"10. The Terms and Conditions for determination of Tariff..................... The norms for O&M expenses and the operational norms contained in the 2004 Regulations were notified after study of the data of the utilities under the regulatory jurisdiction of the Commission. However, at the time of framing of the 2004 Regulations, the data relating to the petitioner Corporation was not available before the Commission. ....":

87. The emphatic assertion made by the Appellant for continued application of the provisions of the Act, relating to electricity object of DVC, which are not inconsistent with the provisions of the Act, therefore, becomes **central to issues** raised. Section 79 of the Act, empowered the Central Commission to determine the tariff for DVC in terms of Section 62 of the Act. Also Section 61 of the Act provides that the appropriate Commission shall, subject to the provisions of the Act, specify the terms and conditions for determination of tariff and in doing so shall be guided by, inter-alia, the principles and methodologies specified by the 'Central Commission.' Section 178 of the Act provides for the Central Commission to make regulations consistent with the Act and Sub-Section 2(s), in particular, mandates the Central Commission to frame terms and conditions, for the determination of tariff under Section 61 of the Act. In other words the regulations framed by the Central Commission under Section 61 of the Act is designed to guide the process for determination of the tariff.

88. We further observe that the Sections 173 & 174 of the Act read together provide that the **Act and any Rules and Regulations** made therein shall be overriding other provisions of law not inconsistent with the Act, except in case

105 102

of the Consumers Protection Act, Atomic Energy Act and Railway Act. The DVC Act, 1948, does not figure in the exemption clause of Section 173 implying that any Rule and Regulation made under the Act shall override the DVC Act only when they are inconsistent with the provisions of the Act. It is also observed that like Sections 173 & 174 of the Act, the Fourth proviso of Section 14 does not make any reference to **inconsistency with any Rule or Regulation** framed under the Act but only refers to the inconsistency with the provisions of the Act, meaning plenary Act, 2003. It seems to us that the Parliament intended not to apply *ipso facto,* the Rule and Regulation framed under the Act to the special legislation of DVC Act, 1948 under which the DVC was constituted, perhaps giving due regard to duties cast upon DVC to perform varied functions, some of which being in the nature of State obligations and are to be financed mainly out of the revenue from power operations and are not common to functions assigned to other Central Electricity Utilities.

89. From the aforesaid, it could be viewed that Legislature, expected that the Central Commission while framing regulations under the plenary Act will take care of such provisions of the DVC Act not inconsistent with the Act. As pointed out earlier, the provisions of the DVC Act which are not inconsistent with the Act but inconsistent with the regulation made thereunder **shall continue to apply**. This interpretation appears to be in harmony with the Fourth proviso of Section 14 i.e. the provisions of the DVC Act which are inconsistent with the provisions of the Act shall stand repealed and the provisions which are not inconsistent with the plenary Act but inconsistent with the regulations made thereunder **shall continue to apply**. What remains is, therefore, to examine the applicability of the Fourth proviso of Section 14 of the

Act which is consistent with the other provisions of the plenary Act, but not with the regulations made thereunder.

90. We have already sustained the stand taken by the Appellant that the provisions provided in Part IV of the DVC Act particularly those related to capital structure; interest on capital; source of fund; depreciation; redemption reserve; rule for allocation of expenditure on various objects of the Corporation; recovery of charges through power tariff; distribution of profit out of the surplus etc. are necessary requirement in formulation of power tariff regardless of who undertakes it.

91. Having held that the provisions in Part IV of the DVC Act provide essential parameters for determination of tariff for DVC, and viewing it in conjunction with the provisions of the Section 175 of the Act we come to the conclusion that **the regulations under the Act are to be read in addition to and not in derogation of any other law (i.e. provisions of Part IV of DVC Act) for the time being in force.** This directly implies that the Regulations, 2004 formulated by the Central Commission need to be read along with the provisions of Part IV of DVC that relate to the power-object of DVC. We accordingly allow the contention of the Appellant on this count.

92. We will now take up the contention of the Respondents having legal implications, viz. that the Tariff Regulations, 2004 have to be applied uniformly to all the Central Utilities administered by the Central Government. In this regard the Appellant has submitted that the Tariff Regulations, 2004, itself provide for differential treatment for Tanda and Talchar Power Stations of NTPC and Neyveli Lignite Corporation. The said regulations also specify

different debt-equity ratio from that of 70:30 in certain cases and the same is justified under the provision of the Regulation 20 for being in the interest of general public. Also the Tariff Regulations, 2004, provides for relaxation and deviation that may be required to be made by the Central Government in case of need. The claim of the Respondents that the deviation in respect of Neyveli Lignite Corporation is not on account of any agreement, is not correct as the deviation was given to the Corporation based on the Power Purchase Agreement signed with the TNEB which was based on the Net Fixed Asset and not on Gross Fixed Asset specified by the Regulations 2004. The Appellant has also responded that if the deviation could be made on account of pre-existing agreement then why not the same be provided to DVC by virtue of its unique features and provisions of the pre-existing DVC Act. The aforesaid arguments of the Appellant sound convincing.

93. The Appellant has pointed out that the Tariff Regulations 2004 empowers the Central Commission to vary, alter and change the Regulations from time to time. The following provisions of Tariff Regulations 2004 notified by the Central Commission provides the powers to deviate from norms, to remove defects, to relax, etc. on the basis of rationale and in exercise of judicial discretion.

> "*11. **Deviation from norms**: (1) Tariff for sale of electricity by a generating company may also be determined in deviation of the norms specified in these regulations subject to the conditions that:*
>
> *(a) The overall per unit tariff of electricity over the entire life of the asset, calculated on the basis of the norms in*

deviation does not exceed the per unit tariff calculated on the basis of the norms specified in these regulations; and

(b) Any such deviation shall come into effect only after approval by the commission.

(2) In case of the existing generating stations, TPS-I and TPS-II (Stage I & II) of Nayveli Lignite Corporation Ltd., whose tariff was initially determined by following Net Fixed Assets approach based on mutual agreement, between Nayveli Lignite Corporation Ltd. and the beneficiaries tariff shall continue to be determined by adopting Net Fixed Assets approach.

*12. **Power to Remove Difficulties**: if any difficulty arises in giving effect to these regulations, the Commission may, of its own motion or otherwise, by an order and after giving a reasonable opportunity to those likely to be affected by such order, make such provisions, not inconsistent with these regulations, as may appear to be necessary for removing the difficulty.*

*13. **Power to Relax**: The Commission, for reasons to be recorded in writing, may vary any of the provisions of these regulations on its own motion or on an application made before it by an interested person."*

………………………………

*20. **Debt-Equity Ratio**: (1) ………………*

(2)……..

Provided further that the Commission may in appropriate cases consider equity higher than 30% for the purpose of determination of tariff, where the generating company is able to establish to the satisfaction of the Commission that deployment of equity more than 30% was in the interest of general public;"
(Emphasis supplied)

94. In the rejoinder submitted by the Respondents it is argued that Part –IV of the DVC Act provides for finance, accounts and audit, as to how budget and accounts are to be prepared, audited, etc. and the same is neither incorporated in Section 20 of Para III of the DVC Act nor it is made applicable. They also reiterate that Fourth Proviso of Section 14 of the Act is to be incorporated to say that DVC Act will continue to apply for matter not provided in or covered by the Act e.g. the Constitution of DVC, its area of operation and its non-power activities and also for its financial reporting namely budget, accounts, audit, etc. relating to power and also for non-power activities. They vigorously argued that in the event of any conflict regarding any matter relating to electricity (including determination of tariff), the Act will prevail over DVC Act and to that extent DVC Act is repealed by the Act. They submit that the canons of interpretation, even if not illegal, do not allow the repealed portion of the DVC Act to be read harmoniously together with the Act. The Respondents have argued that the incorporation of one Act into another is to be declared by means of 'specific words'. They have cited some judgments in support of this argument to which the Appellant, in its rejoinder submissions, has responded saying that none of the judgments referred to by the Respondents either expressly or by implication held that unless some 'specific words' have been used the incorporation cannot be presumed. The Appellant has stated that what

107

is essential is not the specific words used but the intention behind the expression used and has stated that the affirmative assertion of **"shall continue to apply"** in Fourth proviso of Section 14 of the Act conveys the intention.

95. The Appellant in its support has cited the judgement of the Hon'ble Supreme Court in **Maharashtra Road Transportation Corporation Vs. State of Maharashtra** (2003) 4 SCC 200 para 8 at page 207, which reads thus:

> "*It is here that there are two allied but qualitatively different concepts of statutory interpretation known as incorporation by reference and mere reference or citation of earlier statute in the later Act. In the former case, any change in the incorporated statute by way of amendment or repeal has no effect on the incorporation statute. In other words, the provision of the incorporated statute as they stood at the relevant time when incorporating statute was enacted will ever continue to be read into that later statute unless the legislature takes a positive step to amend the later statute in tune with the amendments. However, the legal effect is otherwise in the case of a statute which merely makes a reference to the provisions of an earlier statute. In that case, the modification of the statute from time to time, will have its impact on the statute in which it is referred to. The provisions in the earlier statute with their amendments will have to be read into the later enactment in which they are referred to unless any such subsequent amendment is inconsistent with a specific provision already in existence.*"

96. We feel that in order to overcome the discontinuities in application of Regulations, 2004, the Central Commission could have considered to give effect to certain provisions of the DVC Act in Regulations, 2004 by resorting to power vested in it under Regulation 13. Regulation 13 empowers the Commission to vary provisions of the Regulations on its own motion or on an application made before it. This power has been conferred on the Commission to relax rigour of the Regulations in appropriate cases. The tariff determined for the period April 1, 2004 to March 31, 2009 given effect from April 1, 2006 to provide for a transition period, was perhaps given by the Commission under the said clause even though not mentioned in the impugned order.

Issue of Jurisdiction for Tariff Determination

97. DVC is a statutory body constituted under DVC Act, 1948 with multifarious functions for an integrated development of the Damodar Valley which are carved out within the territories of the two States namely West Bengal and Jharkhand who are also major beneficiaries. DVC is a body promoted by the Central Government in consultation with the State Governments of Jharkhand and West Bengal. The Central Government exercises the administrative control over the DVC and the representatives of the State Governments are on the Management Board of DVC.

98. The preamble to the DVC Act provides as under:

"An Act to provide for the establishment and regulation of a Corporation for the development of the Damodar Valley in the Provinces of Bihar and West Bengal.

> *Whereas it is expedient to provide for the **establishment and regulation of a Corporation for the development of the Damodar Valley** in the provinces of Bihar and West Bengal………………….."*
> (Emphasis supplied)

99. In addition to the functions listed in para 4 above DVC is assigned with the 'other activities' as provided in Section 21 of the DVC Act, which are reproduced as under:

> ***"21. Other activities of the Corporation'***
> *(1) The Corporation may establish, maintain and operate laboratories, experimental and research stations and farms for conducting experiments and research for-*
> *(a) utilizing the water, electrical energy and other resources in the most economical manner for the development of the Damodar Valley;*
> *(b) determining the effect of its operations on the flow conditions in the Hooghly river;*
> *(c) making improvements in navigation conditions on the flow of Calcutta, and*
> *(d) carrying out any other function-specified under section 12.*
>
> *(2) The Corporation may set up its own planning, designing, construction and operating agencies or make arrangements therefore, with the participating Governments, local authorities, educational and research institutions or any person carrying on the business of any architect, an engineer or a contractor."*

100. Also Section 45 of the DVC Act provides the following activities which are to be included in the Annual Report:

(i) *irrigation;*
(ii) *water supply;*
(iii) *electrical energy;*
(iv) *flood control;*
(v) *nevigation;*
(vi) *afforestation;*
(vii) *soil erosion;*
(viii) *use of lands;*
(ix) *resettlement of displaced population;*
(x) *sanitation and public health measures; and*
(xi) *economic and social welfare of the people.*

These activities need to be subsidized from the revenue mainly earned from the electricity operations of DVC. This is in conflict with the provisions of Sections 41 and 51(1) of the Act. We have dealt with it in paras 80 and 81 above.

101. The DVC Act envisions the integrated development of Damodar Valley and required the activities of significant public importance to be taken up in its implementation plan. Many of the above activities, which are in the nature of Sovereign or Welfare functions are neither commercial nor remunerative and are normally required to be performed by the State. These activities according to Section 32 of DVC Act, are required to be subsidized from the revenue mainly earned from the electricity operations of DVC as it was the main

revenue earning activity. The aforesaid functionally differentiate the unique status of DVC from that of other Central Electricity Utilities.

102. The Commission in the impugned order dated 03 Oct. 2006, at para 9 states that

> *"At this stage we make it clear that this Commission is concerned with determining tariff for generation and inter-state transmission of electricity undertaken by the petitioner Corporation we have not addressed the issue of distribution tariff since this matter falls within the jurisdiction of the State Commissions."*

103. Accordingly DVC, a deemed licensee in Damodar Valley under the Act, came under the purview of the Central Commission for regulation of the tariff of its generating stations and inter-state transmission of electricity under Section 79 of the Act and the jurisdiction to the respective Commissions of the States of West Bengal and Jharkhand is accorded under Section 86 of the Act for determination of tariff insofar as it concerns the intra-state transmission and distribution systems. It is pertinent to note here that DVC does not supply electricity to the domestic consumers in the Valley and has been supplying electricity directly to about 120 HT-Industrial consumers like Steel, Coal, Railways, etc. beside the bulk supply to main beneficiaries of State Electricity Boards of West Bengal and Jharkhand. The supply of electricity to certain industries outside the Valley and domestic consumers in the valley is being made by the concerned Electricity Boards.

104. The Appellant has submitted that its transmission system which is spread across the two states being integrated one, is to be considered as inter-State transmission and not intra-state transmission. The Appellant concurs that the State Commissions should have the jurisdiction over the distribution and determination of tariff for retail supply of electricity. The Respondents, Govt. of West Bengal and Jharkhand, have opposed the contention of the Appellant insofar as the intra-state transmission is concerned and have stated that the intra-state transmission and distribution systems are in the jurisdiction of the respective Commission of the States and not in the regulatory jurisdiction of Central Commission and their costs have to be segregated from the Inter-State transmission system to facilitate determination of retail tariff for consumers in the distribution areas. State Commission of West Bengal has, also in Appeal No. 8 of 2006, protested that the intra-state transmission, distribution network and determination of retail tariff and wheeling tariff of DVC pertaining to the territory of the State of West Bengal fall within its own jurisdiction. WBERC also contends that the recovery of unfunded liability from their retail consumers could only be decided by them and not by the Central Commission.

105. The Appellant, DVC, banking on unique status of DVC, being controlled by the Central Government, and having functionally integrated generation, transmission and distribution activities, has submitted that the transmission assets and capital costs thereof, spread in two states of West Bengal and Jharkhand, are not amenable to segregation. The views of the Central Commission in regard to this aspect in the impugned order are of relevance as reproduced here under:

113

"25. The capital cost of transmission and distribution systems is not available separately in the books of accounts. DVC has submitted that a precise separation of transmission and distribution system is not possible. However, for the purpose of tariff capital cost of transmission system and distribution has been considered in the ratio of 87:13. For this purpose, 220/132 kV sub-stations, power transformers and associated lines have been considered as part of transmission system whereas similar infrastructure at 33 kv has been treated as part of distribution systems. The Commission observed that line length in Transmission System (220kv and 132kv) is 4538 ckt kms. against 1056 ckt. Kms. in distribution system (33kv). In view of around 23% line-length of distribution system compared to transmission system, the bifurcation of capital costs between transmission and distribution system in the ratio of 87:13 ratio has been accepted by the Commission for the purpose of tariff.'

106. It may be pertinent to mention that Central Commission while discussing the applicable capital costs for the purpose of tariff in para 24 of the impugned order has recorded that the beneficiaries had no objection to take the costs as per books of account for the year 2003-04.

107. On this aspect the impugned order passed on 03.10.2006 states in para 23 as under:

"23. The sharing of capital cost between transmission and distribution business of line length of the two system is of no

relevance. Further it is not possible to segregate between intra-state and inter-state transmission costs, since the transmission system owned by the petitioner Corporation is an integrated one. Even State government has not given any details of costs of two systems separately."

108. In order to further analyze the nature of the DVC's transmission system, we need to consider, the following provisions of the Act :

"***Section 2(36)***

'Inter-transmission system' includes:-

(i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;

(ii) The conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;

(iii) the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by a Central Transmission Utility.

Section 2(37) *'inter-State transmission system' means any system for transmission of electricity other than an inter-State transmission system;*

Section 2(72) *'transmission lines' means all high pressure cables and overhead lines (not being an essential part of the distribution*

system of a licensee) transmitting electricity from a generating station to another generating station on or a sub-station, together with any step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such building or part thereof as may be required to accommodate such transformers, switch-gear and other works;

Section 2(16) *'Dedicated Transmission Lines' means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines of electric plants of a captive generating plant referred to in section 19 or generating station referred to in section 10 to any transmission lines or sub-stations or generating stations or the load centre, as the case may be.*

109. It may be mentioned that the definitions of 'inter-Sate transmission system' and 'intra-State transmission system' as given in Section 2(3) are identical to Section 2(gb) of Indian Electricity Act, 1910, Section 2(e) of Electricity Regulatory Commission Act, 1998 and Section 2(gc) of Indian Electricity Act, 1910 respectively. The term 'transmission lines' as defined in Section 2(72) of the Act is *para-materia* to the definition of "Main transmission lines" provided in Section 2(7) of The Electricity (Supply) Act, 1948.

110. Taking an integrated view of the above provisions and applying them to the instant case, it is clear that any 'transmission line' i.e. high pressure (HT) Cables and overhead lines (HT), excluding the lines which are essential part of

distribution system of a licensee (WBSEB and JSEB as the case may be), used for the conveyance of electricity from a generating station owned by DVC and located in the territory of one State (either State of West Bengal or Jharkhand) to generating station or a sub-Station located in the territory of another State (either in the State of Jharkhand or West Bengal) together with any step-up and step down transformer, switch gear and other works necessary to and used for the control of such cables or overhead lines and such building or part thereof as may be required to accommodate such transformers, switch-gear and other works shall constitute the "Inter-State Transmission system" of DVC. Further, the transmission segments from the generating Stations to HT Consumers located in the same territory of a State are deemed 'dedicated transmission lines' and are to be maintained and operated by DVC.

111. DVC has been supplying power from its generating stations to West Bengal Electricity Board and Jharkhand Electricity Board along with nearly 120 HT-Consumers either through inter-state transmission lines or through the point-to-point 'dedicated transmission lines'. We, therefore, conclude that all transmission systems of DVC be considered as unified deemed inter-state transmission system, insofar as the determination of tariff is concerned and as such regulatory power for the same be exercised by the Central Commission.

Other Grounds of Appeal

112. Keeping in view the above findings we shall now take up other grounds of appeal as described in para 62 above.

A. **Debt Equity ratio**

A.1 The Appellant has submitted that actual Debt-Equity Ratio of 15:85 prevailing as on March 31, 2004 has to be considered keeping in view its special status as a statutory body with multifarious social and other activities. DVC has submitted that as on 31 Mar. 2004 gross fixed assets are of Rs. 3543.65 crores funded by contribution of Rs. 1105.43 crores provided by the participating governments beside, reserves amounting to Rs. 1759.17 crores. DVC has sought higher return as compared to the return available to other 'commercial entities'.

A.2 The One-Member Bench of the Central Commission in its report at para 37 stated that "**it is also stated that since DVC is operating for about six decades it is not possible to ascertain the project-wise debt-equity structure on the date of commercial operation. However, the projects of DVC have not been structured with a definite percentage of debt-equity ratio.**" The Central Commission, rejecting the claim of DVC to adopt Debt Equity Ratio of 15:85 and the counter-claim of objectors to adopt Debt Equity Ratio of 95:5 has adopted the Debt Equity Ratio of 70:30 as recommended by the One-Member Bench of the Central Commission.

A.3 As per Tariff Regulations, 2004 notified by the Central Commission (explanation to Clauses 21 and 30), *'the premium raised by the generating company while issuing share capital and investment of internal resources created out of free reserve of the*

generating company, if any, for the funding of the project, shall also be reckoned as paid up capital for the purpose of computing return on equity, provided such premium amount and internal resources are actually utilized for meeting the capital expenditure of the generating stations and forms part of the approved financial package'.

A-4. The reasoning given by the One-Member Bench to calculate the Debt Equity Ratio by excluding the General Reserves from the purview of the equity capital, does not appear to be correct, as the Tariff Regulations, 2004 clearly provide for consideration of internal resources for the purpose of ROE **provided such internal resources are actually utilized for meeting the capital expenditure of the generating station** and forms part of the approved financial package.

A-5. Further, the Tariff Regulations provides that in case of generating stations or transmission projects where the tariff for the period ending March 31, 2004 has not been determined by the Central Commission, Debt Equity ratio shall be as may be decided by the Commission (para 52 of the impugned order). In the past, the Commission has also dealt with determination of applicable Debt Equity Ratio in the case of Central Power Sector Undertakings (CPSUs) such as NTPC, NHPC, PGCIL etc. where the actual equity deployed in the assets created prior to formulation of Tariff Regulations, was much higher than the equity calculated considering a normative DE ratio of 70:30. These CPSUs were

allowed a normative DE ratio of 50:50 for the purpose of determination of tariff, in respect of their old assets.

A-6. We observe that most of the projects of DVC are analogous to projects of NTPC commissioned prior to 1992 in which the capital investments was largely raised through budgetary support of Government of India and were not based on the concept of project specific debt-equity-ratio. While determining the tariff for such projects of NTPC, etc. under Regulations, 2001, the Central Commission provided special dispensation to these projects of NTPC in terms of normative debt-equity-ratio of 50:50. The same dispensation is allowed to continue under Regulation 20 of Regulations 2004 applicable for the period from April 1, 2004 to March 31, 2009. Regulation 20 extracted below will make it abundantly clear:

> *"**20. Debt-Equity Ratio:** (1) in case of the existing generating stations, debt-equity-ratio considered by the Commission for the period ending 31.03.2004 shall be considered for determination of tariff with effect from 01.04.2004.*
>
> *Provided that in cases where the tariff for the period ending 31.03.2004 has not been determined by the Commission, debt-equity-ratio shall be as may be decided by the Commission."*

A-7 This approach we feel helped in smoother transition so that the financial position of the licensee/generating company is not adversely affected and their investment plans are not suddenly disturbed due to change in the methodology of determination of tariff.

A-8. The DVC Act is silent about adopting any specific Debt Equity Ratio for financing of projects. We, therefore, in the interest of equity and fairness feel that all old projects of DVC commissioned prior to 1992 be assigned normative debt-equity-ratio of 50:50 and the recent projects such as Mejia to be aligned with 70:30 capital structure specified in the regulations.

A-9 The Appellant has contended that DVC having been created with the functions of deemed state to support the state's social functions of West Bengal and Jharkhand, it serves public interest at large and, therefore, by statute equity has been primary source of capital. It has further added that business risks, financials risks, etc. are largely, therefore, carried by the owner Governments who, therefore, by fundamental principles of risk and return are entitled to return on their entire share of capital investment.

A-10 It is true that the owners take upon themselves business related risks and are entitled for return on their share of capital investment. But the return is to be governed by the scheme of determination of tariff for supply of electricity as mandated by the law in place. The scheme provides for an assured ROE, as

permissible under the Tariff Regulations, at the rate of 14%, on the equity deployed for the purpose of supplying electricity. The scheme does not permit return on investments made on projects other than supply of electricity, to be recovered through tariff for supply of electricity.

A-11 Here we can draw attention to Clause 4 of the Tariff Regulations, 2004, which is reproduced below:

> *"For the purpose of tariff the capital cost of the project shall be broken up into stages and by distinct units forming part of the project. Where the stage-wise, unit-wise, line-wise or sub-station-wise break up of the capital cost of the project is not available and in case of the on-going projects, the common facilities shall be apportioned on the basis of the installed capacity of the units and lines or sub-stations. In relation to the multi-purpose hydro-electric projects, with irrigation, flood control and power components, the capital cost chargeable to the power component of the project only shall be considered for determination of tariff.*

A-12 In view of the above, for the purpose of determination of tariff for supply of electricity, submissions made by DVC that it serves public interest and in the absence of revenue earning

sources of taxes and duties it depends only on profit margin from sale of power are of no relevance.

A-13 Some of the Respondents have submitted that *"combined reading of Sections 30, 31 and 38 of the DVC Act clearly indicates that the entire capital invested on the projects as per the DVC Act is the loan capital and interest is a part of the expenditure. There is no provision of any equity capital under the DVC Act."*

A-14 The DVC Act provides for infusion of capital by the participating Governments and for payment of interest thereon. The DVC Act does not categorize such capital as borrowings and there is no reference about repayment of such capital to the participating Governments. It is difficult to assume a commercial organization running solely on borrowed funds. Lenders invariably prescribe for a margin money to be invested by the borrower also. In our opinion the capital infused by the participating Governments is in the nature of equity capital and for the purpose of determination of tariff, same would be eligible for return on equity, as may be permitted by the Tariff Regulations 2004.

A-15 It is to be noted that DVC provides interest on capital contributed by the participating Governments. The accrued interest has been allowed to be retained by DVC and is ploughed back into capital with the tacit consent of the participating

Governments. This has to be provided to DVC as per the provisions of Section 38 of the DVC Act.

A-16 It is observed that the DVC Act envisages the projects to be built only on capital contributed by the participating Governments and any deficit in the capital amount is to be made good by taking loan on behalf of the participating Government. The debt taken will obviously attract interest. The average interest rate of repayment payable during the tariff year is to be applied on 50:50 normative debt capital for tariff purposes. This would mean that out of aggregate equity including reserves, equity considering a normative Debt Equity Ratio of 50:50 would be eligible for ROE at the rates prescribed in the Tariff Regulations and excess of equity if any over the equity earning ROE @14% shall be considered as interest bearing debt. For example, if the actual Debt Equity Ratio comes to 40:60, ROE would be available on 50% portion of the equity and interest would be available on 10% portion of equity and 40% loan, as reduced by repayments.

B. Disallowance of additional capitalization for the period 2004-2009

The Central Commission at para 50 of the impugned order has observed that the "*the petitioner corporation has not claimed any additional capitalization for the period 2004-2009.*" However the records submitted by the Appellant show that a sum of Rs. 767.45 crores and Rs. 181.14 crores have been shown to be capitalized

during 2004-05 and 2005-06 respectively. In order to get the relief on this account, the Appellant may bring out the above omission to the notice of the Central Commission who may appropriately dispose of the matter in terms of law. The appeal is accordingly allowed on this count.

C. Higher Return on Equity

The Appellant has asked for higher return on equity primarily on the ground of it taking higher risks in servicing the public with minimum borrowings. It is not clear to us as to what public purpose would be served if the public is required to pay higher cost of funds in the form of equity, particularly when such funds can alternatively be sourced at lower costs in the form of borrowings. On the contrary the said equity be used for generating larger pool of resources to augment operating assets. We, therefore, find no justification in permitting higher "Return on Equity." The return on equity has been prescribed in the Tariff Regulations, 2004, which we feel is applicable to the Appellant. The appeal accordingly fails on this count.

D. Pension and Gratuity Contribution

D.1 DVC has submitted that based on the actuarial valuation, entire funds need to create the Pension and Gratuity Contribution Fund should be allowed to be recovered through the process of determination of tariff. The Central Commission in its Order has

worked out that a sum of Rs. 1534.49 crore is required to create such a fund. The Commission has held that entire burden for creation of the fund should not be passed on to the consumers and accordingly directed that 60% be recovered through the tariff from the consumers and 40% be contributed by the DVC. We find that this decision is not backed by any justification given in the order. We feel the claim of the Appellant to recover the entire cost for creation of the fund through tariff is justified provided the recovery is staggered in a manner that it does not create tariff-shock to consumers.

D.2 The huge liability for the fund has arisen as earlier DVC was adopting the policy of "pay as you go". A major part of the liability pertains to previous years.

D.3 As a general rule, once the Commission, after prudence check, has agreed with the need for funding the Pension and Gratuity Contribution funds, DVC should have been allowed to recover entire amount from the consumers through the tariff. Asking DVC to contribute out of its own resources would tantamount to denying it the return on equity as assured in terms of Tariff Regulations. However, if we look at it from the point of view of the consumers, the consumers, particularly the industrial and commercial ones, have now no option to adjust their sale price to take into consideration the need for meeting the accumulated liability. It is, therefore, an accepted fact that due to postponing of

the creation of such fund, the consumers were enjoying lesser tariff than the legitimate tariff otherwise applicable to them.

D.4 Some of the Respondents have contended that Accounting Standard AS –15 is not applicable to the Appellant. As a prudent accounting practice, whether AS-15 is applicable to DVC or not, an adequate provision is required to be made for employees related liabilities by DVC. Postponing creation of such funds would again lead to non-determination of appropriate cost of supply of electricity.

D.5 In view of the above we find it unreasonable to allocate 40% of the burden on DVC. We are of the opinion that entire expenditure, as determined after prudence check by the Commission, is to be borne by the consumers.

D.6 Some of the Respondents in the matter have questioned the very basis of working out the quantum of funds of Rs. 1534.49 crores.

D.7 The Respondent No. 4, the State of West Bengal has, in the context of Central Commission's directive that 60% of the unfunded liability relating to generation and transmission functions are to be paid by the consumers, contended that Central Commission has no jurisdiction to determine tariff of the distribution segment and has averred that such directions of

payment by the consumers is encroachment in the jurisdiction of the State Electricity Regulatory Commission and is illegal.

D.8 In our opinion recovery of costs incurred by DVC in respect of generation and transmission functions falls squarely in the jurisdiction of the Central Commission. Tariff so determined by the CERC shall form the basis for determining the tariff at the retail end of the distribution segment.

D.9 Government of West Bengal has drawn our attention to Annual Report of DVC for 2002-03 where *"an amount of Rs. 66 crore have been charged towards Pension and Gratuity Fund and a further amount of Rs. 23 crore have been charged as relief paid to the pensioners. …………………It is not uncommon for Government organizations to divert its funds created for staff welfare to meet other non-planned expenditure. It appears in the present case also that DVC had diverted its funds earmarked for pension fund for which an enquiry was required to be made by CERC, unfortunately the same was not done."*

D.10 It is possible, if the amount charged to the profit and loss account of a particular year is revenue in nature, the same would not be reflected in the balance sheet. The allegations levelled by the Government of West Bengal are serious in nature and if true, would reflect very poorly on the Appellant. The Central Commission is directed to satisfy itself about provisions already made towards Pension and Gratuity Fund and the amount already

collected by DVC be adjusted in this regard. We are of the firm view that the Government of West Bengal being a part owner of DVC and represented on the Board for managing the affairs of DVC, ought to have taken appropriate steps to rectify the matter when the matter came to its knowledge

E. Revenues to be allowed to DVC under the DVC Act

E.1 We have gone through the submissions made by the Appellant and the Respondent and have patiently heard the arguments presented by the learned counsel for the parties. The Appellant has sought to make a case before us that tariff and terms and conditions for generation, transmission, distribution and sale of electrical energy by DVC, unlike other electricity utilities, need to be considered in the background of the functions with which DVC is charged as per section 12 and other provisions of the DVC Act. It has been further submitted that the tariffs determined by DVC in September 2000 were not factored with any standard norms and that another distinguishing feature of DVC in contrast to the Central Power Sector Utilities is that DVC by mandate of the DVC Act, 1948 is required to carry out certain functions which are otherwise the functions of the States of Jharkhand, erstwhile Bihar, and West Bengal viz. Flood control, Irrigation, Social Integration Projects, Soil Conservation activities, Multi-purpose Dams, Afforestation, etc. without dilution in its non-power statutory functions.

E.2 We may agree with the contention of the Appellant that earlier the tariff for electricity supply by DVC were not specifically linked to achievement of operating norms. However, after the enactment of the Act, laws relating to determination of tariff and the process to be adopted in this regards, stands changed substantially.

E.3 Proviso 4 of section 14 of the Act reads as under:

"Provided also that the Damodar Valley Corporation, established under sub-section (1) of section 3 of the Damodar Valley Corporation Act, 1948, ***shall be deemed to be a licensee under this Act)*** *but shall not be required to obtain a license under this Act and the provisions of the Damodar Valley Corporation Act, 1948, in so far as they are not inconsistent with the provisions of this Act, shall continue to apply to that Corporation".* ***(emphasis supplied)***

E.4 From the above provisions of section 14 of the Act, it is clear that DVC shall be deemed to be a licensee under the Act and, therefore, provisions applicable to a licensees as per the Act would become applicable to DVC due to its status as a deemed licensee. Section 62 of the Act, produced below makes it clear that tariff of a licensee should be determined by the Appropriate Commission:

"62. (1) The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for :-

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;
(c) wheeling of electricity;
(d) retail sale of electricity.

....

....

..................."

E.5 Section 61 of the Act, under the heading 'Tariff Regulations', lays down the principles for determination of tariff, which we reproduce below for reference:

'61. The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy'.

(emphasis supplied)

E.6 The Appellants have submitted that fourth proviso of Section 14 of the Act envisages exclusion of the application of the provisions of the DVC Act only if they are inconsistent with the provisions of the Act and that the said provision does not speak of inconsistency with any rule or regulations notified under the Act. DVC has submitted that section 20 of the DVC Act falls in a category wherein the provisions which are in direct conflict with the provisions of section 61, 62, 64, 79 and 86 of the Act and cannot be harmonized at all. Hence, in such cases provisions of the Act shall prevail.

E.7 Section 61 of the Act clearly recognizes the authority of the principles and methodologies specified by the Central commission for determination of tariff applicable to generating companies and transmission licensees. In our opinion, if there arises any inconsistency between the provisions of the DVC Act and the

Regulations made under the Act with regard to determination of tariff for electricity they may be harmonized in such a manner that it satisfies both the DVC Act as well as the Regulations made under the Act. This has been elaborately dealt with in our findings earlier.

E.8 In order to have better clarity of the issues under consideration, we may also refer to the provisions of section 41 and 51 of the Act. Relevant extracts of these sections are reproduced below:

> *Section 41. A transmission licensee may, with prior intimation to the Appropriate Commission, engage in any business for optimum utilization of its assets:*
>
> *Provided that a proportion of the revenues derived from such business shall, as may be specified by the Appropriate Commission, be utilized for reducing its charges for transmission and wheeling:*
>
> ***Provided further that the transmission licensee shall maintain separate accounts for each such business undertaking to ensure <u>that transmission business neither subsidies in any way such business undertaking nor encumbers its transmission assets in any way to support such business</u>:***(Emphasis supplied)

…… … … … ….

> *"51. (1) A distribution licensee may, with prior intimation to the Appropriate Commission, engage in any other business for optimum utilization of its assets:*
>
> *Provided that a proportion of the revenues derived from such business shall, as may be specified by the concerned State Commission, be utilised for reducing its charges for wheeling:*
>
> ***Provided further that the distribution licensee shall maintain separate accounts for each such business undertaking to ensure that distribution business neither subsidies in any way such business undertaking nor encumbers its distribution assets in any way to support such business.**………………"*
> (Emphasis supplied).

E.9 From the above provisions, we are of the opinion that the tariffs for supply of electricity by DVC are to be determined by the Appropriate Commission in terms of the provisions of the Act. The provisions of the Act clearly stipulate that any other business carried on by the licensee is not to be subsidized by the transmission/distribution business of the licensee. There are no

such prohibition in respect of generation business carried on by a deemed licensee like DVC, which is having integrated operations.

E.11 Section 32 of the DVC Act provides that DVC can make expenditure on objects other than irrigation, power and flood control. Section 33 of the DVC Act, under the heading "*Allocation of expenditure chargeable to project on main objects*" provides for allocation of total capital expenditure chargeable to a project between the three main objects namely, irrigation, power and flood control.

E. 12. In view of the above provisions of the DVC Act, we feel that expenditure incurred by DVC on objects other than irrigation, power and flood control be allocated to these three heads as per section 32 and 33 of DVC Act and expenditure so allocated to power object, should be allowed to be recovered through the electricity tariff. The above would be in line with Fourth Proviso of Section 14 of the Act which provides that provisions of DVC Act to the extent not inconsistent with the Act shall remain in force.

E.13 As regards the liability arising under section 38 of the DVC Act on account of interest on capital provided by each of the participating Governments, we have to keep in mind that the total capital to be serviced has to be equal to the value of operating assets when they are first put to commercial use. Subsequently, the loan component gets reduced on account of repayments while

equity amount remain static. As per the scheme of the determination of tariff as per Tariff Regulations 2004, the recovery is in two forms; either by way of ROE or by way of interest on loans. We direct the Central Commission to ensure that capital deployed in financing operating assets is getting fully serviced either through Return on Equity or interest on loan (including on the equity portion not covered as part of equity eligible for Return of Equity).

E.14 The Appellant has submitted that certain provisions of the DVC Act, particularly under Part IV dealing with Finance, accounts and Audit can always be read harmoniously with the provisions of the Act and both can be given effect to without there being any inconsistency or repugnancy.

E.15 As regards sinking funds which is established with the approval of Comptroller and Accountant General of India vide letter dated December 29, 1992 under the provision of Section 40 of the DVC Act is to be taken as an item of expenditure to be recovered through tariff, as brought out in para 82 earlier.

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.

GH. OPERATING NORMS AND O & M EXPENSES

GH.1 It is observed from the order of the CERC the Commission has adopted different benchmarks, which are liberal than the Tariff Regulations of 2004 issued by the CERC, while determining the tariff of the Appellant. In this regard, paras 10 and 34-39 of the CERC order, giving the reasoning for such a dispensation is given below:

> *"10. The terms and conditions for determination of tariff for the period from 1.4.2004 to 31.3.2009 are notified in terms of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2004 (hereinafter referred to as "the 2004 regulations") under Section 61 read with Section 178 of the 2003 Act.* ***The norms for O&M***

expenses and the operational norms, contained in the 2004 regulations were notified after study of the data of the utilities under the regulatory jurisdiction of this Commission. However, at the time of framing of the 2004 regulations, the data relating to the petitioner Corporation was not available before this Commission. Therefore, by virtue of powers under the 2004 regulations, the Commission is considering norms for O&M expenses and the operational norms specific to the generating stations and the transmission assets owned by the petitioner Corporation.' (Emphasis supplied)

34. Before proceeding to determine tariff, we wish to clarify that we are conscious of the special factors pertaining to the petitioner Corporation viz. its statutory status, multifarious responsibilities, the tariff fixation procedure hitherto followed, and the past financial and other commitments with the legitimate expectations borne out of the earlier procedures for tariff fixation. We would like to deal with these aspects before we tackle the issue of tariff fixation.'

35. The petitioner Corporation in its affidavit dated 28.7.2006 has submitted that in the past, it was

allowed to determine tariff, in an integrated manner on cost plus basis covering generation, transmission, distribution and subsidiary activities. On the contrary, the petitioner Corporation is now required to carry out its activities related to generation, transmission and distribution of electricity as independent activities. Based on the past practice, it has initiated the following proposals involving heavy investment and has made substantial financial commitments.

....

....

....

(e) A Financial Plan has also been firmed up to ensure adequate fund comfort for the XI Plan Projects considering that the existing Tariff fixed in September, 2000 will continue at least till the year 2007-08.

36. Accordingly, the petitioner Corporation has prayed that without prejudice to other contentions, a transition period may be allowed to enable the petitioner Corporation to get into the new dispensation. The petitioner Corporation has requested for continuation of the existing Tariff till the year 2007-08. The petitioner Corporation has further prayed that the Plant Operational Norms for the year

2004-05 and 2005-06 as fixed by the one-member bench of the Commission for the existing units be made applicable from the years 2007-08 and 2008-09 respectively and onwards. According to the petitioner, requisite improvement will be possible only from the year 2007-08, after the augmentation and improvement of the existing thermal units which has been initiated during the current year 2006-07.

37. We appreciate the need for such a transition period. In the past, the Commission had recognized the need for such transition for Central Sector Utilities such as NTPC Limited, NHPC, Power Grid Corporation Limited for the period till 31.3.2001. Though this Commission was established in 1998 and started exercising jurisdiction, the norms as earlier applied by the Central Government was continued to be applied. It is also noteworthy that the above mentioned companies were commercial entities and were not carrying any social and other activities as is the case with the petitioner Corporation in the instant case.

38. We are also seized of the matter that the petitioner Corporation requires an overall Extension & Improvement of the old generating station. Under this

situation, adoption of tariff based on the 2004 regulations since 1.4.2004 will unsettle the position already settled. We are therefore, convinced that the petitioner Corporation should be allowed to continue with the existing tariff for a reasonable period to readjust itself with the tariff norms before enforcement of generation and inter-State transmission tariff under the prevailing norms. In the absence of such a special dispensation, the petitioner Corporation is likely to suffer substantial loss and this is not considered to be in public interest, especially in the light of the socio-economic activities entrusted to the petitioner Corporation.

39. We have given our thoughtful consideration to the issue. We find some merit in the contentions of the petitioner. Firstly, we are in agreement that it would not be possible for the petitioner Corporation to rationalize O&M expenses from the back date or to improve norms from the back date. These are possible only prospectively. Further, in the light of the sudden change in the approach and methodology of tariff setting by applying the Commission's Regulations, with effect from 1.4.2004, it would not be possible for the petitioner Corporation to make amends for the loss in revenue if any, by cutting costs. However, we

are not convinced that the prevailing tariff should be allowed to continue till 2007-08. As early as in June 2005, the petitioner Corporation was aware that it would be regulated by Commission so far as its generating stations and transmission system are concerned. The norms applicable, being contents of public documents, were also known. We also observe that the petitioner Corporation has already initiated steps to bring about improvements in operational norms. This is evident by the improvement in norms suggested by it in its own submission which were considered by the one-member Bench. In view of above, we allow the petitioner Corporation to continue the prevailing tariff till 2005-06. The tariff with effect from 1.4.2006 shall be determined based on the terms and conditions duly taking into account the deliberations before and the recommendations in the one-member Bench Order dated 5.5.2006."

GH.2 It is evident from the above that the Appellant has been allowed a transition period to switch over to the Tariff Regulations applicable in this regard. Hence, we feel that the Appellant's views about its special features did not escape the attention of the CERC.

GH.3 One of the Respondents, namely Govt. of Jharkhand, has submitted that *'the current level of efficiency of the Appellant is*

abysmally low when compared to other central and state generation stations. This is the obvious result of the lack of financial and operational discipline in the functioning of the Appellant due to its monopolistic position in terms of high voltage supply within the command area and also the unfettered discretion infixing tariff. These issues can be addressed effectively only by resorting to stringent and strict measures to improve the efficiency of the Appellant in line with the guidelines under the Electricity Act.' **We feel that improvement in the efficiency of the Appellant would require effective monitoring from the participating Governments also.**

GH.4 As mentioned earlier, we find that the CERC has given a transition period and has sought to progressively raise the standard of efficiency keeping in view the operating conditions of the Appellant. Similarly, the O&M expenses have been allowed after a prudence check by the CERC.

GH.5 As regards not allowing any increase in the O&M expenses, we find no reason given in the CERC order. The Tariff Regulations, 2004 notified by the Commission generally provide for a 4% increase annually. We think the same be adopted in the case of DVC also to offset additional burden on the Appellant due to inflationary measures

I. Return on capital Investment on Head Office, Regional Offices, Administrative and other Technical Centres, etc.

I.1 Appellant has requested for inclusion of capital investment made in respect of Head Office, Regional Offices, Administrative and other Technical Centres, etc. for the purpose of determination of capital base and consequently for availability of return on equity. The CERC in its order at para 43 and 44 has observed that *'none of the parties has raised any objection on the approach and recommendations of the one-member bench regarding the capacity not in use and the capital cost to be considered for the purpose of tariff for the capacity in use in case of generating stations.* Accordingly, the Commission accepted and adopted the approach and recommendations of the One Member Bench regarding the capital cost.

I.2 The One Member Bench in its recommendations at para 31 and 32 provides that cost of servicing of capital investment on these offices should be booked to O&M expenses duly apportioned to different generating stations and transmission and distribution system and accordingly, the allocated costs of director office, other offices, central offices and subsidiary activities have been excluded from the capital cost claimed by DVC for the purpose of generating and transmission tariff.

I.3 With the above process, it is true that the cost of operating and maintaining the above facilities would be recovered but the recovery of capital cost in the form of depreciation and return on

corresponding equity, interest on loans, if any, would be missed out without any justification.

I.4 We feel that once the Commission has agreed to treat these assets as part of the generating and transmission activities of the Appellant by permitting recovery of their O&M cost, these assets, after due prudence check, should also be included in the capital cost and consequential effect be given through determination of tariff.

J. Generation Projects presently not operating

J.1 The Appellant has submitted that the CERC ought to have allowed expenses incurred by DVC on generation projects presently not operating as these projects have not been closed down and that DVC is proceeding with repair, renovation and modernization of these projects.

J.2 Keeping in view the scheme of the Act including the Tariff Regulations notified under the Act, we feel that the consumer can not be burdened with costs of maintaining non-productive assets. The Tariff Regulations ensure that before the expiry of useful life of the assets, entire cost incurred in their establishment, operation and maintenance are recovered through the tariff. Expenditure incurred on repair, renovation and modernization aimed at extending the useful life of the assets would be eligible, subject to

prudence check, for capitalization and would be eligible for recovery through tariff once the assets are again put to use.

J.3 Further, the general direction is for determining tariff linked to availability of generating capacity. The National Electricity Policy notified by the Central Government states that '*the ABT regime introduced by CERC at the national level has had a positive impact. It has also enabled a credible settlement mechanism for intra-day power transfers from licensees with surpluses to licensees experiencing deficits. SERCs are advised to introduce the ABT regime at the State level within one year*'. The Tariff Policy further emphasizes (at para 6.2) that '*a two-part tariff structure should be adopted for all long term contracts to facilitate Merit Order dispatch. According to National Electricity Policy, the Availability Based Tariff (ABT) is to be introduced at State level by April 2006. This framework would be extended to generating stations (including grid connected captive plants of capacities as determined by the SERC)*'.

J.4 Implementation of ABT rests on the premise that the tariff is to be linked to availability of generating capacity for the benefit of consumers and recovery of capacity (fixed) charges below the level of target availability shall be on pro rata basis. The Tariff Regulations, 2004 provide that ***at zero availability, no capacity charges shall be payable.***

J.5 DVC has also submitted following grounds to press for inclusion of such expenditure in the capital cost for recovery through tariff:

- The tariff being charged ought not to be reduced
- Entire revenue being ploughed back
- No private interest involved in the revenues earned by DVC
- Retail supply tariffs in the state of Jharkhand and West Bengal being much higher than those prevalent in DVC area

J.6 We find that neither the scheme of determination of tariff as laid down in the Act and the Tariff Regulations nor the DVC Act specify any weightage to above contentions.

K. Other Issues

K.1 One of the Respondents (GoWB) has challenged the capital base adopted by the CERC while determining the tariff. GoWB has contended that certain assets should have been treated as part of the distribution network and hence should have been taken out of the purview of tariff determined by the CERC. While the impact of the above would be revenue neutral on DVC as assets forming part of the distribution network would be eligible for tariff determination at the retail end. However, it would impact the power purchase bills of the beneficiary states. We feel that when the process of tariff determination for distribution segment of DVC takes place, the appropriate Commission would also determine the distribution network capital base. At that time DVC may approach

the CERC again for adjustment of its revenue requirement and corresponding tariff.

K.2 GoWB has contended that the CERC should also have determined the tariff for the period from 10 June 2003 to 2005-06.

K.3 While it is true that with the establishment of the Appropriate Commissions, the powers to determine tariff for sale of electricity by licensees have been vested with the Appropriate Commissions. The CERC in their order (para 37) have observed that '*we appreciate need for such a transition period. In the past, the Commission had recognized the need for such transition for Central Sector Utilities...*'.

K.4 We feel that recognizing various issues involved with the change in the applicable laws the CERC had agreed to provide a transition period to DVC also, which we would not like to disturb. However, this view can not be taken as precedent.

L. Fuel Price Adjustment

As regards applicability of fuel price adjustment, GoWB has contended that the same is in the jurisdiction of State Commissions. We find no substance in this argument as the applicable fuel price adjustment is to be decided by the Commission determining the applicable generation tariff.

113 In view of the above the subject Appeal No. 273 of 2006 against the impugned order of Central Commission passed on October 3, 2006 is allowed to the extent described in this judgment and we remand the matter to Central Commission for *denovo* consideration of the tariff order dated October 3, 2006 in terms of our findings and observations made hereinabove and according to the law. Appeal No. 271, 272 and 275 of 2006 and No. 08 of 2007 are also disposed of, accordingly.

114. With the above order appeals are disposed of but with no order as to costs.

(A. A. Khan)
Technical Member

(Justice Anil Dev Singh)
Chairperson

Dated : 23rd November, 2007.

Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 246 of 2012 &
IA Nos. 401 & 402 of 2012 and 71, 245, 439 & 442 of 2013
& IA No. 139 of 2014
AND
Appeal no. 229 of 2012 &
IA No. 368 of 2012

Dated 28th November, 2014

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

Appeal No. 246 of 2012 &
IA Nos. 401 & 402 of 2012 and 71, 245, 439 & 442 of 2013
& IA No. 139 of 2014

In the matter of:
The Tata Power Company Limited,
Bombay House,
24, Homi Mody Street,
Mumbai-400 001 ... Appellant

Versus

1. The Maharashtra Electricity Regulatory Commission,
World Trade Centre No. 1,
13th Floor, Cuffe Parade, Colaba,
Mumbai-400 005.
(Through Secretary)

2. Reliance Infrastructure Limited,
Reliance Energy Centre,
Santacruz (East),
Mumbai- 400 055
(Through Company Secretary) ... Respondents

Counsel for Appellant : Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Ramji Srinivasan, Sr. Adv.
Mr. Sanjay Sen, Sr. Adv.
Ms. Sakya Singha Chaudhuri,
Ms. Prerna Priyadarshini
Ms. Kanika Chug
Ms. Poonam Varma
Mr. Vishal Anand
Mr. Rahul Kinra
Mr. Jafar Alam, Mr. Akshat

Counsel for the Respondents: Dr. Abhishek Manu Singhvi, Sr. Adv.
Mr. J.J. Bhatt, Sr. Adv.
Ms. Anjali Chandurkar
Mr. Hasan Murtaza for RIL

Mr. Buddy A. Ranganadhan for R-1
Mr. L.N.R. Sharma for R-2

Appeal no. 229 of 2012 &
IA No. 368 of 2012

In the matter of:
Reliance Infrastructure Limited,
"H" Block, 1st Floor,
Dhirubhai Ambani Knowledge City,
Navi Mumbai- 400 710 ... Appellant

Versus

1. The Maharashtra Electricity Regulatory Commission,
World Trade Centre No. 1,
13th Floor, Cuffe Parade, Colaba,
Mumbai-400 001

2. Tata Power Company Limited,
Having its office at Bombay House,
Fort, Mumbai-400 001.

3. Mumbai Grahak Panchayat,
Grahak Bhavan, Sant Dynaneshwar Marg,
Vile Parle (W),
Mumbai-400 056.

4. Prayas,
C/o Amrita Clinic,
Athawale Corner,
Deccan Gymkhana, Karve Road, Pune-411 004

5. Thane Belapur Industries Association,
Plot No. P-14, MIDC,
Rabale Village,
Post: Ghansoli, Navi Mumbai-400 071.

6. Vidarbha Industries Association,
1st Floor, Udyog Bhavan,
Civil Lines, Nagpur-400 041

7. Shri N Ponrathnam,
25, Majithia Industrial Estate,
Waman Tukaram Patil Marg,
Deonar, Mumbai-400 088

8. Shri Sandeep N. Ohri,
A-74, Tirupati Tower, Thakur Complex,
Kandivali (East), Mumbai-400 101.

9. Shri Rakshpal Abrol,
Bhartiya Udhami Avam Upbhokta Sangh,
Madhu Compound, 2nd Floor,
2nd Sonawala Cross Road,
Goregaon (East), Mumbai-400 063.

10. Mumbai International Airport Pvt. Limited,
Having its office at Chhatrapati Shivaji
International Airport, 1st Floor, Terminal 1B,
Santacruz (East), Mumbai-400 099 ...Respondent(s)

Counsel for Appellant : Mr. J.J. Bhatt, Sr. Adv.
Ms. Anjali Chandurkar
Mr. Hasan Murtaza for RIL

Counsel for the Respondents: Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Ramji Srinivasan, Sr. Adv.
Ms. Sakya Singha Chaudhuri,
Ms. Prerna Priyadarshini
Ms. Kanika Chug
Ms. Kanika Chug
Ms. Poonam Varma
Mr. Vishal Anand
Mr. Jafar Alam,

Mr. Buddy A. Ranganadhan for R-1
Mr. Akshat for R-2

JUDGMENT

MR. RAKESH NATH, TEHNICAL MEMBER

Appeal No. 246 of 2012 has been filed by the Tata Power Company Ltd. ("Tata Power") challenging the legality and validity of the impugned order dated 22.8.2012 passed by the Maharashtra Electricity Regulatory Commission ("State Commission") in Case 151 of 2011 imposing certain restrictions on Tata Power with respect to the category of consumers to

(c) In 1964, the restrictions imposed on Tata Power in 1934, were removed by further amendments to the licneces held by Tata Power which directed Tata Power to supply to high end consumers only (more than 1000 kVA in Mumbai suburban area) and to other licensees in bulk and the other licensees were obliged to supply in retail.

(d) RInfra has a licence for distribution of energy in the suburban area of Mumbai. This licence was initially issued on 13.5.1930 to the BSES Limited which was subsequently renamed as Reliance Energy Limited and is now known as Reliance Infrastructure Limited (RInfra).

(e) Thus, the Mumbai suburban area is an area common in the licenced area of supply of both Tata Power and R-Infra.

(f) The genesis of the present dispute dates back to the year 2002 when RInfra filed a Petition in case No.14 of 2002 before the State Commission under Section 22 of the Electricity Regulatory Commission's Act 1998 for restraining Tata Power from supplying electricity to the consumers having contracted demand less than 1000 kVA in the area of supply of RInfra.

(g) On 03.07.2003, the State Commission passed an Order in Case No. 14 of 2002 filed by RInfra, in the matter of interpretation of erstwhile Tata Power Licenses, observed that

which the Tata Power can supply power utilizing RInfra's Network and also in respect of areas wherein Tata Power is required to lay down complete network to meet its Universal Service Obligation.

2. Appeal No. 229 of 2012 has been filed by Reliance Infrastructure Ltd. ("RInfra") against the same impugned order to the limited extent that Tata Power should have been restrained for further utilizing RInfra's distribution network for supplying electricity to the consumers who have migrated or changed over to Tata Power utilizing the wires of RInfra, permitted by the State Commission by an interim arrangement by order dated 15.10.2009.

3. The brief facts of the case are as under:

(a) Historically since 1907, the conditions of Licences of Tata Power allowed supply to be

provided only to other Licensees and bulk consumers of Factories and Railways whose annual consumption was not less than 500,000 units (which were generally HT consumers), and also supply to such consumers for lighting provided the lighting consumption did not exceed 20% of the total annual consumption only by agreement with existing licensees.

(b) In 1934 the Licenses were amended to incorporate further restriction that Tata's cannot supply energy to any consumer other than the licensees within their respective areas except with the written consent of Government which is to be given after consulting the existing licensees.

in terms of clause 5 of the licence Tata Power is entitled to supply energy "for all purposes including supply to other licensees for their own purposes and in bulk". However, in its order the State Commission restrained Tata Power from offering new connection to any consumers with energy requirement below 1000 kVA.

(h) As against this order dated 3.7.2003, both the parties filed separate Appeals before this Tribunal. The RInfra filed Appeal No.31 of 2005 and Tata Power filed Appeal No.43 of 2005.

(i) The Tribunal by the judgment dated 22.5.2006 disposed of both these Appeals setting aside the order of the State

Commission dated 3.7.2003 holding that the Tata Power under its license was entitled to supply energy only in bulk to other licensees and it was not entitled to supply in retail to the consumers irrespective of their demand.

(j) Against this judgment of the Tribunal, the Appeals were filed by Tata Power and others before the Hon'ble Supreme Court.

(k) On 08.07.2008, the Hon'ble Supreme Court delivered its judgment in the case of The Tata Power Company Limited v. Reliance Energy Limited & Ors. reported as (2008) 10 SCC 321. The Hon'ble Supreme Court held that there is nothing in the erstwhile TPC licenses which restricts the supply of electricity to consumers whose maximum demand is less

than 1000 KVA and Tata Power is entitled to supply electricity directly to consumers whose maximum demand is less than 1000 KVA apart from its entitlement of supplying electricity to other licensees for their own purpose and in bulk.

(l) Subsequently, as per the Hon'ble Supreme Court's judgment as well as the Capital Investment approval guidelines, 2005 laid down by the Maharashtra Commission, Tata Power submitted a Network Rollout Plan of Rs. 1062 Crores to the State Commission, in which it proposed a network roll out for the period FY 2009-10 to FY 2011-12 based on the load growth in the ward, land availability, spare capacity and outlet availability from the

corresponding 220 kV Receiving Sub Stations.

(m) The State Commission in its Order dated 15.06.2009 in Case No. 113 of 2008 did not approve the investment proposal of Network Rollout Plan and directed Tata Power for "exploring" the use of the wires of other distribution licensees.

(n) In pursuance of this order, Tata Power made a request to RInfra for permission for use of its network under open access to supply power to consumers who sought power from Tata Power. RInfra through its letter dated 30.7.2009 offered no objection to the Tata Power for use of its distribution system to

supply electricity to the consumers in the common licence area.

(o) On the strength of the judgment of the Hon'ble Supreme Court and the letter of no objection sent by Rinfra referred to above, the Tata Power on 31.8.2009 filed a Petition in Case no.50 of 2009 before the State Commission requesting it to lay down the operating procedure for the consumers who wanted to receive supply from the Tata Power while being connected to the distribution network of the RInfra.

(p) The State Commission, after considering the pleas of both the parties, while disposing of the Petition in Case no.50 of 2009 passed an order dated 15.10.2009 providing for an

interim arrangement finalising the procedure for consumers opting for changeover of supply from one licensee to other licensee through the network of the existing licensee.

(q) In this order, the State Commission, *interalia,* held that the changeover consumers shall be the consumers of the Tata Power from whom it is receiving supply for all purposes under the law. The State Commission further held that such consumers would be liable to pay wheeling charges for RInfra as determined by the Commission and shall not be liable to wheeling charges for Tata Power's distribution network. Tata Power was directed to collect wheeling charges from the changeover consumers and pass it on to

RInfra for allowing it to use its network and for being the carrier of its electricity. As regards the proposal made by the RInfra for recovery of its regulatory assets and cross subsidy charges from the changeover consumers, the State Commission held that since the issues like cross subsidy surcharge would require more examination, the same would be considered separately later in the appropriate proceedings. However, the State Commission mentioned that the interim arrangement as above, shall stay in effect until formulation of the final scheme in the form of regulations or otherwise dealing with all the relevant aspects of changeover are issued by the State Commission. This order was not challenged by any party.

(r) On 21.10.2011, the RInfra filed a petition before the State Commission being case No.151 of 2011 seeking relief on account of certain issues affecting RInfra and its financial viability. In this petition, RInfra alleged that Tata Power is indulging in cherry picking in case of changeover consumers i.e. permitting changeover only to subsidizing consumers and also selective laying network to connect large subsidizing consumers. This has lead to a skewed consumers mix for RInfra. In case Tata Power is permitted to carry on the cherry picking, RInfra will be left out only with subsidized consumers whose tariff would be bound to increase and ultimately the subsidized consumers would also no longer remain with RInfra. The 1st

Respondent allged that the RInfra had permitted Tata Power to use its network in the overall interest of consumers. However, the Tata Power's game plan is to push RInfra out of business and attain monopoly in distribution in Mumbai. RInfra prayed for the following in this petition:

"a) that this Hon'ble Commission may be pleased to modify and/or clarify the Order dated 15th October 2009, by holding and/or providing that the said Order dated 15th October 2009, and the protocol contained therein shall operate and be applicable on the condition that TPC-D does not connect its own network to any existing consumers of RInfra-D or any new consumers in RInfra's area of supply till TPC-D complies with its Universal Service Obligation by laying its network within TPC-D's licensed area of

supply that coincides with RInfra's licensed area of supply.

b) In the alternative to the aforesaid and in the event of the modification/clarification prayed for in prayer (a) above not being granted, this Hon'ble Commission may be pleased to withdraw and/or cancel the non-adversarial Order dated 15th October 2009;

c) Pending the hearing and final disposal of the Petition/Case, TPC-D may be restrained by an order and injunction of this Hon'ble Commission:

i. from connecting on its own network any existing consumer of RInfra-D; or

ii. from connecting on its own network any new consumer in RInfra's licensed area of supply;

in the alternative to prayer (c)(i) and (ii) above the operation of the Order dated 15th October 2009 be stayed;"

(s) This Petition was disposed of by the State Commission by the impugned order dated 22.8.2012 in Case 151 of 2011, directing Tata Power to focus all its energy in developing network in 11 clusters identified by the Commission and within 1 year Tata Power shall develop a network such that it would be in a position to connect to any consumer within a period of 1 month. Further, the State Commission granted relief to RInfra by imposing following restrictions on Tata Power:

(i) From the date of the order changeover will be allowed from RInfra to Tata Power only for the residential consumers having an average consumption less than 300 units per month for next 12 months and after that the

Commission will review the position and decide for future.

(ii) Tata Power can switchover existing changeover consumers and only residential consumers having an average consumption less than 300 units per month in the subsequent 12 months, in the identified 11 clusters.

(t) Aggrieved by the impugned order dated 22.8.2012, both Tata Power and RInfra have filed Appeal No. 246 of 2012 and 229 of 2012 respectively.

4. On the above issues, we have heard Shri Vaidyanathan and Shri Ramji Srinivasan, Sr. Advocates for Tata Power, Dr. Abhishek Manu Singhvi and Shri J.J. Bhatt, Sr. Advocates for RInfra

and Shri Buddy Ranganadhan, learned counsel for the State Commission.

5. Keeping in view the rival contentions of the rival parties, the following issues arise for our consideration:

i) **Whether Tata Power has indulged in "Cherry Picking" of changeover consumers supplied electricity on RInfra's network?**

ii) **Whether Tata Power has laid down network selectively to serve high end subsidizing consumers ignoring low end consumers in the proximity?**

iii) **Whether the State Commission had power to issue the impugned directions to the Appellant under Section 23 of the Act?**

iv) **Whether the State Commission has erred in continuing the interim arrangement for supplying electricity to changeover consumers using RInfra's network permitted by the Commission by order dated 15.10.2009?**

6. Let us consider the above issues one by one.

7. **The first issue is regarding "Cherry Picking " of the changeover consumers.**

8. Let us examine the findings of the State Commission with regard to "Cherry Picking". The relevant paragraphs of the impugned order are reproduced below:

"71. In order to assess whether there is any substance in the above-referred allegations made by RInfra-D, the Commission had directed both, RInfra-D and TPC-D to submit the relevant

information regarding the process of accepting Changeover Applications, and the consumer categories that have shifted from RInfra-D to TPC-D based on the Changeover Protocol laid down under the interim Order dated October 15, 2009 in Case No. 50 of 2009, as summarised earlier in the Order. The Commission has analysed the submissions made by the Parties in this regard, the findings of which are given below:

a) TPC-D has submitted the Internal Audit Report on the process being adopted by TPC-D for changeover, the findings of which have been summarised in the earlier paragraphs of this Order, which confirm that certain requirements such as PAN Card, Mobile Telephone Number, and Cheque Details are mandatorily required to be submitted, for an Application to be accepted by TPC-D's system. In reply to a query by the Commission in this regard, TPC-D submitted that there appears to be an error in the Audit Report, and that other documents are also being accepted

towards address proof, and submission of PAN Card is not compulsory. As regards mobile number, TPC-D submitted that even landline telephone number is accepted, and such contact details are required for easier communication with the consumers. As regards need for submission of cheque details, TPC-D has submitted that payment of cheque is not compulsory, and many changeover consumers have paid the requisite amounts in cash. However, the Commission is of the view that TPC-D cannot make such a subsequent denial of the findings of the Internal Audit Report, since, the same has been submitted by TPC-D itself, without any caveats or comments regarding the findings of the Internal Audit Report.

b) TPC-D's Power Supply Application Form, which is a common Application Form for changeover applications as well as new connections, also confirms that submission of PAN Number/TAN Number is a compulsory requirement under a separate head, in addition to PAN Card being

accepted as one of documentary evidence for identity proof. TPC-D has attempted to justify this requirement by saying that PAN details are required for deducting the correct amount of Income Tax (TDS) while paying interest on Consumers' Security Deposit to the consumers, since in case of consumers having Sanctioned Load above 20 kW, the amount of interest may exceed Rs. 5000, requiring TPC-D to deduct tax at source. However, the Commission is of the view that TPC-D's justification has no merit, since this data is being sought from all consumers and not only from consumers having Sanctioned Load above 20 kW. Further, similar complaints have also been received during the Public Hearing on the ARR and Tariff Petitions filed by TPC-D over the last two years.

c) As regards the documents to be submitted along with the application for supply, Regulation 4 of the MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005, specifies as under:

"4. Application for Supply

4.1 The applicant shall provide the following information / particulars/ documents to the Distribution Licensee while making an application for supply or for additional load, shifting of service, extension of service or restoration of supply:

..

d) From the above, it can be observed that PAN Card is not a mandatory requirement at the time of making application for supply. It is also evident that the Regulations envisaged requirement of details such as telephone number that too only of the Licensed Electrical Contractor and not of the applicants. Therefore, the requirement to provide the above-said data along with the Power Supply Application Form, is not in accordance with the MERC Supply Code, and hence, indicate that TPC-D has been attempting to filter the consumers who are changing over from RInfra-D to TPC-D, rather than accepting all complete Applications from all

eligible consumers, in accordance with its mandate as a Distribution Licensee under the law.

e) The Commission had directed TPC-D to submit the data regarding the category-wise number of changeover Applications rejected at the Application stage itself, since, this data was not brought out by the Internal Audit Report submitted by TPC-D. However, TPC-D has been unable to submit this data, which would have revealed whether cherry-picking is happening in the changeover process. TPC-D has submitted that since, there is no benefit in maintaining this data, such data has not been maintained till March 2012, and hence, the same cannot be provided. However, TPC-D's submission in this regard does not have merit, since; TPC-D has admitted that it is maintaining this data from April 1, 2012. Further, the Internal Audit Report submitted by TPC-D itself confirms that even among registered Applications, out of around 1272 applications rejected due to submission of incomplete documents, in 72 sample cases (i.e., 100% of the selected sample), all the required

documents have been ticked in the system as being actually available. TPC-D's explanation in this regard that maybe the consumers did not submit the latest electricity bill of RInfra-D does not appear reasonable.

f) The above analysis show that genuine applications from low-end consumers are likely to have been rejected, which points towards cherry-picking being done by TPC-D in the changeover process, since the addition of only high-end subsidising consumers to TPC-D's consumer base is being allowed.

72. The above analysis shows that in terms of sales, the proportion of changeover of subsidising sales is far higher than that of subsidised sales and comprises 90% of the sales that has migrated to TPC-D, and even in terms of changeover of consumers, the proportion of subsidising category is very high at 39% of the total changeover consumers. Accordingly, the Commission has arrived at the conclusion that a very high number

of subsidizing consumers (with high energy consumption) are changing over to take supply from TPC-D. The Commission is of the view that whether this is because of any intentional action or omission of TPC-D behind this trend is not as much important as the trend itself, because this trend is upsetting the level playing field and hence, is not conducive to a competitive environment in electricity distribution by two Distribution Licensees having a common area of supply".

9. Thus, the State Commission came to the conclusion regarding cherry picking in changeover process on the basis of the following:

(i) Internal Audit Report of Tata Power which confirms that certain requirements such as PAN card, Mobile telephone number and cheque details are mandatorily required to be submitted for an application to be accepted by Tata Power System.

(ii) Tata Power's Power Supply Application Form common for changeover and new consumers confirms that PAN/TAN no. is a compulsory requirement. In addition PAN card is being accepted for Identity Proof.

(iii) As per the Supply Code, PAN card is not a mandatory requirement at the time of submitting the application. Telephone number of the consumers is also not required to be given. Thus, Tata Power has been attempting to filter the changeover consumers.

(iv) Tata Power has submitted that it is maintaining the data for rejection of application only from 1st April 2012 and data prior to that is not available.

(v) In the audit report in 72 sample cases out of total 1272 applications, all the requirements have been ticked in the system as available.

10. The State Commission came to conclusion that very high number of subsidizing consumers with high energy consumption were changingover to Tata Power and this trend was upsetting the level playing field and not conducive to the competitive environment in the common area of supply of both the distribution licensees.

11. Learned Senior counsel for Tata Power on Cherry Picking in Changeover submitted that the findings of the State Commission in the Impugned Order are factually incorrect and are based on arbitrary reasoning which is evident from the following facts:-

(a) Tata Power never resorted to any '*cherry picking*' of high end consumers. The movement of consumers from RInfra to Tata Power was on account of tariff differential between both the

parties. At the relevant time, consumers chose to migrate from RInfra to Tata Power on account of the fact that the tariff of Tata Power was significantly lower than the tariff of RInfra. Subsequently, when the tariff for RInfra has become lower than Tata Power, there is reverse migration of consumers. Therefore, evidently it is the tariff fixed by the State Commission which is ultimately deciding the trend of movement of consumers and in no way can be termed as '*cherry picking*' by Tata Power.

(b) The State Commission in its Press Note dated 22.08.2013 in respect of the multi-year tariff order (for the period FY 2012-13 to FY 2015-16) of R-Infra has acknowledged the fact that it is the difference in tariffs between that of R-Infra and

Tata Power that drives consumers to changeover from one licensee to another.

(c) The State Commission completely ignored the fact that the real rationale in changeover was the difference in tariff for R-Infra and Tata Power (namely issues of *"tariff design"*). As such due to advantage in Tariff for commercial and industrial categories in R-Infra, there is substantial migration of high-end consumers from Tata Power to R-Infra, which is evident from the chart below:-

	Before Migration		Case 151 Submission		FY 2012-13		July, 2014*	
	MUs	%	MUs	%	MUs	%	MUs	%
Subsidising Sales	4849	56%	2475	41%	2,967	47%	4,280	59%
Subsidised Sales	3827	44%	3578	59%	3,379	53%	2,945	41%
Total	**8676**	**100%**	**6053**	**100%**	6,346	100%	7,225	100%

*****_Annualised Sales_

- *Based on Assumption calculated on consumer migrated from Tata Power-D to RInfra*

12. Learned Sr. counsel for Tata Power further argued that the State Commission has itself observed that it is the tariff design and the corresponding economic benefit, which drives the changeover. The State Commission acknowledges that the pattern of changeover would depend upon the difference in tariffs, and it is the category of consumers who find it more beneficial that would changeover. Accordingly, based on the tariffs designed by the State Commission for Tata Power and RInfra in their respective MYT orders, the State Commission has stated in the Press Note, that some consumers would find it beneficial to changeover, whereas most of the other consumer categories would not. Having acknowledged that it is the economic benefit which drives changeover, it is clear that there is no rationale for the directions issued by the State Commission in the Impugned Order

restricting changeover and switchover to '*calibrate*' the migration of consumers. Hence, the directions given in the Impugned Order are unwarranted and unjustifiable. Even otherwise, the findings of the State Commission which led to the Impugned Order are incorrect and are contrary to the facts of the present case which is evident from the following facts:

(a) The State Commission ignored the fact that in FY 2012 Tata Power has given connection to around 1,97,277 consumers in the residential category out of which 1,41,505 number of consumers fall within the 0-300 units consumption category.

(b) The State Commission failed to take into consideration the fact that residential sales grew from 3% in FY 2008-09 to 15% in FY 2011-12 due to changeover and the share of residential consumption out of the total changeover sales

increased from 7% in FY 2009-10 to 26% in FY 2011-12. The aforesaid facts and figures were tendered before State Commission by Tata Power in the presentation dated 13.04.2012.

(c) The total rejection is only 0.7% of the total applications received by Tata Power from the residential consumers. Apart from that, Tata Power has also rejected applications in other categories, such as industrial and commercial. It is submitted that State Commission has only considered the applications rejected by Tata Power and ignored the fact that 99.3% of applications of residential consumers were accepted and allowed with supply by Tata Power,

as detailed below:

Consumers	Total Applications	Total Rejection		Total Accepted & forwarded to RInfra	
		Number	% to Total Applications	Number	% to Total Applications
Residential	2,02,859	1,401	0.69%	2,01,458	99.31%
Commercial	33,364	324	0.97%	33,040	99.03%
Industrial	5,487	36	0.66%	5,451	99.34%
Advertising	18	5	27.78%	13	72.22%
Crematorium	5	1	20.00%	4	80.00%
Temporary	110	-	0.00%	110	100.00%
Blank (No Category)	81	55	67.90%	26	32.10%
Total	2,41,924	1,822	0.75%	2,40,102	99.25%

(d) Further, the State Commission failed to take into consideration that till date, not a single consumer has approached the State Commission or any other fora alleging the rejection of application by Tata Power.

(e) The State Commission has ignored the number of consumers who have migrated from R-Infra to

Tata Power and has decided the issue on the basis of sales to a consumer category which is erroneous. The comparison of sales between domestic consumer and commercial/ industrial consumers is not possible. A single large/bulk consumer such as the Mumbai International Airport Ltd. ("***MIAL***") consumes about 162 MUs annually while a domestic consumer having consumption of 0-300 units can have a maximum consumption of 3600 units in a year. Therefore the comparison drawn by State Commission on the basis of sales is erroneous and liable to be ignored.

(f) In this context it is necessary to point out that the Tata Power is historically having bulk consumers. State Commission failed to take into consideration

that if the legacy consumers are taken out, the share of consumption by Residential Consumer is much more than share of consumption by high end consumers, as detailed below:-

Consumer Category	Estimated as per TPC MYT FY 15 less estimated Reverse Sales				Rinfra MYT Order	
	Overall Consumption	Consumption by Legacy consumers	Net Consumption less Legacy Sales	Share of total (less Legacy)	Consumption	Share of Total
	(MUs)	(MUs)	(MUs)	(%)	(MUs)	(%)
Residential	1789	86	1702	48%	4600	53%
Commercial	1683	610	1072	30%	3314	38%
Industrial	2520	1757	763	22%	799	9%
Total	5991	2453	3538	100%	8713	100%

(g) The State Commission while observing that PAN Card is a mandatory condition for applying for supply of power to Tata Power ignored the submissions of Tata Power that no application was rejected by Tata Power only on the ground that PAN Card details were not submitted. The entire finding of State Commission is based on

the presumption that Tata Power must have rejected the applications in the absence of PAN Card details. In fact Tata Power in its submissions/presentations demonstrated that PAN Card is not a mandatory requirement for the submission of applications. Factually, nearly 31% of the applications were accepted by Tata Power in the residential category between 0 - 300 units, where identity proof other than PAN Number was tendered by consumers such as passport, driving license, photo pass, voters ID, senior citizen identity card, etc.

(h) PAN Card is not a mandatory requirement for applying for supply of power from Tata Power – it was only an option/alternative to other address proof documents. As an analogy, it is submitted

that whilst booking railway tickets under the tatkal scheme, PAN Card is only one of the alternatives for booking the ticket – it does not imply that the ticket would not be booked unless the PAN Card details are provided. Further, even while depositing money in a bank account, PAN Card Number is an optional requirement and not a mandatory requirement – money can still be deposited in a bank account without the PAN Card Number. It is thus incorrect on the part of State Commission to hold that Tata Power has been *'cherry-picking'* consumers by making PAN Card details as a mandatory condition.

(i) It is also pertinent to note that the State Commission has not referred to any complaints having been received from any consumers of

having applied to Tata Power for changeover and having been refused supply. In the absence of such finding, the allegation of cherry picking is without any merit.

13. Shri Buddy Ranganadhan, Learned counsel for the State Commission made detailed submission in support of the findings of the State Commission which are summarized as under:

(a)The Commission has found, inter alia, on the basis of the materials available before it that the systems of Tata Power are geared towards acceptance of changeover applications from relatively high end consumers and conversely are geared (intentionally or unintentionally) towards not accepting applications from low end changeover consumers.

(b) The Audit report submitted by Tata Power itself has proved the rejection of application forms of low end consumers.

(c) It is worthwhile to note that as found by the Commission in the impugned order what is important is the level of consumption of high end connections changed over and not the number of high end consumer having changed over. There is virtually no argument raised by the Tata Power that the findings in the impugned order is, in any way, wrong on facts.

(d) It is eminently clear that whilst the explanation given by the Tata Power pertains to its application form, the Audit Report referred to the system and process of Tata Power. Hence the clarification given by Tata Power does not, in fact, answer the

findings of the Audit Report that the system and process of Tata Power were responsible for the trend of cherry picking in changeover consumers.

14. Dr. Abhishek Singhvi and Shri J.J. Bhatt also made elaborate submissions which are summarized as under:

(a) The findings of the State Commission in respect of cherry picking on changeover process is not based merely on the internal audit report of the Tata Power but is on an independent examination of the actions of Tata Power by the State Commission, Tata Power having been given adequate and ample opportunity to explain the said actions as is clear from the order itself.

(b) The State Commission has clearly found independently that on examination of application

forms, requirement of mentioning PAN/TAN No. is compulsory in addition to the optional production of PAN Card as being one of the accepted documentary evidence. While the production of PAN Card may be optional, the requirements of mentioning PAN/TAN No. is compulsory and non-mentioning of such compulsory requirement has enabled Tata Power to filter out the applications of low end consumers who may not have a PAN number but may be able to produce other documentary proof of residence. This is precisely what the audit report says.

(c) Tata Power were given an opportunity to explain the internal audit report and the alleged error therein. Tata Power purported to give some sort of an explanation which has been rejected by the

State Commission. The State Commission after consideration of all the material has come to the conclusion that genuine applications from low end consumers were likely to have been rejected and addition of only high end subsidizing consumers to Tata Power consumer base was allowed.

(d) In regard to the allegation that the changeover was more as a result of disparity in tariff rather than any cherry picking action on the part of Tata Power, RInfra submitted that as set out in the impugned order there was deliberate cherry picking in as much as low end consumers desirous of shifting to supply from Tata Power were filtered out. Thus, the said issue was not a tariff issue as is being contended by Tata Power.

(e) Tata Power's contention that no complaints were received as regards unjustified filtering out of low end consumers is concerned, the State Commission has clearly found that continuously in various tariff proceedings of Tata Power, the State Commisison received complaints during public hearings.

(f) As a result of migration of subsidizing consumers, the subsidizing sales of RInfra have reduced as under:

	Before Migration		Migrated break up		After Migration	
Subsidising Sales (MU)	4849	56%	2374	90%	2475	41%
Subsidised Sales (MU)	3827	44%	249	10%	3578	59%
Total	**8676**	**100%**	**2623**	**100%**	**6053**	**100%**

Thus, the migration has upset the level playing field beteween them. Tata Power has produced data

for period subsequent to the impugned order which is not permissible.

(g) The contention of Tata Power that connection was given to 1,97,297 consumers in residential categories out of which 1,41,505 fall in 0-300 units category has been ignored is also fallacious. The said numbers if translated in terms of energy show that the proportion of subsidizing changcover sales is 84% as against 16% of subsidised sales.

(h) The restrictions were necessitated by reason of conduct of Tata Power and the State Commission has rightly calibrated the process of changeover and switchover.

(i) In order to create a level playing field for the competition it is necessary to bring the per capita

consumsption of the two licensees at par by regulating Tata Power so that it connects only low end consumers till the per capital consumption on its network is equal to that of RInfra.

15. We find that the conclusion of the State Commission that Tata Power has been indulging in "Cherry Picking" in changeover consumers is mainly based on the findings that:

(a) Tata Power's application form for power supply has mandatory requirement of PAN number.

(b) The Regulation 4 of the State Commission's Supply Code, 2005 do not specify the requirement of PAN Card in the application form for supply.

(c) The level of consumption of high end connections changed over and not the number of high end consumer having changed over is important. The

consumption of high end consumers changed over to the Tata Power is very high as compared to the consumption of low end consumers during the relevant period. This consumption pattern of high end consumers vis-à-vis low end consumers would it self point out that the Tata Power had been indulged in Cherry Picking.

16. We find that the State Commission has considered the report of M/s. Aneja Associates, the internal auditors of Tata Power in the impugned order. The report indicated that about 2,41,924 applications for changeover were received between October 15, 2009 to December 31, 2011, of which about 1822 were rejected by Tata Power primarily due to non-availability of adequate documents from the consumers. Of the balance 2,40,102 applications,

3626 applications were rejected by RInfra due to various reasons such as arrears, vigilance, etc; whereas 7508 applications were awaiting initial feed back from RInfra as on December 31, 2011. Consequently, 2,29,164 changeover consumers were given supply during the period. Thus, out of 2,30,790 eligible consumers (total applications less those rejected and awaiting initial feed back from RInfra) 2,29,164 were given supply by changeover to Tata Power, i.e. 99.3%. The Auditors also noted that the processes have evolved and matured since October 2009 and as far as possible, system support is used especially for monitoring the applications and adherence to these processes was satisfactory. However, the report has indicated that data fields relating to PAN, cheque details and Mobile number, etc., are mandatory for creation of report.

17. We have also examined the Application form for power supply which is a common form for new connection as well as changeover consumers, for all categories. The first page of the Application Form which is to be filled up by the consumer has field for PAN No. and Phone/Mobile no. The second page bottom portion of the form is for office use only. It clearly indicates that for ownership/ occupation proof, any one of the ration card, voter ID card, passport, owner's NOC with agreement, etc. is required. For identity proof, any one of the voter's ID card, passport, PAN card, driving license, photo pass, etc., is required. Complete reading of the two page form would show that PAN card and Mobile no. are not mandatory.

18. However, the Auditors' report indicates that data filed relating to PAN card no. and mobile no. were mandatory, though it is denied by Tata Power. We do not want to go into the controversy as the total rejection as per the Auditor's report was only 0.7% of total applications after deducting the applications rejected or awaiting no objection from RInfra. Tata Power has also given data regarding category wise applications received and rejection which also indicates rejection of 0.69% in residential category, 1,41,505 connections given to consumers falling within consumption of 0-300 units and progressive rise of sales in residential category and increase in residential sales out of total changeover sales from 2008-09 to 2011-12. Tata Power has also made changes in Application Form as per the directions of

the State Commission and is also maintaining the record of the rejection of application from 1.4.2012.

19. Section 43(1) of the Electricity Act, 2003 provides for the distribution licensee on an application by the owner or occupier of any premises shall give supply of electricity within one month after receipt of the application requiring such supply. The explanation u/s 43(1) inserted by Act 26 of 2007 on 15.6.2007 provided that for the purpose of this sub-section "application" means the application complete in all respects in the appropriate form as required by the distribution licensee. Accordingly, Tata Power devised on Application Form for new connection and for changeover consumers. In this form there are fields relating to certain additional information like PAN and mobile number/telephone no. which are not stipulated

in the Supply Code Regulations, 2005. We do not think that the inclusion of the above fields in the Application form should lead the State Commission to come to the conclusion that Tata Power was cherry pricking the changeover consumers. The facts about number of residential consumers allowed changeover, a large number of which were in 0-300 units sub-category do not indicate so. In any case, Tata Power has taken corrective action and revised the Application Form on the directions of the State Commission and has also been maintaining the record of the rejected applications which are rejected since April, 2012. Further improvement was possible by giving directions for giving public notice that giving PAN no. is not a mandatory requirement for changeover.

20. The State Commission has seen that proportion of subsidizing category in changeover consumers is 39% of total changeover consumers. The State Commission is of the view, as indicated in the paragraph 72 of the impugned order, that whether the increasing energy consumption of subsidizing consumers is because of any intentional action or omission of Tata Power is not so much important as the trend itself, because the trend is upsetting the level playing field and, therefore, not conducive to a competitive environment in electricity distribution.

21. As indicated by Tata Power out of 2,40,102 consumer applications accepted for changeover (84%) were residential and about 16% were commercial and industrial. Again out of 1,97,277 consumers in residential category who were given connections

1,41,505 (71.7%) were within the 0-300 Units category. Thus, the subsidized consumers who were given connection were 71.7% in terms of number of consumers. It is an accepted fact that the load of commercial and industrial consumer is much more than a residential subsidized consumer. For example, a subsidized residential consumer may have a load of 2 KW and a commercial consumer 1000 KW i.e. 500 times the subsidized consumer.

22. The Commission has also based its findings citing the trend in the changeover. It observed that the annual consumption of high end consumers is much higher than the consumption the low end consumers. While doing so the Commission has ignored the fact that the Tata Power was distribution licensee since 1907. During the period between 1907 to 2002 Tata

Power was supplying power to other licensee as well as consumers having demand exceeding 1000 kW. Such consumers which were being supplied by the Tata Power before the order dated 15.6.2009 have been termed by the Tata Power as legacy consumers in its submission. The data submitted by Tata Power from their estimates for FY 2015 show that if the consumption of legacy consumers is deducted, then out of the balance consumption of 3538 MU, the share of residential consumers is about 1702 MU which is 48%.

23. Thc provision for a second distribution licensee in the Act has been given to promote competition the benefit of which should go to the consumers. The proviso to Section 62 also provides that in case of distribution of electricity in the same area by two or

more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees fix only maximum ceiling of tariff for retail sale of electricity. Thereafter, the distribution licensees depending on their own economics, offer competitive tariffs to attract the consumers. In this case the State Commission has not determined the ceiling tariff but fixed different retail supply tariffs for Tata Power and RInfra. The consumer has to ultimately decide the distribution licensee from whom he wants to take the supply. The consumer would normally choose the licensee primarily on the basis of tariff and reliability of supply. For changeover consumer the reliability of supply is the same irrespective of whether the supply is from RInfra or Tata Power. Therefore, the tariff alone is the criteria for the consumer to decide the changeover.

24. The concept of level playing field is that the players in the market get an equal opportunity of competing with each other without any bias and are subjected to same rules of the competition. The competitors should be able to offer the price at which they want to supply power and let the market forces determine the rest. In this case the State Commission has determined the tariff for different categories of consumer for both the licensees following the same Regulations. It is for the consumer to decide the choice of its supplier. However, the State Commission has to ensure that no licensee is putting road blocks in the consumer making his own choice of supplier. In this case it is not established conclusively that Tata Power was intentionally trying to create a road block to avert changeover of certain categories of consumers and indulging in Cherry picking of changeover

consumers. By putting restriction on some categories of consumers to changeover to Tata Power, the State Commission has denied choice to certain categories of consumers to avail supply at cheaper tariff to which they are entitled as per the scheme of the 2003 Act and also as per the changeover protocol devised by the State Commission. Rather than putting restriction on changeover, the State Commission should have taken measures to ensure that adequate publicity is given to the effect that PAN no., etc. were not necessary for applying for changeover and ensured that the internal systems of Tata Power are also functioning accordingly.

25. The movement of consumers from one licensee to other licensee in the same area of supply would be on account of tariff differential between both the

Licensees. Tata Power has claimed that at the relevant time, consumers chose to migrate from R-Infra to Tata Power on account of the fact that the tariff of Tata Power was significantly lower than the tariff of R-Infra. Subsequently, when the tariff for R-Infra has become lower than Tata Power, there is reverse migration of consumers.

26. Therefore, evidently it is the tariff fixed by the State Commission which is ultimately deciding the trend of movement of consumers and in no way can be termed as '*cherry picking*' by Tata Power.

27. Another important aspect on the issue is that Tata Power has claimed that there had been no consumer's complaint regarding refusal of changeover. The Commission, however, has recorded in para 71(b) of the Impugned Order that the Commission had

received similar complaints during Public hearings on the ARR and the Tariff Petitions of the TPC-D during last two years. We fail to understand as to why the State Commission did not conduct enquiry on the complaints and directed Tata Power for corrective action, if any.

28. The State Commission in its written submission has relied on the Judgment of the Hon'ble Supreme Court in the case of Maharashtra Electricity Regulatory Commission Vs Reliance Energy Ltd and Others (2007) 8 SCC 381 and has quoted the portions of this judgment in its Written Submissions in support that the Commission has powers to direct Tata Power under the Electricity Act. While relying heavily on this judgment, the Commission has ignored the ratio of the judgment wherein the Hon'able Supreme Court

has ruled that the Commission, upon receipt of complaints from the consumers inflated bills raised by the licensee, had power to conduct investigations under Section 128 and take appropriate action following the procedure laid down by Section 128. The Relevant extract of the Hon'ble Supreme Court's Judgment is reproduced below:

17. In exercise of this general power notice dated 3.8.2004 was issued when mass scale supplementary/amended bills were issued to the consumers. ***When these consumers approached the Commission, the Commission directed its licensees to immediately review their billing policies and bring the same in conformity with the statutory provisions of the Act. The Commission did not get an investigation made under Section 128(1) which it could have done, and without that, and without getting a report under Section 128(5) it passed an order directing refund of the amounts collected by***

the licensees/distribution companies, which in our opinion was not permissible, since such a direction could, if at all, be given after getting a report of the investigation agency. The Commission could have made an investigation and got a report from the investigation agency and on that basis directions could have been given. However, that was not done. *In these circumstances, in our opinion, the view taken by the Appellate Authority in the impugned order to that extent is correct that the individual consumers should have approached the appropriate forum under Section 42(5) of the Act.*

29. Section 128 of the Electricity Act, 2003 is reproduced below:

> "***128. Investigation of certain matters.***—*(1) The Appropriate Commission may, on being satisfied that a licensee has failed to comply with any of the conditions of licence or a generating company or a licensee has failed to comply with any of the provisions of this Act or the rules or regulations made*