In the Appellate Tribunal for Electricity at New Delhi
(Appellate Jurisdiction)

Appeal Nos. 142 of 2013 & 168 of 2013

Dated: 17th December, 2014

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

In the matter of:

Appeal No. 142 of 2013

M/s Mawana Sugars Ltd.,
5th Floor Kirti Mahal,
Rajinder Nagar,
New Delhi-110 025. ... Appellant

Versus

1. Punjab State Electricity Regulatory Commission,
SCO: 220-221, Sector: 34-A,
Chandigarh.

2. Punjab State Power Corporation Ltd.,
Head Office, The Mall, Patiala-147001. ... Respondents

Appeal No. 168 of 2013

1. M/s Bansal Alloys & Metals (P) Ltd.,
having its registered office G T Road,
Sirhind Side, Mandi Gobindgarh 147301,
through its Director Sh. Sanjay Kumar Bansal
S/o Sh. Prem Bansal.

2. M/s Jogindra Castings (P) Ltd.,
having its registered office at G T Road,
Sirhind Side, Mandi Gobindgarh 147301,
through its Director Sh. Sanjay Gupta
S/o Sh. Mangat Rai Gupta.

3. M/s. Bhawani Industries Ltd.,
having its registered office at Village Ajnali,
Tehsil Mandi Gobindgarh,
District Fatehgarh Sahib-147301,
through its Director Sh. J P Goel
S/o Sh. Barma Nand Goel.

4. M/s. Sona Castings (P) Ltd.,
having its registered office at 72-B,
Mansarovar Park, Shardra, New Delhi

having its works at G. T. Road,
Sirhind Side, Mandi Gobindgarh-147301,
through its Director Sh. Pawan Goel
S/o Ram Saran Dass.

5. M/s Vimal Alloys (P) Ltd.,
having its registered office at Shop No.445,
Sector 3 C, G. T. Road,
Mandi Gobindgarh, 147301,
having its works at Village Sounti, Amloh
District Fatehgarh Sahib,
through its Director Sh. Vimal Vinod Bansal
S/o Sh. Hans Raj.

6. M/s Hansco Iron & Steels (P) Ltd.,
having its Registered Office at
Village Jalalpur Chowk,
Amloh Road, Mandi Gobindgarh,
through its Director Sh. Subhash Bansal
S/o Sh. Hans Raj.

7. M/s Oasis Enterprises (P) Ltd.,
having its Registered Office at Village Talwara,
Talwara Road, Mandi Gobindgarh,
through its Director Sh. Sanjay Gupta
S/o Sh. Mangat Rai Gupta.

8. M/s. Punjab Steels,
Amloh Road Village
Turan, Mandi Gobindgarh,
through its partner Sh. Chander
Parkash Mittal S/o Sh. Darshan Lal. …….Appellant(s)

Versus

1. Punjab State Electricity Regulatory
Commission, through Secretary,
SCO No. 220-221, Sector 34-C,
Chandigarh.

2. Punjab State Power Corporation Ltd.,
Through its Chairman-cum-Managing Director,
The Mall, Patiala.

3. The State of Punjab,
Department of Power,
Through its Secretary,
Punjab Civil Secretariat,
Chandigarh. .....
Respondents

Counsel for the Appellant(s)
(In Appeal No. 142 of 2013) : Mr. Sanjay Sen
Ms. Shikha Ohri

		Ms. Ruth Elwin
(In Appeal No. 168 of 2013)	:	Mr. Aalok Jagga Mr. Aseem Mehrotra
Counsel for the Respondent (s) (In Appeal No. 142 of 2013)	:	Mr. Sakesh Kumar for Respondent No.1 Mr. Anand K. Ganesan for Respondent No.2
(In Appeal No. 168 of 2013)	:	Mr. Sakesh Kumar for Respondent No.1 Ms. Swapna Seshadri for Respondent No.2. Mr. Nikhil Nayyar & Mr. Dhananjay Baijal for Respondent No.3.

JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. Both the aforesaid appeals being Appeal Nos. 142 of 2013 & 168 of 2013 have been filed under Section 111 of the Electricity Act, 2003, before this Tribunal against the same common order dated 10.04.2013 (the impugned tariff order), passed by the Punjab State Electricity Regulatory Commission (in short, 'the State Commission'), in Petition No. 71 of 2012, while determining the Annual Revenue Requirements of respondent no.2 on the tariff application filed by the respondent no.2 viz- Punjab State Power Corporation Ltd.,(PSPCL) for FY 2013-14. Since both the aforesaid appeals have emanated out of the same impugned order dated 10.04.2013, we are deciding the duo by this common judgment.

2. The relevant facts giving rise to the present appeals are as under:-

2.1 that the appellants are large supply Power Intensive Consumers of respondent no. 2 and are engaged in the business of operations where power costs are a major factor in the total manufacturing costs.

2.2 Appellant M/s. Mawana Sugars Ltd. in Appeal No. 142 of 2013 is engaged in production of caustic soda and chlorine by electrochemical process where power costs contribute to around 60% of its total manufacturing costs, it has a contract demand of 35 MVA with a connected load of 38 MW. This appellant's annual power purchase bill is around 120 crores per annum and it has been making regular and timely payment of its

power bills to respondent no.2. This appellant is also purchasing power through power exchange by availing open access through distribution system of respondent no.2. There has been an abnormal and unlawful increase in wheeling charges in the State, leading to a substantial reduction in the quantum of power availed through open access.

2.3. Appellant(s) of Appeal No. 168 of 2013 are operating Induction Furnace Units and are having sanctioned contract demand varying between 4000 KVA to 20000 KVA and their monthly power bills are about Rs. 10-20 crore cumulatively. They are paying their electricity bills regularly to respondent no.2 and they are also purchasing power through open access from Indian Energy Exchange under Open Access Regulations, 2011 notified by the State Commission.

2.4. Respondent no.1 is the State Electricity Regulatory Commission exercising powers and discharging functions under the provisions of the Electricity Act, 2003. The power to determine the tariff is provided in Sections 61, 62, 64, 65 & 86(1) (a) and (b) of the Electricity Act, 2003 read with the applicable provisions of the State Commission's (Terms & Conditions for Determination of Tariff) Regulations, 2005 (as amended from time to time) and the Conduct of Business Regulations, 2004.

2.5. The respondent no.2, Punjab State Power Corporation Ltd., is a distribution licensee in the State of Punjab which is supplying electricity to the appellants.

2.6. that the Government of Punjab through Department of Power is responsible for the duties/ functions assigned to it under the Electricity Act, 2003, particularly, under Sections 131, 132, 133 & 134 of the Electricity Act, 2003 with regard to the re-organization of the Board and timely payment of subsidies determined by the State Commission under Section 65 of the Electricity Act, 2003.

2.7. that the respondent no.1/State Commission has passed the impugned order on 10.04.2013, in Petition No. 71 of 2012 filed by the respondent no.2 distribution licensee for Annual Revenue Requirements for FY 2013-14 and has determined the applicable retail supply tariff that can be levied or charged by the respondent no.2 for various consumer categories for the FY 2013-14.

2.8. that the appellants had filed objections to the ARR petition before the State Commission at the relevant time. It is alleged on behalf of the appellants of both the appeals that by the impugned tariff order, a tariff shock has been caused to the power

intensive large supply consumers as the average realization from the large supply consumers through proposed tariff is set to increase from 611 paisa per unit to 685 paisa per unit i.e. 12.11% increase for the appellants of Appeal No. 168 of 2013 and about 12.8% increase for the appellant of Appeal No. 142 of 2013. It has been alleged on behalf of the appellants that the State Commission, while passing the impugned order, has erred in ignoring the provision of the Electricity Act, 2003, the Tariff Policy, the National Electricity Policy and the principles laid down by this Appellate Tribunal in its various judgments.

2.9. that the State Commission, in the impugned order, has (in the background for passing the impugned order) stated that the Commission had in the previous 10 tariff orders determined tariff in pursuance of the annual revenue requirements and tariff applications submitted by the Punjab State Electricity Board (the Board) for the years 2002-03 to 2006-07, 2008-09, 2009-10, 2010-11 and Punjab State Power Corporation Limited (PSPCL) for the years 2011-12 and 2012-13.

2.10 that the PSPCL filed the ARR Petition for FY 2013-14 on 30.11.2012 submitting that it is one of the 'successor entities' of the erstwhile Board duly constituted under the Companies Act, 1956, on 16.04.2010 after unbundling of the Board by the Government of Punjab vide Notification No. 1/9/08-EB(PR)/196 dated 16.04.2010, under the "Punjab Power Sector Reforms Transfer Scheme" (Transfer Scheme). The balance sheet appended to the Transfer Scheme is provisional and the Final Transfer Scheme for PSPCL has not been notified as yet. Hence, forecast of various financial parameters have been made on the basis of assumptions detailed in the ARR Petition. PSPCL requested the State Commission to consider its petition as a provisional ARR petition, subject to finalization of the Transfer Scheme by Government of Punjab (GoP) in due course of time. GoP has now finalized transfer of assets and liabilities to the successor entities vide Notification No. 1/4/04-EB (PR)/620 dated 24.12.2012 and Notification No. 1/4/04-EB (PR)/632 dated 24.12.2012. PSPCL has, however, not submitted the audited accounts for FYs 2010-11 and 2011-12

2.11. that the Commission in its tariff order for FY 2012-13 had observed that the provisional balance sheets of the two successor entities, ending March 31, 2009, as appended to the aforesaid transfer scheme showed significant variations when compared to the audited balance sheet of the integrated utility. Therefore, the Commission deemed it proper to rely on the information filed by the erstwhile Board in its ARR Petition for FY 2010-11 and not on the provisional balance sheet for the purpose of tariff determination

for FY 2012-13. On the same lines, for FY 2013-14 also, the State Commission has determined the ARR and tariff based on the submissions of PSPCL in its ARR petition for FY 2013-14. The Commission has adhered to existing norms and principles for review of the ARR for FY 2012-13.

2.12. In the ARR petition for FY 2013-14, the PSPCL has worked out a cumulative revenue gap of Rs. 12053.39 crore and has intimated a revenue gap of Rs. 16039.30 crore after GoP Notification dated 24.12.2012 for FY 2013-14 including gap of previous year and carrying cost of previous year gap . The State Commission has further clarified in the beginning of the impugned order that the Annual Revenue Requirements determined by the State Commission in the impugned tariff order are based on the petition filed by PSPCL, operating as a utility, performing functions of generation, distribution and trading of electricity. The tariff determination by the State Commission is based on the revised estimates of FY 2012-13 and projections of FY 2013-14 as submitted by PSPCL.

3. The impugned order has been challenged on behalf of the appellants, inter alia, on the following issues:

a) Erroneous calculation of cross-subsidy on the basis of combined average cost of supply instead of cross-subsidy based on cost of supply

b) Unmetered Sales and Transmission & Distribution Loss

c) Return on Equity

d) Peak Load Exemption Charges

e) Wheeling Charges

f) Non-Tariff Income

4. We have heard Mr. Sanjay Sen, learned Sr. Advocate appearing for the appellant, Mr. Sakesh Kumar, learned counsel for the respondent no.1, Mr. Anand K. Ganesan & Ms. Swapna Seshadri, learned counsel for the respondent no.2 in Appeal No. 142 of 2013 and Mr. Alok Jagga, learned counsel for the appellants, Mr. Sakesh Kumar, learned counsel for the respondent no.1, Mr. Anand K. Ganesan & Ms. Swapna Seshadri, learned counsel for the respondent no.2 & Mr. Nikhil Nayyar & Mr. Dhananjay Baijal for the respondent no.3 in Appeal No. 168 of 2013. We have also gone through the material on record as well as the respective written submissions filed by the rival parties.

5. The following issues arise for our consideration in the present appeals:-

(i) Whether the State Commission has incorrectly calculated the cross subsidy based on combined average cost of supply instead of cross subsidy based on cost of supply?

(ii) Whether the State Commission has failed to regulate unmetered consumption and has infact allowed such consumption at higher value?

(iii) Whether the State Commission by the impugned order has wrongly increased the equity for FY 2012-13 and FY 2013-14 from Rs. 2617.61 crore to Rs.6081.43 crore and this 132% increase retrospectively for FY 2012-13 and FY 2013-14 has resulted in a tariff shock to the consumers?

(iv) Whether the State Commission has wrongly increased the Peak Load Exemption Charges (PLEC) by 50% in the impugned order, thereby causing a serious tariff shock to the appellants?

(v) Whether the State Commission has erred in ignoring the methodology for voltage-wise cost determination as per the report and has instead wrongly calculated the average wheeling charges of Rs. 1.19 per unit for the distribution business as a whole?

(vi) Whether the State Commission, in the impugned order, has wrongly determined the wheeling charges in contravention of the provisions of the Electricity Act, 2003 and the Punjab State Electricity Regulatory Commission (Terms and Conditions for Intra-state Open Access) Regulations, 2011.

(vii) Whether the State Commission has erred in not including the wheeling charges pertaining to open access consumers in the non-tariff income of the distribution licensee?

OUR ISSUE-WISE CONSIDERATION

6. Issue No.(i)

This issue is whether the State Commission has incorrectly calculated the cross-subsidy based on combined average cost of supply instead of cross-subsidy based on cost of supply. On this issue following contentions have been made on behalf of the appellants:-

6.1. that the State Commission has increased the cross-subsidy surcharge in the system contrary to the provisions of the Electricity Act, 2003, National Tariff Policy and National Electricity Policy.

6.2. that the State Commission has not increased the tariff for the agricultural consumers corresponding to the increase in the cost of supply, whereas the increase for the large supply
(LS) consumers is much more than the increase in the cost of supply, thereby increasing the cross subsidy level in the system.

6.3. that the State Commission has erred in not determining the tariff based on voltage-wise cost of supply but has continued to determine the tariff based on average cost of supply.

6.4. that the cross-subsidy level for large supply (LS) category has increased from 16% in the year 2012-13 to 27% in the year 2013-14.

6.5. that the tariff has to be strictly determined by the State Commission in the impugned order based on category-wise cost of supply including for the aspect of cross-subsidy surcharge.

6.6. That this Appellate Tribunal vide its order dated 12.07.2012, passed in Review Petition No. 8 of 2012 in Appeal No. 163 of 2010 *(Mawana Sugars vs. Punjab State Electricity Regulatory Commission and Anr.)* directed the State Commission to ensure completion of the exercise of determination of voltage-wise cost of supply of the distribution licensee by the end of November, 2012. The relevant part of the judgment dated 12.7.2012 of this Appellate Tribunal is reproduced hereunder:

> *"This Tribunal in its various judgments from the year 2006 onwards has given directions regarding determination of voltage-wise cost of supply. However, the exercise is yet to be concluded.*
>
> *We see substance in the point raised by the learned counsel for the appellant that the State Commission should be directed by the Tribunal to complete the study for determination of voltage-wise cost of supply so that the same could be utilized for determination of tariff in the subsequent tariff orders. This Tribunal in its judgment dated 30th May, 2011 in Appeal No. 01 of 2010 tilted Tata Steels Ltd. Vs. Orissa State Electricity Regulatory Commission and others has given detailed directions regarding determination of voltage-wise cost of supply. Accordingly, we direct the Punjab State Electricity Regulatory Commission to ensure completion of the exercise of determination of voltage-wise cost of supply by the end of November, 2012."*

6.7. that pursuant to the directions provided in the judgment dated 12.7.2012, of this Appellate Tribunal, the State Commission appointed T.E.R.I, which conducted a study for determining the voltage wise, category wise cost of supply for respondent no. 2 for FY 2011-12 and FY 2012-13. The State Commission has accepted the T.E.R.I's report regarding cost of supply for various categories of consumers.

6.8. that the *State Commission has passed the impugned order ignoring the cost of supply, as determined by TERI and instead continued with cross-subsidization based on combined average cost of supply. The relevant portion of the impugned order is reproduced as under:-*

> *"5.2.10 It would be ideal to fix electricity tariff for all consumers on cost to serve basis. But, historically, there has been extensive cross subsidization in electricity sector. The tariff for consumers, who pay less than the cost to serve, will need to be hiked significantly to cover the gap between the tariff of subsidized consumers and cost to serve these consumers. As such, the Commission is raising tariff of subsidized consumers gradually to reduce such gap, and at the same time avoiding tariff shock to subsidized consumers and bringing the tariffs of various consumers within reasonable difference as compared to cost to serve these consumers."*

6.9. that the observation in the impugned order that *the State Commission is raising tariff of subsidized consumers gradually to reduce such gap (gap between the tariff of subsidized consumers and the cost to serve these consumers), and at the same time avoiding tariff shock to subsidized consumers and bringing the tariffs of various consumers within reasonable difference as compared to cost to serve these consumers,* is incorrect as no steps have been taken by the State Commission to increase the tariff of the subsidized consumers. On the contrary, the tariff on the subsidizing category has once again been increased steeply. Even by taking the average cost of supply method, erroneously adopted by the State Commission in the impugned order, the cross subsidy for the subsidizing category, contrary to law has increased while the cross subsidy for the subsidized category, namely, Agriculture Power (AP) consumers has decreased.

6.10. that the cross subsidy for the appellants category (calculated on the basis of cost of supply) has increased from 16% in 2012-13 to 27% in 2013-14, whereas the cross-subsidy for Agriculture Power (AP) category of consumers has been reduced from – 16.77% to – 22.97% by the State Commission, which is in clear contravention of the provisions of the Electricity Act, 2003 and the Tariff Policy issued thereunder.

6.11. that under Section 61(g) of the Electricity Act, 2003 a duty has been cast upon the State Commissions to ensure that the tariff progressively reflects the cost of supply of electricity and also that cross-subsidies are reduced progressively. As per the Tariff Policy also, tariff has to progressively reflect the cost of supply, with consistent reduction in cross subsidies and has to be within ± 20% of the average cost of supply by 2010-11.

6.12. that the distribution licensee's contention that the impugned order is in line with the Tariff Policy, as the tariff is ± 20% of the average cost of supply is entirely misplaced because the tariff policy should be read as a whole and not in piecemeal manner.

6.13. that the Tariff Policy clearly states that cross-subsidy surcharge should be brought down progressively and, as far as possible, at a linear rate to a maximum of 20% of its opening level by the year 2010-11. Hence, the increase in cross-subsidization permitted by the impugned order is illegal.

6.14. that the impugned order is in contravention of the Full Bench decision of this Appellate Tribunal in the case of SIEL Ltd. Vs. Punjab State Electricity Regulatory Commission reported in 2007 ELR (APTEL) 931 **by which the Full Bench of this Appellate Tribunal directed the State Commission to determine the tariff on cost to supply basis** and the same approach has been stressed upon by this Tribunal in its various judgments over the years but the same has not been implemented till date and the appellants category of consumers are continued to be burdened with unjust costs.

6.15. that the increase in cross subsidization is also in contravention of this Appellate Tribunal's order dated 30.05.2011 passed in the case of M/s. Tata Steel Limited vs. Orissa Electricity Regulatory Commission (Appeal No. 102 of 2010) whereby the following test was laid down for determining whether any prejudice is caused to any category of consumers with regard to the issues of cross subsidy and cost of supply:-

a. the cross subsidy calculated on the basis of cost of supply to the consumer category is not increased but reduced gradually;

b. the tariff of consumer categories is within ±20% of the average cost of supply;

c. except the consumers below the poverty line, tariffs of different categories of consumers are differentiated only according to the factors given in Section 62(3) of the Electricity Act, 2003; and

d. there is no tariff shock to any category of consumer.

6.16. that the State Commission has incorrectly calculated the cross subsidies based on combined average cost of supply instead of cross subsidy based on cost of supply. The State Commission, after determining cost to serve in accordance with methodology II of

the aforesaid report, has incorrectly proceeded to adopt the average cost of supply approach.

6.17. that the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 issued by the State Commission on 21.11.2005 provided that cross subsidy shall be calculated in the following manner:

"7. CROSS SUBSIDY

1. *Cross-subsidy for a consumer category" in the first phase {as defined in clause (2) below} means the difference between the average realization per unit from that category and the combined average cost of supply per unit expressed in percentage terms as a proportion of the combined average cost of supply. In the second phase {as defined in clause (2) below} means the difference between the average realization per unit from that category and the combined per unit cost of supply for that category expressed in percentage terms as a proportion of the combined cost of supply of that category.*

2. *The Commission shall determine the tariff to progressively reflect the cost of supply of electricity and also reduce and eliminate cross subsidies within a reasonable period. To this purpose, in the first phase the Commission shall determine tariff so that it progressively reflects combined average unit cost of supply and the cross subsidy as defined above is eliminated over a period of 10 years from the date of issue of these Regulations. In the second phase, the Commission shall consider moving towards the category-wise cost of supply as a basis for determination of tariff."*

6.18. That, however, on 17.09.2012, the State Commission issued an amendment being Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff), Second Amendment, Regulations, 2012. By this amendment, Regulation 7 was amended as follows:

"(1) Cross-subsidy for a consumer category" means the difference between the average realization per unit from that category and the combined average cost of

supply per unit expressed in percentage terms as a proportion of the combined average cost of supply.

(2) The Commission shall determine the tariff so that it progressively reflects the combined average unit cost of supply and the cross subsidy as defined above shall be reduced gradually to ± 20% of the average cost of supply."

6.19. that the second amendment to the extent it is contrary to the provisions of the Electricity Act, 2003, the National Electricity Policy and the Tariff Policy is illegal and ought to be ignored by this Tribunal while determining the legality and validity of the impugned order. Under Section 61(g) of the Electricity Act, 2003 a duty has been cast upon the State Commissions to ensure that that the tariff progressively reflects the cost of supply of electricity. This mandate of the Electricity Act, 2003 cannot be rendered nugatory by amending the Tariff Regulations in the year 2012. Once, the voltage wise, category wise costs are available with the State Commission, it is not open to the State Commission to determine cross subsidies on the basis of average cost of supply, much less increase the same annually for the appellants category of consumers.

7. **Per contra**, the following submissions have been made on behalf of the respondents:

7.1. that the large supply consumers (LS category of consumers) are still within 20% of the cost of supply as provided for in the National Tariff Policy. The National Tariff Policy mandates that the tariff for the subsidising category of consumers shall not exceed 20% of the average cost of supply.

7.2 that for the large supply category of consumers, the cross subsidy level has been determined by the State Commission at 18.49% which has been arrived at based on the combined average cost of supply strictly in terms of the Regulations framed by the State Commission and the practice adopted by the State Commission for determination for determination o f cross subsidy surcharge.

7.3. that so long as the cross-subsidy level does not exceed the 120% limit, there can be no grievance raised on the decision of the State Commission being contrary to the provisions of the Electricity Act, 2003 or the National Tariff Policy. The Act does not mandate elimination of the cross-subsidy surcharge. On the other hand, the mandate is only to ensure that the subsidizing category does not pay more than 120% of the cost of

supply. The same has been achieved and the large supply industry category is within 120% of the cost of supply and hence the grievance made out is misconceived.

7.4. that the State Commission has, also while increasing the tariff for the agricultural category, taken a conscious view that considering the supply being only for the few hours and depending upon availability, limited the increase for this category to 7 paise per unit. The State Commission has, in this regard, inter alia, stated as under:-

"6.2.3……..Keeping in view the fact that the supply to AP category is given on an average for 6 to 8 hours per day and that too during different time slots in a month as per availability of power, the Commission decides to increase the tariff for AP category by 7 paise/unit (increase of 1.67% over the existing tariff). The average increase for the remaining categories works out to 11.43% over the existing tariff, including MMC, to meet the balance revenue gap. The Commission decides to increase the tariff as given in Table 6.1 to recover the revenue gap of Rs. 1782.50 crore."

7.5. that considering the hours of supply to the agricultural consumers and the availability of power, the increase in tariff is justified. The State Commission has taken a conscious decision that since the agricultural consumers are provided for electricity only for restricted time periods at different slots and as per the availability of power with PSPCL, the increase of tariff has been limited by the State Commission to 7 paise per unit.

7.6. that the State Commission has, however, not correspondingly increased the cross subsidy surcharge payable by the large supply category of consumers over and above the level of 120% to the average cost of supply as provided for in the National Tariff Policy. On the other hand, tariff for the large supply category of consumers is within the band of 120% to the average cost of supply as provided for in the National Tariff Policy.

7.7. that the issue that so long the tariff of the subsidizing category of consumers is within 120% of the average cost of supply, they cannot have any grievance on any increase in tariff or cross-subsidy surcharge is settled by the decision of this Appellate Tribunal in its judgment dated 25.2.2011 in Appeal No. 135 of 2010 (Polyplex Corporation Vs. Uttarakhand Commission) wherein it has been held as under:-

"<u>.....The Tariff Policy postulates that the category-wise subsidy has to be within ± 20 % of average cost of supply by the end of the year</u>

> *2010-2011 and not the tariff for each and every consumer that is to say, if the tariff for subsidizing category is already within 120% of the cost of supply, the cross subsidy must not be increased beyond that point, and may or may not be reduced further. The Commission rightly found that the previous tariff order against which Appeal was presented reflected that the level of cross subsidy was higher than 20%. The Commission was examining whether demand charge, energy charge and/ or the continuous supply surcharge should be reduced on the plea that Appellant was given a tariff shock. The Tribunal clearly held that re-determination of tariff must not affect the other categories of consumers. The Commission held that uniform demand charges are payable by all HT consumers with contract load above 1000 KVA; any reduction in demand charges for HT consumes with contract load above 1000 KVA and load factor above 50% would lead to a discrimination vis-à-vis the other consumers with contract load above 1000 KVA but load factor below 50%. We find no better logic to sustain this finding. Similarly, it could not be disputed that energy charge vary on the basis of the load factor, but is independent of contracted load. It is adequately presented that change in energy charge, if to be made, has to be made for both HT consumers upto 1000 KVA and above 1000 KVA which will not be a sound one"*

7.8. that the appellants are indirectly challenging the Regulations framed by the State Commission. The State Commission has determined the cross subsidy surcharge strictly in terms of the Regulations framed. The appellants themselves have challenged the said Regulations before the Hon'ble High Court of Punjab & Haryana and in the circumstances it is not proper on the part of the appellants to challenge the said issue before this Appellate Tribunal.

7.9. that the State Commission has determined the tariff in terms of the statutory Regulations framed and the State Commission has also come to a specific finding that it may not be possible to immediately and in one stroke introduce the category wise cost of supply principle for the purpose of tariff determination. This is particularly in view of the historical tariff design that has been in existence and the extensive cross subsidization in the electricity sector.

7.10. that the State Commission has, in the impugned order, proceeded on the basis of the average cost of supply for the purposes of tariff determination, as the first step the State Commission has provided rebates to consumers taking supply at high voltages. This is for the reason that while it may not be possible to implement the voltage wise tariff determination process at one go and the effect of such implementation has to be kept in mind.

7.11. that this Appellate Tribunal in a recent decision dated 28th May, 2014, in Appeal Nos. 131, 134, 151 & 185 of 2012 (Bihar Chamber of Commerce V. Bihar Electricity Regulatory Commission & Batch) has held that the determination of tariff based on the average cost of supply is legal and valid and cannot be set aside. In this regard, this Appellate Tribunal has, inter alia, held as under:-

> *"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 category wise 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 ±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 ±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 ±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 Judgment in Appeal Nos.131, 135, 151 & 185 of 2012 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 ±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 ±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 ±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 +20% of the average cost of supply in accordance with the Tariff Policy as also it 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."

7.12. that the continuation of determination of tariff based on the average cost of supply has been upheld by this Appellate Tribunal and there is no mandate for the Regulatory Commission to adopt the voltage wise cost of supply as against the average cost of supply.

7.13. that in the impugned order, considering the existing system of tariff determination, the extent of cross subsidy prevalent and the difficulty in shifting over to the voltage wise cost of supply principle, the State Commission has provided for the tariff to be determined and the cross subsidy principle to be applied based on the average combined cost of supply basis as provided for in the statutory Regulations, while at the same time providing for certain discounts to consumers taking supply at higher voltage level.

7.14. that the State Commission has, infact amended the basis on which the rebate is allowed to consumers by providing for rebate to all consumers taking supply of electricity at higher voltage level as against the prior practice of providing the rebate only to those consumers who take supply of electricity at a voltage level higher than their character of service. It is one of the steps towards the implementation of voltage wise tariff determination process.

7.15. that lastly the contention of the appellants that the voltage wise tariff determination has to be done in one go irrespective of the tariff shocks caused or the implication in the tariff design and the existing cross subsidy level is mis-conceived and liable to be rejected. :

8. We have given serious thoughts to the rival contentions made on this issue.

The learned State Commission, by the impugned order, has calculated the cross-subsidy based on combined average cost of supply instead of cross subsidy based on cost of supply while determining the Annual Revenue Requirements of the respondent no.2/PSPCL on its tariff application for FY 2013-14, as per the amended Regulation 7 in terms of Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff), second Amendment Regulations, 2012 which were made effective from 17.09.2012, the date of publication of the said amendment. The State Commission by the said amendment in the State Regulations in 2012 has amended

Regulation 7 **which provides for the cross-subsidy for a consumer category means the difference between the average realization per unit from that category and the combined average cost of supply per unit expressed in percentage terms** as a proportion of the combined average cost of supply. Thus, the State Commission has determined the cross-subsidy surcharge strictly in terms of the Regulation 7 of 2005 as amended in the year 2012. The appellants have challenged the said amended Regulations before the Hon'ble High Court of Punjab and Haryana which, according to the learned counsel for the parties, is pending before the Hon'ble High Court for adjudication. Thus, the legality of the said Amendment 2012 made by the State Commission in its Tariff Regulations is in question before the High Court.

We find that so long as the State Regulations, as amended in 2012, are on the statute book, they shall remain effective for the purpose of tariff determination, particularly, cross subsidy until the said amendment is not found illegal or invalid by the Hon'ble High Court.

9. We have carefully gone through the Full Bench decision of this Appellate Tribunal in the case of SIEL Limited Vs. Punjab State Electricity Regulatory Commission & Others reported in 2007 ELR (APTEL) 931. Throwing light on the Full Bench judgment, learned counsel for the appellants have contended that the Full Bench of this Appellate Tribunal directed, in its judgment dated 26.05.2006, the State Commission to determine the tariff on cost to supply basis but the said approach has not been acted upon by the State Commission until now.

10. The aforesaid Full Bench judgment reported in 2007 ELR (APTEL) 931 was pronounced when the main question was whether determination of tariff without framing of Regulations by any State Commission was bad in law or stood vitiated. The full Bench of this Appellate Tribunal held as under at page 953:-

Para 30(e)

"we are of the opinion that the Commission may be under a legal obligation to frame the Regulations but the existence of Regulations is not a condition precedent for determination of tariff under Section 62 of the Act of 2003. The Act of 2003 does not intend that power to determine tariff should remain in suspended animation till tariff Regulations are framed. The exercise of power conferred by the statute on the

Commission to determine the tariff does not depend upon the existence of Regulations since the Statute does not provide so.

Page 976 Para 85 (c)

The Board in consonance with the cost plus regime is entitled to recover all costs prudently incurred for providing service to the consumers. Besides, the Board is entitled to reasonable return. Since the cost prudently incurred has to be recovered, therefore, in the event of the tariff order being delayed, it can be made effective from the date tariff year commences or by annualisation of the tariff so that deficit, if any, is made good in the remaining part of the year or it could be recovered after truing up exercise by loading it in the tariff of the next year. All these options are available with the Commission."

11. The Full Bench further held in para 119 as under:-

"119. We further direct that:

i) The Commission shall determine the cost of supply of electricity to different class and categories of consumers;

ii) The Commission shall also determine the average cost of supply;

iii) Once the figures of cost of supply and average cost of supply are known, the Commission shall determine the extent of cross subsidies added to tariff in respect of each class/category of consumers; and

iv) The consumers who are being cross subsidized by the Commission, a limit of consumption shall be specified for which special support through cross subsidy may be provided. Once the consumer exceeds the limit, he shall be charged at normal tariff. These directions shall be applicable from the next tariff year onwards."

12. We, after going through the lengthy and voluminous judgment rendered by the Full bench of this Appellate Tribunal , find that at the time of the pronouncement of judgment of Full Bench, Electricity (Amendment) Bill 2005, which had been tabled in Parliament with Section 7 of the Amendment Bill seeking to amend Section 61 (g) of the Principal Act, 2003 was pending. In that context the Full Bench observed as under:

"109. According to Section 61(g) of the Act of 2003, the Commission is required to specify the period within which cross subsidy would be reduced and eliminated so that the tariff progressively reflects the cost of supply of electricity. Under Section 28(2) of the Act of 1998, the Commission while prescribing the terms and conditions of Tariff was required to safeguard the interests of the consumers and at the same time, it was to ensure that the consumers paid for the use of the electricity in a manner based on average cost of supply. The word "Average" preceding the words "cost of supply" is absent in Section 61(g) of the

Act of 2003. The omission of the word "Average" is significant. **It indicates that the cost of supply means the actual cost of supply, but it is not the intent of the legislation that the Commission should determine the tariff based on cost of supply** from the date of the enforcement of the Act of 2003. Section 61(g) of the Act of 2003 envisages a gradual transition from the tariff loaded with cross subsidies to a tariff reflective of cost of supply to various class and categories of consumers. Till the Commission progressively reaches that stage, in the interregnum, the roadmap for achieving the objective must be notified by the Commission when the tariff Policy was notified by the Government of India, within six months from January 6, 2006, i.e. by July 6, 2006. In consonance with the tariff policy, by the end of the year 2010-11, tariffs are required to be fixed within + 20% of the average cost of supply (pooled cost of supply of energy received from different sources). **But the policy has reached only up to average cost of supply**. As per the Act, tariff must be gradually fine tuned to the cost of supply of electricity and the Commission should be able to reach the target within a reasonable period of time to be specified by it. **Therefore, for the present, the approach adopted by the Commission in determining the average cost of supply cannot be faulted.** We, however, hasten to add that we disapprove the view of the Commission that the words "Cost of Supply" means "Average Cost of Supply". The Commission shall gradually move from the principle of average cost of supply towards cost of supply.

110. Keeping in view the provisions of Section 61 (g), which requires tariff to ultimately reflect the cost of supply of electricity and the National Tariff Policy, which requires tariff to be within + 20% of the average cost of supply, it seems to us that the Commission must determine the cost of supply, as that is the goal set by the Act. It should also determine the average cost of supply**.** Once the figures are known, they must be juxtaposed, with the actual tariff fixed by the Commission. This will transparently show the extent of cross subsidy added to the tariff, which will be the difference between the tariff per unit and the actual cost of supply.

111. In a given case, where an appropriate Commission comes to the conclusion that time has come when tariff is to be fixed without providing for cross subsidies between various consumer categories, it can fix the tariff accordingly as there is nothing in the Act which compels a regulatory Commission to formulate tariff providing for cross subsidies between the consumer categories for all times to come."

13. In the same spirit this Tribunal, in its judgment dated 25.2.2011 in Appeal No. 135 of 2010 (supra) and judgment dated 28.05.2014 in Appeal No. 131 of 2012 & batch re-affirming the view taken in judgment dated 29.01.2014 in Appeal No. 153 of 2012 in the matter of East Coast Railway vs. Orissa Electricity Regulatory Commission & Ors. has repeatedly held the same view as that of the Full Bench judgment of this Appellate Tribunal and observed that the tariff policy postulates that the category-wise cross-subsidy has to be within ± 20 % of average cost of supply by the end of the year 2010-2011. Further, if the tariff for subsidizing category is already within 120% of the cost of supply, the cross subsidy must not be increased beyond that point, and may or may not be reduced further.

We have in the recent judgment dated 28.05.2014 in Appeal No. 131 of 2012 & batch have disapproved the appellants' contention that the tariff has to be determined according to the cost of supply or voltage-wise cost of supply after relying on this Tribunal's judgment dated 30.05.2011 in Appeal No. 102 of 2010 & batch in the matter of Tata Steel Vs. Orissa Electricity Regulatory Commission observing 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.

14. We find that the State Commission in the impugned order has determined the voltage-wise cost of supply as per the directions given by this Tribunal in its previous judgments. However, the State Commission has not determined the category-wise cross subsidy with respect to the voltage-wise cost of supply to transparently indicate the cross subsidy being provided/received by each category of consumer. We are not suggesting that the tariffs have to be as per the voltage wise cost of supply. We only want that the cross-subsidy with respect to actual cost to supply should also be shown to reflect the cross-subsidies transparently and to ensure in the future tariff exercise that the cross subsidy with respect to voltage wise cost of supply is not increased. However, the tariffs for different categories have to be within $\pm$ 20% of the overall average cost of supply as per the Tariff Policy (as ensured in the impugned tariff order). The State Commission is directed to also show the cross-subsidy for each category of consumer with respect to voltage wise cost of supply in the next tariff order.

15. The State Commission, in the impugned order, has given cogent and just reasons for computing and determining the cross-subsidy based on combined average cost of supply acting in consonance with the Regulation 7 as amended by the State Commission's Amendment 2012. This issue has been decided by the State Commission in accordance with the existing State Regulations and the provisions of Section 61 (g) of the Electricity Act, 2003 and National Tariff Policy which mandates that the tariff for the subsiding category of consumers shall not exceed 20% of the average cost of supply. Since, in the instant case, the cross-subsidy level of the subsidizing categories of the consumers do not exceed the 120% limit, there can be said no grievance to be caused to the appellants. The impugned order clearly records sufficient reasons for marginally increasing the tariff for agriculture power (AP) category. We do not find any force in the appellants' contention that the State Commission has not taken the steps to increase the tariff of the

subsidized consumers and has marginally increased the tariff for subsidized consumers like agriculture power (AP) category of consumers.

16. We are also unable to accept the contention of the appellants to the effect that the State Commission's Amendment dated 17.09.2012 being PSERC (Terms and Conditions for determination of Tariff), second Amendment, Regulations 2012 is contrary to the provisions of the Electricity Act, 2003, National Tariff Policy and the Electricity Policy and the same ought to be ignored by this by this Appellate Tribunal while determining the legality or validity of the impugned order. This Appellate Tribunal can only interpret the Regulations or the provisions of the Electricity Act, 2003 or other tariff policies but is not legally competent to decide the legality of any amendment of State Commission's Regulations because the State Commission's Regulations are subordinate legislations.

17. Consequently, we do not find any illegality or perversity in the findings recorded on the issue of calculation of cross-subsidy based on combined average cost of supply by the State Commission as the same is based upon the amended Regulation 7 as introduced by the second Amendment of the State Regulations, 2012. Further, we do not find any sufficient reason to deviate from the reasoning given by the State Commission in the impugned order on this issue. However, we have given some directions to the State Commission under paragraph 14 above regarding voltage wise cost of supply. Resultantly, Issue No. (i) is decided against the appellants.

18. Issue No.(ii)

Now, we deal with the issue relating to unmetered consumption and Transmission & Distribution Loss (T & D Loss).

19. The following contentions have been made on behalf of the appellants on this issue:-

19.1. that under Section 55 of the Electricity Act, 2003, a mandatory obligation has been cast for ensuring 100% metering within 2 years from the date of notification of the Electricity Act, 2003. However, this has not been achieved in the State where till date over 30% of the total energy sale is still unmetered. The entire burden of such unmetered consumption is loaded upon the shoulders of the consumers, particularly those consumers who are paying much above the cost of supply. By the impugned order, a true up for FY 2010-11 and FY 2011-12, a review for FY 2012-13 has been conducted while annual revenue requirement of respondent No. 2 has been determined for FY 2013-14.

19.2 that for FY 2012-13, the State Commission has approved AP consumption of 10687 MUs. However, for FY 2013-14, a significantly higher AP consumption of 11221 MUs has been approved by the State Commission. Table 4.4 of the Impugned Tariff Order clearly shows that the total metered sales approved by the State Commission are 27461 MUs against the total approved sales in the State of Punjab being 38682 MUs. Therefore, there is a loss of revenue for about 11221 MUs (AP consumption) in the tariff year on account of subsidized rates for AP consumers.

19.3. that further, Transmission and Distribution (T & D) losses are being artificially reduced every year, whereas at the same time the unmetered AP consumption is increasing significantly. The State Commission, in the impugned order, on one hand has approved the overall T &D loss level target of 17% for FY 2013-14. However, at the same time increased the unmetered AP sales from 10687 MUs to 11221 MUs. T & D losses assumed without the metered data or on the basis of any scientific study to assess the unmetered consumption are meaningless and only a means of hiding the inefficiencies of the distribution licensee. In fact due to extensive urbanization, there is substantial decrease in land availability for agriculture resulting in reduced AP consumption.

19.4. that the State Commission has failed to regulate unmetered consumption and has in fact allowed such consumption at higher tariff (procurement cost). Since the entire burden of such unmetered consumption is loaded on the paying consumers, particularly those consumers who are paying much above the cost of supply, hence the entire burden of unmetered AP consumption requires to be revisited so that the same can be rationalized.

19.5. that under Section 55(3) of the Electricity Act, 2003, the State Commission has the power to ensure compliance of the mandatory provision by issuing such order as it thinks fit for requiring the default to be made good by the Generating Company or the licensee or the officer of the Company who is responsible for the default.

20. The learned counsel for the respondents has made the following **counter submissions** on this issue:

20.1. that the consumption of the agricultural consumers is computed by the State Commission based on relevant data. Further, the Government of Punjab takes the

responsibility of the entire subsidy towards the agricultural consumers without requiring the levy of full tariff from the agricultural consumers. There is no additional burden placed on the other categories of consumers on account of the non-recovery of tariff from the agricultural consumers.

20.2. that a substantial portion of the consumption in the State of Punjab continues to be towards the agricultural requirements. The State of Punjab has a substantial agricultural contribution to the country and it is incorrect to contend that the consumption of electricity is not to the extent of 30% of the total supply by distribution licensee to agricultural consumers.

20.3. that the State Commission has computed the agricultural consumption based on its own analysis and not as per the claim of PSPCL, which was higher.

20.4. that, lastly, it is not correct on the part of the appellants to challenge the consumption of electricity by the agricultural consumers and the terms and conditions on which the supply is given to the agricultural consumers.

21. We find that PSPCL estimated the AP consumption of 11456 MU for FY 2012-13. The State Commission after scrutinizing the detailed data obtained from PSPCL regarding month-wise and division wise details of feeders , energy pumped and load, etc., revised the approved energy consumption to 10687 MU as against 10479 MU approved in the tariff order, subject to validation. For FY 2013-14, the State Commission has decided to estimate the AP consumption by applying 5% increase (ad hoc) over the AP consumption approved for FY 2012-13. Thus, the State Commission approved energy consumption of 11221 MU as against 12029 MU projected by PSPCL. This is subjected to review on the basis of revised estimates in the next tariff order.

22. We find that the State Commission has estimated the AP consumption after detailed scrutiny of the data. Therefore, we find no reason to interfere in the matter.

23. **Issue No. (iii) Relating To Increase in Equity And Tariff Shock To The Consumers**

Now, we are required to see whether the State Commission has, by the impugned order, wrongly increased the equity for FY 2012-13 and FY 2013-14 from Rs. 2617.61 crore to Rs. 6081.43 crore and this 132% increase retrospectively has resulted in a tariff shock to the consumers. The following contentions have been raised on behalf of the appellants on this issue:-

23.1. that the State Commission, by the impugned order, has increased the equity for FY 2012-13 and FY 2013-14 from Rs. 2617.61 crore to Rs. 6081.43 crore and this 132% increase retrospectively has resulted in a tariff shock to the consumers.

23.2. that pursuant to the notification dated 24.12.2012 issued by the Government of Punjab allocating the opening balances of various assets and liabilities between the two successor entities viz- PSPCL and PSTCL as on 16.04.2010, the respondent No. 2 revised its claim for Return on Equity of Rs. 607.55 crore on the equity amount of Rs.2617.61 crore to a Return on Equity of Rs.1411.50 crore (@ 23.21%) on the revised equity amount of Rs.6081.43 crore for the year 2012-13. Thus, the State Commission, by the impugned order, has determined the return of equity amounting to Rs. 942.62 crore (@15.5%) for FY 2012-13 and FY 2013-14. Admittedly, this equity of Rs. 6081.43 crore is inclusive of consumer contributions, grants and subsidies amounting to Rs 3741.85 crore. Such consumer contributions, grants and subsidies cannot be converted into equity as per accounting norms. Thus, the State Commission accordingly approved the return on equity of Rs. 942.62 crore on the equity amount of Rs. 6081.43 crore vested with the utility in the Transfer Scheme (notified by the Government of Punjab) for FY 2012-13.

23.3. that the reliance placed by the distribution licensee upon Section 131 of the Electricity Act, 2003 and particularly, Section 131 (3) of the Act, 2003, which deals with vesting of property of the Electricity Board in State Government on the re-organization of the Board when transfer scheme is prepared by the State Government, to urge that the transfer scheme is binding on all persons including the State Commission while discharging its functions of determination of tariff, is entirely misplaced because Section 131 of the Electricity Act, 2003 casts an obligation upon the State Commission to determine tariff for generation, transmission and distribution and for such determination the State Commission has to apply prudence checks and ensure that generation, transmission, distribution and supply of electricity are conducted on commercial principles in an efficient manner and by economical use of resources and optimum investments. Safeguarding consumer interests is the cornerstone for such determination of tariff and only prudent costs are to be allowed.

23.4. that this Appellate Tribunal in a catena of judgments has clearly laid down the law that even directions issued by the Government under Section 108 of the Electricity Act, 2003 cannot bind the Commission discharging its functions of tariff determination. In fact, one of the objectives of the reform legislation was to distance the government from the

tariff determination process by creating independent and transparent bodies, namely, the State/Central Commission. This objective cannot be vitiated by an incorrect reading or interpretation of Section 131 of the Act, curtailing the powers of the State Commission to allow/ disallow costs after undertaking prudence check.

23.5. that allowing ROE to the distribution licensee on the consumer contributions, grants and subsidies is entirely contrary to the consumer interest and the provisions of the Electricity Act, 2003.

23.6. that Section 131 (3) of the Electricity Act, 2003, does not begin with a non-obstante clause vis-à-vis the Act as a whole. The sub-Section starts with '*notwithstanding anything contained in this section',* thus, Section 131 of the Act in no manner curtails or abrogates the powers of the State Commission to determine tariff under Sections 61 and 62 of the Electricity Act, 2003.

24. Refuting the contentions of the appellants, the **following submissions have been made on behalf of the respondents on this issue**:-

24.1. that the contention of the appellants that State Commission has incorrectly determined the equity base of the distribution licensee/PSPCL at Rs. 6081.43 crore in terms of the statutory Notification under Section 131 of the Electricity Act, 2003 issued by the Government of Punjab and an amount of Rs. 2599.32 crore of consumer contributions and Rs. 1142.02 crore of grants/subsidies have been illegal, baseless and factually incorrect and also amounts to challenging the Notification under Section 131 of the Electricity Act, 2003. The appellants cannot question the binding nature of such Notification in terms of Section 131 (3) (b) of the Electricity Act, 2003.

24.2. that Section 131 (3) of the Electricity Act, 2003 states as under:-

"Vesting of Property of Board in State Government…….

……..

Notwithstanding anything contained in this section, where,-

(a) the transfer scheme involves the transfer of any property or rights to any person or undertaking not wholly owned by the State Government, the scheme shall give effect to the transfer only for fair

value to be paid by the transferee to the State Government;

(b) a transaction of any description is effected in pursuance of a transfer scheme, it shall be binding on all persons including third parties and even if such persons or third parties have not consented to it."

In view of the clear wordings of Clause (b) of sub-Section (3)of Section 131 of the Electricity Act, 2003, the statutory Notification issued by any State Government is binding on all the persons including third parties and even if such persons or third parties have not consented to it.

24.3. that the basic contention of the appellants of comparing the books of accounts of the erstwhile Punjab State Electricity Board to that of PSPCL and then to claim that the consumer contributions and grants have not been transferred to PSPCL is misconceived. The appellants are treating the transfer scheme under Section 131 of the Electricity Act, 2003 as an inter-se transfer between the erstwhile Punjab State Electricity Board and PSPCL/distribution licensee and that the values in the books of accounts have to be exactly the same, which contention is misconceived.

24.4. that the power with regard to vesting of rights and properties of the erstwhile State Electricity Board in the Government is provided in Section 131 (1) of the Electricity Act, 2003. Thereafter, the right of the State Government to re-vest such rights, properties, assets along with such further assets and on such values to Companies is provided in Section 131 (2)of the Electricity Act, 2003. In terms of the whole reading of Section 131 of the Electricity Act, 2003, the following position in law emerges:-

(a) The assets, property, interest in property, rights and liabilities of the Electricity Board is to be transferred and vested in the State Government. The transfer is not from the Electricity Board to the successor company, but to the State Government.

(b) Upon such transfer and vesting of the rights, properties, interests, liabilities etc in the state government, all the capital, equity, consumer contributions, grants, liabilities etc get cancelled in the hands of the State Government. There is no entry of consumer contributions, grants etc. The transaction under Section 131(1) of the Act, 2003 gets completed.

(c) Under Section 131(2) of the Electricity Act, 2003 the State Government shall transfer the assets, rights, interests etc as obtained from the Electricity Board and also such further rights, assets etc to company or companies created. The transfer shall be on such terms and conditions as agreed under Section 131(2) of the Electricity Act, 2003.

(d) In terms of the proviso to section 131(2), the transfer value shall be, as far as may be, based on the revenue earning potential of the assets. It is not that the assets have to be transferred at the book value which was in the hands of the Electricity Board. It is not provided to be on book value, or historical cost basis etc, but based on revenue earning potential as agreed to.

(e) In terms of Section 131 (3)(b), the transfer scheme providing for the above shall be binding on all persons including third parties.

24.5. that in view of Section 131 of the Electricity Act, 2003 the contention of the appellants on the nature of the transfer scheme, wherein the assets are to be transferred are from the Electricity Board to the successor companies at book value of the Electricity Board is incorrect. The transfer being from the Electricity Board to the State Government, the successor entity is not vested with the assets, rights, interest etc. directly from the Electricity Board. It is for the State Government to vest such assets, interests etc. from itself to the successor entity and on such terms and conditions as provided for.

24.6. that the transfer is not merely as bilateral and contractual transfer of assets and liabilities from the erstwhile Punjab State Electricity Board to the successor entity, but a statutory transfer from the erstwhile Punjab State Electricity Board to the Government and then to successor entity (respondent no. 2 - PSPCL) in terms of Section 131 of the Electricity Act, 2003.

24.7. that the statutory power of the State Government under Section 131 of the Electricity Act, 2003, is not subject to the approval or jurisdiction of the State Commission, on the other hand, the Statutory Transfer Scheme in terms of Section 131(3)(b) of the Electricity Act, 2003 is binding on all including the State Commission. In the instant matter, the State Commission has, following the provisions of Section 131 including 131(3)(b) of the Act, adopted the transfer scheme notified by the Government of Punjab.

24.8. that further during the pendency of the impugned proceedings before the State Commission, the PSPCL in its letter dated 22.03.2013 filed before the State Commission stated that the actual amount of equity employed in creation of assets is Rs. 6081.43 crore and the enhanced equity has also contributed to the creation of assets which is in line with Regulation 25 (4) of PSERC (Terms & Conditions) for determination of Tariff Regulations and requested that Return on Equity @ 15.5 % may be allowed on the said amount. The State Commission, keeping in view the amount of equity as per the Transfer

Scheme notified by Government of Punjab on 24.12.2012, determined ROE of Rs. 942.62 crore @ 15.5% on an equity of Rs. 6081.43 crore for FY 2012-13.

24.9. that it was for the Government of Punjab to determine its equity contribution to the PSPCL and in the present case, out of the total asset value, less than 30% of the total asset value has been contributed by the Government of Punjab as equity capital for which equity shares have been actually issued by PSPCL in favour of the Government of Punjab.

24.10. that the appellants' contention that the assets etc are to be transferred free of cost or that the State Government ought to have provided for consumer contributions etc in the books of accounts of PSPCL is wrong because the assets have been transferred by Government of Punjab as the owner of the assets and it is for the Government of Punjab to determine the consideration for such transfer.

24.11. that in terms of the Tariff Regulations of the State Commission, actual equity subject to a maximum of 30% is to be serviced in the Annual Revenue Requirements of the PSPCL. In the present case, the actual equity shares issued being less than 30% of the asset value, the actual equity has been adopted by the State Commission in the Annual Revenue Requirements of the PSPCL.

24.12. that the appellants are not entitled to reopen the past accounts or otherwise question the values taken by the Government of Punjab in the statutory transfer scheme in the proceedings before the State Commission or the Tribunal. The grants/subsidy etc. as claimed by the appellants as being paid to the PSPCL is misconceived. **The PSPCL has begun its licensed operations with effect from 16.4.2010 and has not received any grants or subsidies or consumer contributions for the capital assets commissioned prior to 16.4.2010**. The statutory transfer scheme and opening balance sheet notified thereunder is required to be adopted as such and the decision of the State Government on its equity contributions etc. cannot be questioned by the appellants in the instant proceedings.

24.13. that the contention of the appellants that the Government of Punjab has converted the consumer contributions and subsidies and grants in the books of PSPCL to equity and the State Commission has without conducting any prudence check allowed the return on equity on the said amounts is misconceived as the same is contrary to the records and

financials of the PSPCL and also the Transfer Scheme notified by the Government of Punjab.

24.14. that the consumer contributions to the extent of Rs. 2599.32 crore and subsidies/grants to the extent of Rs. 1142.02 crores were in the books of Punjab State Electricity Board, which upon the transfer of the entire undertaking, rights, liabilities etc to the Government of Punjab stood cancelled.

24.15. that the Government of Punjab by notification dated 16.04.2010 in terms of Section 131 of the Electricity Act, 2003 published the provisional transfer scheme for transfer of assets, liabilities, undertaking etc. to PSPCL/distribution licensee and the transmission licensee. In the said transfer scheme, there was no provision for any consumer contributions, subsidies/grants capital asset etc. The provisional balance sheet notified by the Government of Punjab in terms of Section 131 of the Electricity Act, 2003 did not provide for any such consumer contributions etc in the books of PSPCL. In the circumstances, the entire premise on which the appellants have challenged the impugned order in the present appeals that there has been conversion of consumer contributions etc. in the books of PSPCL to equity is misconceived.

24.16. that by the vesting of assets, liabilities, interest etc. in the hands of PSPCL, the Government of Punjab has in fact cleaned up the financials and provided a clean balance sheet to PSPCL. The Government of Punjab has valued the various assets and liabilities and transferred the assets, liabilities, interest etc to PSPCL and the transmission licensee after undertaking a detailed financial restructuring. In fact, in the entire financial restructuring process, the total accumulated losses for the past period which were existing in the books of the State Electricity Board have been wiped out and there has been no vesting of accumulated losses etc. of the past period carried into the accounts of PSPCL.

24.17. that since the transfer scheme dated 16.04.2010 issued by the Government of Punjab was only provisional in nature and the final transfer scheme was yet to be issued by the Government of Punjab which would take some-time on account of detailed verification of assets etc., the State Commission for the purposes of tariff determination continued the tariff determination based on the existing capital structure/equity in the hands of Punjab State Electricity Board. **The State Commission was of the opinion that since the transfer scheme is not yet finalised, it would not be appropriate to change the figures of equity etc. based on the provisional transfer scheme and that the value should be taken based on the final transfer scheme**. In the circumstances, the adoption

of the figures as per the transfer scheme issued by the Government of Punjab under Section 131 of the Electricity Act, 2003 was postponed by the State Commission till the notification of the final balance sheet and the final transfer scheme by the Government of Punjab.

24.18. that prior to passing of the impugned order, the Government of Punjab on 24.12.2012 issued the final transfer scheme Notification. The final transfer scheme Notification was effective from the date of transfer, namely, 16.04.2010 and in the said final transfer scheme Notification there was no conversion of consumer contribution, subsidies etc. to equity.

24.19. that the total value of the assets vested by the Government of Punjab in PSPCL was Rs. 30,912 crore. As against the total value of the assets vested in PSPCL by the Government of Punjab, the actual amount of equity shares issued to the Government of Punjab was for Rs. 6081.43 crore. It is not that the amount of Rs. 6081.43 crore is fictional or does not represent the value of assets against which the equity shares have been issued. PSPCL has issued actual equity shares to the value of Rs. 6081.43 crore in favour of the Government of Punjab.

24.20. that in the impugned order, the State Commission has merely adopted the figures in the final balance sheet and final transfer scheme issued by the Government of Punjab under Section 131 of the Electricity Act, 2003.

24.21. that there has been no conversion of consumer contributions or subsidies etc in the books of PSPCL to equity thereby increasing the return on equity to the PSPCL. Neither under the provisional balance sheet nor under the final balance sheet was there any consumer contributions, subsidies etc which has been vested by the Government of Punjab in PSPCL.

24.22. that the State Commission being a Statutory Authority is bound by the statute and is required to act within the four corners of the statute as was held by the Hon'ble Supreme Court in the case of Institute of Chartered Financial Analysts of India v. Council of The Institute of Chartered Accountants of India, (2007) 12 SCC 210; V.K. Ashokan *v.* CCE, (2009) 14 SCC 85 and M.P. Wakf Board v. Subhan Shah, (2006) 10 SCC 696.

25. We find from the Audit Report of CAG on the accounts of Punjab State Electricity Board for FY 2010-11 (upto 16.04.2010) that the consumer contribution, grants and subsidies towards cost of capital assets is indicated as Rs. 3741.34 crores. The funds from State Government are indicated as Rs. 3583.45 crores, out of which equity capital from State Government is Rs. 2946.11 crores and bonds issued by RBI on behalf of State Government is Rs. 637.34 crores.

26. It is seen from clause 3 of the Transfer Scheme notified by the State Government on 16.4.2010 that on the effective date of Transfer all assets, properties, etc. of the Electricity Board shall stand transferred and vested in and under the control of the State Government absolutely at book value. Under clause 4 of the Transfer Scheme, the assets, liabilities and proceedings of the Board vested in the State Government stand classified into Transmission Undertaking and other undertakings as per the provisional balance sheet and from the effective date of transfer, the transmission functions of the Board along with all assets, liabilities, etc. shall stand re-vested in the Transco and rest of the functions assets and liability to powercom.

27. We find from the impugned order that PSPCL in the ARR Petition for FY 2012-13 had claimed ROE on the opening equity of Rs. 2617.61 crores. In the ARR Petition for the FY 2013-14 also PSPCL had filed its claim for ROE on the equity amount of Rs. 2617.61 crores subject to the final claim in final balance sheet after finalization of Financial Restructuring Plan.

28. In the State Government's Notification dated 24.12.2012 amending the Transfer Scheme of 2010, the equity was increased from Rs. 2946.11 crores to Rs. 6687.26 crores, Rs. 6081.43 crores assigned to PSPCL (Appellant) and Rs. 605.08 crores

to PSPTCL (Transmission company). The equity notified in the Notification dated 24.12.2012 is the summation of equity as on 16.04.2010 and consumer contribution, subsidies grants etc., of Rs. 3741.34 as indicated in the audited balance sheet as on 16.04.2010 of the Punjab State Electricity Board, the successor of the Appellant, as under:

Equity as on 16.4.2010	Rs. 2946.11 crores
Consumer contribution, subsidies grants, etc.	Rs. 3741.34 crores
	Total Rs. 6687.45 crores

29. Let us see the reply of PSPCL furnished to the State Commission by letter dated 26.2.2013 on a query by the State Commission about the increase in the equity:

"Punjab State Power Corporation Limited

To

The Secretary,

Punjab State Electricity Regulatory Commission,

SCO 220-221, Sector 34-A,

Chandigarh,

Memo No. 1706/CC /DTR/Dy. CAO/238 Dated:26.2.2013

Sub: Punjab Govt. Notification dated 24.12.2012 regarding transfer scheme.

Ref: Your office memo no. PSERC/Sr.AO/ARR -2013-14/130/11583/84 dated 20.2.2013.

Enclosed please find herewith a copy of Financial restructuring Plant finalized by the GOP for reference & record please. The GOP equity has been determined as Rs. 6687.26 crores as detailed below:

Sr. No.	*Item*	*Rs. Crore*
A.	*GOP equity in PSEB* *i) Less Equity contributed to PSPCL and PSTCL* *ii) Less cost of 87.5 Acre land retained by GOP while vesting assets in new entities.*	*2946.11* *0.10* *0.09*
	Balance	*2945.92*
B.	*Consumer contributions treated as equity*	*2599.32*
C.	*Subsidies/Grants for capital assets treated as equity*	*1142.02*
	Total	*6687.26*

The amount has been apportioned between PSPCL and PSTCL in ratio of 90.94% which worked out as under:

PSPCL *6081.43 Cr.*

PSTCL *605.83 Cr.*

Total *6687.26 Cr.*

The comments of PSPCL on the ARR and Tariff Determination Petition of PSTCL for FY 2013-14 is being sent separately.

DA: As above

Chief Engineer/ARR&TR,

PSPC, Patiala"

30. Thus, under the Financial Restructuring Plan finalized by the State Government, the total equity has been worked out by summation of the Government's equity in the Electricity Board, the consumer contribution treated as equity and subsidies/grants for capital assets also treated as equity. The State Commission on the basis of above letter allowed the revised equity of Rs. 6081.43 crores for PSPCL and determined the ROE on the same.

31. We find from the Transfer Scheme of 2010 that assets of the Electricity Board were transferred and vested with the State Government at the book value i.e. Rs. 2946.11 crores. However, while transferring the assets to the successor company, namely PSPCL and PSTCL, in the notification issued by the State Government on 24.12.2012, the equity was increased to Rs. 6687.26 crores (Rs. 6081.43 crores to PSPCL and Rs. 605.83 crores to PSTCL) by adding the consumer contribution for capital assets and subsidy/grants etc. for capital assets.

32. According to the learned counsel for the State Government and learned counsel for the PSPCL, the transfer scheme is binding on the State Commission under Section 131(3)(b). Section 131 of the Act provides for revaluation of the assets and liabilities at the time of transfer of assets from the Government of Punjab to PSPCL. According to them, the valuation of assets, property, interest in property, rights and liabilities were undertaken in terms of the proviso to Section 131(2) pursuant to a detailed expert report

submitted on financial restructuring and valuation. Pursuant to above, the final Notification under Section 131(2) of the Act was notified by the Government of Punjab on 24.12.2012. Upon such valuation of the assets which belong to Government of Punjab to be transferred to PSPCL which worked out to Rs. 30912 crores, the Government of Punjab was issued equity shares to the extent of Rs. 6081.43 crores which works out to 30% of the capital assets value. PSPCL has actually issued equity share capital to the extent of Rs. 6081.43 crores to the Govt. of Punjab in terms of the Transfer Scheme Notification under Section 131.

33. We find that Section 131(1) provides that the State Government can notify Transfer Scheme for transfer of property, interest in property, rights and liabilities of the State Electricity Board to vest in the State Government on such terms as may be agreed between the State Government and the Board. Under this provision, the assets, liabilities, etc., of the Punjab State Electricity Board have been vested in with the State Government at book value of the assets.

34. Section 131(2) provides that the property, interest in property, rights and liabilities vested in the State Government under sub-section (I) shall be re-vested by the State Government in a Government company or in a company/companies, in accordance with the Transfer Scheme on the terms and conditions as may be agreed between the State Government and such company/companies. Proviso to Section 131(2) states that transfer value of any assets transferred shall be determined as far as may be, based on the revenue potential of such assets.

35. Section 131(3) is reproduced below:

"(3) Notwithstanding anything contained in this section, where,—

(a) the transfer scheme involves the transfer of any property or rights to any person or undertaking not wholly owned by the State Government, the scheme shall

give effect to the transfer only for fair value to be paid by the transferee to the State Government;

(b) a transaction of any description is effected in pursuance of a transfer scheme, it shall be binding on all persons including third parties and even if such persons or third parties have not consented to it.

36. Under Section 131(3) (a) if the transfer scheme involves the transfer of any property or rights to any person or undertaking not wholly owned by the State Government, then the transfer value will be fair value to be paid by the transferee to the State Government. Sub-section 3(b) states that transaction in pursuance of a Transfer Scheme shall be binding on all persons including third parties. In this case the transfer has taken place from the State Government to the State owned entities, namely PSPCL and PSTCL. Therefore, Section 131(3) (a) shall not be applicable to the present case. However, under proviso to Section 131(2) assets can be determined based on the revenue potential of such assets.

37. From the Consultants Report on Financial Restructuring Plan of PSPCL and PSPTCL dated 18.12.2012, we do not find any exercise of re-valuation of assets of the Board vested with the State Government to be transferred to the successor companies. The Consultants has only proposed disaggregated balance-sheet.

38. Admittedly, the Transfer Scheme as notified by the State Government is not under challenge. However, the State Commission is authorized to carry out a prudence check of the balance sheet. This Tribunal in the past has held that the State Commission is not bound to accept the figures as given in the audited balance sheet in toto and can determine the return on equity and other expenses after prudence check. In this case, there was no induction of fresh funds and the equity as on the date of transfer has been increased from Rs. 2946.11 crores to Rs. 6687.26 crores. The increase as explained by PSPCL in their letter dated 26.2.2013 is on account of treating the consumer contribution

and grants and subsidies towards the capital assets as standing in the audited accounts of the Electricity Board as equity. In our opinion, the State Commission should have allowed return on equity on the actual equity of Rs. 2946.11 crores to be apportioned to PSPCL and PSTCL.

39. This Tribunal had dealt with a similar matter in its judgment dated 17.09.2014 in Appeal No. 46 of 2014 and held as under:

> *"46. Admittedly, the consumer security deposit has been capitalized pursuance to the State Govt. order and the Respondent No.2 is claiming ROE on such capitalized sum. We feel that the consumer security deposit is not a capital asset on which ROE can be claimed. Even if the State Government has ordered capitalization of consumer security deposit and accordingly the balance sheet of the Distribution Companies has been drawn up with gross fixed assets including the consumer security deposit, the State Commission should have deducted the amount of consumer security deposit while allowing ROE on the equity component of the capital cost.*
>
> ***47.*** *As already held by this Tribunal, the State Commission is not bound to follow the audited accounts and the State Commission can scrutinize the same and allow the expenditure only after prudence check. By allowing ROE on consumer security deposit and also allowing interest paid by the Distribution Licensee to the consumers against consumer security deposit in the ARR of the Distribution Licensee, the consumer has been burdened unreasonably. On one hand the Distribution Company has been allowed ROE on the security deposit which is contributed by the consumer and on the other hand the interest paid to the consumer on such deposit is also allowed as a pass through in the tariff to be recovered from the consumers. This is wrong.*
>
> ***48.*** *Hence, we find force in the arguments of the Appellant that ROE on consumer security deposit amount capitalized in the books of accounts of the Distribution Licensee should not have been allowed in the ARR of the Distribution Licensee. Accordingly, we direct the State Commission to adjust the excess amount of ROE*

allowed in the Impugned Order from FY 2011-12 onwards in the APR/True up for these years to provide relief to the consumers".

40. The findings of this Tribunal in Appeal no. 46 of 2014 shall squarely apply in this case. Accordingly, this issue is decided in favour of the Appellants. The State Commission shall re-determine the ROE as per our directions and the excess amount allowed to the distribution licensee with carrying cost shall be adjusted in the next ARR of the respondent no.2.

41. **Issue No. (iv) Relating to Peak Load Exemption charges (PLEC)**

The following submissions have been made on behalf of the appellants on this issue:-

41.1. that the State Commission, by the impugned order, has increased the Peak Load Exemption Charges (PLEC) by 50%, thereby causing a serious tariff shock to the appellants. Peak in demand is being created by DS/NRS consumers, whereas large supply continuous process industry is being penalized for the same. Time of Day (TOD) tariff for commercial and domestic will not only flatten the demand curve, it will also help in reducing misuse of expensive peak power. However, the State Commission by the impugned order has introduced TOD tariff for six months (October to March), during off peak hours for large supply industrial consumers only. While at the same time, the PLECs have been increased by 50% and are being levied for the entire year even though there is no shortage during peak hours from October – March.

41.2. that PLEC is charged over and above the tariff charges. A utility is a tariff neutral entity, once all its charges including short term power purchase charges are recovered, there can be no rationale for levy of PLEC. The increased PLEC and the corresponding tariff during peak hours will amply demonstrate the tariff shock caused to the appellants, e.g. even if PSPCL buys power at Rs 6.00 from IEX during peak hours ,the landed cost with 6.0% losses for 66KV customer will not be more than Rs 6.70 per kwh. There can be no

justification for charging Rs 9.03 and Rs 10.38 per unit for power consumed during peak hours.

42. **Per contra,** the submissions of the respondents on this issue are as under:-

42.1. that the appellants' contention that the State Commission has erroneously increased the peak load exemption charges payable by the consumers is misconceived and further the appellants' contention that the peak in demand is created only by the domestic and non-residential consumers is also misconceived.

42.2. that the Peak Load Exemption Charges have been determined by the State Commission only for the purposes of compensating the utility for the power purchase during peak and to discourage consumers from taking supply of electricity during peak which can be avoided. The consumers who require electricity during peak hours, the peak load exemption charges have been imposed on such consumers.

42.3. that the State Commission has, in the impugned order, discussed in detail on the aspect of Peak Load Exemption Charges. The PSPCL had filed a separate petition seeking revision in the Peak Load Exemption Charges on account of the difficulties faced and the losses caused to PSPCL. The State Commission has conducted public hearing and after considering all the relevant data came to the finding that there were sufficient reasons to restrict the load/demand during peak to save the grid and to protect the security of the grid.

42.4. that the State Commission has come to the specific finding that after imposition of the time of the day metering, the loss on account of the peak load demand to PSPCL is Rs. 108 crore which required an increase of 60% in the existing Peak Load Exemption Charges. The Peak Load Exemption Charges were not raised for a long time and were required to be revised considering the facts and circumstances as prevalent and the fact that the demand in the system had increased substantially resulting in system constraint and also shortage of electricity.

42.5. that, however, in view of the potential of shifting large supply industry load from day to night hours, the State Commission has restricted the increase to only 50% of the existing Peak Load Exemption Charges as against the 60% increase which is required. The said charges had not been increased for a long period of time and the State Commission has, in fact, reduced the quantum of increase that was required based on the assumption

that about 10% would get compensated by shifting of Large Supply Consumers from day shift to night shift.

42.6. that the increase has been necessitated on account of the high demand during peak leading to system constraints and also leading to grid instability and insecurity. As a measure to restrict demand of electricity during peak, the State Commission has revised the Peak Load Exemption Charges payable by the consumers taking supply of electricity during peak.

43. After considering the rival submissions on this issue, we do not find any force in the appellants' contentions because there was a purpose for which a provision of Peak Load Exemption Charges has been made. In order to restrict the load or demand during peak hours to save the grid failure or peak load or restriction is one of the mechanisms to achieve the same. The State Commission has observed that the increase in Peak Load Exemption charges affects maximum to the continuous process industry. The general industry (other than continuous) can avoid the Peak Load Exemption Charges by not running during peak load period. If a continuous process industry is not allowed to run during peak load hours, lot of material gets wasted which might cost much more than the increased Peak Load Exemption Charges. Charging of Peak Load Exemption Charges from AP consumers has not been found justified by the State Commission as the supply is given only for 6 to 8 hours per day as compared to 24 hours to other categories of consumers. The State Commission has noted that the computation of ±20% of average cost of supply for the industrial consumers is after taking into account the Peak Load Exemption Charges and as such, no indirect cross subsidy is imposed. We find complete justification and logic in the submissions of the respondents and we agree to the findings recorded by the State Commission on this issue. This issue is also decided against the appellants and the State Commission's findings on this issue are affirmed.

44. **Issue Nos. (v) & (vi) Relating to Voltage-wise Cost and Determination of Wheeling Charges**

Since both these issues are inter-woven, we are considering and deciding them together. On these issues, the following contentions have been raised by the appellants:-

44.1. that regarding wheeling charges (Open Access Consumer Charges) as per the TERI report on voltage-wise cost of supply, the wheeling charges for 66 KV supply works out to be Rs 0.45 for the year 2012-13, whereas the State Commission in the tariff order for FY 2012-13 fixed the wheeling charges @ Rs 1.24 per kwh (matter of challenge in Appeal No.

176 of 2012, in which judgment has been reserved by this Appellate Tribunal). The Report was issued by TERI whereby the voltage-wise cost of supply of generation, transmission and distribution business were determined based on which the voltage wise wheeling charges can be calculated. However, the State Commission has erred in ignoring the methodology for voltage-wise cost determination as per the report and has instead calculated the average wheeling charges of Rs 1.19 per unit for the distribution business as a whole which amounts to double cross subsidization in open access charges. As the appellants are already paying cross subsidy surcharge on one hand and on the other hand are being burdened with inflated wheeling charge by Rs 0.74 per kwh (1.19-0.45). This difference in wheeling charges is due to the incorrect methodology adopted by the State Commission.

44.2. that the determination of wheeling charges by the State Commission, in the impugned order, is in contravention of the provisions of the Electricity Act, 2003 and the PSERC (Terms and Conditions for Intra-state Open Access) Regulations, 2011.

44.3. That under Regulation 25 of the PSERC (Terms and Conditions for Intra-state Open Access) Regulations, 2011, the distribution licensee has to segregate the accounts for its supply and wires business and the annual wheeling charges will represent only the cost of the wires business of the distribution licensee. The Regulation 25 is reproduced herein below:

> ***"25. Wheeling Charges:***
>
> ***1) Wheeling Charges shall be payable by an Open Access customer who utilises the distribution network for wheeling of electricity.***
>
> ***2) <u>The distribution licensee shall segregate the accounts for the consumer service (retail supply) business and its wire business and submit the same to the Commission</u>.***
>
> ***3) <u>The Annual Wheeling Charges (AWC) will represent the cost of the wires business of the distribution licensee. The Commission shall determine the prudent level of Annual Wheeling Charges. While doing so, it shall use its own assumptions for apportioning the expenses of a licensee for the purpose of</u>***

computing expenses pertaining to wires business till such time segregated accounts of the licensee are available.

4) The wheeling charges payable shall be calculated in accordance with the following formula:

Wheeling charges = (AWC) / (DIS_CAP*365)

Where:

DIS_CAP means the capacity in MW which can be served by the distribution system of the Distribution licensee and shall be the sum of import of power at each interface point of exchange of power at electrical boundary of distribution licensee and generation from captive power plants and co-generation plants (to the extent fed into the grid) and plants generating electricity from renewable sources of energy located in the area of such licensee.

5) Long term, Medium term and Short term Open Access customers availing supply at 220 KV, 132 KV, 66 KV, 33 KV or 11 KV, in addition to transmission charges, shall be liable to pay wheeling charges determined by the Commission as per the Tariff Order applicable for the year."

44.4 that the removal of the percentage cap of 15% and 30% for wheeling charges for open access consumers availing supply at 33/66 and 11 KV by the amendment does not automatically imply that the open access customer will become liable to pay 100% wheeling charges determined in the tariff order. Regulation 25 read as a whole adequately clarifies that the segregation of accounts of the retail supply and wires business is the first step towards determination of wheeling charges. Once the segregation is done, only the costs of the wires business can be used to determine the annual wheeling charges.

44.5.that the Regulations cannot be applied in a piecemeal manner contrary to the object and purpose of the Electricity Act, 2003. Further, the National Electricity Policy clearly provides that wheeling charges like transmission cost should be in proportion to their respective utilization of the transmission system.

44.6. that the impugned order is illegal to the extent it directs consumers connected at 220 KV and 132 KV to pay wheeling charges when they are already paying transmission charges in terms of the tariff determined by the State Commission for the Transmission Company. Respondent No. 2 cannot collect wheeling charges for utilization of transmission assets, which assets are owned and operated by the Transmission Company.

45. Per contra, the following submissions have been made on behalf of the distribution licensee/respondent no.2:-

45.1. that the State Commission has determined and applied the wheeling charges strictly in terms of the Open Access Regulations framed which mandate the levy of wheeling charges on all open access consumers taking supply at 11 KV and above.

45.2. that the instant appeals indirectly seek to challenge the Statutory Regulations framed by the State Commission which is impermissible

45.3. that the State Commission has specifically amended the existing Open Access Regulations, Regulation 25 of PSERC for Intra-State Open Access Regulations, 2011.

45.4. that the appellants' contention that the consumers connected at 132 KV and 220 KV and availing power through open access cannot be made to pay the wheeling charges is incorrect. The total wheeling charges are apportioned and recovered from the all the consumers irrespective of the voltage level at which the supply is being taken by the consumers. The retail supply consumers of PSPCL who were taking supply of electricity at 132 KV or 220 KV also pay for the entire transmission and wheeling charges. In these circumstances, when the above principles are applied to the consumers taking electricity from the PSPCL, the same manner for apportionment and recovery of wheeling charges needs to be made from the open access consumers. The open access consumers cannot be allowed to be subsidized for the transmission and wheeling charges at the cost of the other consumers in the State of Punjab.

45.5. that in case the above provision is not applied, the PSPCL would pay the entire transmission and wheeling charges and recover the same from its consumers through the retail supply tariff and the open access consumers would only pay a part of the said charges. The above is independent of the power purchase cost incurred by the PSPCL. Thus, the open access consumers would be benefited to the extent of the wheeling charges which are paid by PSPCL and the other consumers and to get subsidized at the cost of the public at large, which is impermissible. The open access consumers cannot claim any further additional benefit that is not available to the other consumers in the State.

45.6. that it is also incorrect to state that the wheeling charges levied include a part of the non-wire business of PSPCL. The wheeling charges do not include the power purchase cost or the other costs and expenses incurred by PSPCL for supply of electricity, but is related to the wires laid down and maintenance of the said wires. The determination of the wheeling charges as per unit charge does not mean that the same is not related to the use of wires of PSPCL. It is also not correct to contend on behalf of the appellants that

unless each and every cost element is divided between the retail supply and wire business, the determination of the wheeling charges by the State Commission is illegal.

45.7. that the State Commission has applied and determined the wheeling charges after segregating the major cost elements between retail supply business and wire business and levied the wheeling charges on the consumers based thereon.

45.8. that the issue regarding the applicability of wheeling charges has been challenged by the appellant itself, M/s Mawana Sugars Limited before the High Court of Punjab & Haryana wherein the amendment to Regulation 25 (5) of the PSERC (Terms and Conditions for Intra-State Open Access) Regulations, 2011 has been challenged.

45.9. that lastly in the circumstances, there is no merit in the contentions of the appellants on the levy of transmission and wheeling charges on the Open Access consumers in the State of Punjab.

46. This issue has been dealt with this by Tribunal in judgment dated 12.09.2014 in Appeal Nos. 245 of 2012 and batch in the matter of Steel Furnace Association of India Vs. Punjab State Electricity Regulatory Commission and Ors. in which the Tribunal after dealing with the Open Access Regulations, 2011 decided that the wheeling charges have been determined by the State Commission in contravention to the provision of the Act, Tariff Policy and National Electricity Policy and its own Regulations and set aside the wheeling charges applicable to the open access customers with the directions to re-determine the wheeling charges applicable to open access customers as per the above findings. The relevant extracts of the judgment dated 12.09.2014 in Appeal no. 245 of 2012 & batch is reproduced below:

"58. We feel that the wheeling charges for the period from 7.5.202014 to 31.3.2013 have not been determined according to the provisions of the Electricity Act, National Electricity Policy, Tariff Policy and the comprehensive consideration of the Open Access Regulations for the following reasons:

(i) Levy of wheeling charges from the Open Access consumers directly connected to the transmission system of the transmission licensee and are not using the distribution system of the distribution licensee for conveyance of electricity under Open Access in contravention to the scheme of Open Access under the Electricity Act, Tariff Policy and the dictum of this Tribunal in earlier judgment.

(ii) Regulation 25(1) clearly specifies that the wheeling charges shall be payable by an open access customer who utilizes the distribution network for wheeling of electricity. This is in consonance with the provisions of the Electricity Act and Tariff Policy and the dictum of this Tribunal.

(iii) The intent of amendment to Regulation 25 (5) is against the scheme of Open Access under the Electricity Act and the dictum of this Tribunal and also in contravention to the other provisions of the Regulation viz., Regulation 15, Regulation 25(1) and the definition of Open Access and wheeling. However, the amended Regulation 25(5) has only made a change that the State Commission has to determine the wheeling charges for open access customers availing supply at 220 kV, 132 kV, 66 kV, 33 kV or 11 kV in the respective tariff order as against a specific percentage of wheeling charges as specified in the un-amended Regulation 25(5). The State Commission was expected to determine the wheeling charges in the tariff order keeping in view the objects of the Electricity Act which promotes competition and other provisions of the Open Access Regulations.

(iv) Regulation 25(1) clearly specifies wheeling charges to be payable on utilization of the distribution network. As per the principles as laid down by us for wheeling charges on interpretation of the Electricity Act, National Electricity Policy and Tariff Policy, the wheeling charges have to be in proportion to the actual utilization of the distribution network.

(v) While the State Commission has correctly determined the voltage wise transmission and distribution losses for availing supply at 220 kV, 132 kV, 66/33 kV and 11 kV, it has incorrectly levied uniform wheeling charges for all voltage levels irrespective of the utilization of the distribution network.

(vi) The Open Access customer as per the 2011 Regulations is a consumer who has been permitted to receive power from a person other than the distribution licensee or a generating company including a captive generating plant or a licensee. Thus, if a generator connected at 220/132 kV, avails open access to supply to a consumer at 66 kV/33 kV/11 kV, it has to pay wheeling charges as distribution network is used in conveyance of electricity. Similarly, if a consumer availing supply at 220/132 kV i.e. directly connected to a transmission system, avails open access from a Captive Power Plant which is connected at 66 kV/33kV/11 kV i.e. embedded in the distribution system, then wheeling charges shall be leviable. However, when a consumer availing supply at 220 kV or 132 kV avails open access through inter-state transmission system, then distribution network of the distribution licensee is not used and in that case no wheeling charges can be levied for use of the distribution network.

(vii) The tables under Regulation 15 clearly indicate the applicability of charges depending on the point of injection and point of drawal of power under open access. Regulation 15 has not been amended. The State Commission should have determined the applicable charges based on the inter-se location of point of injection and point of drawal as specified in the Regulations. This was not done by the State Commission and uniform wheeling charges were determined applicable to all Open Access customers irrespective of inter-se position of point of injection and point of drawal in contravention to the Regulation.

(viii) By increasing the wheeling charges substantially and imposing the same on consumers availing Open Access at 220/132 kV from outside the State, the State Commission has tried to curb Open Access thereby acting in contravention to the scheme of the Electricity Act which mandates promotion of Open Access and competition."

59. In view of above, we feel that wheeling charges have been determined by the State Commission in contravention to the provisions of the Act, Tariff Policy, National Electricity Policy and its own Regulations. Therefore, we have no option but to set aside the impugned order in respect of determination of wheeling charges applicable to Open Access customers for the period from 7.5.2012 to 31.03.2013 with directions to re-determine the

wheeling charges applicable to Open Access customers as per the above findings within 90 days of communication of this judgment and pass on the consequential relief to the Appellants and other Open Access customers."

47. The above findings will squarely apply to the present case. Accordingly, we set aside the impugned order in respect of wheeling charges applicable to open access customers with the directions to re-determine the wheeling charges applicable to open access customers as per the above findings within 90 days of communication of this judgment and pass on the consequential relief to the Appellants and other open access customers.

48. The last issue is regarding non-consideration of the wheeling charges estimated for open access consumers amounting to Rs. 259.67 crores in the non-tariff income.

49.1 According to the appellant the State Commission has taken a contradictory stand for FY 2012-13 and 2013-14 by determining the wheeling charges pertaining to open access consumers amounting to Rs. 259.67 crores as non-tariff income for FY 2012-13 and the not considering such income in the projection for FY 2013-14.

49.2 We find that the State Commission has included the wheeling charges of Rs. 259.67 crores (inclusive of Rs. 149.44 crores receivable from open access consumers) in the non-tariff income for FY 2012-13. However for FY 2013-14 the State Commission has not taken into account the sum of Rs. 156 crores projected by PSPCL estimated for open access charges as the Commission felt that the receipt from open access consumers are infirm source of receipt. We direct the State Commission to consider the wheeling charges as per the actual in the true up exercise.

50. SUMMARY OF FINDINGS

Issue No. i) Relating to cross-subsidy

50.1 The State Commission has correctly and legally calculated the cross-subsidy based on combined average cost of supply as per Regulation 7 as amended by PSERC (Terms and Conditions for Determination of Tariff) Second Amendment, Regulations, 2012 which were made effective from 17.09.2012, the date of publication of the said Amendment of 2012. Since the State Commission has calculated cross-subsidy based on combined average cost of supply instead of cross-subsidy based on cost of supply and the legality or validity of the said Amendment of 2012 has already been challenged by one of the appellants, namely, M/s. Mawana Sugars Ltd., before the Hon'ble High Court of Punjab and Haryana,

we do not find any cogent reason to interfere therewith. This Appellate Tribunal is not competent to consider the validity or legality of any amendment made in the Regulations of any State or Central Commission or in the provisions of the Electricity Act, 2003 or the Tariff Policy as settled by the Constitutional Bench of the Hon'ble Supreme Court. This Tribunal only has the power to interpret the Regulations or the provisions of the Act and by-laws etc., and this is not a case where any interpretation to such Regulations or Amendment in the said Regulations is to be considered. However, we have given some directions to the State Commission in paragraph 14 regarding voltage-wise cost of supply.

Issue No.ii) Relating to unmetered consumption

50.2. The State Commission has computed the agricultural consumption based on its own analysis and not as per the claim of the distribution licensee – PSPCL which claim was higher. The findings recorded by the State Commission in the impugned order on issue no. (ii) are hereby affirmed.

Issue No. (iii) Relating to Return on Equity, Consumers Contributions, Grants, Subsidies etc.

50.3 The findings of this Tribunal in Appeal no. 46 of 2014 shall squarely apply to the present case. The State Commission shall re-determine the ROE as per our directions and the excess amount allowed to the distribution licensee with carrying cost shall be adjusted in the next ARR of the respondent no.2.

Issue No. (iv) Relating to Peak Load Exemption Charges (PLEC)

50.4. The State Commission has legally and rightly increased the Peak Load Exemption Charges (PLEC) by 50% in the impugned order though distribution licensee/PSPCL was claiming increase in the PLC charges by 60%. For increasing these charges, the State Commission, has mentioned in the impugned order that said charges have not been increased for a long time and the said increase has been necessitated on account of the high demand during peak leading to system constraints and also leading to grid instability and insecurity. In order to restrict demand of electricity during peak, the State Commission has rightly revised these charges payable by the consumers by taking supply of electricity during peak hours because the said increase affects maximum to the continuous process industry. We agree to the State Commission's finding that the general industry other than the continuous process industry can avoid the Peak Load Exemption Charges by not running the industry during peak load period. The State

Commission is fully justified in not charging Peak Load Exemption Charges from Agriculture Power (AP) consumers as they are given supply only 6-8 hours per day and that too at the specified timings as compared to 24 hours supply to other categories of consumers.

Issue No. (v) & (vi) Relating to Determination of Wheeling Charges

50.5. The findings of this Tribunal in Appeal no. 245 of 2012 and batch will squarely apply to the present case. Accordingly, we set aside the impugned order in respect of wheeling charges applicable to open access customers with the directions to re-determine the wheeling charges applicable to open access customers as per the above findings within 90 days of communication of this judgment and pass on the consequential relief to the Appellants and other open access customers. However, the distribution licensee will be allowed the same amount in the next ARR to be determined by the State Commission, so that there is no loss to the distribution licensee on this account.

Issue No.(viii) Non-consideration of Wheeling Charges for the Open Access Consumers

50.6. We have directed the State Commission to true up the wheeling charges as per the actual.

51. Consequently, the instant Appeals being No. 142 of 2013 and 168 of 2013 are hereby allowed in part. The State Commission is directed to pass consequential order as indicated above. No order as to costs.

Pronounced in open Court on this 17th day of December, 2014.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

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