

Damodar Valley Corporation vs Jharkhand State Electricity ... on 18 May, 2026

Judgement in Appeal No. 163 of 2017

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 163 OF 2017 & IA NO. 399 OF 2017

Dated: 18th MAY, 2026
Present: Hon`ble Ms. Seema Gupta, Officiating Chairperson
Hon`ble Mr. Virender Bhat, Judicial Member

IN THE MATTER OF:
Damodar Valley Corporation,
DVC Towers, VIP Road,
Kolkata - 700 054

- Appellant

Versus

1. Jharkhand State Electricity Regulatory Commission.
2nd Floor, Rajendra Jawan Bhawan,
Sainik Bazar, Main Road
Ranchi 834001
2. Association of DVC HT Consumers of Jharkhand
Kalyani Apartment, 1st floor
Gandhi Chowk, Giridih
Jharkhand, 815301.
3. Steel Authority of India Limited
Through Chief General Manager
Ispat Bhawan, Lodhi Road,
New Delhi-110003.

- Respondent(s)

Counsel on record for the Appellant(s) : Mr. Shri Venkatesh
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Mr. Ashutosh Kumar Srivastava
Mr. Bharat Gangadharan
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Mr. Siddharth Nigotia
Mr. Shivam Kumar

Mr. Kartikay Trivedi
Mr. Mohit Gupta
Mr. Manu Tiwari
Mr. Aashwyn Singh
Mr. Punyam Bhutani
Mr. Harsh Vardhan
Mr. Suhael Buttan
Mr. Priya Dhankar
Ms. Himangi Kapoor
Mr. Anant Singh Ubeja
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Ms. Nehal Jain
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Mr. Jamnesh Kumar
Mr. Himanshu Shekhar for Res.2

Mr. Rupesh Kumar
Ms. Pankhuri Shrivastava
Ms. Ananya Mohan
Mr. Pravesh Bahuguna for Res.3

JUDGEMENT

PER HON'BLE MRS. SEEMA GUPTA, OFFICIATING CHAIRPERSON

1. The captioned Appeal No. 163 of 2017 has been filed by Damodar Valley Corporation (hereinafter referred as "DVC/Appellant"), challenging the order dated 19.04.2017 ("Impugned Order") passed by the Jharkhand State Electricity Regulatory Commission (hereinafter referred as "JSERC/State Commission") in Case (T) No. 02 of 2016, whereby the Judgement in Appeal No. 163 of 2017 State Commission has decided true up of the financials of DVC for FY 2006- 07 to 2013-14 and the Annual Performance Review for FY 2014-15.

Description of Parties

2. The Appellant/ DVC is a statutory body constituted under the provisions of the Damodar Valley

Act, 1948('DVC Act') dealing with the Damodar Valley Area falling within the geographical boundaries of two states; State of West Bengal and State of Jharkhand.

3. The Respondent No.1 / JSERC is the State Commission, the statutory regulatory body for the power sector in the State of Jharkhand. The Respondent No.2 is the Association of DVC HT Consumers of Jharkhand. Respondent No.3 is Steel Authority of India Limited.

Factual matrix of the Case:

4. DVC is an integrated utility engaged in generation, transmission, distribution, bulk sale and retail sale of electricity to consumers in the Damodar Valley Area, in addition, DVC is also engaged in multifarious functions inclusive of sovereign functions and non-remunerative welfare of state functions such as irrigation, flood control, afforestation, resettlement, and public health measures. Consequent to the Electricity Act, 2003 coming into force on 10.06.2003, DVC was deemed to be a licensee under the said Act and covered by Section 79 of the Electricity Act, 2003 vesting regulatory control in the Central Commission in so far generation and transmission are concerned.

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5. By Order dated 06.08.2009, CERC determined the tariff for the period of 01.04.2006-31.03.2009 excluding various elements, deferring them for determination in separate proceedings. The key order in present issue is the Order dated 08.05.2013 passed by CERC in Petition No. 272 of 2010, which determined the final annual fixed charges (AFC) admissible to DVC for the period 01.04.2006 to 31.03.2009 for its generating stations and transmission systems.

6. In the meantime, the State Commission had passed provisional retail supply tariff of DVC, for DVC area falling within State of Jharkhand vide orders dated 22.11.2012 and 04.09.2014 for different periods i.e., 2006-07 to 2012-13 and 2013-14 to 2015-16 respectively.

7. DVC filed an Appeal (Appeal No. 255 of 2014) against the Order dated 04.09.2014 passed by JSERC, which was decided by this Tribunal on 23.03.2016. Aggrieved thereby, DVC as well as M/s Anjaney Ferro Alloys Ltd., a consumer, preferred Civil Appeals (No. 8317 of 2016 and 7383 of 2016 respectively) before the Supreme Court. By Order dated 26.10.2016, in civil appeal no 7383 of 2016, the Supreme Court directed JSERC to undertake the true-up exercise and pass orders within six months. By Order dated 02.01.2017 in civil appeal no 8317 of 2016, the Supreme Court further directed that JSERC shall examine the questions of disallowance of claims in the true-up proceedings, without being influenced by this Tribunal's Order dated 23.03.2016

8. In pursuance thereof, JSERC passed the Impugned Order dated 19.04.2017 in Case (T) No. 02 of 2016. Aggrieved by the Impugned Order, DVC has filed the present Appeal.

Judgement in Appeal No. 163 of 2017 ANALYSIS AND DELIBERATION

9. Though DVC has raised several issues in its original Memorandum of Appeal, however at the time of hearing, it confined its submissions to the following three issues:

(A) Non-consideration of expenditure on account of pay revision allowed by CERC for FY 2006-09.

(B) Erroneous linkage of contributions towards the Pension and Gratuity (P&G) Fund and Sinking Fund with the availability of thermal power stations for the period FY 2009-14.

(C) Non-consideration of aggregate Transmission and Distribution (T&D) losses at actuals for FY 2012-13 to FY 2014-15.

10. Accordingly, in this Appeal, adjudication is limited to above three issues. We heard Mr. Shri Venkatesh, learned counsel for the Appellant, Mr Ashok Panigrahi learned counsel appearing on behalf of State Commission, and Mr Rajiv Yadav learned counsel for the 2nd respondent, on the above three issues, perused the Impugned Order, written submissions filed by respective parties and other documents and the issues are deliberated in following paragraphs.

ISSUE A: NON-CONSIDERATION OF EXPENDITURE ON ACCOUNT OF PAY REVISION ALLOWED BY CERC FOR FY 2006-07 TO FY 2008-09.

11. The issue involved is the disallowance of pay revision expenditure of Rs. 210 Crore for FY 2006-07 to FY 2008-09, on the ground that such expenditure is not expressly reflected in the summary AFC table at Para 160 of the CERC Order dated 08.05.2013. Appellant contends that CERC specifically examined and allowed the impact of pay revision in Paras 132 to 136 of the same Order, holding that pay revision, is a legitimate and Judgement in Appeal No. 163 of 2017 mandatory component of employee cost, and was not factored into the normative O&M expenses for the tariff period of 2004-05 to FY 2008-09, and that denial of such expenditure would result in under-recovery of cost of electricity and such expenditure is required to be allowed to be recovered from beneficiaries over and above the normative O& M expenses. It is further contended that once such expenditure is recognized by CERC, it forms a binding input cost for the State Commission under Rule 8 of the Electricity Rules, 2005, and ought to have been duly considered while determining the retail supply tariff.

12. Per Contra, it is submitted on behalf of Respondents that Appellant itself has acknowledged that such additional O&M arrears were "inadvertently not included" in the approved AFC and rule 8 of the Electricity Rules, 2005 clearly provides that tariff determined by CERC under Section 79 of the Electricity Act shall not be subject to re-determination by the State Commission, which is required to adopt such tariff as input cost without modification and therefore allowing pay revision at the State level, when it does not form part of the approved AFC, would amount to re-determination of generation tariff and the same is expressly prohibited under the statutory scheme. It is also submitted by respondents that the appropriate remedy for the Appellant was to approach CERC by way of review or to file an appeal against the CERC Order and having failed to do so, the Appellant

cannot seek to indirectly modify the tariff before the State Commission and State Commission has correctly declined the claim and directed the Appellant to approach CERC for relief.

13. The Appellant relied upon this Tribunal's judgment dated 19.02.2016 in Appeal No. 184 of 2013 (Bhaskar Shraichi v. CERC) along with Appeal No. 305 of 2013 in the matter of SAIL Limited v. CERC, wherein this Judgment in Appeal No. 163 of 2017 Tribunal had upheld the inclusion of pay revision arrears as part of O&M expenses, including components such as Pension & Gratuity ("P&G) contribution and common office expenses. The Appellant also relies on the Order dated 19.07.2021 of the West Bengal Electricity Regulatory Commission (WBERC) in the APR order dated 19.07.2021 for FY 2006-07 to FY 2008-09, which expressly allowed the pay revision impact of Rs. 210 Crore, thereby reflecting a consistent regulatory approach.

14. In this context, it is relevant to refer to CERC Order dated 08.05.2013 in Petition No 272/2010, for determination of deferred elements of Tariff for Generation and inter-State transmission of electricity of DVC for the period 01.04.2006 to 31.03.2009, in which besides other claims, at Para 132- 136, deliberations have been held with regard to additional expenditure for the period FY 2006-07 to FY 2008-09 on account of pay revision pursuant to implementation of sixth pay commission. At Para 132, the said figure has been quantified as Rs. 210 Crore, for various projects/Stations of DVC. The CERC, in the said order took note that some other Central Generating Company i.e., NTPC has also claimed such additional O&M charges on account of pay Revision etc, which was allowed by the CERC in its Order dated 12.10.2012 and extracted the relevant paragraphs (Para 11-Para18) of the said Order, in its order dated 08.05.2013. Paragraph 18 of the order of CERC dated 12.10.2012, which was extracted in CERC order dated 08.05.2013 is reproduced hereunder: -

"18. In exercise of our power to remove difficulty under Regulation 12 of the 2004 Tariff Regulations, we allow the above increase in the employee cost of NTPC as additional O&M charges. However, the arrears shall be paid by the beneficiaries in twelve equal monthly installments during the year 2013-14 in addition to the O&M charges as per the 2009 Tariff Regulations. Keeping in view of the distance of time we order that as a special case, no interest shall be charged on the arrear which will benefit the consumers. In our view, this Judgement in Appeal No. 163 of 2017 arrangement will protect the interest of both the petitioner and the beneficiaries."

15. Further, CERC in its order dated 08.05.2013, at Paragraph 136 allowed the impact of arrears payments based on pay revision payable by beneficiaries to DVC; the referred paragraph is extracted hereunder:

"136. Similar prayers for revision of O&M expenses for the period 2004-09 due to pay revision were also made before the Commission by some of the other central sector generating stations/transmission licensee namely, NLC, NHPC and PGCIL by filing separate applications. The Commission, in line with the decision contained in order dated 12.10.2012 in Petition No. 35/MP/2011 etc and on prudence check, allowed the revision of O&M expenses in relaxation of the provisions of the 2004 Tariff Regulations. In line with the decision of the Commission in order dated 12.10.2012 as

above, the prayer of the petitioner to consider the actual increase in employee cost on account of salary & wages has been considered and has been limited to 50% of the salary and wages (Basic+DA) of the employees of the petitioner as on 1.1.2006. It is to be noted that in case of NTPC, the arrears on account of the said pay revision was ordered to be paid by the beneficiaries in twelve monthly installments during 2013-14 keeping in view that no tariff petitions of NTPC for the period 2004-09 were pending as on the date of the said order. However, in the instant case, since additional capital expenditure in respect of the generating stations and inter-state transmission system of the petitioner for 2006- 09 are being determined in this petition, we direct that the impact of arrear payments (on account of employee cost) based on the pay revision as allowed above, is payable by the beneficiaries, in addition to the normative O&M expenses allowed in this order as per the 2004 Tariff Regulations. However, keeping in view of the distance of time, we order that interest shall not be charged on the said arrear amount, which will benefit the consumers."

16. It is evident from the foregoing that a sum of Rs. 210 Crore was specifically approved by the CERC to be recovered from the beneficiaries in Judgement in Appeal No. 163 of 2017 tariff determination for FY 2006-07 to FY 2008-09, in addition to the normative O&M charges admissible under the 2004 Tariff Regulations.

17. The summary of Annual Fixed Charges (AFC) reflected at Paragraph 160 of the CERC order dated 08.05.2013 records the AFC as per the 2004 Tariff Regulations, however in the summary of the annual fixed charges for the period FY 2006-07 to FY 2008-09 in respect of various stations of DVC, the additional O&M charges so allowed are admittedly not reflected.

18. In our view, this could be attributable to either of two reasons: first, that the said amount was inadvertently not added while preparing the summary; or second, that Para 160 was intended only to capture the determination of charges strictly in line with the 2004 Tariff Regulations, with the additional O&M charges already dealt with and allowed in paragraphs 132 to 136.

19. We find it apposite to refer to the judgement of this Tribunal dated 19.02.2016 in Appeal No. 184 of 2013 (Bhaskar Shraichi v. CERC) & Appeal No. 305 of 2013 (SAIL Limited v. CERC), wherein this Tribunal had upheld the inclusion of pay revision arrears including components such as Pension & Gratuity ("P&G) contribution as part of O&M expenses.

20. In the present case also, respondents have not disputed the allowance of Rs. 210 Crore by the Central Commission towards arrears of pay revision for FY 2006-07 to FY 2008-09 as additional O&M charges to the Appellant. Learned counsel for the Respondents also didnot point to any deliberation or observation in the CERC order dated 08.05.2013 casting doubt upon the allowance of such charges to the Appellant or their recoverability from the beneficiaries.

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21. It is an admitted position that under Rule 8 of the Electricity Rules, 2005, as reproduced hereunder, the tariff determined by the Central Commission is not open to re-determination by the State Commission, "8. Tariffs of generating companies under section 79.- The tariff determined by the Central Commission for generating companies under clause (a) or (b) of sub-section (1) of section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of functions under clauses (a) or (b) of sub-section (1) of section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission."

22. We find that the State Commission has sought to justify its exclusion of Rs. 210 Crore, which had been expressly allowed by the Central Commission in its order dated 08.05.2013 towards arrears of pay revision, on the ground that the said amount does not figure in the AFC summary at Paragraph 160, and that its inclusion would amount to impermissible re-determination of tariff under Rule 8 of the Electricity Rules, 2005. At first blush, this explanation may appear plausible. However, upon a closer and holistic reading of the order, such reasoning cannot be accepted.

23. Acceptance of the State Commission's approach would render Paragraphs 132-136 of the same order wholly otiose. Those paragraphs contain the detailed and reasoned findings of the Central Commission, wherein the arrears of pay revision were specifically considered and allowed. Furthermore, Central Commission consciously refrained from allowing interest on the said amount in the interest of consumers, thereby underscoring its considered approach.

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24. It is a settled principle that an order must be read as a whole, and effect must be given to all parts thereof. A summary table, such as that at Paragraph 160, is intended only as an aid to comprehension; it cannot override or nullify the operative findings contained in the body of the order.

25. Rule 8 of the Electricity Rules, 2005 prohibits re-determination of tariff by the State Commission. However, in the present case, the Central Commission had already determined the arrears of pay revision as part of tariff. The State Commission's exclusion of the said amount does not constitute lawful restraint under Rule 8; rather, it amounts to non-implementation of the Central Commission's determination. The bar under Rule 8 cannot be invoked to justify refusal to give effect to what has already been adjudicated.

26. We are therefore of the considered view that the exclusion of Rs 210 Crore by the State Commission is unsustainable. The Central Commission's order dated 08.05.2013, when read harmoniously, clearly allows the said amount, and the State Commission was bound to give effect to it. Accordingly, the impugned order is set aside to the extent of exclusion of Rs 210 Crore, and the said amount shall stand included in the tariff as determined by the Central Commission.

ISSUE B: LINKAGE OF CONTRIBUTIONS TOWARDS THE PENSION AND GRATUITY (P&G) FUND AND SINKING FUND WITH THE AVAILABILITY OF THERMAL POWER STATIONS FOR THE PERIOD FY 2009-14.

27. The present issue pertains to partial disallowance of contributions towards P&G Fund and Sinking Fund by linking its recovery based on plant availability for FY 2009-14 in the Impugned Order. It is contended on behalf Judgement in Appeal No. 163 of 2017 of Appellant that such contributions are statutory obligations under Section 40 of the DVC Act and therefore, distinct from ordinary O&M expenses; these contributions constitute mandatory financial commitments, inherently different in nature from performance linked cost and remain independent of operational parameters such as plant availability. This Tribunal, vide its judgment dated 23.11.2007 in Appeal No. 271 of 2006, held that entire contribution of P&G fund to be borne by consumers after prudence check to be done by CERC and that the Sinking Fund to be treated as expenditure recoverable through tariff with the approval of Comptroller and Accountant General of India under Section 40 of the DVC Act. This position was subsequently incorporated in Regulation 43(2)(iv) of the CERC Tariff Regulations, 2009, which recognized the unique statutory scheme under the DVC Act and provided for recovery of such contributions as pass-through in tariff, distinct from AFC under Regulations 14. Furthermore, CERC, vide Order dated 08.05.2013, allowed P&G contribution without any linkage to availability. This approach was upheld by this Tribunal, in *Bhaskar Shrachi v. CERC* (Appeal No. 185 of 2013), judgment dated 29.04.2016, wherein it was affirmed that P&G contributions were rightly decided in favour of DVC. In the above background, the partial disallowance of such contribution by linking it with availability, would be in contravention with the settled position and in violation of as Rule 8 of the Electricity Rules, 2005, which prohibits State Commissions from varying CERC determined tariff. The Appellant has contended that State Commission's reliance on this Tribunal's Judgment dated 23.03.2016 in Appeal No. 255 of 2014 is wholly misconceived and impermissible as the said Judgment was challenged by *M/s Anjaney Ferro Alloys Ltd.* (CA No. 7383/2016) and *DVC* (CA No. 8317/2016) before the Supreme Court, in which by its Orders dated 26.10.2016 and 02.01.2017 respectively, the Supreme Court specifically directed that JSERC shall Judgment in Appeal No. 163 of 2017 conduct the true-up exercise without being influenced by the Tribunal Judgment dated 23.03.2016 and shall independently examine the question of disallowance of claims on its own merits. Notwithstanding these explicit directions, JSERC has proceeded to rely upon this Tribunal Judgment dated 23.03.2016.

28. Per Contra it is submitted on behalf of Respondents that P&G contributions are not an independent or standalone cost head; they form part of O&M expenses embedded within the Annual Fixed Charges (AFC) determined by CERC. Under the CERC Tariff Regulations, recovery of AFC is inherently linked to plant availability. A generating station is entitled to recover full AFC only upon achieving the prescribed Normative Annual Plant Availability Factor (NAPAF), failing which recovery is reduced proportionately. This principle applies uniformly to all components of AFC, including P&G contributions. It is therefore, contented that allowing P&G costs as an unconditional pass-through, irrespective of plant performance, would impermissibly de-link a component of AFC from the statutory tariff framework. The State Commission has thus, correctly applied this principle, and this position stands conclusively affirmed by this Tribunal in its Judgment dated 23.03.2016 in Appeal No. 255 of 2014. The issue is no longer res integra.

29. Thus, the issue for consideration is whether the approved contribution towards P&G fund as well as sinking fund is to be recovered in Toto as approved by CERC or whether its recovery to be linked to availability of the generation plant as per Impugned Order. For a proper adjudication of this issue, it is important to take note of the genesis of creation of this fund and judicial pronouncement governing the same.

Judgement in Appeal No. 163 of 2017 CERC Order dated 03.10.2006 CERC, taking cognizance of the provision of Section 40 of DVC Act noted that DVC is under a statutory duty to make provisions for the funds as directed by Auditor General of India, and observed that since present case involves making provision of terminal benefit fund, the corporation is bound to act under the Direction of C&AG. It was however held that entire liability shall not be shared by consumer, rather the split of such liability shall be 40:60 between DVC and Consumer and to be recovered in three annual equal instalments starting 2006-07.

APTEL Judgement dated 23.11.2007 in Appeal 271 of 2006 and batch The aforesaid CERC order dated 03.10.2006 was assailed before this Tribunal by DVC as well as by the beneficiaries of generation and distribution function of DVC. This Tribunal vide its Judgement dated 23.11.2007 passed in Appeal 271 of 2006 and batch, held that 100 % Pension and Gratuity Contribution fund to be recovered from the beneficiaries through tariff instead of liability split of 40:60 between DVC and consumer as determined by the CERC in its order dated 03.10.2006. The Tribunal further observed that such recovery ought to be staggered to avoid tariff shock to consumers.

30. In compliance with this Tribunal judgement, CERC in its order dated 06.08.2009 in Petition No 66/2005, staggered 40% balance contribution of Pension fund over a period of five years during the tariff period 2009-14.

Judgement in Appeal No. 163 of 2017 Similarly, contributions towards the Sinking Fund were considered in tariff as expenditure.

31. The Appellant has referred to CERC (Terms and Conditions of Tariff) Regulation 2009, it is profitable to quote relevant Regulation 43(2) (iv) of said Regulations as under: -

"(iv) Funds under section 40 of the Damodar Valley Corporation Act, 1948: The Fund(s) established in terms of section 40 of the Damodar Valley Corporation Act, 1948 shall be considered as items of expenditure to be recovered through tariff."

32. From the above, it is evident that 100 % contribution towards P&G fund and sinking fund are to be recovered from beneficiaries by way of tariff. It is also relevant to refer to the order dated Sept 2014 passed by JSERC for determination of ARR from 2013-14 to FY 2015-16 and Retail supply tariff for DVC command tariff in the State of Jharkhand, in which a cost of Rs 42.34 Crore claimed as differential amount of P&G and sinking fund contribution was denied. The said order of JSERC was assailed before this Tribunal, in Appeal 255 of 2014, wherein this tribunal, vide judgment dated 23.03.2016 upheld the findings of JSERC, inter alia with respect to linking the recovery of Contribution to P&G fund and sinking fund as part of fixed cost linked with normative plant

availability factor. Relevant Paragraph is extracted hereunder:

"(k) As regards another issue of pension & gratuity and sinking fund contribution, the State Commission in its Impugned Order dated 04.09.2014 vide para 6.72 states as follows: -

"6.72 The Commission is of the view that the contribution to Pension and Gratuity and Sinking fund has already been considered by CERC in the Annual Fixed Charges of the DVC's generating stations and as per Section 21 of the CERC Regulations, the fixed costs of the generating Judgement in Appeal No. 163 of 2017 stations shall be computed on annual basis based on actual plant availability factor as well as the normative plant availability factor. Hence, the claim of the Petitioner finds no merit and accordingly the Commission has disallowed the cost claimed by the Petitioner under this head."

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 Commissions findings as above"

33. The reliance placed by State Commission, in the impugned order, on this Tribunal's judgment dated 23.03.2016 with regard to linking the contribution to the P&G and Sinking fund to the Normative Plant availability has been disputed by the Appellant stating that same is in contravention of Supreme Court Judgements dated 26.10.2016 in Civil appeal No 7383 of 2016 and Civil dated 02.01.2017 in civil appeal No 8317 of 2016. The Civil Appeal No 8317 of 2016, was preferred by DVC assailing the judgement of this Tribunal dated 23.03.2016. In this context, it is apposite to refer Supreme court Order in Civil appeal No 8317 of 2016, as extracted hereunder: -

"Learned counsel for the Jharkhand State Electricity Regulatory Commission submits that alongwith true-up issue in terms of the order of this Court dated 26.10.2016 passed in Civil appeal No.7383 of 2016, the Commission shall also examine the question of dis- allowance of claims.

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2. In view of the above statement, we are of the view that nothing survives for consideration in this appeal. The appeal is closed in the above terms.

3. The consideration by the Commission would naturally be made without being influenced by the order passed by the Appellate Tribunal for Electricity."

34. With regard to the observation of the Hon'ble Supreme Court that the true-up exercise shall be carried out by the Commission without being influenced by the order passed by this Tribunal, it is pertinent to note that, in relation to linking the contribution to the P&G Fund and the Sinking Fund with normative plant availability, this Tribunal had merely affirmed the findings of the State Commission without laying down any independent reasoning of its own. In such circumstances, the application of the same principle by the State Commission in the impugned order cannot be said to be in contravention of the directions of the Supreme Court.

35. What emerges is that the State Commission, in the impugned order, has essentially reiterated and affirmed its own findings contained in its earlier ARR order dated 04.09.2014 for FY 2013-14 to FY 2015-16. The exercise undertaken by the State Commission is therefore consistent with the mandate of the Supreme Court, which required the true-up to be carried out independently and uninfluenced by the Tribunal's prior affirmation.

36. Accordingly, we hold that the approach adopted by the State Commission in the impugned order, insofar as it links the contribution to the P&G Fund and the Sinking Fund with normative plant availability, is not in breach of the directions of the Hon'ble Supreme Court, but rather constitutes a continuation of its own earlier reasoning.

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37. On going through the various orders of this Tribunal and applicable Regulations as noted in previous paragraphs, the 100% contribution towards the P&G Fund and Sinking Fund are recoverable from the beneficiaries over the years as part of Tariff. The contributions as mandated under Section 40 of the Damodar Valley Corporation Act, 1948, being statutory in character, stand recognized as legitimate items of expenditure forming part of the Annual Fixed Charges, as also reflected in the CERC orders. Once so subsumed, their recovery is necessarily governed by the regulatory design of the availability-based tariff framework. As such, the linkage to availability is not inherent in the nature of the fund itself, but arises from the systemic principle that all fixed costs whether arising from statutory mandate or operational necessity are apportioned to beneficiaries in proportion to declared availability. To carve out an exception would amount to delinking a component of AFC from the Statutory tariff framework and would undermine the cost reflective character of tariff determination. In the absence of any specific statutory or regulatory provision permitting such de-linkage, it is not legally tenable to allow recovery of Section 40 fund contributions independent of plant availability. The prevailing regulatory regime mandates that all fixed costs, including statutory fund allocations, remain subject to availability linkage.

38. In view of the foregoing analysis, no infirmity is found in the Impugned Order on this issue, and the same is accordingly upheld.

ISSUE C: NON-CONSIDERATION OF AGGREGATE TRANSMISSION AND DISTRIBUTION (T&D) LOSSES AT ACTUALS FOR FY 2012-13 TO FY 2014-15 [

39. This issue pertains to allowing normative T&D loss target of 3.00% fixed in the MYT order dated 04.09.2014, during the true-up for FY 2012-13 Judgement in Appeal No. 163 of 2017 to FY 2014-15. The Appellant has contended that JSERC has applied the normative T&D Loss target without examining the actual T&D losses, while the MYT order itself stated that Normative target is subject to true up on actuals. Reliance has been placed on the JSERC Order dated 22.11.2012, wherein T&D losses were allowed on actuals ranging from 3 % to 4.8 % for FY 2006-07 to FY 2011-12. It is further submitted that DVC has, in fact, improved its performance, reducing losses from 4.86% in FY 2013-14 to 3.58% in FY 2014-15. In such a situation applying a stricter norm of 3.00% during true-up, particularly when higher level losses had been allowed historically amounts to inconsistent and arbitrary approach. The Appellant also drew our attention to JSERC' MYT Tariff Regulations, 2015, applicable for control period FY 2016-17 to FY 2020-21, which prescribe a distribution loss of 5% for all licensees including DVC, which is even higher than actual losses claimed by DVC.

40. The Appellant further contends that this Tribunal in its judgment dated 08.11.2010 in WESCO v. OERC (Appeal Nos. 52, 53 & 54 of 2007,) has held that: (i) loss reduction targets must reflect ground realities and operational constraints and (ii) true-up must compare actual performance against projections and not projections against projections. Thus, mechanical application of the 3.00% normative target without examining DVC's actual losses is contrary to JSERC's own orders, this Tribunal's directions, the Supreme Court's orders, and settled true-up principles. The disallowance of T&D losses and consequential power purchase cost is therefore unsustainable and liable to be set aside.

41. Per Contra, it is submitted that the State Commission fixed a normative T&D loss level of 3% based on the Appellant's system characteristics and its demonstrated performance as DVC itself has achieved 3% losses in FY Judgement in Appeal No. 163 of 2017 2008-09, thereby, establishing that the benchmark was reasonable and achievable. The tariff determination is founded on normative and efficient costs and operational inefficiencies cannot be passed on to consumers. It is also submitted that Appellant has failed to demonstrate any uncontrollable factors justifying deviation from the prescribed norm during FY 2012-13 to FY 2014-15 and therefore, the State Commission has rightly restricted T&D losses to 3% and disallowed the additional power purchase cost corresponding to excess losses. This position has been affirmed by this Tribunal in its Judgment dated 23.03.2016 in Appeal No. 255 of 2014, wherein it was held that the State Commission is entitled to impose efficiency benchmarks in the interest of consumers and is not bound to accept actual losses accordingly Impugned Order warrants no interference on this issue.

42. It is to note from the MYT order dated 04.09.2014, that Appellant has claimed T&D losses of 4.86 % for FY 2013-14, 4.56 % for FY 2014-15 and FY 2015-16, however, JSERC had approved the target T&D losses as 3 % for the MYT period from FY 2013-14 to FY 2015-16, which was subject to true up based on actuals. The relevant paragraph is reproduced below:

"6.13 The Commission in the previous Tariff Order dated 22nd November 2012 noted that as DVC supplies mostly to bulk and HT consumers above 33 kV, its T&D losses should be very less. The actual losses during past years were kept at 3% and accordingly, the Commission approved the T&D loss for FY 2012-13 as 3% which was

subject to True up on basis of actual. Accordingly, for computation of energy requirement, the Commission has considered the T&D losses target to be 3.00% for the MYT period from FY 2013-14 to FY 2015-16 subject to true up based on actual. However, the Commission notes that during FY 2012-13, the Petitioner has not been able to achieve the targeted loss level. The reasons for same and deviation will be dealt in detail at time of true up for FY 2012-13 in next tariff order. However, the Commission directs the Petitioner to make all out Judgement in Appeal No. 163 of 2017 efforts to restrict the T&D losses within the targeted level during the MYT period."

43. JSERC, while setting the target of 3 % for FY 2013-16, in the MYT orders has acknowledged that DVC has not been able to achieve the target of 3 % for the year FY 2012-13 and stated that same shall be dealt at the time of True Up for FY 2012-13. It is also an admitted position that JSERC had approved T&D losses ranging from 3 % to 4.8 % for the year FY 2006-07 to FY 2010-11, as observed from its order dated April 2017, for True up for FY 2006-07 to FY 2013-14 as noted below:

FY 06-07; 3.7%, FY 07-08; 3.5 %, FY 08-09; 3.0 %, FY 09-10; 4.6%, and FY 10-11; 4.8 %.

44. Further, it is noted from the Impugned Order that JSERC has approved T&D loss of 4.6% for the FY 2011-12. With regard to True up of FY 2012-13 to FY 2014-15, though Appellant has claimed T&D loss of 4.82% for FY 2012-13, 4.86% for FY 2013-14 and 3.58% FY 2014-15, JSERC has restricted the same to 3% citing MYT Order, relevant paragraph is reproduced below:

"6.10 Further, the Commission, in the MYT Order dated 04.09.2014, had set a T&D loss target of 3.00% for the Period FY 2012-13 to FY 2015-16. The Commission observes that the Petitioner has failed to achieve the loss target in the years FY 2012-13, FY 2013-14 and FY 2014-15. The Petitioner has reported T&D loss of 4.82%, 4.86% and 3.58% in FY 2012-13, FY 2013-14 and FY 2014-15 respectively. Accordingly, while computing the energy requirement for FY 2012-13, FY 2013-14 and FY 2014-15, the power procured in excess of normative loss levels is disallowed."

45. However, it is evident that DVC achieved 3 % T&D losses only in the FY 2008-09, and in the subsequent years, JSERC itself has approved/allowed higher losses for FY 2009-10 till FY 2011-12. We have no Judgement in Appeal No. 163 of 2017 reason to believe that such allowance of higher T&D losses in these Financial years is not based on prudence check conducted by the State Commission and therefore same cannot be considered to be arbitrary. It appears that from FY 12-13 onwards, a normative T&D loss of 3 % has been set for DVC and on observing that DVC has not been able to achieve such normative loss, JSERC in its MYT order dated Sept 2014, though set the normative loss at 3% for FY 2013-14 to FY 2014-15 also, indicated that same would be subject to actuals at True up stage as well as actual T&D loss for FY 2012-13 to be looked up at the true up stage. Notwithstanding such express stipulation, no prudence check for actual losses has been carried out by State Commission for FY 2012-13 to FY 2014-15 in the Impugned Order instead, the

claims of DVC have been restricted to the normative level of 3 % as fixed in the MYT Order.

46. Referring to the judgement of this Tribunal dated 23.03.2016 in Appeal No. 255 of 2014, we are in agreement with the submissions made by State Commission that it is entitled to impose efficiency benchmarks in the interest of consumers and is not bound to accept actual losses. However, in the referred judgement, this Tribunal, though did not interfere with the target of T&D losses at 3 % as set in the order of JSERC dated 04.09.2014, for FY 2013-16 but observed that "since true up exercise by the State Commission is not yet accomplished for the recent past Financial years, the State Commission would be analysing the same during True Up". Thus, it is evident that this Tribunal was also of the view that prudence check of actual losses shall be carried out by State Commission at the True up stage, and ordered accordingly.

47. It is a settled principle that the fixation of Transmission and Distribution loss levels by a Regulatory Commission must be grounded in rational Judgement in Appeal No. 163 of 2017 methodology, empirical data, and statutory mandate. While the Commission is empowered to prescribe a trajectory of loss reduction, such fixation cannot be arbitrary or capricious. An arbitrary ceiling, divorced from actual system conditions, historical performance, or technical feasibility, would offend the principles of reasonableness and transparency embedded in Section 61 of the Electricity Act, 2003. Judicial precedents have consistently held that tariff determination must rest on prudence checks and objective criteria; hence, any ceiling imposed must be supported by study reports, benchmarking, or accepted regulatory methodology. To permit recovery of losses beyond the approved trajectory is impermissible, but equally, to prescribe an unrealistic ceiling without basis would amount to regulatory excess. The Commission's role is to balance the consumer interest with operational realities, and therefore, ceilings on T&D losses must be rational, evidence-based, and progressively achievable, not arbitrary. In the present case no rational has been provided by State Commission for fixing the T&D losses at 3 % for DVC during true up other than it was so set in the MYT order, which itself states it will be subject to true up based on actuals. Further, we do not find merit in the submissions of State Commission, that DVC has been able to achieve the 3 % T&D losses in the past (FY 2008-09), as it is interesting to note that in the immediate subsequent years, as noted above, JSERC has allowed higher T&D losses.

48. Our attention has been drawn to the Regulation 5.23 of JSERC Regulations 2015 that "the licensee shall be allowed to operate at below 5 % audited distribution losses without any incentive/penalty mechanism". Thus, ceiling of 5 % T&D losses shall be applicable for DVC also FY 01.04.2016 to 31.03.2021. Thus, going forward, for the year FY 2016-17 onwards till 31.03.2021, ceiling of T&D losses has been kept at 5 %.

Judgement in Appeal No. 163 of 2017

49. In view of above deliberation, we set aside the findings in the Impugned Order on the issue and it is remanded to the State Commission to undertake prudence check of T&D losses claimed by DVC for FY 2012-13 to FY 2014- 15 and pass consequential orders accordingly.

Conclusion In view of above deliberations, our findings on the three issues, is summarised as under:

| Issue | Description | Findings |
|-------|------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------|
| A. | Non-consideration of expenditure on account of pay revision allowed by | Issue is decided in favour of Appellant. The matter is remanded to State Commission to consider Rs. 210 Crore |

CERC for FY 2006-09. of arrears for pay revision as allowed by CERC in its order dated 08.05.2013, as additional O&M expenditure for various projects in the True up for FY 2006-07 to FY 2008-09.

| | | |
|----|------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------|
| B. | Linkage of contributions towards the Pension and Gratuity (P&G) Fund and Sinking Fund with the availability of thermal power stations for the period FY 2009-14. | Impugned Order, to the extent to this issue is hereby upheld |
| C. | Non-consideration of aggregate Transmission | Findings in the Impugned Order on the |

and Distribution (T&D) issue is set aside and it is remanded to losses at actuals for FY the State Commission to undertake 2012-13 to FY 2014-15.

Judgement in Appeal No. 163 of 2017 prudence check of T&D losses claimed by DVC for FY 2012-13 to FY 2014-15 The State Commission is directed to pass consequential orders on the issues remanded as expeditiously as possible along with applicable carrying cost in terms of Regulations, within three months from receiving the copy of this judgement. The Appellant shall also to provide further details, as may be required by the State Commission with regard to Issue No. C, to enable it to undertake the prudence Check expeditiously.

The Captioned Appeal and pending IAs, if any, are disposed of in these terms PRONOUNCED IN THE OPEN COURT ON THIS 18th DAY OF MAY, 2026.

(Virender Bhat)
Judicial Member

(Seema Gupta)
Officiating Chairperson

REPORTABLE / NON-REPORTABLE

Pr/dk/as