Before the Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No. 76 of 2011

Dated : 2nd March, 2012

Coram; **HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**
HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

In the matter of

Punjab State Transmission Corporation Limited
PSEB Head Office,
The Mall, Patiala- 147 001,
Punjab …. Appellant

Versus

1) Punjab State Electricity Regulatory Commission
SCO No. 220-221,
Sector 34 A, Chandigarh- 160 022

2) Punjab State Power Corporation Limited
PSEB Head Office,
The Mall, Patiala-147 001,
Punjab

3) Shri P.C. Dewan,
Induction Furnace Association of North India,
Room No. 212, 2nd Floor, Savitri Complex,
G.T. Road, Ludhiana-141 003

4) Shri Bhupinder Singh,
General Secretary,
PSEB Engineers's Association,
45, Ranjit Bagh, Near Modi Mandir,
Passey Road, Patiala-147 001

5) Shri A. Puri,
General Manager, (Proj. & Materials),
Punjab Alkalies & Chemicals Limited,
SCO 125-127, Sector 17 –B,
Post Box No. 152,
Chandigarh-160 017

6) Er. Padamjit Singh,
Patron, PSEB Engineers Association,
45, Ranjit Bagh, Opp. Modi Mandir,
Passey Road, Patiala- 147 001

7) Government of Punjab
Through the Secretary, Department of Energy,
Mini Secretariat, Sector-9
Chandigarh-160 009 … Respondents

Counsel for the Appellant : Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran

Counsel for the Respondent (s) : Mr. Sakesh Kumar for R-1
Mr. Karunakar Mahalik for R-

JUDGEMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. The Punjab State Transmission Corporation Limited (PSTCL), an entity established under the Companies Act, 1956, with effect from 16th. of April,2010 following unbundling of the erstwhile Punjab State Electricity Board to carry out the function of intra state transmission of electricity within the State of Punjab has preferred this appeal being aggrieved by the order of the Punjab State Electricity Regulatory Commission, the respondent no.1 herein passed on 09th May,2011 in Petition No. 45 of 2010 whereby it determined the annual revenue

requirement and the transmission tariff and the SLDC charges of the appellant for the FY 2011-12 and undertaking the review of the financials of the FY 2010-11.

2. The Punjab State Power Corporation Limited (PSPCL), also a successor entity of the erstwhile Punjab State Electricity Board following bifurcation of the said Board is the respondent no2, and it is the business of distribution that is being carried out by this entity. The Government of Punjab who is the last respondent, being no.7, and four other respondents are the non-contesting ones, while the Commission preferred to contest by furnishing a written note of arguments and the PSPCL filed a counter affidavit to counter some of the contentions of the appellants while conceding to some points raised by the appellant.

3. The Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 was notified on 21.11.2005 and it was amended on 27th July, 2009, while the National Tariff Policy was notified under section 3 of the Electricity Act, 2003 on 06th January, 2006.

4. It is necessary to remember that on 23rd April, 2010 the State Commission passed a tariff order relating to generation, transmission and distribution business of the Punjab State Electricity Board (PSEB), while the PSPCL and the PSTCL came to be in existence with effect

from 16th of April, 2010.The PSTCL, the appellant herein is also carrying out the functions of SLDC.

5. The appellant filed a petition, being no. 45 of 2010 before the State Commission for approval of ARR and determination of tariff for the financial year 2011-12 for transmission and state load despatch functions. On account of the fact that at the time of filing of the aforesaid petition the Government of Punjab had not finalized the transfer of assets and liabilities from the erstwhile PSEB the appellant submitted its ARR on the basis of the provisional figures from 16.4.2010 to 30.9.2010, estimates from October,2010 to March,2011 and projections for 2011-12.

6. By the order dated 09.05.2011 the Commission decided the following:-

a) Review of the ARR of the transmission and state load despatch business for the FY 2010-11

b) ARR and the Transmission Charges for the appellant for the FY 2011-12

c) ARR and SLDC charges for the FY 2011-12.

7. In the instant appeal the appellant has raised the following points:-

1. Employees cost and other O&M expenses

2. Capital expenditure

3. Interest payable by the appellant on account of diversion of funds

4. Depreciation

5. Return on equity

6. Treatment of revenue gap with the erstwhile PSEB

7. Payment security mechanism

8. Of the seven points it is the issue on the employees cost that is the bone of contention, so far as the appellant is concerned. According to the appellant, the Commission committed error in reducing the cost of the employees for the financial year 2011-12 on the basis of the bifurcation of the PSEB expenses and determining the cost to be allocated to the PSTCL (appellant)for the FY2010-11by applying the principle of allowance of proportionate cost allowed to the erstwhile PSEB in the year 2009-10; and for the year 2011-12 also the Commission applied the methodology of the proportionate reduction vis-a-vis the erstwhile PSEB and holding that employees cost should stand reduced by 28.48%. The Commission should have examined the case of the appellant on merit instead of proportioning the same to either the expenses of the integrated PSEB or the expenses to be allowed or disallowed in the case of the respondent no2, the PSPCL. The Commission failed to consider that the employees cost for the FY 2009-

10 which was taken as the base year for calculation of the employees' cost of the appellant for the year 2010-11 and FY 2 011-12 was determined on the basis of the salaries prior to the 5th Pay Commission for the months from April,2009 to October,2009. The Commission in determining the O&M Expenses for the appellant ought to have applied the State Tariff Regulations as notified and as amended clearly providing therein that the O&M Expenses for the transmission utility shall be guided by the CERC Regulations as notified. The Central Regulations,2009 clearly mandate application of the normative instead of the actual. The employees costs claimed by the appellant for the transmission activities and for the activities of the SLDC both for the financial year 2010-11 and FY 2011-12 are comparable to and consistent with the Central Regulatons,2009. The Commission erred in disallowing 28.48% from the amount of arrears payable by the appellant solely on the ground that the State Commission had in the past disallowed on an average 28.48%of the employees' cost claimed by the erstwhile PSEB. The Commission should have allowed the arrears as per the actuals and should not have disallowed the same without any reason or justification for the same. The Commission failed to take note of the fact that the appellant initiated independently a number of activities, namely planning, safety, quality assurance, human resources, IT, Corporate Office, commercial and regulatory affairs , legal accounts,

finances, auditing etc., and various miscellaneous activities. The Commission erred in disallowing R&M Expenses and A&G Expenses relatable to the additional assets added during the FY 2011-12 contrary to the regulations 28(4) of the Tariff Regulations,2005 and inconsistent with the methodology adopted in the review of the ARR for the year 2010-11 in the impugned order. The Commission should have considered the increase in the R&M and A&G Expenses on account of additional assets likely to be added during the financial year 2011-12 in determining the ARR instead of postponing the same to the review in the next financial year.

9. With regard to the capital expenditure it is contended that the Commission ignored the substantial projects being undertaken by the appellant to meet the growing load demand of power and it submitted a comprehensive transmission plan, called investment plan containing details of the works to be undertaken during the period 2010-11 and 2011-12 under regulation 22 of the State Regulations, 2005 as amended in 2009. The Commission erred in not allowing the entire proposed investments by the transmission company and reducing the quantum of investments to Rs.400 crore. The Commission erred in disallowing part of the capital expenditure proposed by the appellant for its SLDC business even though the State Commission had accepted

that the expenditure was necessary for efficient operation and better viability of the grid.

10. The Commission erred in disallowing the interest cost payable by the appellant following the past practice of disallowance of interest cost on account of diversion of funds. The Commission failed to consider that the appellant has not claimed any interest as being payable to the State Government and hence disallowance of interest and holding that the same is to the account of the Government of Punjab and the appellant is erroneous.

11. In the matter of depreciation the Commission, it is alleged, did not consider the assets added during the year which is contrary to the regulatios27(4) of the State Tariff Regulations,2005, as amended clearly providing that the depreciation will be chargeable from the first year of operation and further provides for pro-rata depreciation for assets commissioned and operating for part of the year. Further, the Commission erred in applying the weighted average rate of depreciation as 4.81% on the Gross Fixed Assets to be allowed instead of taking the same as 4.88% The rate of 4.88%has been worked out by the Commission itself for the year 2009-10.

12. The Commission erred in calculating the return on equity at 14% instead of 15.5% claimed by the appellant. Regulation 25 of the Tariff

Regulations, 2005 provides that the State Commission shall, in computation of Return on Equity be guided by the Central Regulations, 2004, as amended from time to time. The Central Regulations, 2009, regulation 15 (2) provides that Return on Equity shall be computed on pre-tax basis at the base rate of 15.5% to be grossed up as per the clause (3) of the said Regulations subject to the rider that that an additional return of 0.5% shall be allowed in the case of projects being commissioned on or after 1st of April,2009 if the projects are completed within the timeframe as specified in Appendix-II.

13. The Commission failed to appreciate the revenue gap claimed by the appellant in the ARR for the year 2011-12 and it was in error in withdrawing the entire revenue gap of the erstwhile PSEB to the PSPCL instead of proportionate division of the gap among the successor entities of the erstwhile PSEB including the appellant.

14. The appellant proposed for the security and payment mechanism from the PSPCL to enable the appellant to leverage the same for raising the finances. Such payment security mechanism in the form of Letter of Credit and Escrow arrangements proposed by the appellant was necessary and consistent with the established commercial principles. The Commission failed to consider the same.

15. The respondent no. 2, the PSPCL also a successor entity of the erstwhile PSEB in its counter affidavit contends as follows:

a) The Board, in its ARR Petition for FY 2010-11, had projected net employee cost of Rs. 3,566.57 crore for FY 2010-11. The Commission had approved Rs. 2,989.83 crore on this account after deducting Rs. 100 crore on account of the Board's alleged failure to rationalize manpower expenses. The Commission had also segregated the approved employees cost between different functions of the Board in the Tariff Order for FY2010-11. The employee cost segregated for transmission business of the Board was Rs. 252.64 crore. The appellant furnished its estimation of employee cost as Rs. 270.95 crore for FY 2010-11, net of capitalisation of Rs. 53.35 crore, inclusive of terminal benefits of Rs. 27. 69 crore and Rs. 44.36 crore on account of arrears due to pay revision. The Appellant claimed employee cost of Rs. 226.59 (revised) crore for FY 2010-11 inclusive of terminal benefits of Rs. 27.69 crore. Since terminal benefits are to be allowed on actual basis as per Regulation 28(8) the Commission allowed terminal benefits of Rs. 27.69 crore for FY 2010-11.The appellant claimed Rs. 198.89 crore as other employee expenses excluding terminal benefits in FY 2010-11 and such other employee expenses is to be limited to average increase in WPI and the Commission calculated the average WPI increase of 7.55 %,while the Commission approved other employee expenses of Rs. 1375,93 crore for the erstwhile PSEB during true up of FY 2009-10. After bifurcating the approved other employees expensess of the Board in proportion to the average number of employee of the Respondent No. 2 and the appellant the approved other employee expenses for the Appellant for FY 2009-10 worked out to be Rs. 92.05 crore which after applying the WPI of 7.55 % came to be Rs. 99.00 crore for the FY 2010-11.

b) The Commission disallowed Rs. 100 crore from the approved employee expenses for FY 2010-11 on account of the Board's alleged failure to finalise the study on rationalisation of manpower. The share of the appellant was worked out at Rs. 6.69 crore which was disallowed by the Commission in respect of the appellant from the approved employee expenses for FY 2010-11. The Commission accordingly allowed approved employee cost of Rs. 120 crore (27.69+99.00-6.69). The respondent No. 2 supports the case of the appellant with regard to reduction of employee cost for 2010-11 by 28.48%.

c) The respondent No. 2 agrees with the appellant that since the appellant was liable to pay the revised salary for the entire year 2010-11 and 2011-12 the base year employee cost of 2009-10 should have been revised proportionately.

d) With regard to repair and maintenance expenses the PSPCL contends that the base R &M expenses for the appellant works out to be Rs.41.02 crore which finally upon application of WPI of 7.55% of the R & M expenses was worked out to be Rs.45.04 crore. The appellant claimed additional R&M expenses of Rs. 10.91 crore (inclusive of Rs. 0.06 crore on account of SLDC) in the ARR petition for FY 2011-12 . The Commission restricted the claim of asset addition to Rs. 302.03 crore in FY 2010-11, based on the ratio of sum of opening Capital Work in Progress (CWIP) and capital expenditure estimated by the appellant. As per Regulation 28(6) of the PSERC Tariff Regulation, R&M expenses are allowable for additional assets added during the year on a pro-rata basis from the date of commission of assets. Based on the ratio of approved R&M expenses of Rs. 45.04 crore and opening Gross Fixed Assets of Rs. 2112.92 crore (which works out to 2.13%), additional R&M expenses of Rs. 3.22 crore are approved for FY 2010 -11. Thus, the total allowable R&M expenses for the

Appellant for FY 2010-11 work out to Rs. 48.26 crore (45.04+3.22). Accordingly, the Commission approved Rs. 48.26 crore as R&M expenses for the Appellant for FY 2010-11.

e) With respect to the A & G expenses the amount in respect of the transmission business for FY 2010-11 was Rs. 14.48 crore and the appellant for FY 2011-12 claimed Rs. 16.75 crore inclusive of Rs. 0.81 crore on account of SLDC, and Rs. 3.64 crore on account of additional A&G expenses for addition of asset in 2010-11. The Regulation 28(4) (a) of the PSERC Tariff Regulations provide for adjusting base O&M expenses in proportion to increase in WPI to determine O&M expenses for subsequent years. Based on the WPI increase data available for 5 months (April 2010 to August 2010), the Commission calculated the average WPI increase of 7.55 % which was adopted for purposes of calculation of allowable A&G expenses. The base A&G expenses of Rs. 81.12 crore was bifurcated between the respondent No. 2 and the appellant in the ratio of Grass Fixed Assets (GFA) of the respondent No. 2 and the appellant as on April 1, 2010 . Thus , the base A&G expenses for the appellant work out to Rs. 8.36 crore after apportioning a sum of Rs. 81.13 crore in the ratio of Gross Fixed Assets of the respondent No. 2 and the appellant as on April 1, 2010 . Applying the increase in WPI of 7.55 % , the A&G expenses for FY 2010-11, worked out to be Rs. 8.99 crore for the appellant . The appellant claimed additional A&G expenses of Rs. 3.66 crore (inclusive of Rs. 0.2 crore for SLDC) wich was determined by considering asset addition of Rs. 623.73 crore (inclusive of Rs..16 crore pertaining to SLDC). Based on the ratio of approved A&G expenses of Rs. 8.99 crore and opening Gross Fixed Assets of Rs 2,112.92 crore (which works out to 0.43%)the additional A&G expenses of Rs. 0.65 crore is approved for FY 2010 -11 . Thus, the total allowable A&G expenses for the appellant for FY 2010-11 works out to Rs. 9.64 crore (8.99+0.65). Accordingly, the Commission approved Rs. 9.64 crore as A&G expenses for the appellant for FY 2010 -11.

f) With regard to the depreciation charge the Commission found net depreciation of Rs. 98.09 crore for transmission business of the erstwhile Board for FY 2009-10 and the average rate of depreciation was worked out at 4.81% which was applied to the GFA of the Appellant to derive a figure of Rs101.63 crore for FY 2010-11.

g) Regarding diversion of capital funds the share of the appellant as on 1st April, 2010 out of Rs 240.40 crore came out to be Rs. 24.77 crore which was disallowed by the Commission and the

Commission approved net interest charges of Rs. 84.97 crore for the appellant for FY 2010-11.

h) With respect to return on equity the PSPCL agrees with the appellant that the Commission completely ignored the regulation for determining ROE on the basis of past practice.

i) With regard to ARR in respect to the appellant for FY2011-12 the respondent no. 2 does not contend anything.

j) With respect to payment security it is submitted that the payment security mechanism as per CERC Regulations is Letter of credit and the same has been provided in Transmission Service Agreement between the Respondent No. 2 and PGCIL recently signed. As such LC will be provided as per CERC regulations.

16. The Commission has submitted a written note of arguments, though not a counter affidavit, contending that the Commission determined the employees cost as per regulation 28(4) of the PSERC Regulation 2005 stipulating that employees cost should be determined on the basis of WPI of the relevant year and regulation 28 (3) of the 2005 Regulations only provides that the CERC regulation 2004 shall be a guiding factor as far as feasible .It is contended that the Regulation 28(3) of the State Tariff regulations,2005 makes it

very specific that the Commission will keep it in mind the fact the CERC Regulations mainly relate to interstate transmission of higher quantum of energy and an extra high voltage over long distances whereas the transmission tariff to be determined by the Commission will be relating to intra state transmission of lower quantum of energy at relatively lower voltage and over short distances .Since the WPI for 2011-12 was not available , the Commission relied upon the data of the previous year as per the normal practice. The Commission allowed employees cost of Rs.162.82 crore for the transmission business and Rs.3.32 crore for the SLDC business .

17. It is next contended that the appellant itself had based its claim in its ARR with reference to the WPI indices as per the State Tariff Regulations, 2005 and payment of arrears on account of pay revision in accordance with the Regulations 28(4) (b) of the PSERC Tariff Regulations,2005. The Commission has in consonance with its Regulations and after duly considering the claim of PSTCL determined the ARR of the appellant in accordance with the PSERC Tariff Regulations, 2005. The appellant has not claimed that its ARR should be decided in accordance with the CERC Regulations. The appellant has tried to make out a case as an afterthought. The appellant has stated that it commenced its business as a deemed

transmission licensee under section 14 of the Act and was also notified as a State Transmission Utility by the Government under section 39 of the Act. It further intimated that that the opening balance as given in the balance sheet of the PSTCL as on 31.3.2009 was also provisional. Its ARR was also provisional and till the date of finalization of the tariff order for the FY 2011-12 the Government of Punjab has not finalized the transfer of assets and liabilities of the successor entities i.e. PSTCL and PSPCL. The Commission in its previous tariff order had observed that the provisional balance sheets of the two successor entities ending March, 2009 as appended to the Transfer Scheme showed significant variations when compared to the audited balance sheet of the integrated utility. Therefore, the Commission deemed it proper to rely on information filed by the erstwhile Board in its ARR petition for FY 2010-11 and not on the provisional balance sheet for the purpose of determination of ARR and Tariff for FY2010-11. On the same lines for the FY 2011-12 also, the Commission determined ARR and transmission tariff based on the submission of the appellant in its ARR and Tariff Petition for 2011-12. The claim of the PSTCL in the ARR of 2011-12 is provisional as per the claim of the appellant's own submission and is subject to finalization of the balance sheets as on 16.04.2010 and its audit by the CAG. The appellant also informed that the Fixed Asset

Register as well as the Financial Restructuring Plan were yet to be finalized by the Government. Thus, all the claims of the PSTCL will be subject to change after such finalization. In fact, the claim of the appellant is based on estimates and projections for 2010-11 and 2011-12. The claim of the appellant has been considered and allowed in keeping with the Regulations laid down by the PSERC without any departure.

18. The Commission took into account the employees cost claimed by the Board for the three years 2007-08, 2008-09, and 2009-2010 and the cost allowed by the Commission in these years. It noted that on an average for all the three years the employees' cost allowed by the Commission was 28.48%less than the amount actually claimed by the Board. Thus the Commission was justified in disallowing its employees cost to the extent of 28.4% in order to allow only the justified cost to the appellant rather than the actual employees cost as claimed by the appellant in its ARR. In this connection, the Commission has drawn the attention of the Tribunal to the decisions of this Tribunal in the Appeals no. 4 of 2005, 153 of 2007 and 99 of 2009 and submits that the decisions reached therein in these respects are final and cannot be allowed to be re-agitated afresh.

19. As regards the capital expenditure, it is contended by the Commission that it allowed capital expenditure of Rs.600 crores relying on the capital expenditure of Rs.306 Crore from April,2010 to January,2011 instead of Rs1367.44 Crore and pro-rata expenditure for the months of February and March,2011. An examination of the ARR showed that the projected expenditure for the year 2011-12 was on the higher side when compared to the actual expenditure level achieved by the transmission licensee for the previous year. The Commission accordingly allowed an expenditure of Rs.600 crore which was 50% higher than the previous year 2010-11. The Commission made it clear that increase in capital expenditure, if any, will be considered by the Commission during review of FY 2011-12.

20. During the processing of the ARR the PSTCL itself. so far as the SLDC business is concerned, reduced its claim of capital expenditure to Rs.30 crore for FY 2011-12, and the Commission after consideration approved capital investment of Rs.25.00 crore as against the claim of Rs. 30 crore. Thus the total capital expenditure for the FY 2011-12approved by the Commission was worked out to be Rs.625.00 Crore.

21. It is contended by the Commission that the appellant itself proposed investment plan of Rs.843.04 crore against which the

Commission approved investment plan of Rs.400 Crore based on investment level of Rs.306 crore achieved by the utility from April, 2010 to January,2011. The appellant itself has communicated on 20th June, 2011 by a communication and confirmed that a total investment of Rs.414.69 Crore was made for FY 2010-11.The Commission was therefore justified in approving capital expenditure of Rs.400 crore for the FY 2010-11. The Commission has drawn the attention of this Tribunal to the paragraph 3.7.2 of the Commission's order in this respect.

22. With respect to the interest payable by the appellant on account of diversion of funds the Commission has drawn the attention of the Tribunal to the two decisions of this Tribunal rendered in Appeal no.5 of 2008 and 63 of 2008 and submitted that the Tribunal held that the Commission correctly decided to burden the Government with the interest on diverted funds. The Commission disallowed interest cost of Rs.100 crore of the Board and the rest of the interest on diverted funds was attributed to the Government. Thus, the appellant has an inherited liability of proportionate diversion of capital funds for revenue purpose and accordingly proportionate disallowance of interest was made by the Commission.

23. In the matter of depreciation it is pointed out that the rate of 4.81% is based on the audited accounts of the Board for the year 2008-09. The Commission insisted the appellant on emphasizing the necessity of applying asset category wise depreciation rate as notified by the Government of India and despite direction made by the Commission the appellant’s predecessor was unable to submit actual figures of addition in fixed assets and furnish information with regard to the date of commissioning each asset .Accordingly, the Commission considered it appropriate to take into account addition to assets only after the same are got validated in audit. The asset register of the erstwhile Board was not complete and it failed to provide adequate information of its assets as required by the Commission. Accordingly, the Commission had no other alternative than applying the methodology of the weighted average rate of depreciation derived from the audited accounts of the erstwhile board while approving depreciation charges in its successive tariff orders.

24. As regards return on equity the Commission justified its order with reference to its own Regulations, 2005 and submits that the Commission has not adopted the CERC Tariff Regulations,2009 and regulation 25 of the State Regulations says that the Commission shall

be guided by the 2004 Regulations of the CERC which allows return on equity of 14%.

25. With respect to the treatment of revenue gap it is submitted that the entire revenue gap of the previous tariff order of FY 2010-11 has been taken care of in the tariff order of the PSPCL for 2011-12. The entire ARR of RS. 401.97 crore of the PSTCL for the year 2010-11 and the ARR of Rs.491.45 crore for the year 2011-12 have been finally taken into account in the ARR of the PSPCL for the year2010-11 and FY 2011-12 respectively in the tariff order of the PSPCL for the year 2011-12 . The Commission has taken into account the revenue gap determined for the years 2009-10,2010 -11 and 2011-12 in the tariff order of the PSPCL for the year 2011-12. The Commission has adopted this methodology because the entire ARR of the PSTCL for the respective years is to be met through tariff increase and the payment of the ARR/Transmission charges payable to PSTCL is to be made by the PSPCL.

26. Lastly, with respect to the Payment Security Mechanism it is submitted that the Commission has directed the PSTCL to make back to back arrangements with PSPCL to collect Inter –State Transmission charges as per the procedure approved by the CERC with effect from the commencement of the applicability of the CERC

Regulations. The Commission has further affirmed that any rebate availed or surcharge paid by the PSTCL while paying Inter- State transmission Charges to PGCIL under such back to back arrangement shall be passed on to the PSPCL.

27. The appellant on receipt of a copy of the written note of submissions from the Commission filed what it calls “Rejoinder Submissions” apart from earlier filing a written note of arguments. This rejoinder submission is basically a repetition of what has been stated in the memorandum of appeal and it is not necessary to reproduce the contents of the written note of arguments and the rejoinder submissions.

28. The points for consideration are as follows:-

1. Whether the Commission was justified in its treatment of the employees cost and other O&M Expenses ?

2. Whether Capital expenditure was not justifiably determined?

3. Whether the Commission was not proper in its treatment of interest payable on account of diversion of funds?

4. Whether depreciation was correctly determined by the Commission?

5. Whether the Commission was justified in fixing return on equity at 14%?

6. Whether the commission was justified in its treatment of revenue gap ?

7. Whether the Commission adequately dealt with the factor of payment security mechanism?

29. The appellant is a new entity that came into existence following unbundling of the erstwhile Punjab State Electricity Board; equally the respondent no.2 is also new corporation consequent upon unbundling of the same erstwhile entity in terms of the notification dated 16th of April, 2010 whereby the function of the appellant after bifurcation has been to carry out the activities of intra state transmission of electrical energy . The two companies coming out of the integrated one are the Government companies and according to the Punjab Power Sector Reforms Transfer Scheme, 2010 the assets, liabilities and proceedings of the erstwhile Board that vested in the State Government shall stand classified into a) Transmission Undertakings and b) Other undertakings that include the undertaking of distribution which the respondent no 2 herein has been carrying

out. It is also not in dispute that in terms of the notification referred to herein the appellant was assigned with assets and liabilities on a provisional basis and the opening balance as given in the balance sheet of the appellant as on 31.03.2009 was also provisional. It admits of no dispute that the ARR of the appellant was also provisional and till the date of finalization of the tariff order for the FY 2011-12 the Government of Punjab did not finalize the transfer of assets and liabilities of the PSPCL and PSTCL. In this perspective it is worthwhile to mention that it was the erstwhile PSEB who filed a composite application before the Commission in respect of the ARR and determination of the tariff as an integrated entity but when the tariff order for the FY 2010-11 was passed on 23rd of April, 2010 the transfer scheme had come into being following which the appellant filed for the first time its ARR and the application for determination of tariff for the FY 2011-12. Be it further mentioned that against the tariff order for the FY2010-11 dated 23rd. of April,2010 two appeals were preferred , being no 163 of 2010 by the Mawana Sugars Limited and the appeal no 06 of 2011 by the Government of Punjab against the Commission and the erstwhile PSEB on certain grounds but the present appellant , the PSTCL which by the time the aforesaid order was passed had come into being did not prefer any appeal, nor the PSEB did prefer any appeal on the grounds of the employees cost, depreciation, capital expenditure, etc. This Tribunal has dealt with the said appeals separately.

30. In this background we shall take up the issue of employees cost first. On this issue Mr. M.G. Ramachandran,, the learned Advocate for the appellant raises the following arguments:-

a) The concept of allowing proportionate cost for the appellant for the year 2011-12 instead of examining the case of the appellant on merit was illegal.

b) Being a transmission utility the appellant was entitled to the normative O&M expenses as per the CERC Regulations, 2009; and the State Tariff Regulations, 2005 clearly provide that the O&M Expenses of the transmission utility shall be guided by the Regulations notified by the CERC.

c) Taking into account the cost for the FY 2009-19 as the base year was wrong because the employees cost for the FY 2009-10 was on the basis of salaries prior to the 5th. Pay commission for the months from April to October, 2009. The revised salaries were payable only with effect from November, 2009.

d) The claim of the appellant was consistent with the Central Regulations and the National Tariff Policy.

e)The disallowance of 28.48% from the amount of the arrears payable by the appellant solely on the ground that the State Commission had in the past disallowed on an average 28.48% of the employees cost was illegal.

f) The appellant following unbundling has to undertake a number of independent activities.

g)There was expansion of transmission network consequent upon which there has been increase of the employees cost.

h) The Commission was not justified in disallowing R&M Expenses and A&G Expenses relatable to the additional assets added during the FY 2011-12.

31. According to Mr. Ramachandran, the Commission approved in the tariff order dated 23.4.2010 an amount of Rs.252.64 Crore against the estimation of the appellant for the FY 2010-11at Rs.226.59 crore. The net revenue requirement for the FY 2010-11 was Rs. 702.19 crore, while without justification the Commission allowed a sum of Rs. 401.97 crore. Again, for the transmission business for the FY 2011-12 the appellant projected Rs.268.31 crore towards the employees cost but the Commission without any reason allowed Rs.162.82 crore. The norms for O&M Expenditure for the transmission system as per the

Central Regulations, 2009 were ignored by the State Commission. According to the appellant, applying the Central norms the appellant was entitled to Rs. 38690 lac for the FY 2011-12.

32. It is now relevant to see the order of the Commission

" 3 .3 Employee Cost

3.3.1 PSTCL has projected employee expenses of Rs. 268.31 crore for its transmission business for FY 2011-12 (net of capitalisation of Rs. 63.36crore), inclusive of Rs.21.81 crore as pay arrears. While projecting employee expenses, PSTCL has not considered WPI indices. Instead, an overall leverage increase of 8.79% over employee expenses for FY 2010-11 has been considered for making such projections. PSTCL has submitted that for making projections, the base year expenses of FY 2010-11 were considered exclusive of Rs. 44.36 Crore of pay arrears liability for FY 2010-11.

3.3.2 Similarly, PSTCL has projected employee expenses of Rs. 4.54 crore for its SLDC business for FY 2011-12 (net of capitalisation of Rs. 0.15 crore), inclusive of Rs. 0.37 crore as pay arrears.

3.3.3 PSTCL has submitted that a onetime pay arrears liability of Rs. 44.36 crore has been estimated for FY 2010-11. Further, the second instalment of pay arrears liability is payable in two instalments, i.e., in FY 2011-12 and FY 2012-13 respectively. Therefore, PSTCL has considered only Rs. 22.18crore (combined for transmission and SLDC business) towards pay arrears liability for FY 2011-12. Subsequently, PSTCL submitted that as per GoP Notification no arrears will be paid in FY 2010-11 and 40% of the total arrears amounting to Rs. 35.49 crore (including SLDC) will be paid in FY 2011-12.Apportioning Rs. 35.49 crore in the ratio of claim of arrears for transmission and SLDC business, the revised claim for transmission business and SLDC business becomes Rs. 34.89 crore and Rs. 0.60 crore respectively .Accordingly the claim of employee cost is revised to Rs. 281.39 crore and Rs.4.76 crore for transmission and SLDC respectively.

3.3.4 As per PSERC Tariff Regulations, there is a provision for determination of employee cost in two parts.

• Terminal benefits on actual basis

• Increase in other expenses limited to average increase in WPI

Regulation 28(8) also provides for consideration of any exceptional increase

in employee cost on account of pay revision.

3.3.5 As per the projections of PSTCL, the terminal benefits including pension

Payments for transmission business for FY 2011-12 are Rs. 32.83 crore. Since terminal benefits are to be allowed on actual basis, the Commission allows terminal benefits of Rs. 32.83 crore for transmission business for FY 2011-12. Similarly, terminal benefits of Rs. 0.11 crore have been projected by PSTCL for SLDC business for FY 2011-12. The Commission allows Rs. 0.11 crore as terminal benefits for SLDC business for FY 2011-12.

3.3.6 PSTCL has claimed Rs. 213.67 crore as other employee expenses (excluding terminal benefits, pension payments and arrears due to pay revision) in FY 2011-12 for transmission business. For approving the other employee expenses of SLDC business and transmission business separately, the Commission has bifurcated the other employee expense approved for PSTCL for FY 2010-11 between SLDC and transmission business of PSTCL, in the ratio of average number of employees of SLDC and transmission business, respectively.

3.3.7 The Commission has approved other employee expenses of Rs. 99 crore for PSTCL in FY 2010-11. The approved other employee *expenses of SLDC works out to Rs. 2.55 crore after apportioning Rs. 99 crore in proportion to the*

average number of employees posted in SLDC and transmission business. Similarly, the approved other employee expenses of transmission business works out to Rs. 96.45 crore,.

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3.3.8 The average annual increase in WPI for FY 2011-12 would only be available next year. However, it is the normal practice to apply annual average increase in WPI of the previous year, for projecting the expenses for the ensuing year. The Commission has been applying WPI base of 1993-94 in the past. However, the latest WPI with base of 2004-05 has now been stabilised and is available till February 2011. The Commission has decided to apply this latest base for allowing annual WPI increase for FY 2011-12. Based on the WPI indices available for 11 months (April 2010 to February 2011), the Commission has calculated the average annual increase in WPI of 8.91%. By applying this WPI increase to the base figure of Rs 96.45 crore, the other employee expense for transmission business for FY 2011-12 works out to Rs.105.04 crore. Similarly, by applying 8.91% to the base figure of Rs. 2.55 crore for SLDC, the other employee expense for SLDC for FY 2011-12 works out to Rs.2.78 crore.

3.3.9 In the ARR Petition for FY 2011-12, PSTCL has originally claimed Rs. 21.81 crore and Rs. 0.37 crore as arrears due to pay revision for FY 2011-12 for transmission and SLDC business respectively. Subsequently, consequent upon GoP's notification, the amount of arrears payable in FY 2011-12 isRs. 35.49 crore. Apportioning Rs. 35.49 crore in the ratio of claim of arrears for transmission and SLDC business, the revised claim for transmission business and SLDC business becomes Rs. 34.89 crore and Rs. 0.60 crore respectively. The Commission in its previous Tariff Order had approved this component of employee expenses after reducing it by 28.48%. For determining this figure of 28.48%, the Commission had considered the employee cost claimed by the erstwhile Board for FY 2007-08, FY 2008-09 and FY 2009-10 (projections) and the cost allowed by the Commission in those years. It was observed that on an average for all three years the employee cost allowed by the Commission was 28.48% lower than the amount claimed by the Board. Applying the same principle here, the Commission approves Rs.24.95 crore for transmission business and Rs.0.43 crore for SLDC business towards pay arrears for FY 2011-12, after reducing the same by 28.48%.

The Commission thus approves employee cost of Rs. 162.82 crore (32.83 + 105.04 + 24.95) for transmission business and Rs. 3.32 crore

(0.11 + 2.78 + 0.43) for SLDC business of PSTCL for FY 2011-12.

3.3.10 In the Tariff Order for FY 2010-11, the Commission had directed the successor entities of PSEB to ensure that the Work Study Report on Manpower is completed and the action plan in the light of its findings finalised by 31.03.2011. However, till date the Study Report has not been finalised. The Commission has disallowed an amount of Rs. 6.69 crore on account of PSTCL's continuing failure to finalise the study on rationalisation of manpower in para 2.4.7 of the Tariff Order. The Commission directs PSTCL to finalise the Work Study Report on Manpower and submit implementation Action Plan to the Commission.

33. It appears that the appellant has projected employee cost to the tune of Rs. 268.31 crore (net of capitalisation of Rs. 63.36 crore). In addition the appellant projected expenses of Rs. 4.54 crore (net of capitalisation of Rs. 0.15 crore) for the SLDC business. It is the stand of the Commission that it determine the employee cost as per regulation 28 (4)of the PSERC Regulations, 2005 which clearly stipulate that O&M expenses which include employee cost shall be determined on the basis of WPI of the relevant year.

34. It is now necessary to look at Regulation 28 of the PSERC Regulations 2005 which is reproduced below:

"28. Operation and Maintenance Expenses

(1) 'Operation & Maintenance expenses' or O&M expenses' shall mean repair and maintenance (R&M) expenses, employees expenses and administrative & general expenses including insurance.

(2) While determining the O&M expenses for generation functions within the State, the Commission shall be guided, as far as feasible, by the principles and methodologies of CERC on the matter, as amended from time to time.

(3) While determining the O&M expenses for transmission functions within the State, the Commission shall be guided, as far as feasible by the principles and methodologies specified by CERC on the matter, as amended from time to time. However, in such

determination, the Commission will keep in mind the fact that the CERC regulations mainly relate to inter-state transmission of higher quantum of energy and on extra high voltage over long distances, whereas, the transmission tariff to be determined by the Commission will be relating to intra-state transmission of lower quantum of energy at relatively lower voltages and over short distances.

(4) O&M expenses for distribution functions shall be determined by the Commission as follows:

(a) O&M expenses as approved by the Commission for the year 2005-06 shall be considered as base O&M expenses for determination of O&M expenses for subsequent years;

(b) Base O&M expenses as above shall be adjusted according to variation in the rate of WPI per annum to determine the O&M expenses for subsequent year, where WPI is the Wholesale Price Index on April 1 of the relevant year;

(c) In case of unbundling of the Board and formation of separate distribution companies, the Commission will make suitable assessment of base O&M expenses of individual distribution companies separately and allow O&M expenses for subsequent years for individual companies on the basis of such estimation and above principle.

(5) O&M expenses of assets taken on lease/hire-purchase and those created out of the consumers' contribution, shall be considered in case the generating company or the licensee has the responsibility for its operation and maintenance and bears O&M expenses.

(6) O&M expenses for gross fixed assets added during the year shall be considered from the date of commissioning on pro-rata basis.

(7) O&M expenses for integrated utility shall be determined by the Commission on the norms and principles indicated above."

35. It appears that the State Regulations 2005 as was subsequently amended in the year 2009 in sub-regulation 3 provides that in respect of O &M expenses which include employee expenses the State Commission shall be guided by the Central Regulations so far as the principles and methodologies are concerned.. It must not be forgotten that the order dated 23 April 2010 which the State Commission passed was upon the application of the erstwhile PSEB for determination of tariff for the FY 2010-11 and only a week before the order was passed the said utility was bifurcated between the appellant and respondent no. 2 so that, it did not occur to the Commission that the Regulation 2005 immediately needed amendment so far as the O&M expenses for the transmission utility is concerned. There is a point in favour of the Commission that though sub-regulation 3 provided for following the principle and methodologies specified by the CERC a rider has been attached to the Sub Regulation to the effect that the CERC Regulations mainly relate to inter state transmission of higher quantum of energy at extra high voltage over long distances, while intra state transmission takes place of lower quantum of energy at low voltage and over short distance. The Sub Regulation further provides that the principles and methodologies specified by the CERC shall be followed as far as feasible. Overnight it might not have been possible for the State Commission to lay down its own provision in respect of the O&M

expenses for the transmission utility. It was convenient for the Commission to apportion the expenses between the employees attached to distribution business and those attached to the transmission business. It is the grievance of the appellant that while it projected for transmission business a sum of Rs. 268.31 crore the Commission approved 162.82 crore. Now, the appellant also while projecting a sum of Rs. 268.31crore took into consideration an over all average increase of 9.79% over the employees expenses for the FY 2010-11 and the said amount was inclusive of Rs. 21.81 crore as pay arrear. It appears that so far as the SLDC business is concerned there is not so much of variation in respect of employees cost for FY 2011-12 in so far the employees cost is concerned and such variation has been on account of apportionment. Now, the Commission has its own rationale in approving in the ARR for FY 2011-12 a sum of Rs. 162.82 crore because it took into consideration of the fact that the appellant has to pay 40% of the total areas amounting to Rs. 35.49 crore (including SLDC) in FY 2011-12.As per the projection of appellant of the itself, the terminal benefits including pension payment for transmission utility for FY 2011-12 are in the sum of Rs. 32.83 crore which was allowed as was prayed for. Excluding the sum of Rs. 21.81 crore as was originally projected as pay arrear the amount claimed by the appellant for FY 2011-12 was Rs. 213.67 crore, and as earlier noted this figure was reached after increase at random of 8.79% over employees expenses for FY 2010-11. It is important to note that against the tariff order dated 23rd April 2010, that related to the FY 2010 -11 neither the PSEB nor its successor entity preferred in appeal. The appeal against the order dated 23rd April 2010 was preferred by an industrial consumer and the Government of Punjab which have been separately dealt with. While we could advise the Commission to amend its Tariff Regulations and specify normative O&M expenses in line with the Central Commission's Regulations so far as the transmission utility is concerned we cannot find too much fault when the Commission fixed a sum of Rs. 105.04 crore in respect of other employees expenses for transmission utility because for the FY- 2010-11 the Commission approved Rs. 99 crore upon which by applying average annual increase in WPI of 8.91% and after deducting Rs. 2.55crore for SLDC business the Commission reached a figure 105.04 crore, but we do not find any logic behind reducing the arrear pay of Rs.35.49 crore by 28.48%. The Commission's reasoning that in the past it has been reducing the figure by the said percentage is no ground for maintaining that reduction particularly when the appellant is now a separate entity and as per the Government of Punjab notification the appellant has to pay 40% of the total areas amounting to Rs. 35.49 crore . The matter of the fact is that the appellant, it being a new entity, projected all its figures provisionally. The transfer of assets and liabilities of the bifurcated entities are yet to be finalized. There is ample scope for review and true up. Therefore, subject to review as it may happen after the expiry of the current financial year 2011-12 which will happen only after a little over two months the Commission therefore, will re-examine the matter and pass appropriate order.

Issue No. 2

36. It is the case of the appellant that the Commission ignored the substantial transmission project to meet the growing load demand of power in the State of Punjab. The appellant is said to had submitted a comprehensive transmission plan containing details of the works to be taken up during the period 2011-12 but entire proposed investment has not been considered and the Commission disallowed Rs. 400 crore . We do not find that the Commission committed any grave error in allowing expenditure of Rs. 600 crore relying on actual capital expenditure of Rs 306 crore from April 2010 to January 2011 and the proposed expenditure for February and March 2011. The Commission found that the projected expenditure for the year 2011-12 was on higher side when compared to the actual expenditure level achieved by the transmission licensee. In fact, the Commission allowed 50% more than the capital expenditure for the 2010-11. In the impugned order the Commission observed that the during the review for FY 2011-12 the

Commission will consider any expenditure if made and the carrying cost for the amount of the capital expenditure, being a genuine cost and is passed through tariff what is significant is that for SLDC business the appellant reduced it revised capital expenditure from Rs. 56.66 crore to Rs. 30 crore and Commission allowed Rs. 25 crore. Therefore, on this issue we do not find any major irregularity.

Issue No. 3

37. On the issue of the diversion of fund this Tribunal has dealt with in Appeal no. 5 of 2008 and the Appeal no 63 of 2008. In appeal no. 63of 2008 the Government of Punjab specifically challenged the interest part on diversion of fund. The Commission decided against burdening the consumers with interest cost on diverted fund to the tune of RS. 289.92 crore. This Tribunal held that the approach of the Commission was correct. Though, the appellant in now a legal entity it is one of the successor entities of the Board and it has inherited its assesses and liability. The Government and the Board were responsible for the diversion of capital funds. Therefore, the Commission had disallowed interest cost of Rs.100.00 crore of the Board and the rest of the interest on diverted funds was attributed to the Government. Thus, PSTCL has an inherited liability of proportionate diversion of capital funds for revenue purpose and accordingly proportionate disallowance of interest

was made by the Commission. We do not find that the Commission committed any illegality on this issue.

Issue No. 4

38. On depreciation the Commission allowed 4.81 % instead of 4.88% . According to the Commission the rate of 4.81% is based on the audited account of the Board for the year 2008-09, 2009-10, 2010-11 and 2011-12 and further, the erstwhile Board did not provide any information with regard to the date of commissioning of each asset on the ground that large number of asset of different categories are added during the year. Again, the assets and liabilities of the unbundled entities have not been finalized. Accordingly, the Commission adopted the methodology of weighted average rates of depreciation derived from the audited accounts of the erstwhile Board while approving depreciation charges in its successive Tariff orders.

Issue No. 5

39. Having heard the submissions of the learned counsel for the appellant and the State Commission it appears that the question is absolutely a legal one in as much as the question is whether return on equity shall be in terms of the regulation 21(iii) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff)

Regulations,2004 or regulation 15 of the CERC (Terms and Conditions of Tariff)Regulations,2009 and answer to this question depends on what exact legal interpretation should we attach to the regulation 25 of the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff)Regulations,2005 which deals with return on equity.

The regulation 25 of the State Regulations,2005 in its paragraph 1 provides as follows:-

"Return on Equity shall be computed on the paid up equity capital determined in accordance with Regulation 24 and shall be guided by the Central Electricity Regulatory Commission (Terms and Conditions of Tariff)Regulations,2004 as amended by the CERC from time to time. The same ***principle*** *will apply for distribution business also as far as possible."*

Regulation 24 of the State Commission's Regulations,2005 deals with Debt –Equity Ratio which unquestionably is the same as in the CERC Tariff Regulations,2004 and the CERC Tariff Regulations,2009.This regulation 24 is parimateria the same as in regulation 20 of the CERC Tariff Regulations,2004 and the regulation 12 of the CERC Tariff Regulations,2009.

Now, regulation 21(iii) of the CERC Tariff Regulations,2004 provides as follows:-

"Return on equity shall be computed on the equity base determined in accordance with regulation 20 @14% per annum. Provided that equity invested in foreign currency shall be allowed a return up to the prescribed limit in same currency and the payment on this account shall be made in Indian Rupees based on the exchange rate prevailing on the due date of billing.

Explanation

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 utilised for meeting the capital expenditure of the generating station and forms part of the approved financial package."

The*n comes regulation 15 of the CERC Tariff Regulations,2009 which is reproduced below:_*

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

(2) Return on equity shall be computed on pre-tax basis at the base rate of 15.5% to be grossed up as per clause (3) of this regulation:

Provided that in case of projects commissioned on or after 1st April, 2009, an additional return of 0.5% shall be allowed if such projects are completed within the timeline specified in Appendix II

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

(3) The rate of return on equity shall be computed by grossing up the base rate with normal tax rate for the year 2008-09 applicable to the concerned generating company or the transmission licensee, as the case may be:

Provided that return on equity with respect to the actual tax rate applicable to the generating company or the transmission licensee , as the case may be, in line with the provisions of the relevant Finance Acts of the respective year during the tariff period shall be trued up separately for each year of the tariff period along with the tariff petition filed for the next tariff period.

(4) Rate of return on equity shall be rounded off to three decimal points and be computed as per the formula given below:

Rate of pre-tax return on equity =Base rate/(1-t)

Where t is the applicable tax rate in accordance with clause (3) of this regulation.

Illustration:-

In case of the generating company or the transmission licensee paying Minimum Alternate Tax (MAT) @ 11.33% including surcharge and cess:

Rate of return on equity =15.50/(1-0.1133)=17.481%

In case of generating company or the transmission licensee paying normal corporate tax @ 33.99% including surcharge and cess:

Rate of return on equity = 15.50/(1-0.3399)=23.481%

40. Mr. M G Ramachandran, learned Advocate for the appellant submits as follows;-

The CERC Regulations,2009 has to be made applicable because when the impugned order was passed the CERC Regulations,2009 have since been in force. Section 61 of the Electricity Act,2003 mandates a State Commission to follow the principles and methodologies specified by the Central Commission. It is not a case of incorporation in specific terms of the provisions of an earlier statute into a later statute, rather it is squarely a case of mere reference to or citation of an earlier statute into a later statute. He refers to the decisions in Collector of Customs v. NathellaSampathuChetty, AIR 1962 SC 316 and Bajaya vs. Gopikabai and another, 1978(2)SCC 542 and an authority, namely Corpus JurisSecundum on the subject. On many a issues e.g., interest on working capital the Commissioned in the impugned order specifically followed the CERC Regulations,2009 and there is no earthly reason as to why the CERC regulations,2009 shall not be followed particularly when the State Commission in its own Regulations,2005 has not provided for any principles and methodologies.

41. The learned Advocate for the State Commission argued in the main that when the State Commission has its own Regulations,2005 it must follow its own Regulations and its own Regulations refers to the CERC Tariff Regulations,2004 to be followed by it. The learned Advocate placed this argument somewhat in elaborate terms and justifies the Commission’s order holding that there was no justification in awarding higher return on equity when the performance of the licensee was no better.

42. Our understanding is that the law is not intended to be case specific and it does not recognise as to who will be the beneficiary or who will

face hardship in ultimate terms. Was it the intention of the Authority making the State Regulations,2005 that it would strictly and blindly follow the CERC Regulations,2004 as amended from time to time or it intended to follow the principles and methodologies of the CERC norms which were reflected at that point of time in the CERC Regulations,2004? Before we answer the question we must remind ourselves of the fundamental law which is adumbrated in Section 61 of the Act,2003 thus:- *"The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in so doing , shall be guided by the following, namely:- a)The principles and methodologies specified by the Central Commission for determination of the tariff applicable ton generating companies and transmission licensees.* **'' In plain terms when a State Commission in its own regulations provides for principles and methodologies then obviously the said Commission has to follow its own regulations. But there is a rider which is that the principles and methodologies as would be provided for in the State Regulations shall be guided by the principles and methodologies specified by the Central Commission for determination of tariff. Again, when there is no existence of any State Regulations at all the State Commission is not debarred from determining tariff but in doing so it shall be guided by the principles and methodologies of the CERC. The rationale is that there must not be a dichotomy between the two laws that would have the ultimate effect of bringing about a discrimination between a licensee governed by the CERC and another remaining under the jurisdiction of the State Commission. Secondly, the historical facts are that the PSERC Tariff Regulations,2005 enacted under section 61 read with section 181 of the Act (We have extracted the relevant portion of section 61) came in to force on 21.11.2005. At that point of time the CERC Tariff Regulations,2004 which came in to effect from 1.4.2004 had already been in the shelves of the statutes. At that point of time the CERC Regulations,2009 could not be in conception. The CERC Regulations,2009 came in to force from 1.4.2009. The impugned tariff order was passed on 09.5. 2011 i.e. a little over two years after the CERC Regulations,2009 had been in currency. Thirdly, and by that time the principles and methodologies on return on equity have undergone change either by repeal or amendment or re-enactment (this point we will traverse a little later and the distinction is thin) of the CERC Regulations. Fourthly, in the State Regulations,2005, no principles and methodologies were spelt out on return on equity at all. Fifthly, in consequence thereof it was provided in the regulation 25 of the State Regulations, 2005 that it will be guided by the principles of the CERC Tariff Regulations,2004. The reference to the CERC Tariff Regulations,2004 had no special significance except that at that time it was the CERC Regulations,2004 that was alone in vogue so that it had no other alternative than laying down so. Sixthly, it must not be missed that the CERC Tariff Regulations,2004 relates to determination of tariff for the period from FY 2004 -05 to FY 2008 -09,and the CERC Tariff Regulations,2009 relates to determination of tariff from the FY 2009-10 to FY 2013-14. The impugned tariff order of the State Commission relates to the period from 01.04.2011 to 31.03.2012. Seventhly, during the period from 01.04.2011 to 31.03.2012 the CERC Tariff Regulations,2004 suffered from nihilism so that it could not be made applicable more particularly when re-enactment replaced the earlier one by that time. Eighthly, given a thorough reading of the entire State Regulations,2005 it gives out that on issues in plurality it will follow the norms, principles and methodologies of the CERC Regulations. Ninthly, in legal parlance the following of the CERC norms, principles and methodologies means those norms, principles and methodologies as would be reflected through a Regulations in force at a given point of time. Tenthly, by way of example, in the matter of interest on working capital it specifically followed the CERC Regulations,2009 and it preferred not to follow the CERC Regulations,2004. In the matter of O & M expenses it followed the CERC norms as far as possible as it is so laid down in its own Regulations. Eleventh , and this is important, the impugned order did never say that legally it is bound by the CERC

Regulations,2004 and if it had said so we would have no difficulty in understanding its mind or intention. It is not their order that they would not follow the CERC Regulations,2009 although it was determining tariff for the FY 2011-12. It is not their case that as its own Regulations speak that it would be guided by the CERC Regulations,2004 it would follow the same, no matter whether the said Regulations had in fact been repealed and a new enactment did come into being. The order simply says that in the past it allowed return on equity @ 14% and the Commission finds no justification for allowing return on equity at a higher rate. It does not say anything more. It only says that the appellant has been unable to effect requisite improvements in critical performance parameters. It does not speak of any law . It is only the learned Counsel through whom supplementary is sought to be introduced. We are unable to accept the same. It is not difficult for us to decipher the intention of the law making body which is in this case the State Commission. Tariff determination is a quasi-legislative function exercisable by the State Commission which again discharges its legislative function in framing its Regulations. If it was the intention of the State Commission that it was bound to follow the CERC Regulations,2004 it could have said so and there would have been the end of the matter. Twelfth, it cannot be the legal proposition that the CERC Regulations,2004 and the CERC Regulations,2009 are two different living laws both being applicable according to marriage of convenience because the former expressly says that it will live for five years and when the impugned order was passed it got eclipsed by its successor, whether one calls the later to be amendment or re-enactment. Thirteenth, there is plethora of case laws on interpretation of statutes that deal with two sorts of distinction. One distinction is drawn between incorporation and a mere reference of an earlier Act into a later Act. The second sort of distinction occurs when what is referred to is not an earlier Act or any provision from it but law on subject in general. In Collector of Customs (ibid) it has been ruled that the distinction is between "a mere reference to or a citation of one statute in another and an incorporation which in effect means the bodily lifting of the provisions of one enactment and making it part of another so much so that the repeal of the former leaves the latter wholly untouched." Bajaya (ibid) refers to Sutherland: A statute which refers to the law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted. This is nearer to our point. In the case of incorporation any change in the incorporated statute by way of amendment or repeal has no repercussion on the incorporating statute. In a case of reference or citation a modification or repeal or re-enactment that is referred will also have effect for the statute in which it is referred. ours is not a case of incorporation, for the words ‘ *shall be guided by the CERC Tariff Regulations,2004 as amended from time to time* ‘ cannot be construed to be a case of ‘bodily lifting’. It means, in absence of its own regulations clearly specifying its own norms, methodologies and principles it will follow the CERC Regulations,2004 as amended from time to time. *‘As amended from time to time’* does not merely mean that it would admit only of those amendments as would be brought out only in 2004 Regulations. The intention of the framers was that it in absence of its proper regulation would continue to follow the CERC Regulations as would be available from time to time. Any other interpretation would defeat the very purpose of the law. Fourteenth, as laid down in Maharashtra State Road Transport Corporation vs. State of Maharashtra, AIR2003SC1909, ultimately it is a matter of probe into legislative intention and / or taking an insight into the working of the enactment if or the other view is adopted. The doctrinaire approach is directed towards that end. The provisions of section 61, the National Tariff Policy which is consistent with the Act, the overall impression created on close reading of the State Regulations,2005 , its treatment in the impugned order, reliance upon the CERC Regulations,2009 at times, the legislative history, non- application of the doctrine of the bodily lifting all taken together would point out that regulation 15 of the CERC Regulations,2009 would be applicable on the question on return on equity. Fifteenth, and last but not the least, the argument that the CERC Regulations,2009 is not an amendment of the Regulations,2004 but is altogether a new law pales into insignificance and can be answered with reference to section 8(1) the General Clauses Act,1897 thus: *"Where this Act , or any central Act or Regulation made after the commencement of this Act, repeals and re-enacts , with or without modification , any provision of a former enactment , then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."* In the conspectus of the case the re-enactment after repeal cannot be called to be qualitatively different from amendment. Sutherland in his Statutory Construction has observed that the distinction between repeal and amendment as these terms are used by courts is arbitrary though the distinction is followed.

43. So far, we have covered one aspect of the matter. Given the language employed in Regulation 25 of the State Regulations, 2005 we have held that the principles adopted in Regulation 25 was in the light of the regulation 21 (iii) of the CERC Regulations, 2004 and with the change of the Regulations of the CERC, the CERC Regulations, 2009, will apply. This is regulation 15 of the CERC Regulations, 2009. There is a rider in this that CERC Regulations, 2004 which deals with return on

equity (regulation 21 (iii)) is intrinsically related to regulation 7 dealing with tax on income. In the State Regulations similar provision has been made in Regulation 32. Since regulation 25 of the State Regulations speaks of being guided by the Central Regulations as amended from time to time and as the CERC has framed new Regulation in 2009 (regulation 15), the said regulation 15 which is applicable in the instant case shall be applied sans the regulation 7 of the Central Regulation, 2004 inasmuch as regulation 15 of the CERC Regulations, 2009 has abolished the provision of regulation 7 of the CERC Regulations, 2004 and there cannot be double advantage accruable to a transmission company who is of course entitled to the benefit of the CERC Regulations, 2009 (regulation 15). Once we hold that regulation 15 of the CERC Regulations, 2009 will become applicable it is implied as also it becomes explicit that tax on income cannot be a pass through to the beneficiaries. Regulation 15 of the CERC Regulations, 2009 has spoken so in express language so that there cannot be any misapprehension on the question of application of regulation 7 of the CERC Regulations, 2004 or regulation 32 of the State Regulations, 2005. A question may arise as to why then regulation 25 read with regulation 32 of the State Regulations, 2005 should not be applied. Answer is two fold, namely,:

a) Analysis of regulation 25 of the State Regulations, 2005 as made above makes it clear that it was the intention of the Authority that passed the order impugned to follow the CERC Regulations, 2009. The State Commission was quite conscious of the necessity of following the norms, principles and methodologies enunciated by the CERC. The norms, principles and methodologies must be such as are prevalent at a given point of time.

b) It is also the settled position of law that if two interpretations are possible then the interpretation which is beneficial to the subject should be accepted.

We answer the point accordingly.

Issue No. 6

44. The appellant demands revenue gap for the year 2011-12. The entire revenue gap of the previous tariff order of 2010-11 has been taken care of in the tariff order for the PSPCL for 2011-12 . The Commission has its own logic in this that entire ARR of the appellant is to be met through tariff increase and the payment of the ARR/ Transmission charges payable to the appellant is to be met by the PSPCL. The appellant does not appear to suffer loss.

Issue No. 7

45. According to the appellant, the payment security mechanism in the form of letter of credit and Escrow arrangement proposed by the appellant was necessary. . The Commission in the impugned order has already directed the appellant to make back to back arrangements with PSPCL to collect inter state transmission charges as per the CERC Regulations. The PSPCL has also confirmed that it will open LC for intra-state transmission charges payable to the appellant for intra-state transmission system.

46. In the result, the appeal succeeds only in part with regard to modification made over the issue no 5. The Commission will enter necessary correction in the impugned order to the extent indicated above. The Commission will also re-examine during review the aspect of reduction of the employees cost @28.48% so far as the appellant is concerned. No Costs.

(P.S. Datta)	(Rakesh Nath)
Judicial Member	Technical Member

KS

REPORTABLE /NON- REPORTABLE