Appellate Tribunal for Electricity

(Appellate Jurisdiction)

APPEAL NO. 146 OF 2009 &
I.A. Nos. 332, 333, 334, 340, 341, 342, 349, 350, 351, 352, 355, 359, 360 of 2009 & 264 of 2009

Dated: 10th May, 2010

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. H.L. Bajaj, Technical Member

In the matter of:

Damodar Valley Corporation
DVC Towers, VIP Road
Kolkata-700 054 …Appellant(s)

Versus

1. **Central Electricity Regulatory Commission**
   3rd and 4th Floor, Chanderlok Building
   Janpath, New Delhi-110 001 … Respondent-1

2. **Department of Energy**
   Government of West Bengal
   Secretariat, Kolkata-700 001 … Respondent-2

3. **Department of Energy**
   Government of Jharkhand
   Ranchi-834 002 … Respondent-3

4. West Bengal State Electricity Distribution Company Limited
Vidyut Bhawan, Block 'DJ'
Sector-11, Salt Lake City
Kolkata-700 091 … Respondent-4

Counsel for the Appellant(s): Mr. S.K. Dholakia, Sr. Adv. with Mr. P.K. Tarafdar, Mr. J.R. Das, Mr. Swetaretu Mishra, Ms. Taruna Prasad & Mr. Shwetaketu Mishra

Counsel for the Respondent (s): Mr. Amit Kapur with Apoorva Mishra for R.7
Mr. Sachin Das &
Mr. Gautam Shoraff
for R. 7 &8
Mr. Jagdeep Dhankhar,
Sr. Adv. with
Mr. Aneesh Mittal
for SAIL (IA. 360/09)
Mr. Rakesh Dvivedi, Sr. Adv. with Mr. Rajiv Ranjan,
Mr. S. Chandrashekhar,
Mr. Rajiv S. Dwivedi &
Ms. Priteeka Dvivedi
for SAIL-BSL
Mr. Shyamal Sarkar,
Mr. Rajesh Gupta &
Mr. G Shroff for
Jai Balaji Industries Ltd.
Mr. Jayant Bhushan, Sr. Adv. with Mr. Shyamal Sarkar & Mr. Rajesh Gupta for R.8

Mr. S.B. Upadhyay, Sr. Adv.
with Mr. Anish Kumar &
Mr. Rajesh Dubey for R.5
Mr. Nikhil Nayyar for
R.1 - CERC
Mr. Saurabh Mishra for R.4
Mr. Sunil Kumar, Sr. Adv. with
Mr. Gunjan Kumar &
Mr. Hari Budhia for Bihar
Foundary – R.8
Mr. Sagar Bandopadhyay ,
Mr. Tapas Saha &
Mr. Hiren Dassan for
Objectors / Added
Respondents for
Shyam Steel Industries; Impex
Ferrotech Ltd; Impex Steel Ltd.
Vikash Metal & Power Ltd.;
SRC Udyog Ltd.;
SRC Metallick (P) Ltd.;
Mark Steel Ltd.; Chalira Ispat
(P) Ltd,Gaurang Alloys and
Iron Ltd.; Mihijam Vanaspati
Ltd.; BRGD Ingot (P) Ltd.;
Hira Concart (P) Ltd.;
Sreeramrathi Steel (P) Ltd.;
Delanjana Hard Coke (P) Ltd.;
Baahulali Ferrotech & Power
Ltd. Shri Badrinarain Alloyed
Steel Ltd.; & Nikita Metal (P)
Ltd.

Judgment

As per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

1. Damodar Valley Corporation (DVC) is the Appellant herein. It is a statutory body established by the Central Government under the DVC Act 1948 for the development of Damodar Valley with three participating Governments, namely, the Central Government, the Government of West Bengal and the Government of Jharkhand.

2. The Appellant filed a petition before the Central Commission for determination of its tariff under sections 61 and 62 of the Electricity Act, read with section 79 of the Act for generation, and inter-State transmission of electricity undertaken by the Appellant in respect of the period from 01.04.2004 to 31.03.2009.

3. The Central Commission, after finishing the due process, determined the tariff by the order dated 03.10.2006 in respect of the period from 01.04.2006 to 31.03.2009 after

allowing a special dispensation to the Appellant for a transition period for 2 years, i.e. from 01.04.2004 to 31.03.2006.

4. Having not satisfied with this order, the Appellant filed an Appeal before this Tribunal in Appeal No. 273 of 2006 raising various issues. The Tribunal ultimately passed order dated 23.11.2007 rejecting some of the issues and allowing other issues and remanded the matter in respect of those issues for fresh consideration by the Central Commission. In the light of the said Remand Order passed by the Tribunal, the Central Commission gave opportunity to the Appellant to produce the documents and information in respect of those issues. Accordingly, the same were placed. After considering the materials available on record, the Central Commission passed the order granting the relief to the Appellant in respect of some issues out of those issues for which remand order was passed. Though the Central Commission declined to grant the relief for other issues, it

gave liberty to the Appellant to approach the Central Commission separately in respect of those issues. Feeling aggrieved over this, DVC, the Appellant, has filed this Appeal.

5. The main ground urged on behalf of the Appellant in this Appeal is that the Central Commission has not implemented the remand order passed by this Tribunal in letter and spirit and therefore, the impugned order is liable to be set aside. On the other hand, it is contended on behalf of the respondents, that the Central Commission has scrupulously followed the Remand Order of this Tribunal and gave appropriate relief to the petitioner (Appellant) in respect of some issues and gave liberty to the Appellant to approach the Central Commission separately with reference to other issues and as such there is no infirmity in this order.

6. Before dealing with the rival contentions on this issue, it is worthwhile to refer to the relevant and required facts for proper disposal of this Appeal. These facts are as under:

7. The DVC is a Corporation established under the DVC Act 1948 for the development of Damodar Valley area falling in the States of West Bengal and Jharkhand. There were three major activities undertaken by the DVC under this Act, namely (i) Power Generation, Transmission and Distribution; (ii) Flood Control; and (iii) Irrigation and some other activities like soil conservation, health, afforestation etc.

8. For its electricity business for Generation, Transmission and Distribution, the DVC was authorized to determine its own tariff and recover the same from its consumers under section 20 of the DVC Act, 1948. Accordingly on 01.09.2000, the Appellant (DVC) notified its own tariff order under the DVC Act 1948 and collected the tariff from its consumers. The new Electricity Act came into force in the year 2003, w.e.f. 10.06.2003. Under this Act, the DVC was brought under the provisions of the Electricity Act, 2003 for electricity business. In view of the said Act, the

tariff of the DVC for generation and inter-State transmission was to be determined by the Central Commission.

9. Despite the enforcement of the Electricity Act, 2003, w.e.f. 10.6.2003, the DVC did not approach the Central Commission in time to determine its tariff. Hence, the Central Commission initiated suo moto proceedings through the order dated 29.03.2005 directing the Appellant, DVC to submit its application for approval of its tariff for the tariff period from 01.04.2004 to 31.03.2009. Accordingly on 08.06.2005, the DVC made an application before the Central Commission for determination of its tariff in Petition No. 66 of 2005 in respect of the period from 01.04.2004 to 31.03.2009. After due process, the Central Commission by the order dated 03.10.2006, issued the first tariff order determining the tariff for generation and transmission for the tariff period from 01.04.2006 to 31.03.2009 while allowing a 2-year transition period to DVC, i.e. from

1.4.2004 to 31.3.2006 with the result the tariff determined by the Central Commission was made applicable only from 01.04.2006 to 31.03.2009.

10. On being not satisfied with the said order dated 03.10.2006 passed by the Central Commission, the Appellant challenged the said order before the Appellate Tribunal in Appeal No. 273 of 2006.

11. The Appellant raised the following 10 issues before the Tribunal in the said Appeal No. 273 of 2006 challenging the order dated 03.10.2006 determining the tariff:

(1) Debt Equity ratio;

(2) Disallowance of additional capitalization for the period 2004 to 2009;

(3) Higher return on Equity;

(4) Pension and Gratuity contribution;

(5) Revenues to be allowed under the DVC Act 1948;

(6) Depreciation rate;

(7) Resetting of operating norms at variance from the operating norms prescribed in the 2004 regulations;

(8) Operation and Maintenance expenses;

(9) Return on capital investment on Head Office, Regional Offices, administrative and other technical centres, etc.; and

(10) Generation projects presently not operating.

12. The Tribunal after considering all the issues and hearing the parties by the order dated 23.11.2007 rejected the 5 issues out of these 10 issues and allowed the other 5 issues giving some findings on these issues and remanded the matter to the Central Commission for de novo consideration

in respect of those 5 issues, in the light of their findings. These allowed 5 issues remanded for de novo consideration are as follows:

(1) Additional capitalization for the period 2004-05 and 2005-06;

(2) Pension and Gratuity contribution.

(3) Revenue to be allowed to the DVC under the DVC Act.

(4) Operation and Maintenance expenses.

(5) Debt Equity Ratio.

13. At this juncture, it is appropriate to quote the directions given by the Tribunal to the Central Commission by its judgment dated 23.11.2007 while remanding the matter in respect of those 5 issues:

"113. ***In view of the above, the subject Appeal No. 273 of 2006 against the impugned order of the Central Commission passed on 03.10.2006, 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 03.10.2006 in terms of our findings and observations made hereinabove and according to law."***

14. In this judgment, this Tribunal had categorically directed the Central Commission to consider the tariff order dated 03.10.2006 afresh only in respect of those 5 issues in terms of the findings and observations referred to in its judgment dated 23.11.2007 and according to law.

15. In the said Remand Order, the Appellate Tribunal gave a finding that though the regulations framed by the Central Commission would not prevail over the provisions of the DVC Act, the provisions of the DVC Act which are inconsistent with the Electricity Act 2003 would not operate

and shall stand superseded by the Electricity Act, 2003. It is also specifically found in the said judgment that sections 18, 19, 20, 32, 60(2) (c) are inconsistent with the Electricity Act and therefore these sections stand superseded by the Electricity Act 2003 but the provisions under sections 12(b), 30, 31, 34, 35, 37 to 42 and 44 are not inconsistent with the Electricity Act and therefore these provisions can be given effect to and shall not be subject to any regulations by any authority, except by the legislation.

16. Thereupon some of the parties in the Appeal including the Central Commission challenging the order of Remand dated 23.11.2007 passed by the Tribunal, filed Appeals before the Supreme Court and sought for stay of the Remand Order. The Hon'ble Supreme Court, though issued a notice in the main matter, declined to grant stay of the operation of the Remand Order. Hence, the Central Commission proceeded to initiate the process of fresh

consideration in respect of those issues referred to it in the Remand Order dated 23.11.2007.

17. Accordingly on 28.04.2009, the Central Commission directed the DVC to furnish detailed information with regard to additional capitalisation for the period 2004-05 and 2005-06 as referred to in the Remand Order as well as the provisions made towards pension and gratuity fund.

18. In pursuance of the said order dated 28.04.2009, the DVC filed IA No. 19 of 2009 in the Original Petition No. 66 of 2005 on 11.05.2009 and placed on record additional information, particulars relating to the subsequent events relating to the tariff period from 1.4.2006 to 31.3.2009. Thereupon on 11.06.2009 the DVC filed an affidavit giving details with regard to additional capitalisation for the period 2004-05 to 2008-09. On 16.06.2009, the Central Commission again directed the DVC to submit detailed information in respect of the assets under replacement category since the details of the corresponding de-capitalization of old assets

for the year 2004-05 had not been submitted. In pursuance of the said directions, the DVC filed another affidavit on 02.07.2009.

19. After considering the materials placed before the Commission and after hearing the parties, the Central Commission passed the impugned order dated 6.8.2009 in respect of those 5 issues referred to in the Remand Order. In this impugned order, the Central Commission allowed only some issues out of those 5 issues referred to in the Remand Order and declined to consider the other issues holding that they are beyond the scope of the Remand Order. However, the Central Commission granted liberty to the DVC to make a fresh application for adjudication of those issues, holding that those issues have to be separately dealt with.

20. Having aggrieved over this order dated 06.08.2009 passed by the Central Commission, the DVC has filed the present Appeal No. 146 of 2009. The same was admitted by this Tribunal and notice was ordered to the Respondents.

21. During the pendency of this Appeal, the Appellant prayed the Tribunal or granting stay of the operation of the impugned order dated 06.08.2009 determining the tariff. However, the Tribunal, by the order dated 16.09.2009 declined to grant stay of the operation of the impugned order dated 06.08.2009 as the same was objected to by the opposite parties. Thereupon, the DVC issued a disconnection notice to some of the parties and on their applications, the disconnection notice alone was stayed by the Tribunal pending the Appeal by the order dated 08.10.2009 on imposing some conditions.

22. In the meantime, some of the parties filed the Petition in the Hon'ble Supreme Court, sought for direction to this Tribunal for the early disposal of this Appeal filed by the Appellant as against the impugned order dated 6.8.2009. Accordingly, the Hon'ble Supreme Court by the order dated 06.01.2010 made a request to this Tribunal to dispose the Appeal within 3 months, if possible, from the date of the

communication of this order. This order was communicated to this Tribunal on 15.01.2010. Accordingly, priority had been given to this Appeal and matter had been posted and heard on day-to-day basis.

23. Large number of lawyers appeared representing both the Appellant as well as the Respondents, including the impleaded parties and the objectors as permitted by the Hon'ble Supreme Court. All of them argued the matter at a very great length for number of days. Apart from their oral (lengthy) submissions, they also filed their (lengthy) Written Submissions.

24. This Appeal seeks to challenge the findings of the Central Commission dated 6.8.2009 on the following issues:-

i) Additional capitalisation.

ii) Interest on capital as per Section 38 of the DVC Act.

iii) Other capital being adjusted against depreciation.

iv) Pay revision.

v) Pension and gratuity fund.

vi) Interest on working capital.

vii) Operation & maintenance expenses.

viii) Expenditure on subsidiary activities.

ix) Debt equity ratio.

25. On the above issues, the following points were urged by the learned Senior Counsel for the Appellant.

(a) Additional capitalisation of Mejia Unit 4 has not been considered by the Central Commission.

b) Other additional capitalisation during the tariff period 1.4.2006 to 31.3.2009 has not been considered.

c) In regard to the O&M expenditure on account of revision of pay, pension and gratuity as a result of the implementation of the VIth Pay Commission recommendation has not been considered.

d) The recovery of 40% of the pension and gratuity contribution has been postponed.

e) The capital cost funded by equity in excess of 50% has not been considered as interest bearing debt as on 1.4.2006.

f) Interest on capital as per Section 38 of the DVC Act has not been allowed.

g) Interest on working capital has not been considered as per the Tariff Regulation, 2004 both in regard to rate and inclusion of appropriate fuel cost.

h) O&M expenses allowed for Transmission System below 132 KV have not been considered. and

i) Expenditure incurred on subsidiary activities and other aspects has not been considered.

j) Debt Equity Ratio has not been correctly fixed.

26. Besides these contentions, as referred to in the earlier paragraph, the learned Senior Counsel for the Appellant urged as the main ground contending that this Tribunal while remanding the matter back to the Central Commission by the judgment dated 23.11.2007 after setting aside the earlier Tariff Order dated 3.10.2006 specifically directed the Central Commission to make a de novo consideration of all the issues but the Central Commission did not make a de novo

consideration in respect of those issues raised by the Appellant and miserably failed to take note of the materials including the particulars about subsequent events placed before the Central Commission by the Appellant and as such the Central Commission passed wrong order by disregarding the directions given by the Tribunal. It is also strenuously contended by the learned Senior counsel for the Appellant that Chapter IV of the DVC Act, even as per the findings of the Tribunal, is entirely applicable but the Central Commission failed to take into consideration the provisions of Sections 29,30,31,32,37, 38,40,41,42,46 and 47 of the DVC Act while disallowing certain claims made by the Appellant and thus the Central Commission has failed to comply with the directions of this Tribunal by not implementing the Remand Order in letter and spirit.

27. Refuting these contentions, the learned Counsel for the respondents including the Central Commission as well as the

impleaded parties and objectors made their elaborate arguments in justification of the order impugned.

28. We have carefully considered these submissions made by the parties and perused the entire records. In the light of the rival contentions, the questions that may arise for consideration are as follows:

(i) Whether the Central Commission has implemented the Remand Order in letter and spirit and dealt with all the issues allowed to be raised before the Central Commission as per the Remand Order in the proper prospective?

(ii) Whether the Appellant is entitled to re-open all the issues decided already by the Tribunal and to raise afresh issues which were not raised earlier either before the Central Commission or the Tribunal in this appeal?

(iii) Whether the Central Commission erred in law in consideration of the additional capitalisation for Mejia Unit 4 in determination of the tariff for the period 1.4.2006 to 31.3.2009?

(iv) Whether Central Commission committed any error in ignoring some claim by the Appellant such as interest on capital and disallowing certain other claims under the head additional capitalisation for the period from 2004-05 to 2006-07 by not accepting the audited account duly certified by CAG?

(v) Whether the Central Commission was justified in adjusting depreciation reserves against the notional loan?

(vi) Whether this Tribunal can interfere with the implementation of the order in exercise of its Appellate jurisdiction under the provision of Section 111 of the Electricity Act 2003?

29. Let us now consider the first issue with reference to the grievance of the Appellant that the Remand order passed by the Tribunal has not been implemented in letter and spirit by the Central Commission.

30. We shall now deal with the scope of the Remand order dated 23.11.2007 passed by this Tribunal.

31. The learned Senior Counsel for the Appellant on this point makes the following contentions:-

(1) This Tribunal in the Remand Order dated 23.11.2007 found fundamental flaws in the first tariff order dated 3.10.2006 and set aside the said order holding that DVC Act shall prevail over the Central Commission Tariff Regulations and therefore, Central Commission Tariff Regulations cannot be applied to DVC and as such, the Remand Order was not limited to five issues alone but was for de novo consideration of all the issues

afresh but the Central Commission failed to follow the said directions given in the Remand Order in letter and spirit.

(2) The scope of the Remand is very wide for the following grounds:-

(a) It was de novo

(b) Law provides that the subsequent events must be taken into account to mould relief.

(c) The Central Commission ought to have considered the subsequent events mentioned in IA No. 19/2009 and allowed the claims made by the Appellant.

32. While dealing with these contentions, it is necessary to refer to the relevant directions given by the Tribunal while remanding the matter as contained in para 113 of the judgment dated 23.11.2007.

"113. In view of the above, the subject Appeal No. 273 of 2006 against the impugned order of the Central Commission passed on 03.10.2006, 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 03.10.2006 in terms of our findings and observations made hereinabove and according to law."

33. The perusal of the entire Remand Order of this Tribunal inclusive of the para 113 mentioned above would clearly indicate that the Tribunal categorically rejected the claim of the Appellant over 5 issues, out of 10 issues raised and allowed the Appellant to raise only the other 5 issues before the Central Commission. The paragraph 113 would mean that the Tribunal allowed the Appeal, and remanded <u>to the extent in</u> respect of some issues and directed the Central Commission to consider those issues alone afresh

that too in the light of the findings rendered by the Tribunal as well as according to law.

34. Thus the directions given in the Remand Order has got 3 elements. They are:-

(a) Remand Order is for de novo consideration of the tariff order dated 03.10.2006 in respect of only 5 issues and not in respect of the issues rejected by the Tribunal;

(b) Decision to be taken by the Central Commission on those 5 issues, shall be in terms of findings and observations made by the Tribunal in various paragraphs of the Remand Order dated 23.11.2007; and

(c) These decisions shall be in accordance with law.

35. As indicated earlier, the whole reading of the judgment of the Tribunal would make it clear that the Remand Order

for de novo consideration was only in respect of 5 issues allowed by the Tribunal and not for other issues which were disallowed by the Tribunal. As a matter of fact the Tribunal order dated 23.11.2007 did not fully set aside the order dated 03.10.2006 passed by the Central Commission. It is factually incorrect to contend that the first Tariff Order dated 3.11.2006 was set aside on all issues.

36. In fact, the Tribunal determined the applicable law in the Remand order itself and advised the Central Commission to decide those 5 issues as per the provisions of the Electricity Act read with only the provisions of the DVC Act which are consistent with the Electricity Act and the Central Commission's regulations relating to Return on Equity, Debt Equity Ratio, etc. It is quite evident from the Remand Order that this Tribunal itself has relied upon and applied some of the Central Commission tariff regulations while determining the specific issues raised by the DVC.

37. Therefore, it is made clear that the Remand order for de novo consideration is not an open remand as projected by the DVC but it is a limited Remand on limited issues described in the judgment that too in terms of the findings and observations made in the judgment and according to law.

38. According to the Learned Senior Counsel for the Appellant, even in Remand cases the subsequent events could be taken into consideration by the Central Commission while arriving at a conclusion. In support of this plea, the Appellant has relied upon a judgment in the case of *Pasupuleti Venkateswarlu versus Motor and General Traders,* reported as AIR 1975 SC 1409. He has also cited another judgment in the case of Ramesh Kumar versus Kesho Ram reported in (1992) SCC 770. However, the Learned Counsel for the respondents pointed out that the judgment rendered in AIR 1975 SC 1409 had been overruled by the subsequent judgment by the Supreme

Court in the case of *Shri kishan versus Manoj Kumar* reported in 1998 (2) SCC 710. It is also brought to our notice by the Respondents that in the said judgment, the Hon'ble Supreme Court has not only overruled AIR 1975 SC 1409, but also held that subsequent events should not be taken into consideration in Remand cases, otherwise the litigation in many cases may drag on for a period of 10 years or more and make the proceedings infructuous by prolonging the litigation. Therefore, the Appellant cannot place reliance upon the overruled judgment.

39. The other decision (1992) SCC 770 cited by the Appellant also would not help the Appellant in view of the ratio subsequently decided by the Supreme Court in the Judgment 1998(2) SCC 710. On the other hand, the Learned Counsel for the Respondents have cited some judgments, which are quite relevant to the issue of limited remand. They are as follows:

(1) *Mohan Lal versus Anandibai*, ((1971) 1 SCC 813).

(2) ***Paper Products Ltd. Versus CCE*** **((2007) 7 SCC 352)**

(3) ***Smt. Bidya Devi versus Commissioner of Income Tax, Allahabad*** **(AIR 2004 Calcutta 63)**

(4) ***K.P. Dwivedi versus State of U.P.*** **((2003) 12 SCC 572)**

(5) ***Mr. Muneswar & Ors. Versus Smt. Jagat Mohini Desi.*** **(AIR (1952) Calcutta 368)**

(6) ***Amrik Singh Vs Union of India*** **((2001) 10 SCC 424).**

(7) ***Union of India and Another versus Major Bhadur Singh*** **((2006) 1 SCC 3670.**

(8) ***Prakash Singh Badal and Another versus State of Punjab and Others*** **(2007) 1 SCC 1)**

(9) ***Tirupati Balaji Developers Private Limited versus State of Bihar*** **(2004(5) SCC 1)**

(10) ***Jamshed Harmusji Wadia versus Port of Mumbai*** **(2004) 3 SCC 214)**

(11) ***C.V. Rajendran versus versus Mohmmed Kinhi*** **((2002) 7 SCC 447)**

40. In these cases referred to above, the following principles have been laid down:

(i) When a matter is remanded by the superior court to subordinate court for rehearing in the light of observations contained in the judgment, then the same matter is to be heard again on the materials already available on record. Its scope cannot be enlarged by the introduction of further evidence, regarding the subsequent events simply because the

matter has been remanded for a rehearing or de novo hearing.

(ii) The court below to which the matter is remanded by the superior court is bound to act within the scope of remand. It is not open to the court below to do anything but to carry out the terms of the remand in letter and spirit.

(iii) When the matter comes back to the superior court again- on appeal after the final order upon remand is passed by the Court below, the matter/issues finally disposed of by order of remand, cannot be reopened.

(iv) Remand order is confined only to the extent it was remanded. Ordinarily, the superior court can set aside the entire judgment of the court below or it can remand the matter on specific issues through a "Limited Remand Order". In case of Limited

Remand Order, the jurisdiction of the court below is limited to the issue remanded. It cannot sit on appeal over the Remand Order.

(v) If no appeal is preferred against the order of Remand, the issues finally decided in the order of remand by the superior court attains finality and the same can neither be subsequently re-agitated before the court below to which remanded nor before the superior court where the order passed upon remand is challenged in the Appeal.

(vi) In the following cases, the finality is reached:

(a) The issue being not challenged before the superior court, or

(b) The issue challenged but not interfered by the superior court, or

(c) The issue decided by the superior court from which no further appeal is preferred.

These issues cannot be re-agitated either before the court below or the superior court.

41. In the light of these principles, it has to be held that the Appellant can neither raise the issues already decided by the Tribunal nor raise any new issues which were not raised earlier. Hence, the plea of the Appellant that 3.10.2006 order was fully set aside and as such the Appellant is at liberty to raise all the issues including the new issues before the Central Commission cannot be accepted. Similarly, Appellant cannot be allowed to produce additional evidence regarding the subsequent events.

42. It has been strenuously contended, on behalf of the Appellant, that the audited accounts authorized by the Comptroller & Accountant General produced by the Appellant have been wrongly ignored and disbelieved by the

Central Commission while considering the claims made by the Appellant with regard to additional capitalisation and O&M expenses and the same ought to have been accepted since such audited accounts have been approved by a statutory authority of the Government, i.e. C&AG without any scrutiny.

43. This contention is misconceived. It is not disputed that the Appellant submitted their claims regarding the additional capitalization and other things supported by the audited Balance Sheet duly certified by the C&AG. But it is noticed that, Annual Accounts submitted by the Appellant for the years 2004-05 and 2005-06, which were duly audited were considered by the Central Commission. The accounts for the further period which was said to be audited cannot be entertained by the Central Commission since in the Remand order, the Tribunal directed the Central Commission to consider the claim for additional capitalization only in respect of the period 2004-05 and

2005-06 alone and not for the further period. So Central Commission has correctly held that the same was absolutely outside the scope and purview of the remand order.

44. It is also submitted on behalf of the Appellant that the Central Commission merely disallowed certain claims of the Appellant on the ground either for want of proper justification or for want of proper details/justification and these reasons cannot be said to be sufficient reasons to reject their claim.

45. We are unable to accept this plea because admittedly the Appellant did not produce any material in justification of their claims. When there are no materials to show that the claims made were to be admitted as per the procedure and provisions of the Electricity Act, there is no valid reason to allow those claims. Hence, the reason given by the Central Commission that there is no justification to allow their claim is perfectly valid. In fact, the Tribunal has categorically held in the remand order that only provisions of DVC Act can be

allowed to operate when they are consistent with the Electricity Act and not otherwise. In such circumstances, the Central Commission was correct in considering the admissibility of the claims keeping in mind the safeguard of consumer interest as per the provisions of the Electricity Act and also regulations framed under the said Act

46. Let us now consider the other issues raised by the Appellant. The first issue is disallowance of Additional Capitalisation. On this issue, the Appellant has raised the following grounds:-

(1) Central Commission did not allow Additional Capitalisation incurred for Mejia Unit 4 even though the Appellant furnished full particulars.

(2) The Central Commission did not allow other Additional Capitalisation for the period 2006 to 2009.

(3) Central Commission did not allow cost incurred on Residual Life Assessment Studies

These grounds in our view have no merit for the following reasons:-

47. It is true that the Tribunal in its order of judgment dated 23.11.2007 observed as under:-

> ***"However, the record submitted by the Appellant show that Rs. 767.45 crores and Rs. 181.14 crores have been shown to be capitalized during 2004-05 and 2005-06 respectively. In order to get the relief on this account, the Appellant may bring out the above amount to the notice of the Central Commission who may appropriately dispose of the matter in terms of law."***

48. This direction related to the period 2004-05 and 2005-06. Only in accordance with this direction, the Central Commission by its order dated 28.04.2009 directed the

Appellant to furnish detailed information with regard to the additional capital expenditure for the period 2004-05 and 2005-06 as well as provisions made towards pension and gratuity and depreciation.

49. The Appellant filed IA 19 of 2009 and submitted the details of the additional capitalisation for the period 2006-09 based on the combined capital cost as on 01.06.2006. Subsequently, by a further affidavit dated 11.06.2009, the Appellant filed details with regard to the additional capitalisation for the period 2004-05 and 2005-06 which included the capital expenditure in respect of Mejia TPS Unit-4.

50. As indicated above, the inclusion of the claim for additional capitalisation for 2006-09 would expand the scope of the de novo consideration as the Central Commission has to be confined to the period 2004-05 and 2005-06 alone in respect of Additional Capitalization and not for further period.

51. In fact the claim for the further period was disallowed by the Central Commission not on merits but, the opportunity was given to the Appellant to approach the Commission for additional capitalisation in respect of the further period 2006-09 by filing a separate petition as it would not cover the remand order.

52. The grievance of the Appellant is, that Additional Capitalization has not been considered in respect of Mejia Unit-4 despite the direction of this Tribunal. This cannot be accepted for the following reasons. According to the Central Commission, as per Regulation 18.4 of the Regulation 2004, the impact of additional capitalisation in tariff revision may be considered twice in a tariff period. Admittedly, the Date of commercial operation of the Mejia Unit-4 is 28th February 2005. As a matter of fact, the Central Commission in its earlier order dated 03.10.2006 had determined the tariff for the generating stations of the Appellant Mejia Units 1 to 3 based on information submitted by the Appellant.

53. As mentioned above, as per Regulation 4(1) of Regulations 2004, the tariff in respect of the generating stations shall be determined stage-wise, unit-wise or for the whole generating station. There is no dispute in the fact that Mejia Unit-4 is a new unit and it has been commissioned only after six years from the date of commercial operation of Unit-3.

54. The Appellant itself has identified the date of commercial operation of Mejia Unit-4 as 28.02.2005. Therefore, all capital expenditure found to be prudent by the Central Commission which is prior to 28.02.2005 has to be considered under regulation 17. The capital expenditure indicated in regulation 18(1) which was within the original scope of work but was actually incurred between February 2005 and March 2006 which has to be calculated in accordance with regulation 18(1). The capital expenditure incurred on works of the nature after March 2006 has to be

dealt with under regulation 18(2). The following details would clarify the legal position:

i) **'Capitalisation' (under Regulation 5 read with Regulation 17 of the Central Commission Tariff Regulations) and "Additional Capitalization" (under Regulation 18 of the Central Commission Tariff Regulations are distinct claims in law which arise at different stages of construction and operation of a plant.**

ii) **As per settled accounting and regulatory practices "Additional Capitalization" is not possible without first completing the process of "Capitalisation". The said principle is also reflected in Regulation 17 and 18 of the Central Commission Tariff Regulations. In other words, unless capital expenditure for Mejia Unit 4 is approved and its original tariff determined in accordance with Regulation 5 (3), the question of**

Additional Capitalisation therefore, incurred after the "Date of Commercial Operation" and up to the "Cut-Off Date", does not arise in law or in facts.

iii) The new generating unit like Mejia 4 do not qualify as "additional capitalisation" or come within the definition of "Additional Capitalisation".

55. It is to be stated in this context, as mentioned earlier, that the Appellant was not authorized to either amend the tariff petition or to bring out new materials in connection with the tariff petition by filing any additional application and to seek consideration of these materials in considering the tariff petition earlier filed. It is evident that this Tribunal never directed the Appellant to file any additional petition or to rely upon any additional material at the time of consideration of the matter by the Central Commission in pursuance of the Remand order.

56. In the present proceedings, the DVC has mentioned certain expenditure for the Mejia Unit-4 in its additional affidavit dated 11.06.2009 without making any distinction with reference to the Regulations 17 and 18(1) or 18(2).

57. It is rightly pointed out on behalf of the respondents that without producing the various item wise details of the expenditure incurred to qualify itself to claim Ádditional Capitalization, it is not possible to carry out any exercise of prudence check for the capitalisation or additional capitalisation so far as Mejia Unit-4 is concerned.

58. In fact, this Tribunal in the remand order dated 23.11.2007, directed the Central Commission to dispose of the issue relating to the additional capitalisation only in terms of law as indicated earlier. The Central Commission has obeyed the law as well as the direction by this Tribunal ánd accordingly has not allowed the additional capitalisation in respect of Mejia Unit-4 as claimed by the Appellant as it is not permitted by law.

59. The claim of the Appellant for additional capitalisation on other counts has got to be examined in 3 categories (1) for year 2004-05 and 2005-06; (2) for years 2006-07 and 2008-09 and (3) the claims regarding the cost of Residual Life Assessment studies for renovation and modernization.

60. It is seen from the impugned order that the additional capitalisation for the years 2004-05 and 2005-06 as directed by the Tribunal were actually considered by the Central Commission and allowed. With regard to those findings about the additional capitalisation in respect of these years, the Appellant has not urged any ground challenging the same. As mentioned above, the Central Commission correctly did not consider the additional capitalisation for the years 2006-09 as this Tribunal directed the Central Commission to consider the additional capitalisation in respect of 2004-05 and 2005-06 alone and not in respect of 2006-09.

61. The next issue with regard to the claim on Residual Life Assessment Study, which is not allowed. The issue of the principle of allowing expenses incurred on Residual Life Assessment Studies for undertaking renovation and modernization is provided for under Note-4 to Regulation 18(2) of the Central Commission Tariff Regulations. As per the Regulation, the expenses can be allowed only after the renovation work is over. On this issue, the Leaned Senior Counsel for the Appellant argued that no opportunity was given to them to provide particulars to show that the work is over. The Tribunal repeatedly questioned the Learned Senior Counsel for the Appellant, as to whether Renovation and Modernisation work had actually materialized by way of incurring R & M expenses as a result of such a Residual Life Assessment Study before the impugned order was passed. But the Learned Senior Counsel for the Appellant is unable to give suitable reply.

62. On this issue the Central Commission in the impugned order has clearly indicated that such expenditure can be allowed only after the expenditure on renovation and moderanisation has been incurred and the benefits passed on to the consumers as provided in Regulation. This conclusion is based upon the Regulation 18(2) Note 4. It is not the case of the Appellant that this Regulation is inconsistent with either Electricity Act or DVC Act. Therefore, this conclusion was correctly arrived at by the Commission on the basis of the Regulation. Further, this Tribunal in Appeal Nos. 133, 138 etc. dated16.03.2009 has held that such a claim is premature. Hence, this contention on this issue would fail.

63. Now, let us go to the next issue relating to contribution towards Pension and Gratuity Funds. On this issue the learned Senior Counsel for the Appellant has raised the following grounds:-

i) The Central Commission did not give any valid reasons whatsoever for deferring 40% of the Pension and Gratuity contribution to the next tariff period 2009-14.

ii) The Central Commission has no jurisdiction to defer the determination of tariff to 2009-14 period when the expenditure is for the period 2004-09.

iii) Since the Appellant has already paid the Pension and gratuity contribution to the Trust, the Central Commission ought to have allowed the carrying cost for the amount staggered.

(iv) The Tribunal in its Remand order has specifically given a direction to the Central Commission to allow the claim of the Appellant in respect of this issue and this direction is as follows:

"We feel that claim of the Appellant to recover the entire cost for creation of the fund through the tariff is justified provided the recovery is staggered in a manner that it does not give tariff shock to the consumers.

64. It is contended by the Appellant that in pursuance of the above direction, the Appellant filed an IA No. 19 of 2009 before the Central Commission relating to this issue but despite this, no relief was given.

65. We have considered the above grounds. Admittedly, the Appellant has not provided for pension and gratuity funds since its inception. For the first time while determining the tariff for the period 2006-09, the Appellant claimed the pension and gratuity funds in respect of average past service of 20 years and average future service of 13 years i.e. liability for last 20 years to be paid in future 13 years i.e. 2006 to 2019. Though the liability of DVC to pay pension and gratuity fund is to be staggered over a period of

13 years from 2006 to 2019, the Central Commission has staggered the liability only up to the year 2014 in order to avoid tariff shock. Despite this, the DVC is not satisfied with the Central Commission's order. On the other hand, it wants the entire amount to be recovered during the tariff period 2006-09 instead of staggering as envisaged by the Central Commission. In fact, this staggering was in consonance with the direction of this Tribunal. The Central Commission has given reasons for the staggering in pursuance of the direction of the Tribunal order to avoid the tariff shock to the consumers. Actually it was clarified that the recovery by the Appellant under this head during the transition period was taken into account.

66. It is relevant to note that the allowed amount under the said heads pertains to earlier period i.e. for the last 20 years. Most of the present consumers of DVC were not DVC consumers for the entire period of the said period of 20 years. However, the DVC consumers will also have to bear

the brunt of said payment towards pension and gratuity funds. Even as per their own pleas, through their additional information given before the Central Commission as referred to in the proceedings dated 21.6.2005, the Appellant has been recovering from its consumers the element of contribution to pension which was being credited to pension and gratuity funds. Compared to the first tariff order dated 03.10.2006, the revised tariff through the impugned order has already increased and therefore any further addition on account of this 40% proposed fund would give further tariff shock to the consumers. That is the reason why the Central Commission has taken such a decision to avoid tariff shock as per the direction of this Tribunal.

67. In this context, it is quite relevant to take note of the stand taken by the Appellant, in the earlier Appeal No. 273 of 2006. In the said Appeal, the Appellant had claimed the carrying cost which is as follows:

"without prejudice to the above, the Central Commission erred in directing that 60% contribution is also allowed to be recovered only through three equal installments starting from 2006-07. While allowing the contribution for pension gratuity fund in a deferred manner, the Central Commission has not allowed the carrying cost. In the event the contribution is to be made in a deferred manner, there will be an obligation to pay interest on the above amounts of contribution to be made to the relevant Trust."

68. However, this issue about carrying cost was not allowed by this Tribunal in the limited remand order dated 23.11.2007. Hence the Appellant is estopped from claiming any carrying cost again. Therefore, the finding in respect of this issue by the Central Commission in our opinion is perfectly valid as it is in consonance with the directions given by this Tribunal.

69. Let us now come to the next issue relating to the Revenues to be allowed to DVC under section 38 of the DVC Act 1948. In respect of this issue the Appellant has raised the following grounds:-

i) The Central Commission has totally erred in ignoring the direction of this Tribunal to consider the implementation of Part IV of the DVC Act and in particular allow interest on capital to DVC in terms of Section 38 of the DVC Act. The Central Commission has not dealt with the issue at all despite the clear direction of this Tribunal.

ii) The Central Commission has held in the Remand Order that the Tariff Regulations of the Central Commission are not applicable to DVC but Part IV of DVC Act in particular Section 38 is applicable. This has not been considered by the Central Commission.

iii) While considering the Debt Equity Ratio, the Central Commission erred by adjusting the loan against depreciation thereby denying any amount towards interest.

70. We have carefully considered the above grounds urged by the Appellant. On going through records, as indicated above, the operation of the limited remand order would relate to this issue also. The operations of the DVC which have to be implemented have been clearly spelt out in the following paragraphs of Remand Order:

> **"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 remain 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 Return on Equity 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).”

“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 provisions 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.”

71. In regard to this issue, as indicated above, the Tribunal in the remand order dated 23.11.2007 directed the Central Commission to ensure that the capital deployed in financing operating assets is getting fully serviced either

through return on equity or interest on loan. In compliance with the said order of the Tribunal, the Central Commission allowed Debt Equity Ratio on the total capital employed and provided return @ 14% on the normative equity capital in accordance with regulation 21(1)(iii) and provided interest on loan of the normative type in accordance with regulation 21(1)(i). As such, the Central Commission has complied with the remand order by allowing return on equity and interest on loan.

72. In compliance with the said remand order relating to interest on loan, the Central Commission allowed the same in the following manner:

(i) Revised Debt Equity Ratio on the total capital employed

(ii) Provided interest on loan on normative debt in accordance with regulation 21(1)(i)

(iii) Cumulative depreciation was treated as repayment of loan since DVC never repaid the

loan and there is perpetual moratorium in accordance with regulation 21(1)(i)(f). In respect of older units, the normative loan was fully adjusted by the cumulative depreciation reserve.

(iv) However, in respect of new units namely Mejia Unit-1 to 3 and where the cumulative depreciation being lesser than the normative loan, the interest was provided on the net loan less depreciation for the year taken as a repayment during the year".

73. It is claimed by the Appellant that the Central Commission erred in reducing the loan of DVC by adjusting the loan against depreciation thereby denying the Appellant any amount towards interest. The Central Commission while dealing with this issue has specifically held that the Appellant has not availed any loans to meet the expenditure towards additional capitalization. The revised Debt Equity Ratio and depreciation were considered in line with the directions of the Tribunal. As a matter of fact, the Appellant

in the earlier appeal 273 of 2006 has admitted that in terms of section 38 of the DVC Act, the Appellant is required to pay interest on the amount of capital provided by each of the participating governments and the capital provided include the retained interest, which ought to have been paid by the appellant to the participating governments, but the same was retained by the Appellant in view of the obligations of the participating governments and such retained interest is plowed back as capital to the creation of capital assets relating to power. In other words, the Appellant enjoyed perpetual moratorium as it never repaid the loan. So, the question of adjustment of the depreciation for the loan does not arise.

74. It is further contended on behalf of the Appellant that the Central Commission was not justified in adjusting depreciation reserve against notional loan. This is not the subject matter of the remand order dated 23.11.2007. As a matter of fact, the Appellant did not raise any issue with

regard to adjustment of the depreciation reserve with the notional loan in the earlier appeal. In the earlier appeal, the only issue was the rate of Depreciation. The Central Commission in the impugned order has duly complied with the directions of the Tribunal and passed the order with reference to the said issue. So, the issue which has not been raised in the earlier appeal cannot be allowed to be raised here. Therefore, the submission of Appellant has no merit especially when the expenses incurred by the Appellant for replacement of the old machinery are allowable under the O&M expenses. The Appellant cannot be allowed to take double benefit by claiming on the one hand that they require depreciation reserve at the time of replacement of old machinery and claiming on the other hand that the expenses for replacement of old machinery shall be allowed under the head O&M Expenses.

75. In fact, in the first tariff order passed by the Central Commission, it was held as follows:

"The majority of the loans raised by the DVC are not project specific. The normative loan outstanding for individual station on 31.3.2004 has been computed by applying normative debt equity structure of 70:30 to the capital cost with weighted average rate of interest of the loan for the petitioner as a whole. The cumulative depreciation as on 31.3.2004 or notional loan amount, whichever is lower which has been deemed as loan repayment and balance amount, if any, has been allowed to be serviced till it is fully repaid The Annual depreciation amount has been treated as normative loan repayment."

76. The above finding of the Central Commission in the first tariff order regarding the adjustment of depreciation was not challenged by the DVC in the earlier Appeal No. 273 of 2006. As such the said part of the order dated 03.10.2006 has attained finality and is binding on DVC. Therefore, the issue which has been decided by the Central Commission in

the earlier order which has not been challenged cannot be allowed to be agitated at the subsequent proceedings.

77. As per Regulation 21(1)(i)(f) of the Central Commission Tariff Regulations, in case any moratorium period is availed of by the generating company, the depreciation provided for in the tariff during the years of moratorium shall be treated as repayment during those years and interest on loan capital shall be calculated accordingly. So, under this Regulation, the Central Commission correctly held regarding the adjustment of the repayment of loan from the loan.

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.

79. Admittedly, the DVC have never repaid any loan to the participating Governments and enjoyed moratorium for all these periods and still enjoys moratorium. Therefore, the Central Commission rightly allowed the interest on capital under section 38 as interpreted by the Tribunal in paragraph E-13 of the remand order dated 23.11.2007. Consequently it has to be held that there is no legal infirmity in finding given by the Central Commission on this issue.

80. We will now come to the issue of expenditure on subsidiary activities.

81. On this issue the Appellant has raised the following ground.

> ***"The Central Commission has erred in not considering the expenditure on subsidiary activities despite specific direction contained in the remand order of the Tribunal".***

82. On perusal of the Remand order, passed by the Tribunal and the impugned order passed by the Central Commission, it is clear that the Central Commission in compliance with the Remand Order excluded depreciation on subsidiary activities from operation related expenses and included the same on Return on Equity and interest on loan on capital cost. As such the expenditure on subsidiary activities were considered and allowed by the Central Commission. The relevant observations in the impugned order are as follows:-

> ***" In terms of the above observations of the Appellate Tribunal, the return on equity, interest on loan and depreciation of the common assets has been calculated and the amount so calculated has been apportioned to each of the productive generating stations/transmission system of the petitioner in proportion to the capital cost allocated as on 31.03.2004."***

83. Thus, the Central Commission, in compliance with the Remand order excluded depreciation on subsidiary activities from Operation and Maintenance expenses and included the same along with the return on equity and interest on loan on capital cost. Thus, it is clear that expenses of subsidiary activities were considered by the Central Commission and allowed by the Central Commission. As such there cannot be any grievance.

84. Now let us come to the other issue relating to Pay revision as per the VI Pay Commission Recommendations. In respect of this issue the following ground has been urged by the Appellant.

> ***"The Central Commission had erred in not considering the financial outflow to DVC on account of revisions on the implementation of the VI Pay Commission recommendation given effect to from 1.1.2006 onwards and postponing the consideration of the same."***

85. In dealing with this aspect, it would be noteworthy to refer to the relevant observations made by the Central Commission in the impugned order dated 06.10.2009, as follows:

> ***"Accordingly, we have decided to confine our consideration to the issue earlier decided in our order dated 03.10.2006 in the light of the observations of the Appellate Tribunal. The petitioner is allowed liberty to approach the Commission through a proper application for consideration of any additional issues which would be considered in accordance with law."***

86. This observation giving liberty to the Appellant to approach the Commission in respect of this issue is perfectly justified. Admittedly, the remand order was passed on 23.11.2007 by this Tribunal. The Sixth Pay Commission recommendation was published on 29.08.2008 much after the Remand Order. So it cannot be conceived that in 2007 this Tribunal directed the Central Commission to consider

the Pay Commission Recommendation which was published in August 2008.

87. As a matter of fact, the Central Commission had no jurisdiction to consider the effect of Sixth Pay Commission recommendation which provided that the arrears will be paid partly in 2008 and partly in 2009. The Central Commission considered the said claim in the proper perspective and found the same to be outside the scope of the limited remand order. However, it granted liberty to the Appellant to approach the Central Commission separately through a proper application. As such, there is no infirmity in the said portion of the finding.

88. The next issue relates to the interest on Working Capital. On this issue the following ground has been urged by the learned Senior Counsel for the Appellant.

"The Central Commission had erred in applying the interest rate at the uniform 10.25% rate for the entire tariff

period instead of applying the interest rate applicable from time to time as provided in Tariff Regulation 2004 namely Prime Lending Rate of SBI."

89. This ground is not a valid one. Actually, the Appellant itself in its original tariff application 66 of 2005, had claimed 10.25% as rate of interest on working capital. The Central Commission in the first tariff order considered the interest on working capital and allowed the same in accordance with the Tariff Regulation 2004 in particular Regulation No. 21(v)(b) which provided for short-term prime lending rate of interest of SBI as on 01.04.2004 on normative basis. This part of the order was never challenged by the Appellant in its earlier Appeal No. 273 of 2006. Therefore, this Tribunal in the remand order did not deal with this aspect and thus the said order dated 03.10.2006 with reference to this aspect has attained finality. Consequently it has to be held that the ground raised in this Appeal is not only barred by the principle of res-judicata

but also contrary to the Central Commission Tariff Regulations.

90. Let us now come to the next issue relating to Operation & Maintenance (O & M) expenditure. According to the Learned Senior Counsel for the Appellant, DVC is aggrieved on 2 counts namely (1) The Central Commission did not allow the Operations & Maintenance (O&M) expenditure at actuals; and (2) the Central Commission did not allow O & M expenditure for transmission system below 132 KV.

91. To consider this issue, it is proper to refer to the relevant portion of the direction in the Remand Order. The Tribunal in the Remand order dated 23.11.2007 has held as follows:

> ***"As regards not allowing any increase in the O&M expenses, we find no reason in the Central Commission's order. The Tariff Regulations 2004 notified by the***

Central Commission generally provide for a 4% increase annually. We think the same be adopted in the case of DVC also to offset additional burden on the appellant due to inflationary measures."

92. On a perusal of the Central Commission order dated 06.08.2009, it is clear that the Central Commission had taken into consideration the above direction and passed the appropriate order. Let us quote the finding given by the Central Commission.

" In view of the above discussions, the revised O&M expenditure have been computed after excluding the depreciation on assets in the nature of common assets and providing for escalation on O&M expenses at 4% annually for thermal generating stations also w.e.f. 1.4.2004."

93. The above observation made by the Central Commission would clearly indicate that the Remand Order on this issue was complied with.

94. Therefore, the allegation made by the Appellant in the Appeal that the Central Commission has not allowed O&M expenses for transmission system below 132 KV is factually incorrect. In fact Rs. 639 lakhs, Rs. 665 lakhs and Rs. 691 lakhs for the years 2006-07, 2007-08 and 2008-09 respectively were provided at item D of table in para 65 the said order.

95. At this juncture, it is relevant to point out that in the earlier Appeal No. 273 of 2006, DVC had claimed operational norms and O&M expenses at actuals. The said claim was actually rejected by this Tribunal in the remand order. Therefore, the claim of O&M expenses at actuals is barred by the principle of res-judicata. In view of the finding given by this Tribunal, the Central Commission rejected such claim but, it granted liberty to the DVC to

approach the Central Commission later through a separate application. Therefore, this aspect also, in our view, has been correctly decided by the Central Commission.

96. The next issue relates to Debt Equity Ratio. According to the Learned Senior Counsel for the Appellant, the fixing of the debt equity ratio as 50:50 is not correct as DVC Act, prevails over the Regulations and under Section 30 and 31 of the DVC Act it is entitled to cent-per cent equity. This contention also has no merit or substance. The Tribunal, in the remand order has held as follows;

> ***"The DVC Act is silent about adopting any specific debt equity ratio for financing of projects. We therefore, in the interest of equity and fairness feel that all old projects of DVC commissioned prior to 1992 be assigned normative debt equity ratio of 50:50 and the recent projects such as Mejia with 70:30 capital structures specified in the regulations,"***

97. As per the finding of the Tribunal, Debt Equity Ratio has to be adopted as 50:50 for the generating plants set up before 1992 and for the plants set up thereafter, the ratio should be 70:30. Central Commission has followed this finding. This finding given in the remand order by the Tribunal cannot be challenged in this Appeal as this Tribunal cannot sit on appeal over its own judgment. Further, sections 30 and 31 of the DVC Act do not deal with this aspect at all. As a matter of fact, the DVC in the earlier proceedings claimed debt equity ratio at the rate of 15:85 before the Central Commission. This claim of 100% equity is new ground which has never been raised either before the Central Commission or before the Tribunal earlier and as such it is barred by the principle of res-judicata.

98. With regard to the issue of resetting of operation norms at variance from the operating norms prescribed in the operation regulation 2004, the Tribunal in the remand order already gave a specific finding that the decision of the

Central Commission on this issue was justified but however, it observed that the Central Commission should also adopt methodology of 4% annual increase in operation and maintenance expenses as provided in 2004 Regulations. Hence, this claim of the DVC has not been allowed by the Commission earlier. Therefore, it is not open to the Appellant to raise the issue now.

99. Similarly, in respect of the issue with reference to the return on capital investment on Head Offices, Regional Offices and Administrative and other Technical Centres, etc., this Tribunal has already come to a conclusion that once the Commission agreed to treat the issue as part of generating and transmitting activities of the Appellant, by permitting recovery of the O&M cost for these assets, this should not be included in the capital cost. Therefore, the claim in this regard by the Appellant which was not allowed by the Tribunal cannot be reopened now.

100. Generally, in the matter of determination of tariff under the Electricity Act, the reasoned and rational conclusion arrived at by the Appropriate Commission cannot be lightly interfered with by the Appellate Tribunal. In other words, the power of the Appellate authority cannot be exercised normally for the purpose of substituting one subjective satisfaction with another without their being any specific and valid reason for such a substitution. In case of exercise of appellate power against orders of the expert forums, namely, Appropriate Commission, the Tribunal, should be careful while interfering with such expert forum's findings on facts. Having regard to the fact that the decision of the Central Commission are based upon the proper reasoning and in accordance with the direction of this Tribunal and in terms of law, it may not be justified for this Tribunal to interfere with the order of the Central Commission merely because there was some minor omissions here and there particularly when the conclusion

on the part of the Central Commission has been correctly arrived at.

101. Thus, we are of the considered opinion that none of the grounds urged by the Appellant in this Appeal challenging the impugned order deserve acceptance.

102. At the end, we would like to deal with one other issue raised by the Appellant through the Application IA No. 349/09. This application has been filed by the Appellant in IA No. 349/09, pending this present Appeal, seeking for permission to continue to collect the same tariff which was determined by the DVC pursuant to section 20 of the DVC Act. At the end of this hearing, it was requested by the Learned Senior Counsel for the Appellant that in the event of further remand by this Tribunal to the Central Commission for reconsideration of some issues, the Appellant may be permitted to continue to collect their own

tariff fixed by them earlier under section 20 of the DVC Act during the interregnum period.

103. Three things have got to be borne in mind on this issue (1) By the Remand Order dated 23.11.2007, the Tribunal categorically found that Section 20 of the DVC Act under which tariff is determined by the DVC is inconsistent with the Electricity Act and therefore it shall stand superseded; (2) By the impugned order dated 06.08.2009 the tariff has now been fixed by the Central Commission which alone is the competent authority to fix the tariff for the Appellant under the Electricity Act. Admittedly, as on date, Section 20 of DVC Act is not in force which already stood superseded. On the other hand, the Central Commission after considering all the materials has finalized the tariff through its order dated 6.8.2009 under the Electricity Act, 2003 which is in force; and (3) Admittedly, the order dated 6.8.2009 which determined the fresh tariff has not been

stayed and on the other hand, this Tribunal during the pendency of this Appeal declined to grant stay by the order dated 16.9.2009.

104. Under the above circumstances, the Application filed by the DVC in IA No. 349/09 seeking for the permission to continue to collect the tariff fixed by the DVC under section 20 of the DVC Act could not be sustained (1) especially when the final order had already been passed by the Central Commission on 06.08.2009 fixing the tariff; (2) particularly when the said tariff order has not been stayed by this Tribunal and (3) more particularly when we feel prima facie that impugned tariff order passed by the Central Commission is valid.

105 <u>Summary of Our Conclusions:</u>

(1) The Appellant can neither raise the issues already decided by this Tribunal in the Remand order nor

raise any new issues which were not raised earlier in this Appeal. When no Appeal is preferred against the Remand order of the Tribunal, the issues decided in the said Remand order attains finality and the same can neither be subsequently re-agitated before the Central Commission to which the matter was remanded nor before this Tribunal where the impugned order in pursuance of our Remand Order is challenged in this Appeal.

(2) The plea, by the Appellant, that the first tariff order dated 03.10.2006 was fully set aside by the Tribunal by order dated 23.11.2007 and therefore, the Appellant is at liberty to raise all the issues already raised before the Central Commission and to produce additional further evidence regarding the subsequent events to establish those issues, cannot be accepted as the same is against the facts as well as the law. This is not an open Remand order but it is the Limited Remand order on

limited issues. As per the scope of the Remand, the Appellant cannot be allowed to file any additional evidence or to place fresh materials or evidence before the Central Commission, in support of those issues. The tariff matter was required to be decided by the Central Commission only on the basis of materials already brought on record or the materials produced relating to the issues to be decided in the light of the findings and observations made by the Tribunal in the order of Remand dated 23.11.2007.

(3) The new generating unit like Mejia Unit-4 does not qualify as 'Additional capitalization or come within the definition of 'Additional capitalization'. The 'capitalization' as defined in Regulation 17 and 'Additional Capitalization' as defined in Regulation 18 are distinct claims in law which arise at different stages of construction and operation of

plant. The Appellant itself identified the Date of commercial operation of Mejia Unit-4 as 28.02.2005. Therefore, all capital expenditure found to be prudent by the Central Commission incurred prior to 28.02.2005 has to be considered under Regulation 17 whereas the additional capital expenditure incurred between February 2005 and March 2006 has to be considered under Regulation 18. Unless the capital expenditure for Mejia Unit-4 is approved and its original tariff is determined, the question of additional capitalization incurred after date of commercial operation and within cut-off date does not arise at all.

(4) The Central Commission correctly did not consider the additional capitalization for the years 2006-2009 as the same were out of the scope of limited Remand order dated 23.11.2007. As per the Remand order the Central Commission was to consider the additional capitalization in respect of

the years 2004-05 and 2005-06 only and not in respect of the period from 2006 to 2009.

(5) The procedure for allowing expenses incurred on Residual Life Assessment Study for undertaking renovation and modernization has been provided for under Note-4 to Regulation 18 of the Central Commission Tariff Regulations. As per this Regulation, the expenses can be allowed only after the renovation work is over. No materials have been placed on record to show that the claim on this issue on the basis that the actual renovation work had already materialised. So, this claim is premature.

(6) In regard to the Pension and Gratuity Fund, the specific direction had been issued by the Tribunal in the Remand Order to consider the same after giving a finding that the claim of the Appellant to

recover the entire cost of creation of the fund through the tariff is justified. However, under this direction, the Central Commission has to ensure that the recovery is staggered in a manner that it does not give tariff shock to the consumers. Accordingly, the Central Commission has considered this direction and passed the order staggering over a specific period. Though the liability of the Appellant to pay the pension and gratuity fund is to be staggered over a period of 13 years from 2006 to 2019, the Central Commission has staggered the liability only up to the year 2014 in order to avoid tariff shock. This staggering is in consonance with the directions of this Tribunal.

(7) In regard to the issue relating to the aspect of Revenues to be allowed under section 38 of the DVC Act, 1948, the Tribunal in the Remand order directed the Central Commission to ensure that the

capital deployed in financing operating assets is getting fully serviced either through Return on Equity or interest on loan. In compliance with the said order, the Central Commission allowed Debt Equity Ratio on the total capital employed and provided return @ of 14% on normative equity capital and also provided interest on loan of the normative type. The revised Debt Equity Ratio and depreciation was considered in line with the direction of the Tribunal. The Appellant itself had admitted in the earlier appeal that the Appellant is required to pay interest on the amount of capital under section 38 of the DVC Act, but the same was retained by the Appellant in view of the obligation of the participating Governments and as such the retained interest is plowed back as capital to the creation of capital assets relating to power. Thus, the Appellant enjoyed the perpetual moratorium on it and never repaid the loans. So the question of

adjustment of depreciation for the loan does not arise.

(8) In regard to the issue of expenditure on subsidiary activities, the Central Commission in compliance with the Remand order excluded the depreciation on subsidiary activities from operation related expenses and included the same along with return on equity and interest on loan of capital cost. As such, the claim regarding the expenses on subsidiary activities to the extent permissible under the Remand order was duly considered and allowed by the Central Commission.

(9) In regard to the claim for Pay Revision as per the recommendations of the VI Pay Commission, it has to be stated that the Central Commission had no jurisdiction to consider the effect of the VI Pay Commission recommendations since the said claim

is outside the scope of the limited Remand order. The Tribunal order was passed on 23.11.2007 and the VI Pay Commission's recommendations were published on 29.08.2008, i.e. long after the Remand order.

(10) The claim on the rate of interest on working capital as per the Prime Lending Rate of SBI was never raised in the earlier appeal before the Tribunal. Actually the Appellant itself in its original tariff application had claimed only 10.25% as rate of interest on the working capital. The same was allowed in the first tariff order itself by the Central Commission. This part of the order was never challenged in the earlier appeal. Therefore, the first tariff order dated 03.10.2006 with reference to the rate of interest on working capital has attained finality.

(11) In regard to the issue relating to Operation and Maintenance expenses, already direction had been issued by the Tribunal in the Remand order. It is clear from the impugned order that the Central Commission has taken into consideration the above direction and complied with the same fully in its order. The Appellant had claimed operational norms and O&M expenses at actuals in its earlier Appeal No. 273 of 2006. The said claim was rejected by this Tribunal. Therefore, in this Appeal the claim of O&M expenses at actuals cannot be raised.

(12) The claim of the Appellant that the Appellant is entitled to cent per cent equity by virtue of sections 30 and 31 of the DVC Act, has no substance. Sections 30 and 31 of the DVC Act do not deal with this aspect at all. The Appellant in the earlier proceedings claimed Debt Equity Ratio only @

15:85 before the Central Commission. The Tribunal has given a finding that DVC Act is silent about adopting any Debt Equity Ratio for financing of projects. On that basis, the Tribunal found that Debt Equity Ratio has to be adopted as 50:50 for the generating plants set up prior to 1992 and 70:30 for the plants set up thereafter. The claim of cent per cent equity was never raised either before the Tribunal earlier or before the Central Commission. Thus, this is a new ground which cannot be allowed to be raised in this Appeal.

106. In view of our conclusions mentioned above, we are to hold that the Central Commission has correctly decided all the issues raised before it after careful consideration, in the light of the findings rendered by this Tribunal and in accordance with law. It must be made clear that the

Central Commission has followed and complied with all the directions given by this Tribunal in letter and spirit.

107. Since, we do not find any substance in the grounds raised in the Appeal, we deem it fit to dismiss the Appeal as devoid of merits. Consequently, we direct the Appellant (DVC) to implement the Tariff as determined by the Central Commission vide its order dated 06.08.2009. DVC is also directed to revise the electricity bills raised by it for electricity consumption during April, 2006 onwards of its licensees and HT consumers and refund the excess amount billed and collected along with the interest at the rate of 6% per annum in line with Section 62(6) of The Electricity Act, 2003. Alternatively the Appellant (DVC) may adjust the excess amount recovered, along with interest at the rate of 6% per annum, in 24 equal monthly prospective installments, starting from July, 2010 by giving credit in the monthly bills of the consumers/licensees. Thereafter, the DVC is directed to approach the concerned State Electricity

Commissions for getting the final order relating to the Retail Tariff who in turn will fix the retail tariff according to law.

108. With these observations, this Appeal is dismissed as devoid of merits. Consequently all the IAs are disposed of. No order as to costs.

(H.L. Bajaj)	**(Justice M. Karpaga Vinayagam)**
Technical Member	**Chairperson**

Dated: 10th May, 2010,
Index: Reportable/Non-\reportable.