

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Review Petition No. 39/RP/2022

in

Petition No. 482/TT/2020

Coram:

**Shri Jishnu Barua, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member**

Date of Order: 20th Dec 2023

In the matter of:

Review Petition under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, seeking review of order dated 10.06.2022 in Petition No. 482/TT/2020.

And in the matter of:

Damodar Valley Power Consumers' Association Review Petitioner Vs.

**1. Damodar Valley Corporation,
DVC Towers, VIP Road
Kolkata-700054**

**2. West Bengal State Electricity Distribution Company Limited,
Vidyut Bhawan, Block 'DJ', Sector-11 Salt Lake City
Kolkata-700091**

**3. Jharkhand Bijlee Vitran Nigam Limited,
Engineers Building Dhurwa
Ranchi-834004**

... Respondents



For Petitioner : Shri Rajiv Yadav, Advocate, DVPCA

For Respondents : Shri M G Ramachandran, Advocate, DVC
Ms. Surbhi Kapoor, Advocate, DVC
Shri Aneesh Bajaj, Advocate, DVC
Ms. Tanya Sareen, Advocate, DVC

ORDER

Damodar Valley Power Consumers' Association ('Review Petitioner/ DVPCA') has filed the present Review Petition No. 39/RP/2022 seeking review and modification of order dated 10.6.2022 in Petition No. 482/TT/2020 under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, wherein tariff of 2014-19 tariff period was trued-up under the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter referred to as 'the 2014 Tariff Regulations') and tariff of 2019-24 tariff period was determined under Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 (hereinafter referred to as 'the 2019 Tariff Regulations') in respect of '**Existing Transmission and Distribution (T&D) System Network' of Damodar Valley Corporation in Eastern Region.**

2 The Review Petitioner has submitted that there are errors apparent on the face of the record in the Commission's order dated 10.6.2022 in Petition No. 482/TT/2020 and has made the following prayers:

- (i) Review the order dated 10.06.2022, passed by the Commission in Petition No. 482/TT/2020;
- (ii) Pass such other order as the Commission may deem fit and proper in the interest of justice.

3 Accordingly, the petitioner has submitted as follows:



(i) The Commission has committed arithmetical errors in the order dated 28.02.2022 with regard to the calculation of Depreciation since Depreciation on DVC's entire capital cost, including freehold land, was allowed.

(ii) The Commission has not adjusted the correct amount of Depreciation in respect of decapitalised assets as per the figures given by DVC in Appendix-15.

(iii) There is a discrepancy between the Depreciation allowed in para 75 and the loan repayment considered in para 82 of the order under review.

(iv) The Commission has allowed Sinking Fund Contribution of ₹2394.71 lakh for each Financial year as "Additional Expenses". Since the Sinking Fund is, admittedly, meant for repayment of Bonds like other components of Annual fixed Charges (AFC) – especially those dealing with borrowed capital such as Interest on Loan and Repayment of Loan (through Depreciation) – the recovery of Sinking Fund Contribution should also be linked to Normative Annual Transmission System Availability Factor (NATAF) in accordance with Regulations 38 of the 2014 Regulations.

(v) The allowance of Sinking Fund Contribution as an "Additional Expense", along with 'Depreciation on Assets funded through Bonds' has resulted in double allowance of loan repayment and is, therefore, in clear violation of Section 61 of the 2003 Act, APTEL's judgment dated 23.11.2007, as well as Regulation 53 of the 2014 Regulations. It may be relevant to point out that paragraphs 130–134 of the order under review pertain to the Commission's consideration of the submissions of the parties. The said paragraphs do not contain any reference to or consideration of, APTEL's judgment dated 23.11.2007 and/or the issue of Double Allowance.

4 Submissions of the Review Petitioner

The Review Petitioner has made the following submissions in respect of the issues raised in the instant review petition:

Depreciation allowed on Freehold Land

4.1 The review petitioner contends that the order under review has allowed Depreciation on DVC's entire capital cost, including 'Freehold Land', and suffers from



certain computational errors in arriving at the depreciable value of assets. In this regard, it made the following submissions:

i) In Form-10A, DVC has reduced the value of Freehold Land from the Average Capital Cost and taken 90% of the balance amount as depreciable value for the purpose of claiming Depreciation.

ii) Similarly, in Form-10A for FY 2019-24, DVC has excluded freehold land for the purpose of its depreciation claim since the value of freehold land has been reduced from the average capital cost, and DVC has taken 90% of the balance amount as depreciable value for the purpose of claiming Depreciation.

4.2 However, in the Table under para 75 of the order under review, the Commission has omitted to exclude the value of Freehold Land from Capital Cost and proceeded to allow depreciation on such land despite Regulation 27(4), which expressly declares that land shall not be a depreciable asset and its cost is required to be excluded from the capital cost for the purpose of computing depreciable value of the asset.

Errors in the adjustment of depreciation due to De-Cap

4.3 In terms of Regulation 27(8), the Depreciation pertaining to decapitalised assets is required to be adjusted against or excluded from cumulative Depreciation. Accordingly, in Appendix-15, DVC had given details of the decapitalised assets, as well as the Depreciation that had been recovered on such assets.

4.4 However, in the table under para 75 of the order dated 10.6.2022, the Commission has not adjusted the correct amount of Depreciation in respect of decapitalised assets as per the figures given by DVC in Appendix-15.

4.5 It is submitted that for FY 2014-15, 2015-16 and 2016-17, the Commission has inadvertently omitted to consider the Depreciation recovered on 'Old Assets for Main Division'. It appears that only the depreciation recovered on 'Old Assets for A-N Stage' has been taken into consideration. Consequently, the Commission's assessment of the 'Adjustment of Depreciation due to De-Cap' is notably below the level stipulated in Regulation 27(8). Additionally, it is argued that if the entirety of the historical depreciation outlined in Appendix-15 had been factored in, the Remaining Depreciable Value would have been reduced, rendering no depreciation eligible for FY 2018-19.



Also for FY 2019-24, the Commission has allowed Depreciation on 'Freehold Land' and omitted to adjust the correct amount of past period Depreciation on de-capitalised assets.

Mismatch between depreciation and loan repayment

4.6 As per Regulation 26 of the Tariff Regulations 2014,
"The repayment for each year of the tariff period 2014-19 shall be deemed to be equal to the depreciation allowed for the corresponding year/period"

4.7 There is a discrepancy between the Depreciation allowed in para 75 and the loan repayment considered in para 82 of the order under review. A brief statement giving details of Depreciation and Loan Repayment considered by the Commission is as follows:

₹ in lakh		
FY	Depreciation	Loan Repayment
2014-15	13876.32	13342.28
2015-16	14200.21	5593.61
2016-17	14439.27	3945.59
2017-18	12245.73	29002.34
2018-19	231.41	122.04

4.8 Commission needs to treat the depreciation amount assessed after taking into consideration the above and treat the same as repayment of loan in accordance with regulation 26.

Availability linked recovery of sinking fund

4.9 For FY 2014-15, 2015-16 and 2016-17, the Commission has allowed 'Sinking Fund Contribution' of ₹2394.71 lakh for each financial year as 'Additional Expenses'. Since 'Sinking Fund' is, admittedly, meant for repayment of Bonds, the Commission may kindly clarify that like other components of Annual fixed Charges (AFC) – especially those dealing with borrowed capital such as Interest on Loan and Repayment of Loan (through Depreciation) – the recovery of 'Sinking Fund Contribution' shall also be linked to 'Normative Annual Transmission System Availability Factor' (NATAF) in accordance with Regulations 38 of the 2014 Regulations.



4.10 In some past distribution tariff proceedings before the WBERC and JSERC, DVC has been claiming 'Sinking Fund Contribution' in entirety and resisting its linkage to availability both before the SERCs and Appellate Tribunal for Electricity.

4.11 Allowance of Sinking Fund Contribution as an 'Additional Expense' - which has also not been included in the AFC Table (@ Para 141) – may be construed as a directive of this Hon'ble Commission that the entire amount of ₹2394.71 lakh has to be allowed regardless of Transmission Availability achieved by DVC. Therefore, the clarification in this regard may kindly be issued by the Commission.

4.12 In the proceedings before the Commission, DVC, itself, had taken a stand that 'The Sinking Fund contribution forms part of the fixed components of tariff of the concerned generating station or transmission assets....'. (@para 127 of order under review).

Double allowance of repayment of Bonds' Amount

4.13 The review petitioner has raised that there is a Double Allowance of Bonds, once through Sinking Fund Contribution and again through Depreciation of Assets funded through Bonds.

4.14 The issue of Double Allowance of Bonds (loan) repayment through Depreciation - when Sinking Fund Contribution was being separately allowed to DVC by virtue of Section 40 of the DVC Act - was also raised in the Written Note of Submissions filed on behalf of DVPCA on 23.6.2021 in Petition Nos. 577/GT/2020 and 571/GT/2020. In the said written note, it had been expressly urged that the same may also be taken into consideration by the Commission in DVC's other tariff petitions. The subject issue of Double Allowance was also raised and elaborately dealt with in the Written Note of Submissions filed on behalf of DVPCA in Petition No. 575/GT/2020 (Raghunathpur TPS 1&2). The said written note of submissions had been filed in compliance with ROP dated 15.3.2022 in Petition No. 575/GT/2020, whereby "The Commission directed the Objector to submit a comprehensive note covering its submissions on the issues of Sinking Fund and P&G expenses, with a copy to the Petitioner, who may file its response, to the same." However, it appears that the said Written Submissions have not been taken into consideration while determining the tariff for DVC's T&D system.

4.15 In para 142 of the order under review, the 'Additional Expenses' have been approved by the Commission under Regulation 53 of the 2014 Tariff Regulations. In



this regard, the review petitioner has made the following submissions with respect to the meaning and scope of Regulation 53:

- i. Regulation 53 does not sanction any 'Additional Expense' to DVC over and above those that are ordinarily allowed to other generators/ transmission licensees.
- ii. In para 142 of the order, Regulation 53 has been erroneously construed as a 'Power to relax', when, in fact, it deals with 'Special Provisions relating to Damodar Valley Corporation'. An identical special provision was incorporated for the first time in the 2009 Regulations in the wake of APTEL's judgment dated 23.11.2007 in Appeal No. 273/2006 and Batch. It is, therefore, imperative that such special provisions are interpreted in consonance with the meaning and scope of Section 40 of the DVC Act – which was elaborately discussed in APTEL's judgment of 23.11.2007.

5 Further, during the hearing, the review petitioner raised a completely new issue which was not part of the review petition on the depreciation rate not being determined by the Comptroller & Auditor General (C&AG) and was decided only by the Ministry of Power Government of India in the notification dated 27.3.1994 which is no longer valid after the coming into force of the Electricity Act, 2003.

Respondent's Submission

6 Respondent no 1, DVC, submitted that the review petitioner DVPCA is again re-agitating the issues of the contribution of sinking fund and depreciation on capital assets funded through bonds, which were raised before the Hon'ble Commission at the time of the hearing and have not succeeded there is seeking to re-argue the above issue by way of the Review Petition. It is submitted that the same is, in essence, converting a review petition into an appeal in disguise.

6.1 The Review Petitioner had earlier raised the issue by alleging double counting before the Hon'ble Tribunal in Appeal No. 17 of 2014, wherein the Hon'ble Appellate Tribunal vide its decision dated 17.5.2019 at Paras 8.5 to 8.8 has rejected the contentions that there has been any double counting or double allowance to DVC in regard to the contribution to the Sinking Fund.



6.2 It has been held in the above cases that contribution to sinking fund is independent of tariff elements under the Tariff Regulations and further in the later Judgement dated 17.5.2019 of the Hon'ble Appellate Tribunal in Appeal No. 17 of 2014 also relating to DVC, the Hon'ble Appellate Tribunal has rejected the contentions of the very same objector that there has been any double counting or double allowance to DVC in regard to the contribution to the Sinking Fund.

6.3 The fact that depreciation and repayment on loan are two different aspects is also a settled position in law by the judgements of the Hon'ble Supreme Court in Delhi Electricity Regulatory Commission v BSES Yamuna Power Limited (2007) 3 SCC 33 read with the Judgments in Ahmedabad Miscellaneous Industrial Workers Union v Ahmedabad Electricity Company Limited, (1962) 2 SCR 934 and Associated Cement Companies Limited v Workmen 1959 SCR 925.

6.4 The respondent number 1, DVC, clarified that the Sinking Fund Contribution is not towards meeting the Interest on Loan admissible under Regulation 32 of the Tariff Regulations, 2019 or similar provisions under Tariff Regulations, 2014. The sinking fund contribution is kept in a fund (interest-bearing) separately for the purposes of redemption of the principal amount of the bond on maturity. The interest on the bond is serviced through tariff as interest on loan. The interest earned on the bond is utilized as an additional amount available for servicing the principal amount of the bond.

6.5 In the context of the depreciation rate respondent number 1, DVC, has further submitted that there is otherwise no merit in the objections raised by the Review Petitioner on the aspect of the depreciation rate. Respondent number 1, DVC, submitted that there is absolutely no basis for raising the issue after the matter regarding the higher depreciation, as per section 40 of the DVC Act, stands decided by all the forums. The C&AG has been prescribing and auditing the accounts of the DVC by following the Depreciation Rate specified under the notification dated 27.3.1994 both before and after the coming into force of the Electricity Act. Further, the C&AG in the Annual Reports confirms that the annual accounts prepared by DVC have been prepared in the format approved by the Government of India under the DVC Act, 1948 and Damodar Valley Corporation Rules, 1948. Respondent number 1, DVC, has also submitted that in the decision dated 27.10.2007 passed in Appeal No. 271 of 2007, the APTEL has, inter alia, decided as under:



“F. Depreciation Rate

F.1 Section 40 of DVC Act provides for the Comptroller and Auditor General of India (C&AG) to prescribe depreciation, reserve and other funds in consultation with the Central Government. The aforesaid provision neither quantifies nor limit the rate of depreciation to be allowed.

F2. The Appellant has claimed depreciation at rate prescribed by the C&AG and submits that all along till the Electricity Act, 2003 came into effect, it has been factoring the prescribed depreciation rate in formulating the tariff. It is relevant to point out that the Act does not make any provision for factoring rate of depreciation in tariff determination. Thus, in our opinion, the DVC Act insofar as the depreciation is concerned is not inconsistent with the Act and shall continue to apply to the corporation.

F3. The depreciation, in respect of useful life of a substantial portion of generation capacity of DVC being aged out and redeemed, leaves little or no impact on the tariff of such plants. However, the impact of depreciation rate on the tariff of the balance generation capacity shall be significant as the rate of depreciation prescribed by the C&AG is higher than what is fixed by the Regulations, 2004. For the aforesaid reason, it is essential for the Central Commission to carryout reasonable assessment of the capital cost of each power plant individually at COD (if the authentication of approved cost is not available/traceable) and apply the prescribed rate of depreciation for each successive year since then to arrive at adjusted fixed cost for each plant for consideration in tariff determination. The depreciation is to be allowed and computed only on aggregate sum of gross capital asset of each plant qualifying for the depreciation and not regardless of it.

F4. We, therefore, direct the Central Commission to adopt rate of depreciation as prescribed by C&AG for computation of tariff for the asset based on the principle outlined above while keeping in view our remarks in respect of Dept-Equity ratio in para 112(A) above.

The above decision of the Hon'ble Tribunal has been upheld by the Hon'ble Supreme Court in Bhaskar Shrachi Alloys Ltd. v. Damodar Valley Corporation (2018) 8 SCC 281).

7 The matter was first listed for a virtual hearing on 24.1.2023, but the review Petitioner was not present. Therefore, the Commission directed to re-list the matter on 22.2.2023. Subsequently, the Petition was listed for hearing on 22.2.2023, and the matter was adjourned due to the non-availability of one of the CERC members. Again, the matter was listed for hearing on 27.4.2023. During the hearing, proxy counsel for the Petitioner sought a short adjournment as the arguing counsel was not available and also sought time to file a rejoinder. The matter was finally heard on 30.8.2023.



8 The learned senior counsel for respondent No.1 submitted that there appears to be some clerical/computational error in respect of the depreciation allowed for the decapitalised assets. He also submitted that the depreciation rates claimed by DVC are as per the CAG rates and sought permission to file the Notification issued in this regard. He further submitted that the Sinking Fund is a special allowance under the DVC Act, 1948, and it has been upheld by the Supreme Court in *Bhaskar Shrachi Alloys Ltd. vs Damodar Valley Corporation* (2018) 8 SCC 281 and by APTEL vide judgement dated 23.11.2007 in Appeal No. 271 of 2006. Subsequently, the Commission has incorporated special provisions in the 2014 and 2019 Tariff Regulations, to give effect to the above decisions. As regards the contention of the Review Petitioner in respect of double allowance, the same is allowed by APTEL in its decision dated 13.6.2007 in Appeal No. 139 of 2006 in the matter of *NTPC Limited vs. Central Electricity Regulatory Commission* and the Supreme Court in Civil Appeals no. 5622 of 2007 and other connected appeals vide the order dated 10.4.2018. After hearing the parties, the Commission directed DVC to submit the CAG's Notification and both the parties were granted liberty to file their short-written submissions by 27.9.2023. and order was reserved in the matter.

ANALYSIS AND DECISION

Depreciation allowed on Freehold Land

9 During the hearing on 30.8.2023, the counsel of the Petitioner conceded that there is no error in respect of computation of depreciation in respect of 'Freehold Land' and has admitted that the same was appropriately considered in an order dated 10.6.2022 in Petition no. 482/TT/2020. Accordingly, this prayer is rejected as not pressed.

Adjustment of depreciation due to De-Cap

10 We have considered the contentions of the Review Petitioner regarding the non-consideration of T&D Main Division assets while adjusting cumulative depreciation in respect of de-capitalised assets and have perused the record. We have observed that the Petitioner's contention of lower depreciable value if the entire depreciation in respect of the de-capitalised asset would have been considered, is misconceived. If



the adjustment in cumulative depreciation is higher, then the remaining depreciable value becomes higher instead of getting lower. Further, on perusal of the record, we have found that respondent No.1, DVC, had earlier filed review petition number 21/RP/2019 in respect of depreciation adjustment of decapitalized assets. As per the Commission's order dated 21.5.2022 in petition no. 21/RP/2019, depreciation in respect of decapitalized items had to be dealt with in the true-up petition (the current petition 482/TT/2020).

The extract from the order dated 21.5.2022 in petition no 21/RP/2019 is as follows:

“12. As regards the adjustment of cumulative repayment in respect of three (3) decapitalized non-ISTS lines, the impact of adjustment of cumulative repayment shall also be considered in Petition No. 482/TT/2020 filed by DVC for truing up of the tariff of the 2014-19 tariff period of the subject assets.”

11 Accordingly, depreciation adjustment for de-cap has been done in the instant petition. On the basis of the above direction of the Commission in 21/RP/2019, depreciation in respect of de-cap is adjusted on a proportionate basis with respect to the gross block of capital cost in that year. Accordingly, the claim of the 'Review Petitioner' in respect of depreciation adjustment on account of de-cap asset as per the figure given by the original Petitioner DVC in Appendix 15 is not allowed as it has already been addressed.

Higher Depreciation Rate

12 The Commission has noticed that this issue related to the depreciation rate was neither part of the review petitioner's reply in original petition 482/TT/2020 nor was it raised as a review point in the instant petition. Thus, a new argument is not permissible to be raised in the name of error apparent at the hearing stage.

Mismatch between Depreciation and loan repayment

13 We have considered the contentions of the Review Petitioner and have perused the record. On perusal of the record, it is observed that repayment of loan during the year is, 'Depreciation amount' or 'Outstanding Loan Amount' whichever is lower. As per the tariff regulation vide regulation 26(3), in case of de-capitalization of assets, the



repayment shall be adjusted after taking into account cumulative repayment on a pro-rata basis. The extract of the regulation is given below:

As per the regulation 26(3)

“(3) The repayment for each of the year of the tariff period 2014-19 shall be deemed to be equal to the depreciation allowed for the corresponding year/period. In case of de-capitalization of assets, the repayment shall be adjusted by taking into account cumulative repayment on a pro rata basis and the adjustment should not exceed cumulative depreciation recovered up to the date of decapitalization of such asset.”

14 In this instant petition, depreciation of ₹13876.32 lakh in the year 2014-15 is adjusted with depreciation adjustment of De-cap i.e. ₹267.02 lakh, and finally ₹13609.30 lakh (₹13876.32 – ₹267.02) is taken for repayment during the year. But from 2015-16 onwards, the outstanding loan balance was less than the De-cap adjusted depreciation. Therefore, repayment of loans during the year was limited to the outstanding loan amount. Accordingly, the Commission rejects Petitioner's submission in this regard.

Availability linked recovery of Sinking Fund

15 We have considered the contentions of the Review Petitioner and have perused the record. On perusal of the record, we find that the matter has already been dealt with in the corrigendum dated 23.7.2022.

Double Allowance of Repayment of Bonds' amount/Regulation 53 doesn't sanction Double allowance

16 The contribution of the Sinking Fund is made by DVC from time to time in pursuance of Section 40 of the DVC Act, 1948 and in accordance with the decision taken by the Board of DVC and approved by the Comptroller and Auditor General of India to meet the specific needs including the servicing of the bonds issued for raising money for DVC projects. The sinking fund liability is accounted for in the revenue requirements of the respective generating stations or transmission projects for which bonds are issued. The issue of sinking funds has already been settled by the APTEL in its order dated 23.11.2007 in Appeal Nos. 271, 272, 273, 275 of 2006 and the said



judgment of the APTEL dated 23.11.2007 was upheld by the Hon'ble Supreme Court vide order dated 23.7.2018 in Bhaskar-Shrachi Alloys Ltd. vs. Damodar Valley Corporation (2018) 8 SCC 281. The Commission is of the view that in light of various courts' judgments substantiated by the respondent in its submission in the original petition and now in this review petition as well, and taking into account the considered view taken in an order dated 10.6.2022 by the Commission in petition no. 482/TT/2020, the Petitioner's claim in this regard needs to be dismissed. The petitioner's claim is, accordingly, rejected.

17 This order disposes of Petition No. 39/RP/2022 in terms of the above discussion and findings.

Sd/-
(Pravas Kumar Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I.S.Jha)
Member

Sd/-
(Jishnu Barua)
Chairman

