

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NOS. 131, 134, 151 AND 185 OF 2012

Dated: 28th May, 2014

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

IN THE MATTER OF :

APPEAL NO. 131 OF 2012

Bihar Chamber of Commerce,
Khemchand Choudhary Marg,
Patna-800001 (Bihar)

... Appellant

VERSUS

1. Bihar Electricity Regulatory Commission,
Ground Floor, Vidyut Bhawan-II,
Jawahar Lal Nehru Marg, Patna-800001(Bihar)

2. Bihar State Electricity Board,
Ground Floor, Vidyut Bhawan,
Jawahar Lal Nehru Marg,
Patna-800001 (Bihar)

... Respondents

Counsel for the Appellant(s) ... Ms. Swapna Seshadri
Mr. Anand K. Ganesan
Mr. Suraj Samdarshi

Counsel for the Respondent(s) ... Mr. Parmanand Singh for R-1
Mr. Mohit Kumar Shah
Ms. Shilpi Shah &
Mr. Nitikesh Kumar for R-2

APPEAL NO. 134 OF 2012

The Bihar State Electricity Board, Through
its Chief Engineer (Commr.), Vidyut Bhawan,
Bailey Road, Patna-800 001 (Bihar) ... Appellant

VERSUS

1. The Bihar Electricity Regulatory Commission,
Through its Secretary,
Ground Floor, Vidyut Bhawan,
Jawahar Lal Nehru Marg, Patna-800 001 (Bihar)
2. Kalyanpur Cements Ltd., Maurya Centre,
1, Fraser Road, Patna-800 001 (Bihar)
3. Bihar Industries Assoc., Industry House,
Sinha Library Road, Patna-800 001 (Bihar)
4. Bihar Steel Manufacturers Association,
307, Ashina Tower, Exhibition Road,
Patna-800 001 (Bihar)
5. Dina Iron & Steel Ltd.,
Abdul Rahmanpur Road, Didarganj,
Patna-800 009 (Bihar) ... Respondents

Counsel for the Appellant(s) ... Mr. Mohit Kumar Shah
Ms. Shilpi Shah
Mr. Nitikesh Kumar

Counsel for the Respondent(s) ... Mr. Nand Sharma for R-1
Mr. Parmanand Singh
Ms. Swapna Seshadri
Mr. Suraj Samdarshi for R-3,4 & 5

APPEAL NO. 151 OF 2012

The Bihar State Electricity Board,
Through its Chief Engineer (Commr.),
Vidyut Bhawan, Bailey Road, Patna800 001(Bihar) ... Appellant

VERSUS

1. The Bihar Electricity Regulatory Commission,
Through its Secretary,
Ground Floor, Vidyut Bhawan,
Jawahar Lal Nehru Marg, Patna-800 001 (Bihar)

2. M/s Bhojpur Chamber of Commerce & Industry,
Mahajan Toli, Ara -802301 (Bihar)
 3. Shri Doman Singh,
Road No. -2, Anand Bihar,
PO –Veterinary College, Patna-800 014 (Bihar)
 4. Kalyanpur Cements Ltd., Maurya Centre,
1, Fraser Road, Patna-800 001 (Bihar)
 5. Prof. Pramod Kumar Sharma,
Vill-Dilawarpur (West), P. O. Bidurpur Bazar
District – Vaishali, Pin – 844 505 (Bihar)
 6. Balmukund Concast Ltd., 108, Kalyani
Complex, Exhibition Road, Patna-800 001 (Bihar)
 7. M/s. Dina Iron & Steel Ltd.,
Abdul Rahmanpur Road, Didarganj, Patna-800 009 (Bihar)
 8. Bihar Industries Assoc., Industry House,
Sinha Library Road, Patna-800 001 (Bihar)
 9. Bihar Chamber of Commerce, Khem Chand
Chaudhary Marg, Patna-800 001 (Bihar)
 10. Bihar Steel Manufacturers Association,
307, Ashiana Towers, Exhibition Road,
Patna-800 001 (Bihar)
 11. Gangotri Iron & Steel Co. Ltd.
307, Ashiana Towers, Exhibition Road,
Patna-800 001 (Bihar)
 12. M/s Patwari Steel Pvt. Ltd.
6A, Rajendra Nagar, Patna-800 009 (Bihar)
 13. M/s Poddar Wires Industries Pvt. Ltd.,
Sarifaganj, Patna City 800 009 (Bihar)
 14. M/s Umang Steel Private Limited,
Sabalpur, Patna City 800 009 (Bihar) ... Respondents
- Counsel for the Appellant(s) ... Mr. Mohit Kumar Shah
Ms. Shilpi Shah
Mr. Nitikesh Kumar
- Counsel for the Respondent(s) ... Mr. Parmanand Singh for R-1
Ms. Swapna Seshadri for R-7,8 & 10
Mr. Anand K. Ganesan for Consumers

APPEAL NO. 185 OF 2012

The Bihar State Electricity Board, Through
its Chief Engineer (Comm.), Vidyut Bhawan,
Bailey Road, Patna- 800021 (Bihar)

... Appellant

VERSUS

1. Bihar Electricity Regulatory Commission,
Through its Secretary,
Vidyut Bhawan-II, Jawahar Lal Nehru Marg,
Patna-800021 (Bihar).
2. M/s. Dadiji Steel Ltd., 502, Santosha Complex,
Bandar Bagicha, Fraser Road,
Patna-800001 (Bihar)
3. M/s Kalyanpur Cement Ltd., Maurya Center,
Fraser Road, Patna-800001 (Bihar)
4. M/s Patwari Steel Pvt. Ltd.,
Fathua, Patna-800009 (Bihar)
5. Shri Pramod Kumar Sharma,
Dilawaerpur West, P.O. Viddupur Bazar,
Vaishali-844505 (Bihar)
6. M/s Bihar Steel Manufacturing Association,
307, Ashiyana Tower, Exhibition Road,
Patna – 800001 (Bihar)
7. M/s Balmukund Concast Limited,
Kalyani Complex, Exhibition Road,
Patna-800001 (Bihar)
8. Shri Doman Singh,
B-44, Road No. 2, Anand Vihar,
Patna-800014 (Bihar)
9. Chief Electrical Engineer (ECR. Hazipur),
East Central Railway, Hazipur-844101 (Bihar)
10. Shri Braj Nandan Pathak, Vidyut Upbhogta
Sangharsh Samiti, 93, Lakshman Sahay Lane,
Gurudwara Road, Gaya-823001 (Bihar)
11. M/s Bhola Ram Steel Private Ltd.,
Nasirganj, Danapur-801503 (Bihar)

12. M/s Bhojpur Chamber of Commerce & Industry
Mahajan Toli, Ara-802301 (Bihar)
13. M/s Bihar Chamber of Commerce,
Khem Chand Chaudhary Marg,
Patna-800001 (Bihar)
14. Shri Vinay Goenka,
Patna City Chowk, Patna-800009 (Bihar)
15. Shri Vyasdev Prasad,
Hospital Road Siwan-841226 (Bihar)
16. M/s Dina Iron and Steel,
Abdul Rahmanpur Road, Didarganj,
Patna-800009 (Bihar)
17. Sri Dilip Kr Jha, Secretary,
Rural Electric Consumer Association,
Loha Madhubani-847211 (Bihar)
18. Sri Pawan Kumar Sureka, President, Divisional
Chamber of Commerce & Industries, Masrat
Bazar, Darbhanga-846004 (Bihar)
19. Dr. Shashi Bhushan Mahto,
Secretary, Upbhokta Manch, Biraul,
Darbhanga-846004 (Bihar)
20. Sri Ajoy Bihari,
Laheria Sarai, Khaja Sarai,
Darbhanga-846004 (Bihar)
21. Sri Gyaneshwar Prasad,
General Secretary,
Mithilanchal Industrial Chamber of Commerce,
Industrial Area, Darbhanga-846004 (Bihar)
22. Sri Lakhan Lal Prasad,
Manik Sarkar Chowk, Bhagalpur-812001 (Bihar)
23. Sri Sandeep Jha, Advocate,
Behind Consumer Court, Bhagalpur-812001 (Bihar)
24. Sri Gautam Suman, Chairman,
Ang Uthanodolan Committee,
Iswar Nagar, Bisharisthan, Isakchak,
Bhagalpur-812001, (Bihar).

25. Prakash Chandra Gupta & Others,
Co-ordination Committee,
Bhagalpur-812001 (Bihar)
26. Dr. Jayant Jalad, Central General Secretary,
Ang Uthanodolan Committee,
Bhagalpur-812001 (Bihar)
27. Sri Mutukdhari Agrawal, President,
Eastern Bihar Industries Association,
4 Rai Gopal Sarkar Lane, Bhagalpur-812001 (Bihar)
28. Sri Surendra Kumar Dauania,
Marwari Tola Lane, Bhagalpur-812001 (Bihar)
29. Sri Shashi Shankar Rai,
Laloo Chak, Isakchak, Bhagalpur-812001 (Bihar)
30. Bimal Chand Bajaria, President,
North Eastern Bihar Chamber of Commerce
& Indust., Syndicate Katra 2nd Floor,
Katihar-854105 (Bihar)
31. Sri Pankaj Kumar Nayak,
Pankaj International, Maranga,
Purnea-854301 (Bihar)
32. Sri Brij Nandan Phatak, Secretary,
Vidyut Bhawan Sangharse Samittee,
93, Lakshman Sahay Lane, Gurudwara Road,
Gaya-823001 Bihar
33. Sri Sandalankara Vikkalauk & Kiran Lama,
President & General Secretary,
International Budhist Council of Buddhagaya
Daijokyo Buddhist Temple,
Bodh Gaya-823001 (Bihar)
34. Sri Arvind Kumar, President,
South Bihar Industrial Association,
Lharia Tola, Gaya-823001 (Bihar)
35. Sri Prakash Narayan Saha, General Secretary,
Viyahut Seva Trust, Yadupati Marge,
Banarash Chowk, Muzaffarpur-842001 (Bihar)
36. M/s. Gangotri Iron and Steel,
Bihta, Patna-800001 (Bihar)

37. Sri Ajit Pd. Mehta, Sr. Vice President,
Jawan Kishan Morcha,
Ara (Bhojpur)- 802301 (Bihar)
38. Raj Kishore Sharma, Vice President,
LK Kalayan Ayog, Sheoganj,
Ara, Bihar--802301 (Bihar)
39. Vishwanath Pd., President,
Bhojpur Chamber of Commerce & Industries,
Mahajantoli, Ara-802301 (Bihar)
40. Deo Ratan Pd., President,
Jan Sangharse Morche, Belwargaj,
Patna City, Patna-800009 (Bihar)
41. M/s Bihar Industries Association,
Sinha Library Road, Patna-800001 (Bihar)
42. M/s Bholaram Steel Private Limited,
Nasriganj, Digha,
Patna-800001 (Bihar) ... Respondents
- Counsel for the Appellant(s) ... Mr. Mohit Kumar Shah
Ms. Shilpi Shah
Mr. Nitikesh Kumar
- Counsel for the Respondent(s) ... Mr. Parmanand Singh
Mr. Nand Sharma
Mr. Suraj Samdarshi for R-1
- Ms. Swapna Seshadri
for R-6,7, 11, 13, 16, 36, 41 & 42
Mr. Anand K Ganesan for Consumers

JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. Appeal No. 131 of 2012

The Appeal No. 131 of 2012 has been preferred by the Appellant under Section 111 of the Electricity Act, 2003 against the Order dated 30.3.2012 passed by the Bihar Electricity Regulatory Commission (hereinafter called the 'State Commission') in the Tariff Petition, being Case No. TP 02 of 2011 approving the Annual Revenue Requirement (ARR) and

Retail Supply Tariff (RST) for the Financial Year 2012-13 of Bihar State Electricity Board (hereinafter called the 'Electricity Board'), Respondent No.2 in this Appeal, the distribution licensee in the State of Bihar.

2. Facts of the case giving rise to Appeal No. 131 of 2012:

The relevant facts of the case, relating to Appeal No. 131 of 2012, are as follows:

- 2.1 that the Appellant is an association of industries and traders who are taking supply of electricity from the Electricity Board (Respondent No.2) under different category i.e. low-tension, high-tension, etc from the electrical system maintained by the Electricity Board.
- 2.2 that the power/electricity (in most categories) constitutes about 20 to 50% of the input cost in the Appellant's industry and therefore constitutes the principal cost of manufacture. The uninterrupted supply of electricity at competitive rates is essential for the sustenance of the industries and commercial establishment in the State of Bihar.
- 2.3 that the Bihar Industry Association had earlier challenged the Tariff Order dated 26.8.2008 passed by the State Commission for the year 2008-09 before this Tribunal being Appeal No. 128 of 2008. Though the Appeal was dismissed, this Appellate Tribunal vide its judgment dated 12.2.2009 gave directions to the State Commission to draw road map for drastic reduction of Transmission and Distribution losses and the Electricity Board should implement the same. Inadequate resources and organizational deficiencies of the Electricity Board cannot be an excuse for increase in tariff due to excessive T&D losses. Allowing the T&D losses of over 46% is wastage of scarce energy source and is deprecated. The Electricity Board has to set its house in order. The State Commission was further directed to monitor the T&D loss reduction programme of the Electricity Board quarterly and

sent report to this Tribunal about progress made by the Electricity Board. To monitor the progress on the trajectory projected by it to achieve 100% metering and report the same to this Tribunal along with the report on T&D losses because the Electricity Act requires 100% metering and the Electricity Board has not metered the rural and agricultural load, domestic and commercial consumption except in a few cases which is blatant violation of Section 55 of the Electricity Act.

- 2.4 that the Bihar Industry Association again filed an Appeal, being Appeal No. 14 of 2011, against the Tariff Order dated 6.12.2010 passed by the State Commission in Tariff Petition No. 3 of 2010 for ARR 2010-11. Although, the Appeal was dismissed but this Tribunal, while dismissing the Appeal No. 14 of 2011, directed the State Commission to determine category-wise cost of supply and also to determine the cross-subsidy based on cost of supply at different voltage level within next six months and ensure that in future orders, beginning from FY 2013-14, the cross-subsidy and tariff are determined based on principles laid down by this Tribunal in para 18.10 of Tata Steel judgment.
- 2.5 that on 15.11.2011, the Respondent No.2 - Electricity Board filed its tariff petition, being T.P. No. 2 of 2011 (impugned petition), for determination of its ARR and tariff, before the State Commission for FY 2012-13. During the hearing of the impugned tariff petition, the Appellant insisted on the need to determine category-wise and voltage-wise cost of supply and the need to reduce the cross-subsidy.
- 2.6 that the State Commission vide impugned order dated 30.3.2012, approved the ARR and RST for FY 2012-13 of the distribution licensee namely, the Electricity Board which is under challenge in Appeal before this Appellate Tribunal.

3. Appeal No. 151 of 2012

This Appeal has been preferred by the Appellant under Section 111 of the Electricity Act, 2003 against the Order dated 1.6.2011, passed in TP-1/2011 and Review Order, dated 22.12.2011, passed in TP-8/2011 by the Bihar Electricity Regulatory Commission (hereinafter called the '**State Commission**') determining ARR and retail tariff for FY 2011-12 in exercise of powers under Section 61, 62 and 64 of the Electricity Act, 2003 contrary to the provisions of Electricity Act, 2003, National Tariff Policy, Bihar Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulation, 2007 (in short, '**Regulation, 2007**'), the recommendations of Shunglu Committee constituted by the Planning Commission, Government of India, and the Judgment of this Tribunal, dated 11.11.2011, passed in OP No. 1 of 2011 and disallowed certain legitimate expenditures without any basis and genuine grounds.

4. Appeal No. 134 of 2012

This Appeal has been preferred by the Appellant under Section 111 of the Electricity Act, 2003 against the Order dated 4.1.2012 passed by the Bihar Electricity Regulatory Commission (hereinafter called the '**State Commission**') in TP-7/2011 whereby the State Commission while truing up the Aggregate Revenue Requirement (ARR) for FYs 2006-07, 2007-08 and 2008-09 for Bihar State Electricity Board (in short, the Board) in exercise of powers under Section 61, 62 and 64 of the Electricity Act, 2003 has passed the impugned order contrary to the provisions of Electricity Act, 2003, National Tariff Policy, Bihar Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulation, 2007 (in short, '**Regulation, 2007**'), the recommendations of Shunglu Committee constituted by the Planning Commission, Government of India, and the Judgment of this Tribunal dated 11.11.2011 passed in OP No. 1 of 2011 and disallowed certain legitimate expenditures without any basis and genuine grounds.

5. Appeal No. 185 of 2012

This Appeal has been preferred by the Bihar State Electricity Board (hereinafter called the '**Electricity Board**') under Section 111 of the Electricity Act, 2003 against the Impugned Order dated 30.3.2012 passed by the Bihar Electricity Regulatory Commission (hereinafter called the '**State Commission**') in the Tariff Petition being T.P. No. 2/2011 whereby the learned State Commission has passed Tariff Orders on truing up for FY 2010-11, review for FY 2011-12 and, has further determined aggregate revenue requirement as well as the Tariff for FY 2012-13 in exercise of powers under Section 61, 62 and 64 of the Electricity Act, 2003 contrary to the provisions of Electricity Act, 2003, National Tariff Policy, Bihar Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulation, 2007 (in short, '**Regulation, 2007**'), the recommendations of Shunglu Committee constituted by the Planning Commission, Government of India, and the Judgment of this Tribunal dated 11.11.2011 passed in OP No. 1 of 2011 and disallowed certain legitimate expenditures without any basis and genuine grounds.

6. Facts of the cases giving rise to Appeal Nos. 134 of 2012, 151 of 2012 and 185 of 2012:

Since the facts relating to the aforesaid three appeals being Appeal Nos.151/2012, 134/2012 and 185/2012 are quite similar and identical, there is no need to repeat the identical facts just to increase the volume of the judgment. All these three Appeals have been filed by the same and sole Appellant, Electricity Board. The relevant facts for deciding all the aforesaid three appeals are reproduced as under:

6.1 that the Appellant Electricity Board was constituted under Section 5 of the Indian Electricity (Supply) Act, 1948. The duties of the Board, under the said Act, were generation, transmission, distribution and supply of electricity within the State. Under the Electricity Act, 2003, the Government of Bihar allowed the Electricity Board to continue to function as State Transmission Utility (STU) and power Distribution Utility.

- 6.2 that the Respondent No.1 is the Bihar State Regulatory Commission (in short, the State Commission) which notified Bihar Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulation, 2007 (in short, the Regulation, 2007) which govern the determination of tariff of generation, supply, transmission and wheeling of electricity in the State.
- 6.3 that the Appellant Board filed a petition before the State Commission for approval of Aggregate Revenue Requirement for the year 2006-07 and seeking revision of tariff to meet the ARR. As per the direction of the State Commission, the Appellant Board filed a revised tariff petition on 4.8.2006 being TP-1/2006 and finally the State Commission, vide tariff order dated 29.11.2006, in Case No. T.P. 1/2006, for the year 2006-07 marginally increased the tariff, although the tariff was not revised from 2001 to 2006 except minor revision for a few categories of consumers in 2001. The State Commission has also created regulatory asset of Rs. 60 Crores without providing for any carrying cost of the same in ARR.
- 6.4 that the Appellant Board filed a tariff petition for the F.Y. 2007-08 on 18.12.2007 for approval of ARR and determination of retail tariff. However, the State Commission, by its letter dated 02.01.2008, directed the Appellant Board to file ARR for FY 2008-09. Consequently, the Appellant Board on 14.2.2008 filed the tariff petition for FY 2008-09 before the State Commission for approval of ARR and determination of retail tariff. The State Commission finally, issued its tariff order on 26.08.2008 in Case No. T.P.-1/2008, again only marginally increasing the tariff by 2.70%, which order was challenged by some respondents namely, Bihar Industries Association and Bihar Steel Manufacturers Association before this Tribunal through Appeal No. 126 of 2008 and 128 of 2008. This Tribunal, vide judgement dated 12.2.2009, dismissed

the Appeals and declined to interfere with the said tariff order dated. 26.8.2008, passed by the State Commission.

- 6.5 that the Appellant Board, thereafter, filed its Tariff Petition for the FY 2009-10 on 09.10.2009 for determination of ARR and Retail Tariff but the State Commission asked the Board to file tariff petition for the financial year 2010-11, then the Board filed a Tariff Petition, being TP No. 3 of 2010 for the FY 2010-11 for determination of the retail tariff as well as for approval of ARR of Rs. 4198.22 crore on 03.02.2010 which was decided, vide tariff order dated 6.12.2010 determining ARR and retail tariff for the FY 2010-11 with almost negligible increase in retail tariff i.e approximately 5 paise per unit inspite of substantial increase in the cost of power purchase and other costs as well as revision of tariff being done after 2 years.
- 6.6 that the Appellant Board challenged the tariff order dated 6.12.2010 passed in Case No. T.P.-3/2010, before this Tribunal by filing an appeal, being Appeal No. 26 of 2011, venting grievances that the State Commission had disallowed certain expenditures without any basis as well as assessed lower consumption of electricity for certain unmetered category of consumers having lower tariff and allocated the same to other categories of consumers having metered supply at higher tariff resulting in unrealistic and notional hike in the projected revenue. Some of the consumers/associations also challenged the State Commission's order dated 6.12.2010 before this Tribunal in Appeal No. 14 of 2011 and Appeal No. 27 of 2011. This Tribunal vide judgment, dated 10.5.2012, dismissed all these Appeals being Nos. 14 of 2011, 26 of 2011 and 27 of 2011.
- 6.7 that the Appellant Board then filed its tariff petition, being TP No. 1 of 2011, for the FY 2011-12 for determination of the retail tariff as well as for approval of ARR of Rs. 5148 crore on 17.02.2011, which was decided by the State Commission, vide tariff order,

dated 1.6.2011, in Case No. T.P.-1/2011 determining ARR and retail tariff for the FY 2011-12 with ARR of Rs. 4538 crores only as against Appellant Board's estimated ARR of Rs.5148 crores. The State Commission has also created regulatory asset of Rs. 245 Crores without providing for any carrying cost of the same in ARR as required under the Law / Regulations.

- 6.8 that the Appellant Board, thereafter, filed a review petition before the State Commission on 2.08.2011 seeking review of tariff order dated 1.6.2011 passed in Case No. T.P.-1/2011, which was dismissed by the State commission, vide order, dated 22.12.2011 in TP-8/2011.
- 6.9 that the Appellant Board, thereafter, challenged the State Commission's main tariff order dated 2.8.2011 and review order dated 22.12.2011 before this Tribunal being Appeal No. 151 of 2012.
- 6.10 that in the meantime, the Appellant Board had filed its true-up petition for FY 2006-07 on 25.5.2011 but the Commission did not entertain the same & directed Appellant Board to file consolidated true up petition for FY 2006-07, FY 2007-08 & FY 2008-09 along with Review of ARR's for FY 2009-10 & FY 2010-11 within three months from the date of issue of Tariff Order for FY 2011-12 namely, 1.6.2011.
- 6.11 that the Appellant Board then filed the true up petitions for FY 2006-07, FY 2007-08 & FY 2008-09 on 1.9.2011, as per the direction of the State Commission. The State Commission passed true up order dated 4.1.2012, determining meagre revenue gap of Rs. 6.11 crore, Rs. 73.12 crore and Rs. 104.47 crore for FY 2006-07, FY 2007-08 and FY 2008-09 respectively with Rs. 183.70 crore and Rs. 33.50 crore being the amount of carrying cost for 1.5 years period only as against Appellant Board's actual revenue gap of Rs. 1167.35 crore (Rs. 351.71 crore for FY 2006-07, Rs. 347.16

crore for FY 2007-08 and Rs. 468.48 crore for FY 2008-09) and Rs. 704.48 crore being the amount of actual carrying cost accrued to the Appellant Board.

- 6.12 that the Appellant Board challenged the impugned order, dated 4.1.2012, passed by the State Commission in Case No. T.P.-7A/2011 through Appeal No. 134 of 2012 before this Tribunal.
- 6.13 that the Appellant Board filed its true up petition being Case No. T.P.12/2011 for FY 2009-10 on 13.10.2011, in which the State Commission passed the true up order dated 27.1.2012, determining revenue gap of Rs. 232.28 crore for FY 2009-10 and Rs. 42.39 crore being the amount of carrying cost for 1.5 years period only as against Board's actual revenue gap of Rs. 947.17 crore & Rs. 354.00 crore being the amount of actual carrying cost accrued to the Appellant Board. The Commission's order dated 27.1.2012 is under challenge before this Tribunal which is said to be pending.
- 6.14 that thereafter, the Appellant Board filed the tariff petition for the FY 2012-13 for determination of the retail tariff as well as for approval of ARR & Review Petition for FY 2011-12 along with the revised estimates for FY 2011-12 and Budget estimates for FY 2012-13 on 15.11.2011. The copies of all these petitions have been annexed with the Memo of Appeal. The Appellant Board has also filed the copy of true up petition for FY 2010-11 dated 16.3.2012 and also the audited accounts for the year ending 31.3.2011.

7. The following issues arise in Appeal No. 131 of 2012:

- A. whether the State Commission has rightly followed the provisions of the Electricity Act, 2003, the National Electricity Policy, the National Tariff Policy, BERC (Terms & Conditions for Determination of Tariff) Regulations, 2007, Recommendations of

Shunglu Committee, and the judgment of this Appellate Tribunal dated 11.11.2011 in OP No.1/2011 to determine the cost of supply category wise and adjust the category wise loss levels and based thereon the tariff applicable to the different classes of consumers?

- B. whether the State Commission has failed to utilize the Government Grant to cover-up the transmission and distribution loss which is as high as 41% as claimed by the Respondent-Electricity Board?
- C. whether the State Commission has rightly determined the tariff for all category of consumers while applying loss level for 27.5% despite the fact that the total losses in the transmission and distribution system at different voltage level from electricity is supplied to a different category of consumers is not the same?
- D. whether the State Commission has rightly decided the cross-subsidy in accordance with the National Electricity Policy and National Tariff Policy?
- E. whether the State Commission has discriminated old and new consumers of HTSS category by fixing 600 KVA per metric ton for old consumers and declaration by manufacturer for new consumers?
- F. whether the State Commission has correctly continued with the fixed charges against the practice adopted by other State Commissions?
- G. whether the State Commission can ask the Licensee/Electricity Board to recover the FPPCA charges without review and truing up when the licensee is not generating rather it is only trading in power?

- H. whether the State Commission can authorize the BSEB/Electricity Board to charge premium over the normal tariff for a particular region for uninterrupted supply, that too subject to grid failure, force majeure, scheduled shut down or emergent break down beyond the control of licensee?
- I. whether the State Commission has rightly allowed the licensee to bridge the revenue gap through the government grant/subsidy given by the State Government under Section 65 of the Electricity Act, 2003?
- J. whether the State Commission has wrongly withdrawn the load-factor rebate on the ground that higher consumption should be discouraged?

8. Issues arising out of the Appeal No. 134 of 2012, 151 of 2012 and 185 of 2012:

As stated above, the facts and other aspects of Appeal No. 134/2012, 151/2012 and 185/2012 are identical and same. The following **common issues**, out of all the three Appeals, arise for our consideration:

- A. whether the State Commission has rightly followed the provisions of the National Electricity Policy, National Tariff Policy, BERC (Terms & Conditions for Determination of Tariff) Regulations, 2007, Recommendations of Shunglu Committee and judgment of this Appellate Tribunal dated 11.11.2011 passed in OP 1/2011 to determine the cost of supply category-wise and adjust the category-wise loss level and based thereon the tariff applicable to the different classes of consumers?
- B. whether the State Commission has committed illegality by completely giving a go by to settled yardsticks and principles invoked and applied by the State Commission for the purposes of determination of retail tariff and ARR for FY 2008-09 which had

been approved by this Appellate Tribunal, vide judgment dated 12.2.2009, in Appeal No. 126/2008 and 128/2008?

- C. whether the State Commission has erred by drastically reducing the actual employee cost incurred by the Board, in the impugned true-up order by excluding the amount of terminal benefit to be paid to all the retired employees of the Board for their services prior to the financial year, for which true-up is being done?
- D. whether the State Commission has erred by disapproving the payment made by the Board for unfunded liabilities?
- E. whether the State Commission has failed to appreciate that the tariffs in the past were not even sufficient to recover the cost of supply, hence, Board has not created the separate head for payment of retiral dues of its employees and the same is being perennially paid throughout from the revenue earned by the Board?
- F. whether the State Commission has erred by adopting a methodology for calculation of interest and finance charges which are not provided for in the Regulations, 2007?
- G. whether the State Commission has erred in not considering the letter of State Government dated 19.9.2011, whereby the Board had been directed to use the Government funding in the form of resource gap/grant, firstly to set-off the T&D loss and, thereafter, the balance amount of the Government grant to be utilized as subsidy granted to the Agricultural and Rural consumers?
- H. whether the State Commission has rightly allowed the licensee/Board to bridge the revenue gap through the Government grant/subsidy given by the State Government under Section 65 of the Electricity Act, 2003?

- I. whether the State Commission has erred by not allowing the carrying cost, till the period of actual recovery of the revenue gap and whether the State Commission was justified in allowing carrying cost up to a period of 1.5 years?
- J. whether the learned State Commission has failed to exercise the powers vested in it under Regulations 27 and 29 of Tariff Regulations to vary the terms and conditions for determination of tariff as well as power to remove the difficulties respectively?

9. The following additional issues arise in Appeal No. 185 of 2012:

- (K) whether the State Commission has erred in not considering the projection of the combined employees cost of the Board for FY 2012-13 and instead of taking the figures of employees cost of audited annual account for FY 2010-11, separately for each of the generation, transmission and distribution function as the base value?
- (L) whether the State Commission has wrongly delayed expenditure on the generation cost and reducing the cost of coal and oil without any reason and logic and also without considering that the generating plant of the Board has exceeded its economic life, the operational parameters have also varied and, therefore, are required to be approved at the actual for FY 2010-11?

10. We have heard Ms. Swapna Seshadri the learned counsel for the Appellant and Mr. Parmanand Singh, Mr. Mohit Kumar Shah, Ms. Shilpi Shah and Mr. Nitikesh Kumar for the Respondents in Appeal No. 131 of 2012. We have also heard Mr. Mohit Kumar Shah, Ms. Shilpi Shah and Mr. Nitikesh Kumar, the learned counsel for the Appellants and Mr. Parmanand Singh and Ms. Swapna Seshadri, the learned counsel for the Respondents in Appeals Nos. 134/2012, 151/2012 and 185 of 2012 respectively.

ISSUE-WISE CONSIDERATIONS ARE AS FOLLOWS:

11. Issue No. A : Appeal No. 131/2012 and Appeals Nos. 134/2012, 151/2012 and 185/2012

- 11.1 Issue No. A in Appeal No. 131/2012 as well as Appeals Nos. 134/2012, 151/2012 and 185/2012 is the same, therefore, we are deciding Issue-A together.
- 11.2 Both the rival parties namely; Association of Traders who is Appellant in Appeal No.131/2012 and the Electricity Board, who is Appellant in each of the Appeal nos. 134/2012, 151/2012 and 185/2012 are aggrieved so far as this issue is concerned.
- 11.3 The distinction between cost of supply and average cost of supply is important. The average cost of supply deals with cost elements namely; the expenses to be averaged out for all consumers together and there will be, only one cost of supply, for the entire distribution licensee area. According to the Traders/Bihar Chamber of Commerce, the tariff, for their category, has been determined in a manner, that is not aligned to the cost of supply to be determined, according to the provisions of Electricity Act and the Policies notified by the Government of India, under Section 3 of the Electricity Act, 2003.
- 11.4 According to the Association of Traders, the State Commission has misconstrued that the policy, notified by the Central Government, only provides for average cost to supply to the basis for tariff design. The State Commission erred in not following the Tariff policy notified by the Central Government for substantial reduction in the cross-subsidy prevalent in the system by the year 2010-11.
- 11.5 As per the learned counsel for the Electricity Board, the State Commission has overlooked its own earlier guidelines and principles formulated by it in the earlier tariff orders, determining the retail tariff and ARR, which had been approved by this

Appellate Tribunal in its judgment dated 12.2.2009 in Appeal No. 126/2008 and 128/2008 and now the State Commission is estopped from deviating the said principles. None of the rival parties has been able to point out any specific provision of the Electricity Act, 2003, National Electricity Policy, National Tariff Policy and Tariff Regulations, 2007 and any part of any judgment of this Appellate Tribunal, which could be said to be contravened.

11.6 The issue regarding voltage-wise cost of supply has been dealt with by this Tribunal in judgment dated 29.1.2014 in Appeal No. 153 of 2012 in the matter of East Coast Railway vs. Orissa Electricity Regulatory Commission & Ors. The relevant extracts are as under:

"....."

21. Regarding voltage-wise cost of supply this Tribunal in Appeal no. 248 of 2012 has held as under:

"14. We do not agree with the contention of the Appellant that the tariff has to be determined according to the cost of supply or voltage-wise cost of supply. This Tribunal in the various judgments including judgment dated 30.5.2011 in Appeal no. 102 of 2010 & batch in the matter of Tata Steel Vs. Orissa Electricity Regulatory Commission has clearly held that the tariff need not be the mirror image of actual cost of supply or voltage-wise cost of supply. The voltage-wise cost of supply has to be determined to compute and reflect the cross subsidy transparently and to ensure that the cross subsidy is not increased but only reduced gradually. However, the variation of categorywise tariff with respect to overall average cost of supply has also to be determined to satisfy the provision of the Tariff Policy that the tariffs are within $\pm 20\%$ of the average cost of supply (overall) by FY 2010-11.

15. According to the Respondents, Tariff Regulation 126 of the State Commission provides that average cost of supply and realization from a category of consumer shall form the basis of estimating the extent of cross subsidy and that the Commission shall endeavour to determine the tariff in such a manner that it progressively reflects the average cost of supply and the extent of cross subsidy to any consumer category is within the range of $\pm 20\%$ of average cost of supply by the FY 2010-11.

16. We agree that the State Commission has to determine the average cost of supply and to ensure that the tariffs are within $\pm 20\%$ of the average cost of supply (overall average cost of supply) to satisfy the provision of its Tariff Regulations and Tariff Policy. However, the voltage-wise cost of supply has also to be determined to transparently determine the cross subsidy with respect to actual cost of supply. Accordingly, we direct the distribution licensees to furnish the necessary data to the State Commission in the future tariff/ARR exercise and the State Commission shall

determine the voltage-wise cost of supply in line with the dictum laid down by this Tribunal in various cases including Tata Steel case, to transparently reflect the cross subsidy. However, we are not suggesting that the tariffs should have been fixed as mirror image of actual cost of supply or voltage-wise cost of supply or that the cross subsidy with respect to voltage-wise cost of supply should have been within $\pm 20\%$ of the cost of supply at the respective voltage of supply. The legislature by amending Section 61(g) of the Electricity Act by Act 26 of 2007 by substituting 'eliminating cross subsidies' has expressed its intent that cross subsidies may not be eliminated.

17. *The Tariff Policy provides that the State Commissions have to notify a road map for reduction of cross subsidy to ensure that tariffs are within $\pm 20\%$ of the cost of supply by FY 2010-11. From the example given in the Tariff Policy, it is clear that the intent of the Tariff Policy is to ensure that the tariffs should at least be $\pm 20\%$ of the overall average cost of supply by FY 2010-11. However, the Tribunal in the various judgments has laid down the dictum that the 'cost of supply' as referred to in Section 61(g) of the 2003 Act is the actual or voltage-wise cost of supply and not average (overall) cost of supply for the distribution licensee. Thus, actual or voltage-wise cost of supply has also to be determined to transparently reflect the cross subsidy and to ensure that the cross subsidy with respect to actual cost of supply or voltage-wise cost of supply is gradually reduced. Therefore, the State Commission has also to determine the voltage-wise cost of supply to transparently reflect the cross subsidy and to ensure that the cross subsidy is gradually reduced and not increased."*

Thus, the State Commission has to ensure that the tariffs are within $\pm 20\%$ of the average cost of supply in accordance with the Tariff Policy as also its own Regulations. But the voltage-wise cost of supply has also to be determined to transparently determine the cross subsidy with respect to actual cost of supply and to ensure that the cross subsidy is gradually reduced and not increased."

11.7 On careful perusal of the impugned order, it appears to be in conformity with the Tariff Regulations and provisions of Electricity Act, 2003, National Tariff Policy and National Electricity Policy. So far as the recommendations, of any Committee like Shunglu Committee, are concerned, if they are not strictly adhered to, in the impugned orders, impugned orders cannot be said to be faulty on this ground alone. Both the rival parties should be satisfied with the relevant part of the impugned orders, so far as this issue is concerned, and we are not inclined to interfere therewith. As the State Commission is justified in passing the impugned orders and no illegality or infirmity has been committed by the State Commission, **the issue No. A in Appeal No. 131/2012 as well as Appeals Nos. 134/2012, 151/2012 and 185/2012 are, accordingly, decided against the Appellants.**

12. Issue No. B : Appeals Nos. 134/2012, 151/2012 and 185/2012

12.1 So far, issue No. B of the connected Appeals Nos. 134/2012, 151/2012 and 185/2012 is concerned, we observe that the State Commission has not committed any illegality and has not given any go-by to the already settled yardsticks and principles, while passing the earlier tariff orders and approved by this Appellate Tribunal in Appeal No. 126/2008 and 128/2008. Tariff is to be determined as per the relevant Tariff Regulations for that particular period and if there is some slight deviation from the earlier yardsticks or principles, by the Commission, the impugned order, cannot be said to be illegal, merely because of that trivial or minor deviation. Even otherwise, each tariff petition is a separate exercise which has to be conducted by the State Commission according to its Regulations. Deviation in practice which was followed in the previous year but which is not in contravention to the provisions of the Electricity Act, Rules and Regulations cannot become invalid just because there is some deviation in the practice followed in the previous tariff order. **This issue i.e. issue No. B of the connected Appeals Nos. 134/2012, 151/2012 and 185/2012 is decided against the Appellant Board.**

**13. Issues Nos. B, C & I in Appeal No. 131/2012:
Issues Nos. G & H in Appeals Nos.134/2012, 151/2012 & 185/2012**

13.1 Since these issues are interconnected, we are taking them together. The main grievance of the Appellant-Bihar Chamber of Commerce/Traders is that the determination of the tariff, for all category of consumers applying loss level for 27.5%, despite the fact, that the total losses in the transmission and distribution system at different voltage level from electricity supplied to different category of consumers is not the same, has wrongly been made by the State Commission. The Appellant/Traders contended before the State Commission that the cost of supply of electricity

to the different category of consumers should be considered after applying the voltage-wise loss level only but that stand has not been accepted by the State Commission. One more contention of the Appellant/Traders on this issue is that the State Commission has failed to take proper initiative, for reduction of the transmission and distribution loss, rather to the contrary that the State grant/subsidy is being adjusted against the transmission and distribution loss with the consent of the State Commission.

13.2 The main submission of the Appellant Board, on this issue, is that the learned State Commission has erred by considering the financial assistance provided by the State Government, to be a subsidy granted to the consumers, without considering the facts, that the State Government had to intervene by extending financial support to the Board in order to bail out the Board out of its financial exigency, on account of the apathy of the State Commission, in allowing unrealistic and undervalue expenditure in the ARR for the various financial years resulting in wrong estimates, leading to fixation of lower tariff.

13.3 The learned counsel for the Appellant Board strenuously argued that the financial condition of the Board started deteriorating since incorporation of the Regulatory Commission. A cumulative losses of the Board were Rs.670.10 crores up to FY 2005-06 which further increased to Rs.5820.86 crores during FY 2010-11 due to the errors of the Regulatory Commission, out of which, Rs.1389.74 crores is on account of losses suffered by the Board due to denial of power purchase cost over and above the normative T&D losses approved by the State Commission and Rs.2982.04 crores on account of denial of interest on non-plan loan taken by the Board from the State Government.

13.4 According to the Appellant Board, the learned State Commission has also erred by not considering the letter of State Government, dated 19.9.2011, whereby the Board was directed to use the

Government funding, in the form of resource gap/grant, firstly to set-off transmission and distribution losses and thereafter the balance amount of financial assistance extended by the State Government should be regarded as subsidy granted to the Agricultural and Rural consumers.

13.5 According to the Appellant Board, the State Commission ought to have considered that the revenue gap cannot be carried over perpetually and has got to be bridged either by a regulatory mechanism or by fiscal grant by the State Government. Once the regulatory mechanism, for bridging out such accumulated revenue gaps, has been disallowed by the State Commission, it cannot dispute, deny or disallow direct resource gap funding by the State Government to wipe out such accumulated and carry forwarded losses which is contrary to the paragraph 65(iv) of the judgment dated 11.11.2011 passed in OP No. 1/2011 by this Appellate Tribunal, as also in utter disregard to the report of the Mr. Shunglu Committee, which has deprecated the functioning of the Regulators and issued guidelines.

13.6 The learned counsel for the Appellant Board has submitted that the learned State Commission has used the resource gap grant for subsidizing the rural consumers and remaining grant has been used to reduce ARR for 2012-13, thus the resource gap grant has not been used to the benefit of the Board for disallowable power purchase cost, which is its first priority of uses of grant. The State Commission, while determining the ARR, for the Board fixes T&D loss achievement target for each financial year. The actual/projected T&D losses of the Board have been higher than the prescribed T&D trajectory of losses due to various reasons. Dilapidated distribution network of the Board has contributed to higher T&D losses. Massive and large scale electrification of villages under

RGVY scheme leading to expansion of rural distribution network too has contributed to the T&D losses of the Board.

- 13.7 On perusal of the impugned orders, we find that the learned State Commission, in the impugned orders, has considered the resource gap funding, for the purpose of compensating disallowed power purchase, in view of the letter of Energy Department, State Government dated 19.9.2011, wherein the Government of Bihar has clarified the priority for use of resource gap funding provided by it. As per this letter dated 19.9.2011, the resource gap funding has to be first used to meet financial losses arising out of non-approval of actual T&D losses by the Electricity Board. The remaining amount of resource gap funding will be used for subsidizing agricultural and rural consumers. In such a view of the matter, the resource gap funding received from the Government of Bihar, has to be first used for meeting unabsorbed power cost on account of disallowed T&D losses.
- 13.8 We note that the resource gap, provided by the State Government, has to be treated, as exactly in the manner, for which it is provided. Now, by defining the nature of the grant, the State Government has not proposed to undo the benefits granted to the consumers in the past tariff orders but it has simply sought to drag erstwhile Board out of the reds. Accordingly, erstwhile Board had requested the State Commission to give revised treatment to all such grants, in determining the revenue loss incurred by the Board, during the relevant Financial Year, which is not possible until the ongoing tariff process is finalized by the order of the learned State Commission, on the true-up petitions filed by the Board for different financial years. Thus, the resource gap funding received from Government of Bihar, should be first used for meeting unabsorbed power cost on account of disallowed T&D losses. The remaining amount should only be treated as income to the Board as shown in the tariff petition.

13.9 Under Section 65 of the Electricity Act, 2003, the State Government has the right to decide the quantum of subsidy and the categories to which it would like to subsidize. The Government of Bihar has exercised this right, in its letter dated 19.9.2011, wherein it has been stipulated, that the resource gap funding will be first used to meet financial losses arising out of non-approval of actual T&D losses of the Electricity Board and then the balance amount of resource gap funding will be used for subsidizing agricultural and rural consumers.

13.10 We further observe that the financial losses arising out of additional power purchase because of higher T&D losses, will have to be borne by the State of Bihar if the actual T&D losses are not approved by the State Commission. The Government of Bihar, in public interest, is discharging its onerous responsibility and providing funds to the erstwhile Electricity Board to meet the gap between actual power purchase cost and approved power purchase cost. This would be essential to avoid, carrying over of loss, year after year, in the books of accounts which would help erstwhile Electricity Board to borrow from Banks for meeting its working capital requirement and the liquidity crunch. Such gap cannot be carried over perpetually and has got to be bridged either by a regulatory mechanism or by fiscal grant by the State Government. Once the regulatory mechanism for bridging out such accumulated revenue gaps has been disallowed by the learned State Commission, the Commission cannot dispute, deny or disallow direct resource gap funding by the State Government to wipe out such accumulated and carry forwarded losses. It is the prerogative of the State Government/Agency, which is giving grant to specify the mode and manner in which the grant is to be utilized by the beneficiary.

13.11 Thus, we are unable to accept the Appellant/Traders' contention that the Government grant for FY 2012-13 has been diverted

towards extra T&D losses and rural electricity supply only which is against the provisions contained under Section 65 of the Electricity Act, 2003. The Government grant has been utilized, as per the letter, dated 19.9.2011, of the State Government and on this aspect, we agree to the findings recorded by the State Commission in the impugned orders, as such findings are based upon just, proper and correct appreciation of the material on record and is also in conformity with the legal provisions. We also find no force in the contentions of the Appellant Board on these issues. **Accordingly, all the issues i.e. issues nos. B, C & I in Appeal No. 131/2012 and issues nos. G & H in Appeals Nos.134/2012, 151/2012 & 185/2012 are decided against the Appellants.**

**14. Issue No. D in Appeal No. 131/2012:
*(Determination of cross-subsidy)***

This issue relates to the point whether cross subsidy has been determined according to the legal provisions?

- 14.1 As per Appellant/Association of Traders, the State Commission has erred in not indicating the computation of cross-subsidy for each category of consumer in the Tariff order, increase/reduction in cross-subsidy with respect to previous year and increase/reduction in Tariff with respect to Tariff of previous year for transparency.
- 14.2 It has also been submitted on behalf of the Appellant Board that this Appellate Tribunal vide judgment dated 10.5.2012 in Appeal No. 14/2011, Appeal No. 26/2011 and Appeal No. 27/2011 pertaining to the tariff order, dated 6.12.2010, passed by the learned State Commission, determining the Aggregate Revenue Requirement (ARR) and Retail Supply Tariff (RST) for the FY 2010-11, directed the State commission to determine the cross subsidy, based on cost of supply at different voltage level, within six

months and ensure that in future orders beginning from FY 2013-14, the cross subsidies and tariffs are determined based on the principles laid down by this Tribunal in the Tata Steel Judgment. Thus, according to the judgment dated 10.5.2012 of this Appellate Tribunal, the tariff has to be worked out, after determining category wise cost of supply, w.e.f. the FY 2013-14, hence the contention of the Appellant-Bihar Chamber of Commerce/Traders, that present tariff has been determined applying the same loss level, despite the fact that losses in the transmission and distribution system at different voltage level from electricity is supply to the different type of consumer is not the same, would not be relevant for the current tariff order i.e. for the FY 2012-13.

14.3 One more contention of the Appellant-Bihar Chamber of Commerce/Traders is that tariffs of the Board till now had not been based on voltage wise costs of supply but the same had been calculated on the basis of weighted average costs of supply for all category of consumers as directed in National Tariff Policy. Thus, average cost of supply and not voltage-wise cost of supply for different categories of consumers is taken for the determination of tariff taking into account the overall Transmission, Distribution and Commercial losses of the Board, which is in consonance with the national Tariff Policy and Section 62 of the Electricity Act, 2003.

14.4 It would be relevant to quote Clause 8.3(2) of the National Tariff Policy, 2006, which reads as follows:

*“For achieving the objective that the tariff progressively reflects the cost of supply of electricity, the SERC would notify roadmap within six months with a target that latest by the end of year 2010-11 tariffs are within $\pm 20\%$ of the **average cost of supply**. The road map would also have intermediate milestones, based on the approach of a gradual reduction in cross subsidy.”*

- 14.5 Thus, even the National Tariff Policy envisages formulation of tariff on the basis of average cost of supply. The road map has been prepared for achieving objective that the tariff progressively reflects the cost of supply of electricity. It has further been argued on behalf of the Board that the present scenario, the State Commission has approved the tariff rates on the basis of overall cost of power. The tariff has thus been determined as per the Electricity Act, 2003, National Tariff Policy, 2006 and Bihar State Electricity Regulatory Commission (Terms & Conditions for Determination of Tariff) Regulations, 2007.
- 14.6 We see that the learned State Commission has indicated the computation of cross subsidy of each category of consumers in its tariff order dated 30.3.2012 in table no. 152.
- 14.7 The Commission, as is evident from para 6.38.1 of the impugned order, dated 30.3.2012, has approved the tariff for various consumer categories considering gradual reduction in cross-subsidy in line with the requirement of Tariff Policy. By showing computation of the same in Table-152, dealing with cross-subsidy for FYs 2011-12 and 2012-13 has depicted that tariff as a percentage of average cost is moving towards the band of $\pm 20\%$ of average cost of supply.
- 14.8 By having a careful look at the table no. 152, shown in the impugned order dated 30.3.2012, we find that the learned State Commission has been trying its best to bring-down the cross subsidy within $\pm 20\%$ of the average cost of supply. The National Tariff Policy also contains the word “average cost of supply” in lieu of “cost of supply”.
- 14.9 The contention of the Appellant-Association of Traders that the State Commission has erred in not indicating the computation of cross subsidy of category of consumer in the tariff order is unworthy of acceptance because the learned State Commission, in

table no. 152 of the impugned order dated 30.3.2012, has indicated the computation of cross subsidy of each category of consumers. The State Commission is trying its best in ensuring that the cross subsidy to come $\pm 20\%$ of the average cost of supply.

- 14.10 We agree to the findings recorded on this issue by the State Commission in the impugned order and there is not cogent reason to interfere with that finding. Thus, we find that the State Commission has approved the tariff rates on the basis of overall cost of power and tariff has been determined as per the Electricity Act, 2003, National Tariff Policy, 2006 and Tariff Regulations, 2007. **The issue no. D in Appeal No. 131 of 2012, is accordingly, decided against the Appellant-Association of Traders.**

15. Issue No. E in Appeal No. 131/2012:

This issue relates as to whether the State Commission has discriminated old and new consumers of High Tension Specified Services (HTSS) category by fixing 600 KVA per metric ton for old consumers and declaration by manufacturer for new consumers?

- 15.1 According to the Appellant-Bihar Chamber of Commerce/Association of Traders, the State Commission has failed to appreciate that cost of supply, in cases of High Tension and HTSS consumers, will have to be determined essentially with reference to the power purchase cost and cost of maintaining the system upto the voltage level, at which the supply is effected. Thus, the State Commission has erred in discriminating the old and new HTSS category consumers by applying different yardstick for determination of the load.
- 15.2 According to the Appellant-Association of Traders, the State Commission has fixed capacity of induction capacity for HTSS category at 600 KVA per metric ton, whereas for new connection or

if the old furnace is replaced with new one, the contract demand is to be based on the capacity of the furnace, as per manufacturer's technical specification. This approach of the State Commission is discriminatory as the present discrimination is within a particular category of consumers which is not permissible.

- 15.3 Mr. Mohit Kumar Shah appearing for the Electricity Board, refuting the submission of the Appellant-Association of Traders has submitted that HTSS (33kV/11kV) category, as per the tariff order for FY 2012-13, is applicable for supply of electricity to all consumers who have contract demand of 300 kVA and more for induction furnace including Ferro Alloy loads. This tariff will not apply to casting units having induction furnace of melting capacity of 500 kVA and below. The capacity of induction furnace shall be 600 kVA per metric tone as existing for determining the contract demand of induction furnace in the existing HTSS service connections. However, for new connection and if the furnace is replaced with a new one for the existing connection, the contract demand shall be based on total capacity of the furnace and equipment, as per manufacturer technical specifications, and in case of difference of opinion, the provisions of clause nos. 6.39 and 6.40 of the Bihar Electricity Supply Code shall apply. Clause 6.3 of which is given below:

“6.39- The connected load of all categories other than Domestic category of consumers shall be the aggregate of the manufacturer's rating plates of all energy consuming devices, in the consumer's premises, which can be used simultaneously. This shall be expressed in kW, kVA or HP. During the process of determination of connected load, if the manufacturer's rating plate is not available, the licensee may use suitable apparatus to determine the load of such device. If, both air-conditioner and room heater are found in the same premises, the load of the item with higher rating shall be taken into account.”

Items stocked for the purpose of sale/repair or genuinely as spare shall not be considered for the purpose of determination of connected load. The licensee shall carryout periodic survey of streetlights and record the type of lamps being used along with their load.

- 15.4 According to Mr. Shah, appearing for the different Appellant-Board in other appeals, no prejudice will be caused to the consumers on account of the tariff provision. The old induction furnace consumers approached the Electricity Board, after large-scale theft of electricity was detected and criminal cases for theft of electricity were filed against many of such consumers, through their association namely; Bihar Steel Manufacturer's Association (BSMA), for discussion on the issue of fixation of tariff for induction furnace, on the line of the tariff of UPSEB. It was, after detailed discussion and meetings between the Electricity Board of Bihar and Bihar Steel Manufacturer's Association, the new tariff for new category of service i.e. High Tension Specified Service (HTSS) was framed and ultimately, new tariff for induction furnace consumers was made effective from 1.9.1999. Thereafter, all the induction furnace consumers entered into a fresh agreement with Board to follow new tariff framed for the induction furnace consumers and now, HTSS consumers cannot raise any grievance against the old parameters for calculating the contract demand and they are bound by the minutes of the meeting dated 24.4.2001 duly signed by office bearers of the association of the HTSS consumers and the agreement entered into by the individual consumers with erstwhile Electricity Board. The State Commission, does not appear to have made any discrimination between old and new consumers of HTSS category by fixing 600 kVA/MT for old consumer and declaration by manufacturers for new consumer.

15.5 In view of the aforesaid submissions of Mr. Shah, we do not find any merit in the demand of the Appellant-Association of Traders and we agree to the findings recorded on this issue by the learned State Commission in the impugned order. **This issue i.e. issue no. E, is also accordingly decided against the Appellant-Bihar Chamber of Commerce/ Association of Traders in Appeal No. 131 of 2012.**

16. Issue No. F in Appeal No. 131/2012:

16.1 The only contention of the Appellant-Bihar Chamber of Commerce/ Association of Traders on this issue is that the fixed charges continue to be the part of the Tariff without appreciating the fact that the licensee is generating negligible electricity, rather it has become a power trader. The concept of fixed charges were approved by the superior Courts on the ground that the respective Electricity Boards engaged in generation of power had to meet certain fixed expenses but the State Commission has approved the fixed charges without considering this aspect. The State Commission has incorrectly allowed the fixed charges to continue in the present tariff order, again rewarding the Electricity Board for not improving its efficiency. According to the Appellant/Association of Traders, the State Commission, in the impugned order, has continued with the fixed charges, whereas other State Commissions have discontinued with such practice, as it gives rise to inefficiency by the licensee so far as it relates to recovery of energy charges on the basis of actual consumption. The State Commission has failed to appreciate that fixed charges are the charges that are to be paid by all the consumers, irrespective of their actual consumption during the month. If the demand charges/fixed charges are billed, as per the maximum recorded demand or the contract demand, whichever is higher, it would mean that in a given month, if a consumer does not have

any consumption of electricity, the consumer will still have to pay the demand charges on the basis of the contract demand.

16.2 **Per contra**, the learned counsel for the Electricity Board has submitted that the fixed charges being levied in the tariff order for FY 2012-13 are in accordance with section 45(2)(3) of the Electricity Act, 2003 which provides that charges for electricity supplied by a distribution licensee may include:

(a) a fixed charge in addition to the charge for the actual electricity supplied;

(b) a rent or other charges in respect of any electric meter or electrical plant provided by the distribution licensee.

16.3 Moreover, the National Tariff Policy, 2006 focuses on introduction of two-part tariff as it would result in flattening the peak and off-peak hours measures. Clauses 6.2 and 8.4(1) of the National Tariff Policy stipulates fixed charges as part of two-part tariff, which has to be introduced by the regulators and the licensees.

16.4 According to the Electricity Board, in line with the National Tariff Policy, the State Commission has approved two-part tariff comprising demand charge and energy charge, while issuing its tariff order for FY 2012-13 or its past orders. During finalization of tariffs for Bihar, the Commission has tried to balance the interest of consumers and the erstwhile Electricity Board. The concept of two-part tariff has also been approved by this Appellate Tribunal in its judgment, dated 12.2.2009, passed in Appeal No. 128 of 2008 and 126 of 2008, wherein the tariff order passed by the Bihar State Commission for FY 2008-09, was challenged. In support of two-part tariff, it has vehemently been argued on behalf of the Electricity Board that the supply of electricity to a consumer involves incurring of overhead installation expenses by the erstwhile Electricity Board, which do not vary with the quantity of electricity consumed and the installation has to be continued, irrespective of whether the energy is consumed or not until the

agreement comes to an end. Hence, the fixed charges are meant to cover investment, installation and the standing charges, as the same has also been held by the Hon'ble Supreme Court in many cases. Further, the component of fixed charges includes salary of the employees, R&M expenses, A&G expenses, finance charges, etc. Therefore, the tariff of different category of consumers is a combination of fixed charges/demand charges and unit energy charges. In such view of the matter, the appellant is not correct in contending that the fixed expenses are only relatable to generation of power because major power suppliers/generators to the erstwhile Board recover fixed charges from the Board as part of two-part tariff being followed by them.

16.5 After considering the aforesaid rival contentions, we agree to the submissions made on behalf of the Electricity Board and we do not find any merit in the submissions of the Appellant/Bihar Chamber of Commerce/Association of Traders. Consequently, we agree to the findings recorded by the State Commission in the impugned order, and there is no reason to deviate, hence, this issue i.e. **Issue No. F in Appeal No. 131/2012, is also decided against the Appellant/Bihar Chamber of Commerce/Association of Traders.**

17. Issue No. G in Appeal No. 131/2012:

17.1 This issue is with respect to imposition of Fuel & Power Purchase Cost Adjustment (FPPCA) in the case of Respondent Board, wherein the Board is acting as a power trader and such enhancement in purchase cost can be reconciled in review and truing up to make the levy prospective.

17.2 The main contention of the Appellant/Bihar Chamber of Commerce/ Association of Traders is that the State Commission cannot ask the licensee/Electricity Board to recover the FPPCA

charges without review and truing up particularly when the licensee is not a power generator but only a power trader.

- 17.3 The State Commission, according to the Appellant/Bihar Chamber of Commerce/Association of Traders has not applied its mind while incorporating FPPCA charge formula as it is beyond the competence of the State Commission to prescribe FPPCA formula in the tariff order. In terms of the Electricity Act, 2003 particularly section 62(4) read with section 2(62), there has to be a regulation for the same. It is well settled principle that if a particular act has to be done in a particular manner, any other manner is barred in law. The approach of the State Commission in allowing the licensee/Board to recover FPPCA charges from the Appellant/ Association of Traders, despite the fact that the traders are not generating energy rather they are engaged in power trading.
- 17.4 Thus, the main point of the argument of the Appellant-Association of Traders on this issue is that FPPCA charges cannot be imposed by the licensee, i.e. the Electricity Board, in the instant case the licensee a trader who files its annual return in Annexure-D is a distribution licensee and therefore any escalation in cost in purchase has to be reconciled in review and truing up, after accounts are audited in the tariff of succeeding year, in terms of regulation framed by the State Commission.
- 17.5 **Per contra**, the learned counsel for the Electricity Board on this issue has submitted that the issue of FPPCA charges is no longer res-integra in as much as this Appellate Tribunal, vide judgment dated 18.5.2011 passed in Appeal No. 172 of 2010 has held that FPPCA formula as laid down in tariff order, dated 26.8.2008, cannot be defeated because of same not being specified in the tariff regulations in terms of regulation 21 thereof and the question of approval of parameters before implementation of the FPPCA formula does not arise because operational parameters

have been laid down in the tariff order itself and, further, the computation of the FPPCA, though it is related to the chapter of determination of tariff, is virtually a mechanical application of the formula already specified and made known to all concerned. On the basis of above observations, this Tribunal had dismissed the aforesaid Appeal No. 172 of 2010, vide judgment, dated 18.5.2011.

17.6 According to the Board's counsel, the Board is filing its monthly cost variation before the State Commission for approval and based on the approval of the same, the Board is levying FPPCA charges on its consumers and, hence, there is no violation of regulations framed by the State Commission and the Appellant-Association of Traders' contention that FPPCA charges cannot be imposed without audited accounts or review and truing-up of the expenses and Revenues based on the final actual figures, is not correct.

17.7 After considering the rival contentions on this issue, we find force in the submissions of the Electricity Board and we agree to the findings recorded by the State Commission in the impugned order on this issue. **Accordingly, the issue no. G in Appeal No. 131/2012, is decided against the Appellant-Bihar Chamber of Commerce/Association of Traders.**

18. Issue No. H in Appeal No. 131/2012:

18.1 On this issue, the contentions of the Appellant-Bihar Chamber of Commerce/ Association of Traders is that the State Commission should not have allowed premium on consumers in notified areas on assurance that the licensee would supply electricity close to 24 hours, but defines continuous supply exclusive of the grid failure, any force majeure condition, scheduled shut down and emergent break down beyond the control of licensee.

18.2 The State Commission has allowed 10% premium over and above the tariff charges for urban area particularly the area in and

around Patna which is discriminatory and violating of Article 14 of the Constitution of India as well as contrary to Section 45 of the Electricity Act, 2003. The State Commission has illegally authorized the Electricity Board to charge premium over the normal tariff for a particular region for uninterrupted supply subject to grid failure, force majeure condition, scheduled shut down and emergent break down beyond the control of licensee.

- 18.3 It is evident from para 8.4.29 of the impugned tariff order, dated 30.3.2012, that the State Commission has already approved charging of premium tariff in notified areas where the Board is supplying close to 24 hours of supply.
- 18.4 We observe that the same Bench of the Appellate Tribunal, consisting of both of us, in Appeal No. 103 of 2013 vide judgment dated 11.3.2014 in the matter of Bihar Industries Association vs. BERC & Ors. had occasion to consider and decide the same issue of premium on consumer in notified areas on assurance of 24 hours supply of electricity by the licensee Board. The relevant part of our earlier judgment dated 11.3.2014 in Appeal No. 103 of 2013, is reproduced as under:

“25. **ISSUE NO. D**

This issue is whether the State Commission was correct in allowing the premium on consumers in notified areas on assurances of 24 hours electricity supply exclusive of grid failure, force majeure, scheduled shut down and emergent break-down beyond the control of licensee?

On this issue, the main submission of the learned counsel for the appellant is two fold. Firstly, the State Commission in the impugned order has allowed a licensee to impose premium which has been allowed for the region in and around Patna which is discriminatory and is violative of Article 14 of the Constitution of India as well as contrary to Section 62 (3) and Section 45 of the Electricity Act, 2003.

Secondly in allowing the premium on consumers in notified areas on assurance that the licensee would supply electricity

close to 24 hours, the State Commission has further defined continuous supply exclusive of grid failure, any force majeure condition, scheduled shut down and emergent break down beyond the control of licensee. Therefore, there is no meaning of charging the premium from such consumers at all.

Refuting the appellant's submission on this issue, the learned counsel for the respondent no. 3 has meekly submitted that the State Commission should not have allowed premium on consumers in notified areas on assurances of 24 hours electricity supply exclusive of the aforesaid situation.

26. Section 62(3) of the Electricity Act, 2003 postulates that appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required. The tariff imposed on the consumer reflects the cost of supply of electricity at an adequate and improved service level and efficiency with optimum investments of utility along with the safeguarding of consumer interest at the same time, which the State Commission has considered in an appropriate manner while determining the tariff.

27. The premium tariff provisions have been continued from tariff order for FY 2012-13 which was not challenged by the appellant. After considering the rival submissions and the provisions of Section 62 (3) of the Electricity Act, 2003 we observe that the learned State Commission has taken the correct stand while deciding this issue and the finding of the State Commission on this issue are just proper and reasonable to which we also agree. Under the provisions of the Electricity Act, 2003 the State Commission has rightly allowed the licensee premium on the consumers in notified areas on assurances of 24 hours electricity supply exclusive of grid failure, force majeure, scheduled shut down and emergent break-down beyond licensee's control. This issue is, therefore, decided accordingly and the stand of the State Commission warrants no interference therewith."

- 18.5 In view of the above, we again re-affirm our same view and upheld the view as well as findings recorded on this point by the State Commission in the impugned order. **The issue no. H in Appeal**

No. 131 of 2012, is also decided against the Appellant-Bihar Chamber of Commerce/Association of Traders.

19. Issue No. J in Appeal No. 131/2012:

- 19.1 The chief argument of the Appellant-Bihar Chamber of Commerce/ Association of Traders is that the State Commission has illegally withdrawn the load-factor rebate which was available to the industrial consumers and which is against the basic principle and design of the tariff, taking the hyper technical view that for demand side management, higher consumption should be discouraged, which is against the scheme and object the Electricity Act, 2003.
- 19.2 ***Per-contra***, the learned counsel for the Electricity Board has submitted that the load-factor rebate already stood withdrawn by the State Commission in its tariff order dated 1.6.2011 for FY 2011-12 and at that time, the Appellant/Association of Traders, had not raised any grievance against that withdrawal and had not challenged the same and, therefore, now, the Appellant/Association of Traders is estopped from agitating the same issue at this juncture. According to the Appellant Board, Bihar is a power deficit state and the present Board is procuring power through short term and medium term sources to meet the increased demand of the State of Bihar. The cost of procuring power from such sources is high and, therefore, increased consumption results in increased power purchase cost for the Board. The load-factor rebate is against the conservation of power and it may increase the power purchase cost. The under recovery of cost will get reflected in higher rate for other consumer categories.
- 19.3 The State Commission while withdrawing the load-factor rebate, took the view that for Demand Side Management (DSM) higher consumption should be discouraged and accordingly has done

away with. The load factor rebate promotes higher consumption at reduced tariff which is against the principle of Demand Side Management. Consequently, the learned State Commission has decided to withdraw the load factor rebate, being provided to HT consumer categories.

- 19.4 After careful scrutinizing the rival submissions made by the Appellant-Association of Traders, as well as the Electricity Board, we find force in the submissions of the Board and we also agree with the view and the findings recorded by the State Commission in the impugned order because there is an incentive on above 9.5 load-factor and if the load-factor goes down say 9.0, there is a provision to impose or levy penalty. **Accordingly, this issue i.e. issue no. J in Appeal No. 131/2012, is also decided against the Appellant-Bihar Chamber of Commerce/ Association of Traders.**

20. Issues Nos. C, D, E & F in Appeals Nos. 134/2012, 151/2012 & 185/2012 and Additional Issue No. K in Appeal No. 185/2012

20.1 Since these issues are interconnected, we are taking them together. These issues relate to actual employee cost incurred by the Appellant Board in these Appeals and payment of retiral dues. The learned counsel for the Appellant Board in these Appeals has made the following submissions:

- (a) that the State Commission has erred by drastically reducing the actual employees cost incurred by the Appellant Board in the impugned true-up order, apparently on a mistaken consideration of facts and figures because it has completely omitted to include the amount of terminal benefits, to be paid to all the retired employees of the Appellant Board, for their services prior to the Financial Year for which true-up is

being done, although, it had allowed the same in its earlier tariff orders.

- (b) that the learned State Commission, apart from deviating from its past practice, has also disallowed the legitimate expenditure on the head of employees cost, which would further result in grave financial consequences to the Appellant. It would, further, aggravate the already precarious financial position of the Board and adversely affect its capacity/efficiency to serve the consumers.
- (c) that the learned State Commission has failed to appreciate that the tariff in the past were not even sufficient to recover cost of supply, hence Board could not create a separate Trust for payment of the retiral dues of its employees and the same is being perennially paid all throughout from the revenue earned by the Appellant Board.
- (d) that the learned State Commission has also erred by applying the principles provided in Regulations, 2007 assuming that the Board's earlier revenue was sufficient to meet its ARRs ignoring the admitted fact that no cash surplus has ever been available with the Board for repayment of its loans and Board has been in financial deficit.

20.2 We find the learned State Commission, while passing the impugned order on these issues, was of the view that the contribution of the employee towards GPF and GSS is not a part of employee cost. This amount is deducted from the salary of the employees and including it into the ARR will result in increasing the burden on consumers. The State Commission also mentioned the same thing in the tariff year 2011-12 that this amount is deducted from the salary of the employees and should be deposited in a separate fund to be governed by a Trust in which

both Board and its employees are represented. Any investment out of this fund has to be with the approval of the Trust. Based on the above basis, the Commission has not permitted recovery of these expenses as part of the truing up exercise.

- 20.3 We further find that the State Commission, considering all the pros & cons on the different aspects on these issues, took the view that such liabilities on account of past issues should be funded by the Board through its own means and should not be passed on to the consumers at this point of time. The regulations anyway provide for interest on normative working capital to be passed on to the consumers for meeting the working capital requirements of the licensee for the year. In view of the above, the State Commission approved the net employee cost after prudent check.
- 20.4 The Appellant Board's grievance in these Appeals is that in the past, the State Commission was allowing such expenditure and there has been a deviation of approach. The process of regulation is a continuous one and each tariff period and true-up period is a fresh course of action. In our view, the State Commission has correctly decided to penalize the Appellant Board for diversion of its fund in GPF and GSS Accounts towards its day to day working capital.
- 20.5 According to the learned counsel of the Appellant Board, employee cost/employee expenses typically comprises of salary, dearness allowance, bonus, terminal benefits in the form of pension & gratuity, leave encashment and staff welfare expenses. The learned State Commission has approved Rs. 551.85 crores as the net employee expenses for FY 2006-07 during the review undertaken as part of the Tariff order for FY 2008-09, which amount is the same in the Audited Annual accounts submitted by the Board along with the true-up petition. The Appellant Board, on account of alleged severe financial crunch and on account of tariff's being lower than the average cost of supply, has allegedly

not been able to maintain a separate fund for retiral liabilities as per the provisions made in the Annual Accounts and the Board has been meeting the payment obligations towards such liabilities out of the revenue realized from sale of energy during the period of incidence of discharge of such liabilities.

- 20.6 The learned State Commission has approved Rs. 551.85 crores as against employee cost in its review order for FY 2006.-07 as against the claim of Rs.577.57 crores. Similar findings have been recorded by the State Commission in respect of the years 2007-08 and 2008-09. According to the Respondent's counsel, there is a specific finding of imprudence on the part of the Appellant Board by the State Commission; namely that the Appellant diverted the money collected for GPF and GSS contribution works towards its day to day working capital for which a normative interest on working capital was already being allowed by the State Commission. Therefore, there can be no question of the interest cost passed on to the consumers.
- 20.7 The contention of the Appellant is that since there was no tariff revision from the year 1993 to 2006, the Appellant could not repay its loans and the interest cost of the same is still a burden on the Appellant. The State Commission has noted that there is no data or proper break-up given by the Appellant as to how the interest and finance charges are worked up. Therefore, the State Commission has proceeded to compute the interest and finance charges based on the provisions of the BERC Tariff Regulations, 2007.
- 20.8 After giving our thoughtful consideration to the respective submissions raised by the rival parties and going through the findings/reasoning recorded in the impugned order on these issues, we find no force or merit in the submissions made by the Appellant board. The findings on these issues, recorded in the impugned order, are based on proper, just and correct

appreciation of the material and data made available on record by the parties and, we do not find any cogent reason to differ from such findings. Consequently, we observe that the State Commission has not committed any illegality in reducing the actual employee cost allegedly incurred by the Board in the true-up order. We, further, note that the Appellant Board is to blame itself for its past poor financial condition and this cannot be accepted as a cogent plea that the tariff in the past were not even sufficient to recover the cost of supply and, consequently, the Board has not created a separate head or Trust for payment of retiral dues of its employees. The Appellant Board is expected to improve its efficiency as per the required prudence check.

- 20.9 We also observe that the State Commission has rightly adopted the correct methodology to compute/calculate the interest and finance charges as per the provisions of BERC Tariff Regulations, 2007.
- 20.10 We find that the State Commission has further not committed any error in not giving favourable consideration to the projection of the combined employee cost of the Board for FY 2012-13 and instead of taking the figures of employee cost of audited annual account for FY 2010-11, separately for each of the generation, transmission and distribution function as the base value. The Appellant Board is itself responsible for the negligence and imprudence that has been committed by it in the past years.
- 20.11 We are further of the view that the State Commission has not committed any illegality while deciding the point of payment made by the Board for unfunded liabilities. If the Electricity Board is running into a loss of huge amount, it can better manage its internal affairs by adopting prudence check.
- 20.12. In view of the above, we do not find any merit in any of the submissions made by the Appellant Board. We agree to all the

findings recorded by the State Commission in the impugned orders in so far as they relates to these issues and we approve the same findings. **Accordingly, all these issues i.e. issues nos. C, D, E & F in Appeals Nos. 134/2012, 151/2012 & 185/2012 and additional issue no. K in Appeal No. 185/2012, are decided against the Appellant Board.**

21. Issue No. I in Appeals Nos. 134/2012, 151/2012 & 185/2012

- 21.1 Now, is to be seen, whether the State Commission is justified in allowing carrying cost up to a period of 1.5 years and has fallen in error in not allowing the carrying cost till the period of actual recovery of the revenue gap, as proposed by the Appellant Board in true-up order for FY 2006-07, 2007-08 and 2008-09, dated 4.1.2012.
- 21.2 The main contention of the Appellant Board on this issue is that the State Commission has committed error by not allowing the carrying cost beyond the period of 1.5 years for no fault of the Appellant Board because firstly, the delay was not on account of the Board but on account of the considerable time taken by CAG in certifying the annual accounts of the Board, only, thereafter, the true-up petition could have been filed, and secondly, the learned State Commission was also empowered to initiate suo-motu proceeding for undertaking true-up exercises in the light of Clause 8.1(7) of the National Tariff Policy read with Regulations 22 and 90 of the Tariff Regulations.
- 21.3 If the carrying cost is not allowed till the period of actual recovery of the revenue gap for different years, the same would have cascading effect on the already staggering financial condition of the Appellant Board. The learned State Commission has further erred by penalizing the Appellant Board for delayed filing of true-up petition even after condoning the delay in filing the same.

21.4 Ms. Swapna Seshadri, the learned counsel for the Respondent No. 3 to 5 of these Appeals, taking us through the impugned orders has vehemently contented that the learned State Commission, in para 6.1 thereof, has discussed in detail the different aspects and has permitted limited carrying cost on the revenue gap which is resulting out of the truing up exercise for the FYs 2006-07, 2007-08 and 2008-09, by citing a table showing summary of carrying cost permitted giving different figures. The learned State Commission, after citing table no. 6.1 and 6.2, has observed that the total revenue gap, which will be carried forward to the ARR of the subsequent year for adjustment, will be Rs.217.20 crores. Adjustment of this entire cost in the ARR for the subsequent year would mean an average tariff hike of around Rs.0.27/kWh over the estimated sales for FY 2011-12 i.e. 6828 MU. The adjustment of this revenue gap of Rs.217.20 crores will be considered at the time of determination of ARR for FY 2012-13. The carrying cost is totally a non-issue as it has been duly allowed by the State Commission in accordance with the provisions of Bihar Electricity Regulatory Commission (Terms & Conditions of Determination of Tariff) Regulations, 2007.

21.5 After considering the rival submissions on this issue, we agree to the submissions raised by Ms. Swapna Seshadri, and we do not find any merit in the submissions of the Appellant Board. Consequently, we agree to the findings recorded on this issue by the State Commission. Accordingly, the State Commission was fully justified in allowing carrying cost up to a period of 1.5 years only and has not committed any error in not allowing carrying cost till the period of actual recovery of the revenue gap. **Accordingly, issue no. I in Appeals Nos. 134/2012, 151/2012 & 185/2012, is also decided against the Appellant Board.**

22. Issue No. J in Appeals Nos. 134/2012, 151/2012 & 185/2012

- 22.1 This issue relates to the failure of the State Commission to exercise the power vested in it under Regulation 27 & 29 of Tariff Regulations, 2007. Regulations 27 & 29 of the Tariff Regulations, 2007, empowers the State Commission to vary the terms and conditions of any Regulation for determination of tariff and also employer to remove the difficulties respectively.
- 22.2 According to the Appellant Board, the State Commission, since was empowered to exercise the power under Regulations 27 & 29 of the Tariff Regulations, 2007, but it has failed, and committed error in not exercising the said powers in favour of the Appellant Board.
- 22.3 The counter plea taken by the Respondents is that this was not a fit case for exercising the power under the said Regulations by the State Commission in favour of the Appellant Board. There was no need to vary the terms and conditions of any regulation for the determination of tariff and since there was no difficulty in passing the impugned order on merits, so exercise of such powers by the State Commission to remove the difficulties was also not warranted. The State Commission was right in not exercising the said powers while passing the impugned order. We also find that the State Commission was justified in not exercising the said powers under Regulations 27 & 29 of Tariff Regulations, 2007. Since, the exercise of such powers was not warranted in the facts and circumstances of the matters leading to these Appeals by the Appellant Board, this **issue no. J in Appeals Nos. 134/2012, 151/2012 & 185/2012, is also decided against the Appellant-Board.**

23. Additional Issue No. L in Appeal No. 185/2012

- 23.1 This issue is whether the State Commission has wrongly delayed expenditure on the generation cost and reducing the cost of coal and oil without any reason and logic?
- 23.2 On this issue, the learned counsel for the Appellant Board has contended that the State Commission has wrongly delayed expenditure on the generation cost and reducing the cost of coal and oil without any reason and logic and also without considering that the generating plant of the Board has exceeded its economic life, the operational parameters have also varied and, therefore, are required to be approved at the actual for FY 2010-11.
- 23.3 This plea has been vehemently refuted on behalf of the Respondents saying that no illegality or perversity has been committed by the State Commission on this issue. The learned counsel for the Respondents taking us to the voluminous record of these Appeals filed by the Appellant-Bihar Chamber of Commerce being Appeal No. 131/2012 and the remaining three Appeals being Appeals Nos. 134/2012, 151/2012 and 185/2012 filed by the common Appellant/Electricity Board, has pointed out that Appeal No. 151/2012 has been preferred against the impugned order, dated 1.6.2011, and review order dated 22.12.2011 passed by the State Commission on the petitions seeking determination of ARR and Retail Tariff for FY 2011-12. In Appeal No. 134/2012, impugned order dated 4.1.2012 has been challenged in which the petition was filed by the Appellant Board for truing up the ARR for FYs 2006-07, 2007-08 and 2008-09. Thus, we make it clear that TP-7/2011 was filed by the Appellant Board for truing up the ARR for FYs 2006-07, 2007-08 and 2008-09, in which impugned order dated 4.1.2012 is under challenge in Appeal No. 134/2012. Appeal No. 151/2012 has arisen out of the order dated 1.6.2011 in TP No. 1/2011 and review order dated 22.12.2011 in TP No. 8/2011 which petition was filed for determination of ARR and

retail tariff for the FY 2011-12. In the remaining two Appeals, being Appeal No. 131/2012 filed by the Bihar Chamber of Commerce and Appeal No. 185/2012 filed by the Appellant/Electricity Board, impugned order, dated 30.3.2012 is under challenge, in which the approval of ARR and retail tariff for FY 2012-13 was sought. The State Commission is justified in passing the impugned orders in the aforesaid matters and State Commission has not caused any delay in the disposal of the aforesaid petitions. There is no material on record to suggest that the operational parameters, so far as the Appellant Board is concerned, have varied and expenditure on generation cost, reducing the cost of coal and oil, should have been approved by the State Commission at the actual for FY 2010-11. We do not find any perversity or illegality having been committed by the State Commission while passing the impugned order. **This issue i.e. Additional Issue No. L in Appeal No. 185/2012 is also decided against the Appellant Board.**

24. Summary of our findings

- 24.1 The State Commission appears not to have committed any illegality and further appears not to have given any go by to the already settled yardsticks and principles while passing the earlier tariff orders because the tariff is to be determined as per the relevant Tariff Regulations for that particular period and if there is some slight or minor deviation from the earlier yardsticks or principles, adopted by the State Commission, the impugned order cannot be said to be illegal, merely because of any trivial or minor deviation.
- 24.2 We notice that the tariff of the industrial categories has been fixed within $\pm 20\%$ of the average cost of supply as per the Tariff Policy. Voltage-wise cost of supply is also being determined to transparently determine the cross subsidy. In this regard, we have given direction to the State Commission to determine voltage

wise cost of supply also in future. The State Commission may refer to the guidelines laid by this Tribunal in Tata Steel judgment dated 30.5.2011 in Appeal No. 102 of 2010 and batch.

24.3 The learned State Commission has rightly considered the resource gap funding/Government grant for the purpose of compensating disallowed power purchase, in view of the letter of Energy Department, State Government dated 19.9.2011, wherein the Government of Bihar has clarified the priority for use of resource gap funding provided by it. According to this letter of the State Government, dated 19.9.2011, the resource gap funding has to be first used to meet financial losses arising out of non-approval of actual T&D losses by the Electricity Board and the remaining amount of resource gap funding will be used for subsidizing agricultural and rural consumers. Thus, the resource gap funding/Government grant received from the Government of Bihar, has been legally used for firstly meeting unabsorbed power cost on account of disallowed T&D losses. Since the letter of the Government of Bihar, while approving the Government grant clearly mentioned the priority for use of such grant which has rightly been considered and used by the State Commission in the impugned order.

24.4 The resource gap funding/Government grant provided by the State Government, has to be treated, as exactly in the manner, for which it is provided. Now, by defining the nature of the grant, the State Government has not proposed to undo the benefits granted to the consumers in the past tariff orders but it has simply sought to drag erstwhile Board out of the reds. The State Commission has rightly disallowed the Electricity Board's request to give revised treatment to all such grants in determining the revenue loss suffered by the Board during the relevant Financial Year, which is, in view of the State Commission, not possible until the ongoing tariff process is finalized by the order of the State Commission on

the true-up petition filed by the Board for different Financial Years.

- 24.5 Under Section 65 of the Electricity Act, 2003, the State Government has the right to decide the quantum of subsidy and the categories to which it would like to subsidize. The Government of Bihar has exercised this right, in its letter dated 19.9.2011, wherein it has been stipulated that the resource gap funding will be first used to meet financial losses arising out of non-approval of actual T&D losses of the Electricity Board and then the balance amount of resource gap funding will be used for subsidizing agricultural and rural consumers.
- 24.6 The financial losses arising out of additional power purchase because of higher T&D losses, will have to be borne by the State of Bihar, if the actual T&D losses are not approved by the State Commission. The Government of Bihar, in public interest, is discharging its onerous responsibility and providing funds to the erstwhile Electricity Board to meet the gap between actual power purchase cost and approved power purchase cost. This would be essential to avoid, carrying over of loss, year after year, in the books of accounts which would help erstwhile Electricity Board to borrow from Banks for meeting its working capital requirement and the liquidity crunch. Such gap cannot be carried over perpetually and has got to be bridged either by a regulatory mechanism or by fiscal grant by the State Government. It is the prerogative of the State Government/Agency, which is giving grant to specify the mode and manner in which the grant is to be utilized by the beneficiary. Thus, the State Commission has rightly adjusted or utilized the Government grant or subsidy given by the State Government as provided under Section 65 of the Electricity Act, 2003.
- 24.7 The State Commission has indicated the computation of cross subsidy for each category of consumers in the tariff order through

a table in its impugned order dated 30.3.2012, showing that the State Commission has approved the tariff for various consumer categories considering gradual reduction in cross-subsidy in line with the requirement of Tariff Policy. By showing computation of the same in Table-152, dealing with cross-subsidy for FYs 2011-12 & 2012-13 shows that the tariff as a percentage of average cost is moving towards the band of $\pm 20\%$ of average cost of supply and the State Commission appears to be trying its best to bring down the cross subsidy within $\pm 20\%$ of the average cost of supply. We also notice that the tariff of the industrial categories has been fixed within $\pm 20\%$ of the average cost of supply. The National Tariff Policy, 2006, in clause 8.3(2) requires the State Commission to notify roadmap within six months with a target that latest by the end of the year 2010-11 tariffs are within $\pm 20\%$ of the **average cost of supply**. The State Commission has approved the tariff rates on the basis of overall power and tariff has been determined as per the Electricity Act, 2003, national Tariff Policy, 2006 and Tariff Regulations, 2007.

- 24.8 The State Commission does not appear to have made any discrimination between old and new consumers of HTSS category by fixing 600 kVA/MT for old consumer and declaration by manufacturers for new consumers.
- 24.9 The learned State Commission is perfectly within its competence and jurisdiction in continuing with the fixed charges and is not bound by the decision of the other State Commissions, which have discontinued with such practice
- 24.10 The State Commission has rightly directed the licensee/Electricity Board to recover the Fuel and Power Purchase Cost Adjustment (FPPCA) charges and no illegality has been committed by the State Commission while passing the impugned order on this score. As approved by this Appellate Tribunal in its judgment, dated 18.5.2011, passed in Appeal No. 172/2010 when this Appellate

Tribunal upheld the FPPCA formula laid down in the tariff order dated 26.8.2008 of the same State Commission.

24.11 The State Commission has rightly allowed the licensee premium on the consumers in notified areas on assurance that the licensee would supply electricity close to 24 hours, by defining continuous supply exclusive of the grid failure, any force majeure condition, scheduled shut down and emergent break down beyond the control of licensee. The same view has earlier been taken by this Appellate Tribunal in its judgment, dated 11.3.2014, passed in Appeal No. 103/2013, in the matter of Bihar Industries Association vs. BERC & Ors. We also reaffirm the same.

24.13 The State Commission has not committed any error of law or perversity in withdrawing the load-factor rebate in the impugned order.

24.12 The State Commission has rightly not permitted recovery of GPF & GSS expenses as part of truing up exercise because the contribution of employee towards GPF & GSS is not a part of employee cost. This amount is deducted from the salary of the employees and including it into the ARR will result in increasing the burden on consumers. The said amount should be deposited in a separate fund to be governed by a Trust in which both Board and its employees are represented and any investment out of this fund has to be with the approval of the Trust. The State commission has taken a right view that such liabilities on account of past issues should be funded by the Electricity Board through its own means and the same should not be passed on to the consumer at this point of time. Since, the Electricity Board has invested the said contribution of the employees in the Board's day to day functioning; the State Commission has correctly decided to penalize the Appellant Board for diversion of its fund in GPF & GSS accounts towards Board's day to day working capital. The State Commission has rightly and correctly approved the net employee cost after prudence check.

- 24.13 The State Commission has adopted the correct methodology to compute/calculate the interest and finance charges as per the Bihar Electricity Regulatory Commission (Terms & Conditions of Determination of Tariff) Regulations, 2007. The State commission has committed no error of law in not giving favourable consideration to the projection of the combined employee cost of the Electricity Board for FY 2012-13, instead of taking the figures of employee cost of audited annual account for FY 2010-11 separately for each of the generation, transmission and distribution function as the base value.
- 24.14 The State Commission is fully justified in allowing carrying cost up to a period of 1.5 years and has committed no illegality or perversity in not allowing the carrying cost till the period of actual recovery of the revenue gap.
- 24.15 The State Commission has not committed any illegality or perversity in not exercising the power vested in it under Regulation 27 & 29 of the Tariff Regulations, 2007 dealing with the power to vary the terms and conditions of any Regulation for determination of tariff and power to remove the difficulties respectively because the instant matters did not warrant the State commission to exercise such powers under these regulations.

25. All these Appeals, being Appeal Nos. 131, 134, 151 & 185 of 2012, are dismissed as devoid of merits. However, there is no order as to costs.

Pronounced in open Court on this 28th day of May, 2014.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

√ REPORTABLE/NON-REPORTABLE

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