APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 256 of 2015

Dated : 28th November, 2018

PRESENT: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF

Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata-700054 …….. Appellant

Versus

1. Delhi Transco Ltd
   Shakti Sadan, Kotla Road
   New Delhi-110002

2. BSES Yamuna Power Ltd.,
   Shakti Kiran Building, Karkardooma
   New Delhi-110092

3. BSES Rajdhani Power Ltd.,
   BSES Bhawan, Nehru Place,
   New Delhi-110 019

4. Tata Power Delhi Distribution Limited
   (Formerly known as North Delhi Power Ltd.)
   Grid Substation Building
   Hudson Lines, Kingsway Camp
   New Delhi- 110 009

5. Haryana Power Generation Corporation Ltd.
Shakti Bhawan, Sector 6,
Panchkula-134109

6. Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi – 110 001 ……Respondents

Counsel for the Appellant(s) **:** Mr. M. G. Ramachandran,
Ms. Ranjitha Ramachandran,
Ms. Anushree Bardhan,
Ms. Poorva Saigal,
Mr.Arvind Kumar Dubey

Counsel for the Respondent(s) **:** Mr. S. K. Chaturvedi, R-1

Mr. R. B. Sharma,
Mr. Mohit Mudgal, for R-3.

J U D G M E N T

PER HON'BLE MR. JUSTICE N. K. PATIL, JUDICIAL MEMBER

1. Damodar Valley Corporation, Appellant herein, ['**DVC'}** questioning the legality and validity of the Impugned Order dated 06.07.2015 passed in Petition No. 219/GT/2013 by the Central Electricity Regulatory Commission, New Delhi ['**CERC']**, has filed the instant Appeal under Section 111 of the Electricity Act, 2003 wherein the CERC has decided the generation tariff for the DVC's Koderma Thermal

Power Station, Unit No. 1 (500 MW) for the period from the date of commercial operation [**'COD'**] till 31.3.2014, under the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2009 and further prayed to pass such other Order(s) as this Tribunal may deem just and proper in the interest of justice and equity.

2. Damodar Valley Corporation, Appellant, hereinafter referred to as "DVC' is an integrated electricity utility undertaking generation, transmission, distribution and retail supply of electricity. DVC is a statutory body constituted under the provisions of the Damodar Valley Corporation Act, 1948, (herein after referred as **`the DVC Act').**

3. Respondent Nos. 2 to 5 are procurers of electricity for distribution to consumers in the respective States. The supply of electricity by DVC to the Respondent procurers is from generating company to the distribution licensee licensees and covered by Section 62 (1) (a) of the Electricity Act, 2003.

4. DVC being a statutory body controlled by the Central Government, the tariff terms and conditions of DVC as a generating company and as a transmission licensee is determined by the Central Commission in terms of section 79 (1) (a), (c) and (d) of the Electricity Act, 2003.

5. The subject matter in the instant appeal relates to the determination of generating tariff for the Koderma Thermal Power Station, Unit No. I (500 MW) of DVC for the period from the date of the commercial operation i.e 18.7.2013till 31.3.2014. The Applicable Regulations are the Central Electricity Regulatory Commission (Terms and Conditions for determination of Tariff) Regulations, 2009 (herein after referred as the **`Tariff Regulations, 2009').**

6. The main issue involved in the instant Appeal is that the CERC has calculated the time over run for commercial operation of Koderma Thermal Power Station, Unit no. I with reference to the letter of Acceptance dated 29.6.2007 treating the same as the date of investment approval and commissioning period as 35 months from

LOA/Investment approval instead of 44 months from the investment approval as provided for in the Tariff Regulations, 2009.

7. The second issue is that the time overrun in achieving the commercial operation which DVC claimed being due to be for Force Majeure reason/reasons beyond the control of DVC has been disallowed except for a period of 8.5 months.

8. Thirdly, The cost overrun, namely, Interest during Construction (IDC) has been disallowed with reference to time over run of 37.5 months in the case of Unit 1 without factoring any implication of the deferred deployment of funds and consequently no adverse implications to cost overrun.

9. The said matter had come up for consideration before the CERC on 6.7.2015. The CERC after considering the relevant material available on records and the case made out by the Appellant, disposed it of in above terms. Not being satisfied with the Impugned Order

passed by the sixth Respondent, CERC, the appellant felt necessitated to present this Appeal.

10. The Respondent Nos. 1 and 6 represented through Counsel, have opted neither to file any reply nor the written submissions.

11. The Respondent No. 3, represented through Counsel, Shri R. B. Sharma, has filed detailed reply and written submission contending that they are filing the present counter affidavit for the purpose of opposing the above appeal and that, at the outset, each and every statement, allegation and submission made by the appellant in the Appeal is being denied and that it is contrary to and/or inconsistent with what is stated herein. It is respectfully submitted that nothing herein should be deemed to have been admitted unless the same is expressly admitted herein. The Respondent No. 3, BSES RPL further contended that the Appellant has prayed for setting aside the Impugned Order dated 6.7.2015 passed in P. No. 219/GT/2013 on the file of the Respondent No. 6, CERC wherein the CERC has determined the generation tariff of Koderma Thermal Power Station, Unit No. 1 (500 MW) for the period

from the COD till 31.3.2014, in accordance with the provisions of the Tariff Regulations, 2009.

12. The Appellant in this Appeal has alleged the following two issues for consideration :-

(i) Computing the period of construction from the Letter of Award (LOA); and

(ii) Disallowing claim on Time Over run.

13. The counsel appearing for the Respondent No. 3 was quick to point out and alleged that the CERC has computed the time period of construction from the LOA and not from the date of investment approval as envisaged under Regulation 15 (2) of the Tariff Regulations, 2009. The allegation of the Appellant is without any base and is misconceived. The timeline specified in Appendix –II by the CERC as provided under 1st and 2nd proviso to Regulation 15(2) of the Tariff Regulations, 2009 is for considering whether any project is entitled for additional Return of 0.5% on account of timely completion. The submission of the Appellant that the applicability of this regulatory provision would necessarily also apply to the commencement date for calculation of the timeline for

completion of the project is misconceived as it is not a case where the Appellant is claiming an additional Return of 0.5% for timely completion. Therefore, the contention of the Appellant of the issue is without any substance as the issue of this nature has also been rejected by this Tribunal in its judgment dated 12.1.2012 in Appeal No. 104/2011.This has been referred by the sixth Respondent CERC in para 8 of the impugned Order.

14. The submission of the learned Counsel appearing for Respondent No. 3 regarding disallowing the claim on time overrun, the Appellant has alleged that the CERC has disallowed the claim on the time overrun on various counts. The CERC in this case has mentioned the judgment related to the time overrun related costs on the principles set out by this Tribunal after duly considering the relevant material available on record and after going through the oral and written documentary evidence. The Appellant by not subjecting himself to the present managerial techniques and concealing the material information in the form desired by the CERC, only shows that the Appellant may be hiding the crucial

information from the CERC and also from beneficiary-respondents which otherwise exposes him to a very large extent.

15. The timeline of 35 months for Unit-I was prescribed by the Appellant as this project was targeted to be commissioned before the Common Wealth Games in October, 2010 in Delhi. The Tribunal after analyzing the entire material available on record and after assigning valid and cogent reasons in para 11 of the impugned Order has rightly considered the scheduled date of issue of LOA, i.e., 29.6.2007 and the schedule COD has been considered as 35 months for Unit-I and 38 months for Unit-II from the date of LOA.

16. Therefore, the Appellant has failed to make out any good ground to substantiate his prayer at all in the Petition before the Respondent No. 6 CERC and it has rightly disposed of in terms of the observations made in the Impugned Order. Therefore, the Appeal filed by the Appellant is liable to be dismissed as misconceived and with costs.

17. We have heard the learned Counsel appearing for the Appellant, Shri M. G. Ramachandran, learned Counsel appearing for the Respondent No. 3, Shri R. B. Sharma at considerable length of time and we have carefully gone through the written submission and reply filed by the respective counsel and also perused the impugned Order passed by the Respondent no. 6, CERC and after carefully analyzing the material available on record, the following principal issues emerged in the instant Appeal for our consideration :-

(i) Whether computing the period of construction from the Letter of Award (LOA); and

(ii) Whether the assessment of time overrun for implementation of the project and corresponding cost over-run (IDC).

RE : ISSUE NO. 1

18. The learned counsel appearing for the Appellant, Shri M. G. Ramachandran submitted that, the CERC has computed timeline for achieving the commercial operation of Unit No. 1 of the Koderma Thermal Power Plant with reference to the timeline stated in the letter dated 29.6.2007 (35 months from LOA/Investment approval) instead of 44 months from the date of investment approval as per Appendix II of

the Tariff Regulations 2009. The primary issue in the Appeal is whether the CERC is right in considering the reduced timeline in the letter dated 29.6.2007, i.e. 35 months for Unit No. 1 from the LOA/investment approval instead of 44 months from the date of investment approval as per Appendix-II.

19. The Central Commission ought not to have considered the time line as per the contents of the letter dated 29.6.2007 only on the ground that such computation from the Letter of Award (Investment Approval) was mentioned in the letter. The time line mentioned in the LOA is as a Contractual provision for BHEL to complete and cannot be substituted as a statutory regulation for deciding tariff.

20. Therefore, he submitted that the timelines specified in regard to the entitlement of additional Return on Equity in Appendix II necessarily apply to the computation of the timeline for completion of the project namely Scheduled date of achieving the Commercial operation.It cannot be that the period allowed for deciding on the additional equity will be as per Appendix II i.e. 44 months from the date of investment approval but

the determination of scheduled Commercial Operation date should be earlier than the above, namely 35 months because it is stated so in the Letter of Acceptance.

21. The Central Commission should have appreciated that the purpose of providing in the LOA a shorter period for completion of the project by the contractor is to ensure that the contractor completes the work at the earliest and delivers the project at an early date. This is to enable DVC to have the COD at an early date and thereby servicing of equity from a period prior to the statutorily provided date for completion of the project for additional Return on equity. Any other interpretation would lead to an anomalous and absurd result. To give an example, in the present case if the period of 35 months is computed from the LOA/Investment Approval dated 29.6.2007 and if DVC had established the Unit 1 on 28.8.2010, DVC would be entitled to additional Return on Equity of 0.5% as provided in Appendix II for the entire duration of the generating project. However as per the decision of the CERC the same being beyond 35 months computed from the Letter of Acceptance/Investment Approval dated 29.6.2007, DVC will be

disallowed the IDC being beyond the timeline provided. This means DVC being incentivised with additional Return of Equity as well as penalised by disallowance of IDC at the same time. This would be grossly irrational and patently erroneous.

22. The proper construction of the provision of the Tariff Regulations, 2009 is that the minimum time allowed for completion of the project, even for the computation of IDC should be the timeline specified under Appendix II of the Tariff Regulations, 2009. It cannot be that DVC will on the one hand get incentive for establishing the units within the timeline provided in Appendix II by way of additional Return on Equity and at the same time be penalised for not achieving is only a matter between DVC and its Turnkey Contractor. The statutory Regulations require the timeline to be determined as per the Regulations. In the presence of specific statutory provision contained in the Tariff Regulations for computing the time line of 44 months there is no justification for the Central Commission to compute the timeline with reference to the contents of letter dated 29.6.2007 (35 months), which is basically inter-se contractual provision of DVC with its EPC Contractor - BHEL.

23. He placed reliance on the case of (Maharashtra State Power Generation Company Limited-v-Maharashtra Electricity Regulatory Commission) in Appeal No 72 of 2010 decided on 27.04.2011 by this Tribunal at Para 7.4. At page 20 it has been held:

> *"7.4 It would also be prudent to consider the delay with respect to some benchmarks rather than depending on the provisions of the contract between the generating company and its contractors/suppliers. If the time schedule is taken as per the terms of the contract, this may result in imprudent time schedule not in accordance with good industry practices."*

24. The counsel appearing for the Appellant vehemently submitted that it is well settled that the CERC is also bound by the Tariff Regulations, 2009. In this regard he placed reliance on the following decision of the Hon'ble Courts:-

(i) [PTC India Limited vs. CERC 2010 (4) SCC 603]

(ii) [Haryana Power Generation Corporation Ltd vs HERC] (Appeal No. 131 of 2011 in the order dated 1.3.2012).

25. The Central Commission in the impugned order at **Para 8 Page 26** has wrongly construed the decision of this Hon'ble Tribunal dated 12.1.2012 in Appeal No. 104 of 2011 in [Powergrid Corporation of India-v-Central Electricity Regulatory Commission]. The Central Commission has referred only to Paras 13 and 14 of the said decision, CERC has mechanically come to the conclusion that the time limit specified in Appendix II is for the Return on Equity. The context in which the said decision has been taken, has not been appreciated. It is clearly for considering more time than what is provided in Appendix II for computing the timeline for achieving the COD in regard to the issue of IDC to be allowed or disallowed and not reducing the time lesser than what has been provided in Appendix II.

26. In the light of the circumstances referred above, particularly, with reference to Paras 15 and 16 read with paras 13 and 14, it clearly and unambiguously establishes that this Tribunal had

considered further time in the context of Regulation 7 of the Tariff Regulations, 2009.

27. Therefore, the above decision of this Tribunal cannot be applied to a vice versa situation where the time line to achieve Commercial operation is to be allowed at least to the extent of the time line provided in Appendix II.

28. The learned counsel appearing for the Appellant submitted that in accordance with the well settled law laid down by the superior Court, it needs to be read in the context of the factual position prevalent. The decision cannot be juxtaposed mechanically to a factual circumstance which is completely different. The principles applied in decision of this Tribunal in the above Appeal No. 104 of 2011 is not to reduce the timeline qua computation of time overrun less than the timeline specified in Appendix II of the Tariff Regulations, 2009.

29. Therefore, he submitted that the timeline for achieving Commercial Operation Date could be more than the timeline for computing the time overrun specified in Appendix II but can never be less than the timeline specified in Appendix II. As a consequence of the above the Respondent No. 6, CERC erred in calculating the admissible IDC on account of the rejection of time overrun by proportionately deducting the IDC for the period of 29 (37.5 – 8.5) months. If the Central Commission had computed the delay in accordance to the time line as provided for in the Tariff Regulations, 2009 i.e. 44 months from investment approval then the delay in commercial operation date would have been 28.5 months as against 37.5 months as decided by CERC in para 33 of the impugned order. Accordingly, the IDC disallowed would be only for 20 (28.5 - 8.5) months.

30. Therefore, he submitted that Respondent No. 6, CERC has failed to consider the case made out by the Appellant and also failed to consider the relevant material available on record and also failed to consider the well-settled law laid down by the Apex Court and this

Tribunal. Hence, the reasoning assigned by the Respondent No. 6 CERC cannot be sustainable and it is liable to be set aside.

31. ***Per contra,*** learned counsel appearing for the Respondent No. 3, Shri R. B. Sharma , inter alia, contended that the Appellant alleged that the CERC has computed the time period of construction from the LOA and not from the date of investment approval as envisaged under Regulation 15 (2) of the Tariff Regulations, 2009. The allegation of the Appellant is without any base and is misconceived. The timeline specified in Appendix-II as provided in Para of the impugned order as second proviso to Regulation 15(2) of the Tariff Regulations, 2009 is for considering whether any project/unit is entitled for an additional return on Equity (ROE) of 0.5% on account of timely completion of unit/project. The provisions of Regulation 15 of the Tariff Regulations, 2009 is quoted below for reference :

> ***"15. Return on Equity.*** *(1) Return on equity shall be computed in rupee terms, on the equity base determined in accordance with regulation 12.*

2) Return on equity shall be computed on pre-tax basis at the base rate of 15.5% to be grossed up as per clause (3) of this regulation: Provided that in case of projects commissioned on or after 1st April, 2009, an additional return of 0.5% shall be allowed if such projects are completed within the timeline specified in ***Appendix-II."***

Provided further that the additional return of 0.5% shall not be admissible if the project is not completed within the timeline specified above for reasons whatsoever."

The Appendix-II is enclosed with the Appeal (Page 71 – 74).

32. The submission of the Appellant that the applicability of this regulatory provision would necessarily also apply to the commencement date for calculation of the timeline for completion of the project is misconceived as this is not a case where the Appellant is claiming an additional return of 0.5% for timely completion. The contention of the Appellant on the issue is without any substance as the issue of this nature has also been rejected by this tribunal in its

judgment dated 12.1.2012 in Appeal No. 104/2011. It has been considered by the CERC in para 8 of the impugned Order.

33. However, the contention of the Appellant is that the CERC has computed the time taken for construction of the project from the date of letter of award and not from the Investment Approval. On this issue, it is submitted that the Appellant refused to furnish the details regarding the time and cost overruns along with copy of investment approval and PERT chart as may be viewed from the impugned Order of the CERC as held in para 10 wherein it is specifically contended by the Appellant in response to the same, the Appellant has clarified that all the information sought for has been submitted and no further details are available for submission in the matter.

34. It is significant to note that the CERC has made all sincere efforts for obtaining the information from the Appellant on the Investment approval but the same was denied. The denial of the document to the CERC when specifically asked for shows clearly **that the Appellant must have derived undue benefits by**

concealing the document. It is noted that the Appellant has claimed Interest during Construction (IDC) from April, 2007 onwards indicating the fact that the zero date to commence the project had started from 1.4.2007. Thus, a very liberal approach was adopted by the Commission by considering the zero date as 29.6.2007. It is further submitted that no capital expenditure can be allowed to be incurred without approval in a statutory body like the DVC and thus the response of the Appellant before the CERC is anything but the facts. It is also submitted that the Appellant is operating in a regulatory environment and it is in his own interest to follow the regulatory regime by filing complete details to claim the benefits. This Tribunal on this issue in it is judgment dated 28.11.2013 in Appeal No. 165 of 2012 has held as under :-

> *"29. The CERC has been mandated to determine the transmission tariff for the Appellant. The CERC has every right to ask any relevant details from the Appellant for carrying out the prudence check on the expenditure of the Appellant."*

35. The Respondent No. 3 BRPL submitted that the tendency to conceal the relevant material facts from the Respondent no. 6 CERC as well as from the beneficiary-respondents is not at all desirable. Therefore, he submitted that the Respondent No. 6 CERC, after due and critical analysis of the case made out by the Appellant and strictly following the provisions of the Electricity Act, 2003 and the respective Regulations in the matter and after assigning valid and cogent reasons answered the issue No. 1 against the Appellant and the same is just and sound. Hence, interference by this Tribunal does not call for.

Our Consideration and Analysis :

RE : ISSUE NO. 1

36. After due consideration of the submissions of the learned Counsel appearing for the Appellant and Respondent No. 3 in respect of this issue, the core issue for our consideration is whether the time period for construction be computed from the LoA or from the date of Investment Approval as per provisions of Regulation 15(2) of the Tariff Regulations, 2009. We do not find any justification in the contention of the learned counsel appearing for the Appellant

because as per the timeline specified in Appendix-II by the CERC as provided under 1st and 2nd proviso to Regulation 15(2) of the Tariff Regulations, 2009 is for considering whether any project is entitled for additional Return of 0.5% on account of timely completion. The provisions of Regulation 15 of the Tariff Regulations, 2009 read as under :-

> ***"15. Return on Equity.*** *(1) Return on equity shall be computed in rupee terms, on the equity base determined in accordance with regulation 12.*
>
> *2) Return on equity shall be computed on pre-tax basis at the base rate of 15.5% to be grossed up as per clause (3) of this regulation: Provided that in case of projects commissioned on or after 1st April, 2009, an additional return of 0.5% shall be allowed if such projects are completed within the timeline specified in* ***Appendix-II."***
>
> *Provided further that the additional return of 0.5% shall not be admissible if the project is not completed within the timeline specified above for reasons whatsoever."*

37. As per Appendix II to the Tariff Regulations, 2009, t*he* completion time schedule of a project shall be reckoned from the date of investment approval by the Board (of the generating company or the transmission licensee), or the CCEA clearance as the case may be, up to the date of commercial operation of the units or block or element of transmission project as applicable. The Appellant contended that the applicability of this regulatory provision would necessarily also apply to the commencement date for calculation of the timeline for completion of the project as this is not the case where the Appellant is claiming an additional Return of 0.5% for timely completion. Therefore, the contention of the counsel appearing for the Appellant on the issue is without any force as the issue of this nature has also been rejected by this Tribunal in its judgment dated 12.1.2012 in Appeal No. 104/2011 as considered by the Respondent No. 6 CERC.

38. The further contention of the learned counsel appearing for the Appellant is that the CERC has computed the time taken for construction of the project from the date of LOA and not from the

Investment Approval. It is significant to note that on this issue, it is submitted that the Appellant refused to furnish the details regarding the time and cost overruns along with copy of investment approval and PERT chart as may be viewed from the impugned Order, as held by Respondent No. 6 CERC in para 10, which reads thus –

> *"10. It is observed that the date of investment approval is 21.7.2007. However, the petitioner has neither submitted a copy of the investment approval as documentary evidence in support of its submission nor any details of the scheduled COD as per investment approval. In order to take a considered view on the question of time overrun, the investment approval indicating the commissioning schedules is required. Accordingly, the CERC during the hearing on 29.5.2014 sought additional details regarding the time and cost overrun along with copy of investment approval and PERT chart from the petitioner. In response, the petitioner has clarified that all information sought for by the CERC has been submitted and no further details are available for submission in the matter."*

39. As held in para 10 of the judgment referred above, the Respondent No. 6 CERC has given substantial opportunity to the

Appellant on the investment approval, the Appellant failed to utilize the same opportunity. The denial of the document to the CERC when specifically asked for shows clearly that the Appellant must have derived undue benefits by concealing the document. It is noted that the Appellant has claimed Interest during Construction (IDC) from April, 2007 onwards indicating the fact that the zero date to commence the project had started form 1.4.2007. The CERC, in fact, has taken a liberal approach by relaxing the same for nearly about three months. It further emerges that no capital expenditure can be allowed to be incurred without approval in a statutory body like the DVC and thus the response of the Appellant before the CERC is anything but the facts. It is further submitted that the Appellant is operating in a regulatory environment and it is in its own interest to follow the regulatory regime by filing complete details to claim the benefits.

40. In view of the well-settled law laid down by this Tribunal, the Appellant ought not have concealed the material facts when they are claiming benefits under the relevant Regulations, they must approach

before Respondent No. 6 CERC with clean hands. In the instant case, the CERC, after due and critical evaluation of the entire material available on records and after assigning the valid and cogent reasons, has answered the Issue No. 1 against the Appellant. We hold that it is just and reasonable and we do not find any legal infirmity in the reasoning assigned by the Respondent No. 6 CERC. Hence interference by this Tribunal does not call for.

Issue No. 2 regarding disallowing claim on time overrun :

41. The learned counsel appearing for the Appellant, Shri M. G. Ramachandran, vehemently submitted that when appreciating the justification given by the DVC for a delay in achieving the commercial operation consequent to the reduction of the time overrun, the Respondent No. 6 CERC has disallowed with cost overrun (IDC). In this regard, the counsel submitted that the cost overrun includes the time overrun and cannot be computed mechanically by reducing IDC for the number of months of delay. It is to be done on the basis of actual additional costs on account of time overrun. Respondent NO. 6 CERC while dealing with IDC has not considered the implication of

Deferred drawal of funds. Since the drawl is deferred there is a saving on IDC in the initial period. DVC had taken loan for the said project from Power finance corporation (PFC) and others and the actual loan drawal had started on from 25.9.2008 as per appendix VII of DVC's submission dated 13.12.2013. To substantiate his submissions, the Appellant DVC placed reliance on the Respondent No. 6 CERC's consideration in another case where the issue of deferred deployment of debt and consequent implication to IDC to be considered was taken note by the CERC in case of NLCL Vs. Jodhpur VVNL in Petition No. decided on 14.2.2016 (SCC 151) as held in para 25 of the said judgment and also placed reliance in case of 'NTPC Vs. MP PTC in P. No. 247/2010 decided by the CERC on 3.5.2012 (2012 SCC) para 21 and 22 of the said judgment. Therefore, he submitted that the CERC is wrong in reducing the IDC admissible by going into the number of months delay. The CERC ought to have allowed the IDC to the extent what had been the IDC for admissible period after timeline of 44 months for completion of the COD had been maintained. Therefore, the CERC has committed an error and has not allowed the time overrun

as claimed by the DVC ignoring the justifications as detailed below and consequent to the above the Interest during Construction for the delay in the construction and commercial operation of the power plant.

42. The CERC has disallowed 12 months as claimed by DVC on account of non availability of startup power due to protest by local people. The Central Commission ought to have appreciated that the arrangement of start up power was to be effected by the way of "Loop in Loop Out" (LILO) arrangement from the 132 KV Barhi – Koderma Transmission line which required construction and erection of towers. This construction of towers required land beyond the main power station project area. The time over run claimed by DVC on the above issue of start up power has been wrongly disallowed by the CERC on the ground that most of the land for the main plant package was already acquired. This is erroneous as the acquisition of land for the main plant package and land for construction of towers for erection of towers (LILO arrangement) beyond the main plant area are completely different issues and ought to have been considered

separately. The CERC has not considered the real reason for delay in the construction of LILO Line to enable getting start up power. Therefore, the said reasoning given cannot be sustainable in law.

43. Regarding Power Evacuation Work, as recorded in para 27 of the impugned Order, the CERC has not considered that the power evacuation was to be done by way of KTPP – Bihar Shariff line which was being built by the Powergrid Corporation of India Limited which is also the Central Transmission Utility as per the Electricity Act, 2003. The Central Commission has not appreciated the fact that the construction of the line and establishing power evacuation from Koderma Power Project was under the purview of the Powergrid Corporation of India Limited and DVC had no part to play in the construction of the same. Charging of the line was delayed due to various reasons faced by the Powergrid Corporation of India Limited. DVC ought not to be penalized for the same for no fault on its part. In view of the above the reasonable delay of 18 months ought to have been condoned in totality keeping in mind the reality and factual aspect of the matter by the CERC.

44. Regarding Water Package as referred in para 28 of the impugned Order, the CERC has under this head rejected the claim of DVC for a delay for 20 months caused due to delay in handing over the land and agitation/strike by local people. While rejecting the claim, the Central Commission had mentioned that more than 80% of the land allotted for the package was handed over to DVC till 27.04.2009 and 100% land was available by 08.10.2009 but ignored the fact that DVC was facing difficulties in getting the physical possession of land even after official handing over of the land due to opposition by the local people. In view of the above the delay suffered in executing the work is bonafide and the CERC commission ought to have considered and condoned the delay.

45. Regarding readiness of Rail Track (RITES), as referred in para 29 of the impugned Order, there is a delay on the part of the RITES company of 4 months from 13.10.2010 to 07.02.2011. This delay has not been caused on account of the Appellant at all. The CERC

ought to have taken judicial note and condoned the delay over and above 4 months already condoned on this account.

46. The CERC has also failed to take into consideration the reality of Ash Pond Problem, as referred in para 31 of the impugned Order. The CERC has not considered the claim of the Appellant DVC for delay of 10 months on account of TG Deck Casting whereby the delay was on account of non availability of surrounding land for dumping evacuated earth, hard rock in the area etc. The Central Commission has also disallowed the delay caused with regard to major milestones to be achieved by DVC with regard to boiler lit up, oil synchronization, coal bunkering, coal synchronization etc. The CERC ought to have taken into consideration the detailed reasons set forth by the Appellant DVC in the affidavit dated 13.12.2013.

47. Further he submitted that the Appellant DVC maintains a L1 schedule in place of Programme Evaluation Review Technology (PERT)/CPM Technique in Project Management and reviewed the progress with respect to L1 schedule of the contract having major

milestones as a contractual schedule. It is wrong and denied that DVC has not provided the requisite details for computation of time over run. It is submitted that the CERC had all the necessary information before it to deal with the issue of time over run. Since there was no provision under any Regulation or law requiring DVC, the Appellant herein to prepare the Programme Evaluation Review Technology (PERT) chart, the Programme Evaluation Review Technology (PERT) chart was not prepared and still is not being prepared by DVC. Since DVC is using the L1 schedule extensively, the package wise delay analysis report was prepared based on L1 schedule and was submitted before CERC. In this regard the order dated 27.3.2015 in Appeal No. 106 of 2014 in the matter of Powergrid Corporation of India ltd v CERC, is relevant wherein the issue of non-submission of PERT chart was raised. The CERC has not at all considered any of the above reasoning given by the Appellant DVC and has, without application of mind, rejected its claim for the delay by vaguely stating that there has been a slackness on the part of the DVC in the project management and improper coordination in execution of works. The CERC ought to

have considered each of the events of delay and its implications iin accordance with law. To substantiate his submission, he placed the reliance on the case of NTPC Ltd in Appeal No. 85/2015 in para 7.4 of the Tribunal's judgment dated 27.4.2011 passed in Appeal No. 72/2010. Thus, in the interest of justice and equity, the burden of cost over-runs arising out of time over-run of 14 months would need to be equally shared by NTPC and beneficiaries. Therefore, he submitted that taking into consideration and totality of the case in hand, the claim of the Appellant DVC, the CERC ought to have allowed delay of 50% of IDC in the interest of justice and equity regarding period of cost overrun arising out of time overrun. This aspect of the matter was neither looked into nor considered. Therefore, he submitted that the impugned Order passed by the CERC is liable to be set aside.

48. ***Per Contra,*** the learned counsel appearing for the Respondent No. 3, Shri R. B. Sharma, submitted that the Appellant has contended that the CERC has disallowed the claim of time overrun on various counts. On this issue, he submitted that there are no specific Regulations to deal with the issue related to time overrun

related cost under Tariff Regulations, 2009. This Tribunal in its judgment dated 27.4.2011 has laid down the following principle for prudence check of time overrun and cost overrun of a project :-

"7.4. The delay in execution of a generating project could occur due to following reasons:

i) due to factors entirely attributable to the generating company, e.g., imprudence in selecting the contractors/ suppliers and in executing contractual agreements including terms and conditions of the contracts, delay in award of contracts, delay in providing inputs like making land available to the contractors, delay in payments to contractors/ suppliers as per the terms of contract, mismanagement of finances, slackness in project management like improper co-ordination between the various contractors, etc.

ii) due to factors beyond the control of the generating company e.g. delay caused due to force majeure like natural calamity or any other reasons which clearly establish, beyond any doubt, that there has been no imprudence on the part of the generating company in executing the project.

iii) situation not covered by (i) & (ii) above.

In our opinion in the first case the entire cost due to time over run has to be borne by the generating company. However, the Liquidated Damages (LDs) and insurance proceeds on account of delay, if any, received by the generating company could be retained by the generating company. In the second case the generating company could be given benefit of the additional cost incurred due to time over-run. However, the consumers should get full benefit of the LDs recovered from the contractors/suppliers of the generating company and the insurance proceeds, if any, to reduce the capital cost. In the third case the additional cost due to time overrun including the LDs and insurance proceeds could be shared between the generating company and the consumer. It would also be prudent to consider the delay with respect to some benchmarks rather than depending on the provisions of the contract between the generating company and its contractors/suppliers. If the time schedule is taken as per the terms of the contract, this may result in imprudent time schedule not in accordance with good industry practices.

7.5. In our opinion, the above principles will be in consonance with the provisions of Section 61(d) of the Act, safeguarding the consumers' interest and at the same time, ensuring recovery of cost of electricity in a reasonable manner."

The CERC in this case has rightly examined the issue related to the time overrun related costs on the principles set out by this Tribunal as above as mentioned in the impugned Order. The details of actual Time Overrun condoned by the CERC are furnished below in tabular form :-

S.No.	*Reasons for Time Overrun*	*Time Overrun Claimed*	*Time Overrun Allowed*
1.	*Resistance of local people & Problem of law and order*	*4.5 months*	*4.5 months*
2.	*Boiler Drum Lift*	*5 months*	*Nil*
3.	*Boiler Hydro Test*	*6.5 months*	*Nil*
4.	*Delay in T.G. foundation & Erection work*	*12.5 months*	*Nil*
5.	*Start-Up Power Availability*	*12 months*	*Nil*
6.	*Coal Handling Plant Package*	*12 months*	*Nil*
7.	*Power Evacuation Work*	*18 months*	*Nil*
8.	*Water Package (KBL) III*	*20 months*	*Nil*
9.	*Readiness of Rail Track (RITES)*	*25 months (in Appeal)*	*4 months*
10	*Teething troubles during stabilization*	*Not mentioned*	*Nil*
11.	*Ash Pond Problem*	*Not mentioned*	*Nil*
	Total	*37.5 months*	*8.5 months*

49. Further, he submitted that it is significant to note that bare perusal of the above table would show that the Appellant although claimed a time overrun of 115.5 months (excluding delay under two activities where delay has not been mentioned) against the above eleven activities yet the cumulative Time overrun for Unit-I was 37.5 months. This is for the fact that all activities in the execution of the project may not result into delay because of the time period cushion available for their execution. The activities which are on the critical path are capable of delaying the project. Accordingly, the CERC directed the Appellant to furnish the reasons for time overrun of 37.5 months for Unit-I along with PERT/CPM chart indicating the activities on critical path and impact of delay on those activities. The Appellant stated that all information has been submitted and no further details are available for submission. The Commission, after due and critical evaluation of the oral and documentary evidence available on file and in para 13 of the impugned Order, has held thus –

> *"13. As stated, the petitioner was directed to furnish reasons for time overrun accompanied with the PERT chart. However, instead of the PERT/CPM chart, the petitioner vide affidavit dated 13.12.2013 has only furnished the "Delay*

Analysis Report" along with reasons for the said delay. The Commission during the hearing on 29.5.2014 sought additional details from the petitioner regarding the time and cost overrun along with copy of investment approval and PERT chart. In response, the petitioner has clarified that all information sought for by the Commission has been submitted and no further details are available for submission in the matter. Accordingly, based on the submissions of the parties and the documents available on record, the reasons for the delay in the commissioning of the units of the generating station has been examined as discussed in the subsequent paragraphs."

Therefore, he submitted that the Appellant denied the complete information on the question of time and cost overrun to the CERC as well as to the Respondent-beneficiaries. It is relevant to submit that the Appellant failed to submit the required information along with PERT/CPM Charts. In the absence of the detailed information, the CERC was working only on the limited information which was before it and in holding the Appellant responsible for time overrun for the period which was not condoned in the impugned order which is just and reasonable. No error or irregularity has been committed by the Appellant.

50. The counsel appearing for the Respondent No. 3 BRPL submitted that the PERT/CPM is widely used technique in project management. The PERT Chart clearly shows the sequence and inter-relationships of all activities in the project. The critical path on the network determines the duration of the project. The Appellant by not subjecting himself to the present managerial techniques and concealing the material information in the form desired by the CERC, only shows that he may be hiding the crucial information from the Commission and the beneficiary-respondents which otherwise expose him to a very large extent. Therefore, he submitted that on account of this, the Appeal filed by the Appellant is liable to be dismissed.

51. The counsel appearing for the Respondent No. 3 BRPL submitted that the timeline of 35 months for Unit-I was prescribed in the LOA by the Appellant as this project was targeted to be commissioned before the Common Wealth Games in October, 2010

in Delhi. This aspect has been rightly considered by the CERC and it is decided in para 11 of the impugned Order. Therefore, he submitted that it may be noted that the project being the priority project and of national importance but no additional efforts were made by the Appellant in spite of all out support made including the Ministry of Power in the execution of the project within the prescribed time limit. Rather, it may be noted that there is imprudence on the part of the Appellant and even a project of national importance results in more than 100% of time overrun. This fact is not in dispute. In spite of given the substantial time, the Appellant could not complete the project on time and it has defeated the importance of a national event and hence the Appellant should be held responsible.

52. Further, the counsel appearing for the Respondent No. 3 BRPL vehemently submitted that the CERC has examined the question of time and cost overrun in the light of the judgment of this Tribunal and while examining the question of time and cost overrun, the CERC has been more than considerate in condoning the time overrun and the Appellant therefore has absolutely no grievance against the order

passed by the CERC. It may be observed that the CERC in spite of denial of information by Appellant has condoned the time overrun of 8.5 months in the execution of the project which appears to be justified but the balance period of time overrun is due to factors entirely attributable to the Appellant DVC alone. Therefore, he submitted that the impugned Order passed by the CERC is wholly justified as the same is in accordance with the judgments of this Tribunal as referred to above by assigning valid and cogent reasons in the impugned Order. There is no error or irregularity in the impugned Order in answering the issue No. 2 against the Appellant. Therefore, interference by this Tribunal does not call for.

Re : Issue No. 2 :

53. As rightly pointed out by the learned counsel appearing for Respondent No. 3 regarding contention of the Appellant that the CERC has not justified in disallowing the claim for time overrun on various grounds, it is significant to note that there are no specific grounds dealing with this issue regarding time overrun related to the cost as per Tariff Regulations, 2009. In fact, this Tribunal in the case of M/s PGCIL Vs. MERC and Others in its judgment dated 27.4.2011

in Appeal no. 72 of 2010 has held that following the principle of prudence check of time overrun and cost overrun for the project as stated supra in para 7.4, the Respondent No. 6 CERC has examined the issue related to the time overrun related cost on the principles set out by this Tribunal as mentioned in the impugned Order and detailed actual time overrun in execution of the Project and time overrun condoned by the CERC for nearly 8.5 months is not in dispute. It is pertinent to note that all activities in the execution of the Project may not result into delay because of the time period cushion available for their execution. The activities which are on the critical path are capable of delaying the project, as rightly pointed by the counsel appearing for the Respondent No. 3. The Respondent No. 6 CERC has directed the Appellant to furnish the reasons for time overrun of 37.5 months for Unit-I along with PERT/CPM chart indicating the activities on critical path and impact of delay on those activities. The Appellant has failed to furnish all information with justiciable details as substantiated in their submission.

Therefore, in the light of the valid and cogent reasoning assigned in Para 13 of the Judgment as referred above, we do not

find any good ground made out by the Appellant for considering the relief sought in the instant Appeal.

54. Further, it emerges from the material available on record and the reasoning assigned by the CERC that the Appellant denied the complete information on the ground of time and cost overrun to the CERC as well as to the Respondent-beneficiaries. It is relevant to submit that the Appellant failed to submit the required information along with PERT/CPM Charts. In the absence of the detailed information, the CERC was working only on the limited information which was before it. Therefore, the CERC has rightly justified in holding the Appellant responsible for time overrun for the period which was not condoned, by assigning valid and cogent reasons in the impugned Order.

55. The PERT/CPM is widely used technique in project management. The PERT Chart clearly shows the sequence and inter-relationships of all activities in the project. The critical path on the network determines the duration of the project. The Appellant by

not subjecting himself to the present managerial techniques and concealing the material information in the form desired by the CERC, only shows that he may be hiding the crucial information from the CERC and the beneficiary-respondents which otherwise expose the failure on the part of the Appellant. Therefore, he has rightly justified in assigning valid reasons in the impugned Order. We do not find any error or arbitrariness in the impugned Order.

56. The timeline of 35 months for Unit-I was prescribed by the Appellant in the LOA as this project was targeted to be commissioned before the Common Wealth Games in October, 2010 in Delhi. The Commission after analyzing the entire material available on record and after considering the oral and documentary evidence and after due appreciation has rightly justified by holding in para 11 of the Order. It is worthwhile to extract the relevant portion of para 11 of the impugned Order hereinunder :-

> *"11. On scrutiny of the documents available on record, it is noticed that a high level committee under*

the Chairmanship of Secretary (Power) was constituted to review the progress of the different projects of DVC and NTPC which were targeted to be commissioned before the Common Wealth Games in October, 2010 in Delhi. In the meeting held on 14.2.2007, the high level committee had stressed the need for completion of both the units of the petitioner in advance of three months as against those proposed by DVC in order to ensure the supply of electricity to Delhi during the said games. Accordingly, the revised schedule for commercial operation of the generating station was indicated as April, 2010 for Unit-I and August, 2010 for Unit-II. Subsequently, CEA, after discussions with BHEL, DVC and NTPC (consultant) vide its letter dated 6.6.2007 had proposed the COD for Unit-I after 35 months from the date of Letter of Award (LOA) and COD for Unit-II after 38 months from the date of LOA. Considering the fact that the actual Supply, Erection and Commissioning of the equipments are to be undertaken by M/s BHEL and a realistic time schedule had been proposed by CEA (in consultation with BHEL and NTPC), the same has been considered in order to take a fair view on the time and cost overrun involved in the execution of the project. Based on the above discussions, the zero date has been considered as the date of issue of LOA i.e.29.6.2007 and

the schedule COD has been considered as 35 months for Unit-I and 38 months for Unit-II from the date of LOA as detailed below:"

What has emerged from the above reasoning and the facts recorded by the CERC is that the zero date has been considered as the date for issue of LOA as 29.6.2007 and the COD has been considered as 35 months for Unit No. I and 38 months for Unit No. II from the date of LOA.

57. It is significant to note that the project being the priority project and of national importance event, no additional efforts were made by the Appellant in spite of all out support made including the Ministry of Power in the execution of the project within time. Therefore, there was a failure on the part of the Appellant being a premium corporation and it is established beyond reasonable doubt that there is imprudence on the part of the Appellant and even a project of national importance results in more than 100% of time overrun. This fact is not in dispute on account of non-completion of the project

within prescribed time-frame. Therefore, we are of the considered view that the Respondent No. 6 CERC after due consideration of the oral and documentary evidence and other relevant material available on record has rightly justified in answering the issue No. 2 against the Appellant, which is just and proper. We do not find any error or irregularity in the impugned Order.

58. The learned counsel appearing for the Appellant, Shri M. G. Ramachandran has taken issue (c) regarding the cost overrun, namely, Interest during Construction (IDC) has been disallowed with reference to time over run of 37.5 months in the case of Unit 1 without factoring any implication of the deferred deployment of funds and consequently no adverse implications to cost overrun. As considered by the CERC at page 44-45 of the impugned Order, it is significant to note that the Appellant has not taken any grounds in the memorandum of Appeal. In para 8 of the memorandum of Appeal at page 9 that there are only issues to be A & B but for the first time in their additional submissions on behalf of the DVC Appellant had raised this issue. However, the learned counsel appearing for the

Respondent No. 3 was quick to point out and vehemently submitted that the said issue raised in the additional submissions filed on behalf of the Appellant dated 4.5.2018 cannot be sustainable and its reply to be rejected at threshold in the light of the reasoning given by the CERC at para 38 page 45 on the ground that for the present IDC including interest on normative loan has been allowed as per the information submitted by the petitioner/Appellant subject to truing up. Therefore, he submitted that the case is liable to be dismissed as misconceived.

59. After careful consideration of the submissions made by learned counsel appearing for the Appellant and learned counsel appearing for the Respondent No. 3, regarding issue (c), first time raised in the additional submissions on behalf of DVC Appellant and the counsel appearing for the Appellant cannot be justiciable in view of the valid and cogent reasons assigned by the CERC in para 38 of the Order. It is worthwhile to extract the reasoning assigned in para 38 which reads as hereinunder --

"*38. It is observed from the submissions of the petitioner that the IDC claim of Unit-I is based on the total cash expenditure as on COD of Unit-I. The petitioner is therefore directed to submit the unit-wise break-up of the cash expenditure as on COD of Unit-I at the time of revision of tariff based on truing-up exercise in terms of Regulation 6(1) of the 2009 Tariff Regulations, for the computation of IDC/Notional IDC. However, for the present, the IDC including interest on normative loan has been allowed as per the information submitted by petitioner, subject to truing-up."*

After careful perusal of the observations made in para 38 of the judgment we do not find any justification or the good ground as such made by the Appellant for considering issue No. 3 first time raised in the additional submission. For the reasoning assigned is well-founded and well-reasoned, interference by this Tribunal does not call for. Hence we answer issue No. 3 against the Appellant.

60. The learned counsel appearing for the Respondent No. 3 submitted that in view of the well-settled law laid down by this Tribunal in judgment dated 28.5.2018 passed in Appeal No. 153 of

2015 [DVC Vs. Delhi Transco Ltd & Ors], this Tribunal has considered the issue raised by the Appellant in this appeal and has answered against the Appellant and dismissed the Appeal being devoid of merits and the Order passed by the CERC in Petition No. 66/GT/2012 has been upheld. On this ground also, the Appeal filed by the Appellant is liable to be dismissed. The submission of the counsel appearing for the Respondent No. 3 has not been disputed by the counsel appearing for the Appellant. But, however, he vehemently submitted that some of the points having been covered in that judgment, the rest are not directly covered in that judgment. Therefore, the said judgment is not fully applicable to the facts and circumstances of the case in hand. After careful consideration of the submissions made by the counsel appearing for the Appellant we hold that in fact reasoning assigned and findings and analysis in the said judgment are applicable to the facts and circumstances of the instant case also.

61. The reliance placed by the learned counsel appearing for the Appellant, to substantiate its submission, on several judgments of the

Apex Court and this Tribunal, is not in dispute but the said judgments of Apex Court and this Tribunal are not applicable to the facts and circumstances of this Case.

CONCLUSION

62. The Respondent No. 6 CERC, after thorough and critical evaluation of the relevant material on record and by assigning valid and cogent reasons, as rightly justified by passing the impugned Order. Therefore, we do not find any legal infirmity or irregularity in the impugned Order, on the ground that the Appellant has miserably failed in implementation of the Project though being of national importance for an international event. It has superseded every purpose for which the project was conceived and approved by the competent authority. The issue raised in the Petition has been vitiated vehemently by the Respondent No. 6 CERC as rightly and judiciously by assigning valid and cogent reasons. Therefore, we thus, hold that there is no legal infirmity of perversity in the impugned order passed by the Respondent No. 6 CERC. Hence, we hold that the Appeal filed by the Appellant DVC is liable to be dismissed being devoid of merits and the impugned Order passed by the Respondent No. 6 CERC deserves to be affirmed.

ORDER

63. Having regard to the facts and circumstances of the case as stated supra, the Appeal filed by the Appellant is dismissed as devoid of merits.

Accordingly, the issues raised in the instant Appeal are answered against the Appellant.

The Impugned Order dated 6.7.2015 passed by the Respondent No. 6, CERC, in Petition No. 219/GT/2013 on the file of the CERC is hereby upheld.

No order as to costs. Pronounced in the open Court on this ___28th____ day of November, 2018.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

√**REPORTABLE /** ~~**NON-REPORTABLE**~~

Bn