2010 upheld the order dated 10.5.2010 passed by the Tribunal. Thus, the recovery of the expenditure towards pension and gratuity contribution by DVC for the period 2004-09 has been upheld by the Hon'ble Supreme Court, and 60% of the recovery was to be done during the period 2006-09 and the balance 40% was deferred for the control period 2009-14.
- (h) In accordance with the above, the P&G contribution for the year 2006-09, to be recovered during the period 2009-14, has been included in the annual fixed charges for the period 2009-14, as per the order dated 9.2.2017 in Petition No. 115 /GT/2015.

Hearing dated 11.11.2021

16. The Commission vide ROP of the hearing dated 11.11.2021 had directed the Respondent DVC to furnish the details in respect of its beneficiaries associated with Units 5 & 6 of Mejia TPS and directed the parties to complete their pleadings in the matter. The Respondent vide its affidavit dated 6.12.2021, has submitted the details in respect of the P&G component billed by DVC in respect of Mejia Units 5 & 6. However, no rejoinder has been filed by the Petitioner, BYPL.

Hearing dated 21.4.2022

17. Though the Petition could not be taken up for hearing on 21.4.2022 due to paucity of time, the Commission, vide ROP, had directed BYPL and DVC to file certain additional information. In response, the Respondent vide affidavit dated 17.5.2022 has filed the additional information.

Hearing dated 25.8.2022

18. Though the Petition could not be taken up for hearing on 25.8.2022 due to paucity of time, the Commission, vide ROP, directed the Respondent to file certain



additional information. In response, the Respondent, vide affidavit dated 15.9.2022, has filed the additional information.

Hearing dated 18.10.2022

19. During the hearing, the learned counsel for BYPL reiterated its submissions made in the Petition and submitted that it was not liable to pay the balance 40% of P&G liabilities billed by the Respondent for the period 2004-09. In response, the learned Senior counsel for DVC clarified that BYPL had already made payment of the amounts vide the bill raised by DVC and, therefore, nothing survives in the petition. However, at the request of the learned counsels, the Commission, after directing the parties to file their written submissions, reserved its order in the petition.

Hearing dated 29.1.2024

20. Since the order in the Petition could not be issued prior to one Member of the Commission, who formed part of the Coram, demitting office, the matter was re-listed and heard on 29.1.2024. During the hearing, the learned counsel for the Petitioner sought permission to file its written submissions in the matter. The learned counsel for the Respondent DVC sought permission to place on record annexures (h) and (i) of its reply, which were inadvertently not enclosed earlier. The Commission, after hearing the parties, directed the Respondent to file the said Annexures (h) and (i) after serving a copy to the Petitioner. The Commission also directed the Respondent to submit the following additional information after serving a copy to the Petitioner, and the parties were requested to complete their submissions in the matter.

(a) Whether the proportionate P&G liability (towards 60% of the approved P&G amount) till March, 2009 was recovered from the Petitioner? If so, the details thereof, with supporting documents;

(b) The reason(s) for not impleading the Petitioner as a Respondent in the tariff Petitions (Petition Nos. 138/GT/2013 and 115/GT/2015) filed earlier before this Commission, in respect of this project.

21. In response to the above, the Petitioner BYPL has filed its written submissions



on 6.3.2024 and the Respondent DVC has filed its additional submissions/clarifications on 21.3.2024.

Written Submissions of BYPL

22. The Petitioner BYPL, in its written submissions has mainly reiterated the submissions made in its petition. However, it referred to the judgment of the Hon'ble Supreme Court in PGCIL v TANGEDCO (2019) 7 SCC 34 and submitted that BYPL and its consumers could not be made liable to pay 40% of the amount for the period 2006-09 when, admittedly, BYPL was not a beneficiary from Mejia Unit-6.

Additional submissions of DVC

23. The Respondent DVC, vide additional submissions, has also reiterated the submissions made in its reply, as above. Referring to the judgment of the Hon'ble Supreme Court in UPPCL V NTPC & ors (2009) 6 SCC 235, the judgment dated 1.4.2014 of the Tribunal in Appeal No. 232/2013 and the Commission's order dated 9.4.2019 in SJVNL v PSPCL & ors, wherein, it has been settled that tariff setting is a continuous and on-going process. The Respondent DVC has stated that as long as power supply was made to BYPL from MTPS, Unit-6 for the period 2009-14, BYPL is liable to pay for the 40% of the P&G contribution pertaining to the period 2006-09, which has been allowed to be recovered during 2009-14, as the same forms part of the revenue requirements of DVC for the period 2009-14. The Respondent has added that BYPL has been supplied power from MTPS Unit-6 in the month of March 2009 and BYPL has duly paid towards the invoices raised by DVC (which also includes the proportionate P&G charges of 60% related to the period 2006-09). Accordingly, the Respondent has submitted that BYPL cannot claim that no power was supplied to them in the month of March 2009 from MTPS, Unit-6.



24. Based on the submissions of the parties, the issue that emerges for consideration is as under:

“Whether the Petitioner BYPL is liable to pay the balance 40% of the P&G liability, relating to the period 2006-09, in respect of Mejia TPS Units-5 & 6 to the Respondent DVC?”

Analysis and Decision

25. As stated, the Commission, while determining the tariff of the generating & transmission systems of DVC had, in its order dated 3.10.2006, in Petition No. 66/2005, admitted the P&G liability for the period 2006-09, based on actuarial valuation. Subsequently, in compliance with the directions contained in the judgment of APTEL dated 23.11.2007 in Appeal No.273/2006 and other connected appeals (as in para 5 above), the Commission, vide its order dated 6.8.2009 in Petition No. 66/2005 (as in para 6 above), had allowed DVC to recover 60% of the admitted P&G liability during the period 2006-09, and the balance 40% of the liability was staggered during the period 2009-14. Thereafter, the Commission, vide its order dated 7.8.2013 in Petition No. 276/GT2012 (tariff of Durgapur TPS, Units III & IV) had permitted DVC to recover the year-wise P&G liability as on 31.3.2006, as well as the balance 40% of the difference in the P&G liability as on 31.3.2009, in five equal yearly installments during the period 2009-14, in line with its order dated 8.5.2013 in Petition No.272/2010. It is pertinent to mention that the recovery of the said P&G contribution has been upheld by the Hon'ble Supreme Court, vide its judgment in BSAL v DVC & ors (2018) 8 SCC 281.

26. In the case of Mejia TPS, Units 5 & 6 (present case), the Commission, vide order dated 23.1.2015 in Petition No. 138/GT/2013, had approved the tariff for the period 2009-14, which was revised vide order dated 9.2.2017 in Petition No.115/GT/2015, after the truing-up exercise. BYPL's contention is that it cannot be saddled with the



balance 40% of the P&G liabilities related to the period 2006-09, since no power was being supplied from Mejia TPS, Unit-6 by DVC to BYPL during the period 2006-09. Referring to paras 102 and 103 of the order dated 9.2.2017, BYPL has argued that the liability to pay the balance 40% of the P& G liability during 2009-14, would only be on the beneficiaries who had already paid 60% of the liability during the period 2006-09 and not on BYPL to whom power was not supplied during 2006-09. Per contra, DVC has submitted that BYPL has been supplied power from Mejia TPS Unit-6 in the month of March 2009 and BYPL had duly paid towards the invoices raised by DVC, which also includes the proportionate P&G liability of 60% related to the period 2006-09. It has also clarified that the mechanism of claiming the P&G amounts from the new beneficiaries who have been supplied power by DVC during the period 2009-14, has been provided in para 103 of the order dated 9.2.2017. Accordingly, DVC has submitted that BYPL cannot now claim that no power was supplied to them in the month of March 2009 from Mejia TPS, Unit-6.

27. We have considered the submissions and the documents on record. BYPL's objection to the recovery of the balance 40% of the P&G liability is on the grounds that it was not a beneficiary of the Mejia TPS Unit-6 prior to April 2009, and since BYPL had not contributed towards 60% of the P&G liability for 2006-09, it was also not liable to bear the remaining 40% of the said liability during the period 2009-14. From the documents placed on record by DVC, it is noticed from the Regional Energy Account (REA) issued by ERPC for the month of March 2009 that power was scheduled from DVC's Mejia TPS to DTL (BYPL, BRPL, and NDPL) during the month of March 2009. In terms of this, the apportioned energy of 27.24 MW (as per DERC order dated 31.3.2007) was scheduled to BYPL and an invoice for the same was raised by DVC on 7.4.2009, as per the tariff order of this Commission, which was paid by BYPL on 21.4.2009. This invoice raised by DVC in the month of March 2009 and fully paid by



BYPL also includes the proportionate P&G liability of 60% related to the period 2006-09. This fact has not been disputed by BYPL either in its Petition or in the written submissions filed by it, as above. BYPL having made the full payment to DVC for the supply of power during March 2009 from Unit-6 of Mejia TPS, cannot now contend that no power was supplied to it by DVC from the said Unit prior to April 2009 and therefore, it was not liable to pay the balance 40% of the P&G liability (related to 2006-09) during the period 2009-14. In our view, since BYPL had been supplied the requisite power by DVC during March 2009 and has paid the proportionate 60% of the P&G liability during 2006-09, based on the invoice raised by DVC, BYPL has become liable to pay the balance 40% of the proportionate P&G liability (related to the period 2006-09), during the period 2009-14. The submissions of BYPL are, therefore, misconceived and deserve no merit for consideration.

28. Another ground raised by BYPL for the non-payment of 40% of the P&G liability (related to the period 2006-09) during the period 2009-14 is that, though power was being supplied by DVC from Mejia TPS Unit-6, it was not arrayed as a party in Petition No.115/GT/2015 (tariff for the period 2009-14), decided on 9.2.2017. Per contra, DVC has clarified that the monthly bills for power supply from Mejia TPS Unit-6, since 2009, based on the tariff determined by the Commission, have been raised on BYPL, which was paid, and it is only now that BYPL has raised this issue of not being a party to the proceedings. Admittedly, BYPL was not arrayed as a party Respondent by DVC either in Petition No.138/GT/2013 or in Petition No 115/GT/2015 filed by it for the determination of tariff for the period 2009-14 and for truing up of tariff of Mejia TPS Units 5 & 6 respectively, for the period 2009-14. It is, however, pertinent to mention that BYPL, in response to the DVC letter dated 28.4.2008, on 3.5.2008, accepted the offer of DVC for the supply of power from Mejia TPS Unit-6 at a provisional tariff of Rs.2.90/ kWh, subject to the final determination of tariff by this Commission.



Subsequently, the Commission vide its order dated 23.12.2009 in Petition No.155/2008 had approved the tariff of Unit-5 (from 29.2.2008 to 23.9.2008) and for Units 5 & 6 (from 24.9.2008 to 31.3.2009). BYPL was not a party to the proceedings in this petition also. However, based on the tariff orders passed by this Commission, DVC has been raising invoices on BYPL with regard to Mejia Unit-6 and the payments were being made by BYPL after reconciliation. No dispute appears to have been raised by BYPL on the monthly invoices raised by DVC, on the ground that it was not a party to the proceedings. Even in the present case, BYPL has raised objections only with regard to the recovery of the balance of 40% of the P&G liability and not the monthly energy invoices raised by DVC. In the above backdrop, the contentions of BYPL are only an afterthought and we find no reason to entertain the submissions of BYPL on this count. Accordingly, the submissions of BYPL stands rejected. In the light of the above discussions, the prayer of BYPL, seeking directions to DVC for withdrawal of the invoice dated 8.5.2017 for Rs 39 crore, stands rejected.

29. One more prayer of BYPL in this petition is for a direction on DVC to clarify the methodology employed for the apportionment of the P&G liability to its various generating stations. As stated above, BYPL had never raised any issues earlier with regard to the invoices raised by DVC, stating the same to be erroneous or that the same was based on a wrong computation. We, however, notice that DVC, in response to the directions of the Commission, in Petition No.115/GT/2015, had, vide affidavit dated 23.6.2016, submitted the details of the assumptions considered and the methodology used for the computation of the P&G liability. Further, the Commission had revised the allocation (recovery of 40% of the difference in the P&G liability, in an order dated 7.8.2013 in Petition No. 276/GT/2012) and has also allocated the share of 40% of the P&G liability to Mejia TPS Units 5&6, on the basis of the capital cost of Rs 205496.66 lakh as on 31.3.2009. Accordingly, 40% of the P&G liability allocated to



the various generating stations of the DVC, including Mejia TPS Units 5&6, for the period 2009-14, have been worked out and allowed in the order dated 9.2.2017 in Petition No.115/GT/2015. This order appears to have not been challenged by BYPL, on this count. Seen from this angle, the objections of BYPL now, with regard to the methodology appear belated. Be that as it may, we direct DVC to clarify to BYPL, the methodology employed with regard to the apportionment of P&G liability for its various generating stations. This prayer of BYPL is disposed of accordingly.

30. Since BRPL's prayer in para 1(b) has been rejected in paragraph 28 above, the recovery of Rs 39 crore by DVC during the period 2009-14, towards the balance 40% of the P&G liability (related to the period 2006-09), in terms of the invoice dated 8.5.2017, is in order and justified.

31. Petition No.373/MP/2018 is disposed of in terms of the above.

Sd/-
(Pravas Kumar Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(Jishnu Barua)
Chairperson

