



ORDER

OF THE

WEST BENGAL ELECTRICITY REGULATORY COMMISSION

IN THE MATTER OF

CASE NO: TP(R)-44/22-23

IN REGARD TO PETITION SUBMITTED BY DAMODAR VALLEY CORPORATION (DVC) FOR REVIEW OF THE TARIFF ORDER DATED 17.06.2022 ISSUED BY THE COMMISSION IN CASE NO. TP-79/18-19 IN RESPECT OF DVC FOR THE YEAR 2018 – 2019 AND 2019 – 2020 UNDER SECTION 94(1)(F) OF THE ELECTRICITY ACT, 2003 READ WITH REGULATION 1.7.5 AND 3.3 OF THE WBERC (CONDUCT OF BUSINESS) REGULATIONS, 2013.

PRESENT:

**DR. MALLELA VENKATESWARA RAO. CHAIRPERSON
SRI PULAK KUMAR TEWARI, MEMBER**

DATE: 22.09.2022



In regard to petition submitted by Damodar Valley Corporation (DVC) for review of the order dated 17.06.2022 issued by the Commission in case no. TP-79/18-19 in respect of DVC for the years 2018 – 2019 and 2019 – 2020 under section 94(1)(f) of the Electricity Act, 2003 read with regulation 1.7.5 and 3.3 of the WBERC (Conduct of Business) Regulations, 2013 for review and rectification of the order dated 17.06.2022



CASE IN BRIEF

- 1.0 This is in regard to the application submitted by Damodar Valley Corporation (in short 'DVC') for review of the tariff order dated 17.06.2022 (Impugned Order) issued by the Commission in case no. TP-79/18-19 for the years 2018 – 2019 and 2019 – 2020.
- 2.0 DVC submitted that the DVC has implemented the tariff order dated 17.06.2022 and revised the energy bills for FY 2018-19 and 2019-20 and onwards as per the approved tariff schedule and other Terms and Conditions of Tariff as specified in the said tariff order and adjusted the resulting arrears.
- 3.0 It is submitted that after thorough scrutiny of the tariff order, in question, DVC finds that there are certain issues which need to be reviewed. The issues are as follows:
 - a) Only distribution loss and no transmission loss has been allowed to DVC
 - b) Partial disallowance of fixed cost in respect of purchase of power during FY 2018-19 and FY 2019 – 20 through Long Term Agreements (LTA)
 - c) Recovery of the expenses towards contribution to P&G Fund and Sinking Fund based on PAFY / TAFY
 - d) Disallowance of the entire cost of temporary financial accommodation
 - e) Consideration of 10% of power purchase cost as working capital instead of our claim of 18%
 - f) Determination of tariff schedule for licensees i.e. WBSEDCL and IPCL getting electricity from DVC in radial mode
- 4.0 It has been prayed to review and rectify the order dated 17.06.2022 passed in Case No. TP-79/18 – 19 to the extent mentioned in the petition and to pass such further order or orders as the Commission may deem just and proper in the circumstances of the case.



In regard to petition submitted by Damodar Valley Corporation (DVC) for review of the order dated 17.06.2022 issued by the Commission in case no. TP-79/18-19 in respect of DVC for the years 2018 – 2019 and 2019 – 2020 under section 94(1)(f) of the Electricity Act, 2003 read with regulation 1.7.5 and 3.3 of the WBERC (Conduct of Business) Regulations, 2013 for review and rectification of the order dated 17.06.2022



5.0 Now, the Commission proceeds to find whether any case for review has been made out by the Petitioner in terms of Section 114 read with Order 47 Rule 1 of CPC, according to which a person aggrieved by order of a Court can file review on the following grounds, if no appeal against the said order has been filed:

- (a) Discovery of new and important matter of evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.
- (b) On account of some mistake or error apparent on the face of record; and
- (c) For any other sufficient reason.

6.0 In this connection, reference could be made to the following judgments:

- (a) In **Lily Thomas & Ors. vs. Union of India & Ors. [(2000) 6 SCC 224]** Judgment, the Hon'ble Supreme Court has held as under:

"56. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review...."

- (b) In **Union of India vs. Sandur Manganese and Iron Ores Limited & others {(2013) 8 SCC 337}**, the Hon'ble Supreme Court has held as under:

"23. It has been time and again held that the power of review jurisdiction can be exercised for the correction of a mistake and not to substitute a view. In Parsion Devi & Others Vs. Sumitri Devi & Others, this Court held as under:

"9. Under Order 47 Rule 1 of CPC, a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 of CPC, it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has limited purpose and cannot be allowed to be "an appeal in disguise."



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(c) In **M/S Goel Ganga Developers India Pvt. Ltd. vs. Union of India 2018**

SCC Online SC 930, the Hon'ble Supreme Court has held the view that one must remind oneself that the power of review is a power to be sparingly used. The power of review is not like appellate power. It is to be exercised only when there is an error apparent on the face of the record. Therefore, judicial discipline requires that a review application should be heard by the same Bench. Otherwise, it will become an intra-court appeal to another Bench before the same court or tribunal. This would totally undermine judicial discipline and judicial consistency”

7.0 Review sought on the issues mentioned in para 3.0 have been discussed below:

7.1 **Only distribution loss and no transmission loss has been allowed to DVC:**

DVC's submission:

The Commission may be pleased to note that the grid network of DVC consists of transmission lines as well as distribution lines & feeders including power transformers, auto transformers and distribution transformers of different capacity and voltage levels. Hence, it cannot be denied that to effect power supply to different consumer premises there occurs transmission energy loss in transmission lines as well as distribution loss in the distribution lines/feeders including the losses in the transformers. However, in the tariff order dated 17.06.2022 in Case No. TP-79/18-19 the Commission has allowed only distribution loss to DVC, ignoring the associated transmission loss. This has resulted in disallowance of around Rs. 33.95 Crs. And 33.56 Crs. for the years 2018 – 19 and 2019 – 20 respectively out of the projected power purchase cost incurred by DVC for the consumers in West Bengal.

It is pertinent to mention here that, distribution loss as allowed to DVC vide WBERC (Terms and Conditions of Tariff) Regulations, 2011 for the respective years have not ignored or disqualified the transmission loss of DVC grid network. The said Regulations have provided for fixing the norms of transmission loss of DVC after final conclusion of legal proceedings in para K of Schedule 9A. The Commission has adopted this methodology notwithstanding the fact that the grid network of DVC has been adjudged



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as 'Unified Deemed Inter-State Transmission System' for the purpose of Tariff determination, by the Hon'ble Tribunal.

It is further submitted that, after the judgement of Hon'ble Supreme Court, at present there are no pending legal proceedings of DVC that may cause any obstruction for fixing the norms of Transmission loss for DVC by the Commission. DVC also in this regard humbly submits that since the transmission activity and distribution activity of the grid networks of DVC are inseparable, the Commission may be pleased to allow composite T&D Loss to DVC instead of only the distribution loss.

Following references has been mentioned by DVC:

- a) Only distribution loss as allowed to DVC is much less compared to transmission loss allowed to WBSETCL as well as the utilities in other states having the voltage level of the networks are either similar to DVC or at higher voltage level.
- b) State Commission of Jharkhand also allowed composite T&D loss for DVC's grid network while arriving at Energy Balance and ARR for different years e.g actual T&D Loss 3.55% and estimated loss of 3.34% of DVC during the Trueing-Up for FY 2018-19 and 2019 – 20 respectively are allowed by JSERC whereas the upper limit set for Distribution loss is 5% as per the JSERC 'Terms and Conditions for Determination of Distribution Tariff' Regulations, 2015.
- c) The transmission loss of CTU & other ISTS, calculated by NLDC, varied in the range of 3.5% to 3.75% during 2021-22 when CTU & other ISTS operates mainly at 220 KV and above contrary to DVC's T&D network consisting of 220 KV lines, 132 KV lines and 33 KV Lines and feeders.

DVC also submitted that as a consequence of approving only the distribution loss and disallowing the associated transmission losses, DVC has been deprived of a substantial portion of its actual cost of power purchase already incurred to maintain quality and reliable power supply to the consumers and has caused a serious stress on its financial position.



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Based on the afore stated justifications and data submitted with the review petition DVC prayed before the Commission to remove the difficulty being faced by DVC in this regard in terms of Regulations 8.2, 8.3 and 8.4 of WBERC (Terms and Conditions of Tariff) Regulations, 2011 and allow the composite T&D loss of DVC in place of only the Distribution loss for finalization of Energy Balance and ARR of DVC for the period under consideration.

Commission's view:

Principles taken by the Commission in para 5.4.3.5 of the MYT order dated 17.06.2022 is self explanatory which has been questioned by the petitioner. As per Order 47 Rule 1 of CPC, the review of such principle does not come within the fold of relevant provision of Civil Procedure Code. According to Hon'ble Apex Court power of review can be exercised for correction of mistake but not to substitute the view already taken. (**Lily Thomas &Ors. vs. Union of India & Ors. [(2000) 6 SCC 224]**)

7.2 Partial disallowance of fixed cost in respect of purchase of power during FY 2018-19 and 2019-20 through Long Term Agreements (LTA):

DVC's submission:

The Commission has disallowed a portion of the power purchased through long term agreements at the time of finalizing the power purchase cost for FY 2018-19 and 2019-20 based on the energy balance and merit order dispatch principle consequent upon consideration of only Distribution Loss (2.2%) in place of Transmission and Distribution Loss (T&D loss). Accordingly, while finalizing the corresponding cost of purchased power during FY 2018-19 and 2019-2020, both fixed cost and variable cost have been disallowed on pro rata basis.

It is pertinent to mention here that DVC entered into power purchase agreements with different generators on long term basis. It is a mandatory condition in relevant CERC Regulations that the beneficiaries (viz. DVC, WBSEDCL etc.) are required to pay fixed cost for the agreed quantum of capacity allocation even for purchasing energy less than the allocation.



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In this regard, DVC has referred to a judgement dated 23.03.2016 passed by the Hon'ble Tribunal in appeal no. 255 of 2014, which, inter-alia, states that *"...we are inclined to accept the same particularly, in light of the Central Commission's Regulations which states that if the utility has been able to declare the capacity to the level as prescribed in the Regulations, the consumers have to bear the fixed charges even if they are not scheduling the power and this is in light of the fact that Appellant has tied up long term PPAs for sourcing its power requirement. Hence, we direct the State Commission to consider entire fixed cost of power purchase as determined by the Central Commission vide its different Orders from the generating stations of CPSUs and other IPPs for meeting the power obligations of the Appellant to serve end consumers....."*

In view of the above, DVC prayed before the Commission to allow the entire Fixed Cost in respect of purchase of power by DVC during FY 2018-19 and 2019-20 on long term basis. This prayer for allowing the entire fixed cost of power purchased during 2018-19 and 2019-20 is, however, without prejudice to decision of the Commission on applicability of T&D loss in place of only the distribution loss as submitted herein before by DVC.

Commission's view:

Principles taken by the Commission in para 5.4.3.5 and 5.6 of the MYT order dated 17.06.2022 are self-explanatory which has been questioned by the petitioner. As per Order 47 Rule 1 of CPC, the review of such principle cannot be undertaken owing to lack of jurisdiction of this Commission.



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7.3 Recovery the expenses towards contribution to P&G Fund and Sinking Fund based on PAFY / TAFY:

DVC's submission:

The Commission in the Tariff order dated 17.06.2022 has not allowed DVC to recover the entire cost related to Contribution Sinking Fund as approved by the Central Commission (CERC), due to the fact that while computing the recoverable amount towards contribution to Sinking Fund, the Commission has factored in the Plant Availability Factor (PAF) and Transmission Availability Factor (TAF) in terms of Regulation 30 of CERC Tariff Regulations, 2014 in a manner linked for recovery of other defined elements of Annual Fixed Cost (AFC) in terms of Regulation 21 of CERC 'Terms and Conditions of Tariff' Regulations, 2014.

Expenses towards contribution to Sinking Fund have been approved by CERC as additional part of AFC which are not covered by CERC Tariff Regulation 21 as mentioned above. Hence recovery of these additional /special elements of AFC cannot be linked to PAF/TAF in terms of Regulation 30 of CERC Tariff Regulations, 2014.

DVC submitted that funds of DVC are created in terms of the provision in Section 40 of the DVC Act, 1948. The expenses towards contribution to Sinking Fund are also treated in the Annual Accounts of DVC in line with the mandate of DVC Act. Moreover, in terms of the judgment dated 23.11.2007 of the Appellate Tribunal, Section 40 of the DVC Act shall continue to apply to DVC being not inconsistent with the Electricity Act, 2003. Furthermore, the Hon'ble Tribunal in the same judgment dated 23.11.2007 has held that entire cost towards P&G Fund and Sinking Fund is recoverable from consumers through tariff, which is also upheld by the Hon'ble Supreme Court in the judgment dated 23.07.2018.

As such the recovery of yearly contribution to Sinking Fund through tariff need to be guided only by Section 40 of the DVC Act and not by any sub-legislation viz. the Tariff Regulations, framed under the Electricity Act, 2003 which may mandate recovery based on performance parameters. CERC has allowed the entire expenses towards Sinking Fund as additional components of tariff / AFC and accordingly tabulated these elements below



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the line of segregation between the main elements (in terms of Regulation 21 of CERC Tariff Regulations, 2014) and additional elements.

The Jharkhand Commission in the tariff order of DVC dated 04.09.2014 also allowed recovery of contribution to P&G Fund and Sinking Fund for the period 2013-14 to 2015-16 based on PAF / TAF. Being aggrieved, DVC filed an Appeal (being the Appeal No. 255 of 2014) before the Hon'ble Appellate Tribunal inter-alia on the same issue. The Tribunal in the judgment dated 23.03.2016 held that *"The State Commission has stated that the pension & gratuity and sinking fund has been appropriately considered by the Central Commission while determining tariff of generating stations of the Appellant and hence the State Commission has not undertaken any determination/re-determination on the same and this cost has in fact been allowed as input cost as part of the power procurement cost from the Appellant's generating stations and as such no part of it is required to be re-determined by the State Commission. We are in agreement with the State Commission's findings as above."*

Being aggrieved, DVC filed the second Appeal (being the Appeal No. 8317 of 2016) before the Hon'ble Supreme Court. Hon'ble Supreme Court of India in the judgment dated 02.01.2017 directed the State Commission of Jharkhand as under:

- "1. Learned counsel for the Jharkhand State Electricity Regulatory Commission submits that along with true-up issue in terms of the order of this Court dated 26.10.2016 in Civil appeal No. 7383 of 2016, the Commission shall also examine the question of disallowance of the claims.*
- 2. In view of the above statement, we are of the view that nothing survives for consideration in this appeal. The appeal is closed on the above terms.*
- 3. The consideration of the Commission would naturally be made without being influenced by the order passed by the Appellate Tribunal/or Electricity."*

From the above judgment dated 02.01.2017 of the Hon'ble Supreme Court it is clear that consideration of the judgment dated 23.03.2016 passed by the Tribunal in Appeal No. 255 of 2014 is not binding for approving the



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recoverable amount of the contribution to P&G Fund and Sinking Fund to DVC for the period 2009-10 to 2013-14 or subsequently.

Based on the afore stated justifications and documents placed before the Commission, DVC prayed to review the issue and allow recovery of the contribution to Sinking Fund in its entirety to DVC for the period under consideration.

Commission's view:

Principles taken by the Commission in para 5.5.5 of the MYT order dated 17.06.2022 is self explanatory which has been questioned by the petitioner. As per Order 47 Rule 1 of CPC, the review of such principle cannot be undertaken owing to lack of jurisdiction of this Commission.

7.4 Disallowance of the entire cost of temporary financial accommodation:

DVC's submission:

DVC claimed the actual interest on temporary financial accommodation in the Tariff Application in terms of regulation 5.6.5.4 of WBERC 'Terms and Conditions of Tariff' Regulations, 2011. The Commission in the Tariff Order dated 17.06.2022 disallowed the entire claim of DVC.

As per the observations made by the Commission in the above dated tariff order, it is apparent that the Commission is of the view that the entire Short-Term Borrowings (Line of Credit) of Rs. 4100 Cr is for financing over - dues of JSEB and nothing is related to consumers in the state of West Bengal.

It is submitted that the major portion of the Short-term borrowing is attributable to JBVNL (erstwhile JSEB) but not the entire portion. DVC in the additional information dtd 31.01.2022 has submitted that total delayed payment surcharge on account of firm consumers of DVC booked in the annual accounts for FY 2018-19 was Rs. 288.68 crores out of which Rs. 210.66 Crs. is for JBVNL. Accordingly, the Commission has considered Rs. 78.02 Crs. as Non-Tariff Income which excludes the Delayed payment surcharge (DPS) of JBVNL and deducted it from the ARR. As such it is evident that there were unrealized arrears from other consumers including the consumers of West Bengal apart from JBVNL for which the DPS was billed.

Therefore, DVC prayed before the Commission to allow a part of the



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Temporary Financial Accommodation commensurate to the Delayed Payment Surcharge (DPS) income adjusted in the ARR as Non-Tariff Income (NTI).

Commission's view:

Principles taken by the Commission in para 5.16.4 of the MYT order dated 17.06.2022 is self explanatory which has been questioned by the petitioner. It has been observed by the Hon'ble Apex Court in **Jain Studios Ltd. V. Shin Satellite Public Co. Ltd. Reported in (2006) 5 SCC 501** that power of review cannot be confused with appellate power which enables a superior court to correct to correct all errors committed by a subordinate court. It is not rehearing of an original matter. A petition of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exception cases.

7.5 Consideration of 10% of power purchase cost as working capital instead of our claim of 18%:

DVC's submission:

The Commission has determined the interest of working capital for the part of West Bengal area vide order dated 17.06.2022 for the years 2018-19 and 2019-20 as Rs. 521.64 lakh and Rs. 616.74 lakhs respectively.

It is respectfully submitted that DVC could not claim the Monthly Variable Cost Adjustment (MVCA) during FY 2018-19 and 2019-20 as the tariff order now becomes applicable from July, 2022. In terms of clause 5.6.5.1 of WBERC (Terms and Conditions of Tariff) Regulations, 2011, 10% rate is applicable if recovery is made through MVCA. In this respect, DVC has referred to the APR order dated 31.05.2021 issued by the Commission in respect of DVC for the years 2009-10 to 2013-14, wherein the Commission has approved @ 18% for working capital requirement for the years 2011-12, 2012-13 and 2013-14.

In view of above, DVC prayed before the Commission to allow 18% rate for computation of working capital requirement in place of only 10%.



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Commission's view:

Principles taken by the Commission in para 5.7 of the MYT order dated 17.06.2022 is self explanatory which has been questioned by the petitioner. As per Order 47 Rule 1 of CPC, the review of such principle does not come under this Commission since according to the Hon'ble Apex Court the mere possibility of two views on the subject cannot be a ground for review. (**Kamalesh Verma V. Mayawati and others(2013) 8 SCC337**).

7.6 **Determination of tariff schedule for licensees i.e. WBSEDCL and IPCL getting electricity from DVC in radial mode:**

It is submitted that DVC is supplying power to WBSEDCL at 13 points and IPCL at 4 points in Radial Mode. Such supply was considered as being in retail consumer mode till the order dated 01.03.2019 passed in the tariff proceedings of WBSEDCL and IPCL, wherein the supply of power by DVC to them was not considered under retail supply mode. The tariff order dated 25.05.2015 passed in the case of DVC, however, did not consider such change in the supply of power to WBSEDCL and IPCL from retail consumer mode. DVC has filed appeals before APTEL vide appeal no. 216 of 2019 and 190 of 2019 in view of the mismatch in the Revenue Realization of DVC on account of supply of power to WBSEDCL and IPCL being treated differently under the above orders.

In the order dated 17.06.2022 for the FY 2018-19 and 2019-20, the Commission has deducted the revenue requirement of DVC from WBSEDCL and IPCL from the approved ARR to arrive at the average cost of supply from which the Tariff was designed for the consumers other than WBSEDCL and IPCL.

This has resolved the mismatch in consideration of revenue requirements effective from 1.04.2018. DVC Consumer Association has filed an Appeal being no. 307 of 2022 against the order dated 17.06.2022 inter alia challenging the WBSEDCL and IPCL tariff being excluded from the retail consumer mode as increasing the tariff to other consumers.



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In the circumstances, DVC wishes to only place on record that the Commission may be pleased to clarify that the implications of the orders that may be passed by the Appellate Tribunal in the above-mentioned appeals being no 216 of 2019 and 190 of 2019 will be considered in the true up proceedings.

Commission's view:

Principles taken by the Commission in table under para 6.1 of the MYT order dated 17.06.2022 is self explanatory which has been questioned by the petitioner. As per Order 47 Rule 1 of CPC, the review of such principle does not come under this Commission subject to decision in the pending appeal.

ORDER

- 8.0 On the basis of para-wise findings as above, the Commission finds that there is no error on the face of the order and decides that issues raised by DVC in the instant petition are not reviewable as per Order 47 Rule 1 of CPC in strict terms of the decisions of the Hon'ble Apex Court pointed out in the foregoing discussion.
- 9.0 DVC is to take note of this order.
- 10.0 The Review petition of DVC is, thus, disposed off. Let a copy of this order be served upon DVC

Sd/-
(PULAK KUMAR TEWARI)
MEMBER

Sd/-
(MALLELA VENKATESWARA RAO)
CHAIRPERSON

DATE: 22.09.2022

Sd/-
(Secretary)