

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

**Appeal no. 76 of 2013 and
Appeal no. 82 of 2013**

Dated :12th August, 2014

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

Appeal No. 76 of 2013

In the matter of:

**Assam Power Distribution companyLtd.,
Bijulee Bhawan, Paltan Bazaar,
Guwahati-781 001**

...Appellant(s)

Versus

**1. Assam Electricity Regulatory Commission,
ASEB Campus, Dwarandhar,
G S Road, Sixth Mile,
Guwahati- 781 022**

**2. Eastern India Powertech Limited,
DLF Galleria Building, 12th Floor,
DLF City, Phase-IV,
Gurgaon-122 009, Haryana**

...Respondent(s)

**Counsel for the Appellant(s) : Mr. Anand K. Ganesan,
Ms. Swapna Seshadri
Ms. Anushree Bernard,
Ms. Swagatika Sahoo**

**Counsel for the Respondent(s): Mr. S. Ganesh, Sr. Adv.
Mr. Manu Seshadri
Ms. Apporva Rajnish
Mr. Pragyan Sharma
Mr. Heshu Kayina for R-1
Ms. Deepti Sarin,
Ms. Ruby Singh Ahuja
Ms. Neha Gupta for R-2**

Appeal No. 82 of 2013

In the matter of:

**Eastern India Powertech Limited,
(formerly known as DLF Power Ltd.)
12th Floor, DLF Galleria Building,
DLF City, Phase-IV,
Gurgaon, Haryana-122 009**

...Appellant(s)

Versus

**1. Assam Electricity Regulatory Commission,
ASEB Campus, Dwarandhar,
G. S. Road, Sixth Mile,
Guwahati,
Assam- 781 001**

**2. Assam Power Distribution companyLtd.,
Bijulee Bhawan, Paltan Bazaar,
Guwahati-781 001**

**3. Assam State Electricity Board,
Bijulee Bhawan, Paltan Bazaar,
Guwahati-781 001**

...Respondent(s)

**Counsel for the Appellant(s) : Mr. S. Ganesh, Sr. Adv.
Mr. Manu Seshadri
Ms. Deepti Sarin,
Ms. Neha Gupta
Ms. Ruby Singh Ahuja
Ms. Apporva Rajnish**

**Counsel for the Respondent(s): Mr. Heshu Kayina
Mr. Pragyan Sharma,
Mr. Gautam Dhamija for R-1**

**Mr. Anand K. Ganesan,
Ms. Swapna Seshadri
Ms. Anushree Bernard for R-2**

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

The Appeal no. 76 of 2013 has been filed by Assam Power Distribution company Ltd. challenging order dated 12.2.2013 passed by the Assam Electricity Regulatory Commission in review petition no. 6 of 2012 as merged with the main order dated 20.10.2011 in Petition no. 14 of 2008 regarding determination of Tariff for Adamtilla and Banskandi power plants of Eastern India Powertech Limited for the FY 2008-09.

2. Appeal no. 82 of 2013 has been filed by Eastern Indian Powertech Limited challenging the same order.

3. Assam Power Distribution company Ltd., the Appellant in Appeal no. 76 of 2013, hereinafter

referred to as Assam Discom, is a distribution company. Eastern India Powertech Ltd., the Appellant in Appeal No. 82 of 2013 is a generating company which has set up two gas based power plants in the State of Assam at Adamtilla and Banskandi and has been supplying power to the distribution company against the Power Purchase Agreement.

4. The brief facts of the case in Appeal no. 76 of 2013 are as under:-

a) Eastern India Powertech Ltd., hereinafter referred to as "EIPL", entered into a Power Purchase Agreement ("PPA") on 9.2.1995 with the Assam Electricity Board, the predecessor of Assam Discom setting out the terms and conditions including the manner of determination of tariff for sale and purchase of

energy from gas based Adamtilla and Banskandi power plants. The PPA contemplated determination of tariff in terms of the Government notifications and subsequent laws/Tariff Regulations notified from time to time.

- b) On 24.5.2006, the State Commission notified Tariff Regulations, 2006.
- c) On 12.5.2009, the State Commission by its order determined the provisional tariff for Adamtilla and Banskandi power plants for the FY 2008-09. This order was challenged by EIPL before the Tribunal in Appeal no. 136 of 2009. On 20.1.2011, the Tribunal disposed of the Appeal no. 136 of 2009 directing the State

Commission to determine the final tariff for the FY 2008-09.

- d) On 24.5.2011, the State Commission passed the Multi Year Tariff order for the Distribution company for the period 2010-13.
- e) The State Commission by order dated 20.10.2011 in Petition no. 14 of 2008 determined the final tariff for purchase of power by the Assam Discom from Adamtilla and Banskandi generating stations for the FY 2008-09.
- f) Assam Discom sought review of the order dated 20.10.2011 by filing a review petition before the State Commission on 16.12.2011.

g) On 12.2.2013, the State Commission passed the impugned order modifying the earlier tariff order dated 20.10.2011.

5. Assam Discom is aggrieved by the impugned order as according to them the State Commission has relaxed the Plant Load Factor (“PLF”) for the generating stations not only for FY 2008-09 but also for the years 2009-10, 2010-11 and 2011-12. Thus, the State Commission has gone much beyond the scope of review petition and *suo motu* reviewed the order dated 20.10.2011 on the issue of deemed generation and recovery of full fixed charges by the Generating company for the years 2009-10, 2010-11 and 2011-12 whereas the remand by the Tribunal and the tariff order dated 20.10.2011 was only pertaining to the FY 2008-09.

6. EIPL is aggrieved by the impugned order as according to them some of the components of the tariff for their generating stations have not been determined correctly by the State Commission.

7. The Distribution company in Appeal no. 76 of 2013 has raised the following issues:

A) Scope of proceedings before the State Commission:

i) The State Commission has gone much beyond the scope of the review petition. The State Commission by the main order dated 20.10.2011 had determined final tariff of the generating company for the FY 2008-09. The State Commission has passed the review order dated 12.3.2013 dismissing the Review petition filed by Assam Discom but has shown further indulgence to EIPL by relaxing Plant

Load Factor not only for the FY 2008-09 but also for the FYs 2009-10, 2010-11 and 2011-12. The review petition had been filed by the Assam Discom. The State Commission has reviewed the order dated 20.10.2011 on the issue of the deemed generation and recovery of full fixed charges by the generating company for the FY 2009-10, 2010-11 and 2011-12 whereas the remand by the Tribunal by its order dated 20.1.2011 and main tariff order dated 20.10.2011 was only pertaining to the FY 2008-09. At the maximum, the review petition of Assam Discom could have been dismissed by the State Commission. However, Assam Discom could not have been in any event placed in a worse off position.

ii) EIPL had not filed any Review petition but requested State Commission vide letters dated 19.12.2011 and 22.12.2011 to extend the validity of tariff order dated 20.10.2011 for future years. In letter dated 22.12.2011, EIPL asked some clarifications. These letters could not be treated as a review petition in terms of Conduct of Business Regulations and ought to have been rejected by the State Commission at the outset. The impugned order in so far as it shows relaxation of Plant Load Factor and recovery of full fixed charges to the generating company from 2009-10 onwards was beyond the scope of the proceedings.

B) Plant Load Factor:

i) The State Commission has fixed the PLF for Adamtilla and Banskandi stations at

66.46% and 68.49% as stipulated in the PPA ignoring that after the constitution of the State Commission and notification of Tariff Regulations, the tariff can be fixed only in terms of the Tariff Regulations 2006 which superseded all PPAs and bilateral arrangements.

ii) The State Commission has wrongly further relaxed the PLF for Adamtilla and Banskandi Stations to 61.46% and 63.49% respectively not only for 2008-09 but indefinitely from 2009-10 onwards without giving any proper reasons except the non-availability of gas. The gas was not available due to the payment default by EIPL to the gas supplier. The State Commission has merely relaxed the normative PLF in favour of the

generating company without their being any prayer for the same. The State Commission has not decided the PLF according to its Tariff Regulations 2006 which specify the target plant load factor for recovery of full fixed charges and target PLF for incentive at 80%.

C) Gross Station Heat Rate:

The State Commission has fixed the Gross Station Heat Rate at the rate at 2500 Kcal/Kwh for Adamtilla Station and 2100 Kcal/Kwh for Banskandi Station without considering the detailed project report dated 30.10.1996 where the Generating company itself guaranteed the Station Heat Rate at 2000 Kcal/Kwh. The State Commission should have decided heat rate as per its Tariff

Regulations 2006 at the level of 1950 Kcal/Kwh.

D) Additional capitalization of initial spares:

The State Commission has allowed the additional capitalization of Rs. 2.423 crores for Adamtilla and Rs. 7.398 crores for Banskandi in the tariff order dated 20.10.2011 and not reviewed the same in the impugned review order dated 12.2.2013. Allowing additional initial capital spares of Rs. 9.821 crores takes the total approved expenditure on initial spares to Rs. 12.825 cores which works out to be 11.37% of the original capital cost of Rs. 112.82 crores. The approval of the additional initial capital spares is conflicting with the Regulation 35.3 (b) of the Tariff Regulations 2006 which allows initial capital

spares up to 4% of the original capital cost for gas based power stations.

E) Debt Equity Ratio:

The State Commission has wrongly allowed actual Debt Equity ratio of 65:35 for Adamtilla and 61:39 for Banskandi instead of normative Debt Equity ratio of 70:30 provided for in 2006 Tariff Regulations.

F) Deemed Generation:

The issue raised by Assam Discom in the review petition was that the State Commission had not only fixed more relaxed PLF but had also allowed the generating company full fixed cost recovery despite not achieving even such relaxed PLF. The State Commission has not only allowed the recovery of full fixed charges at the actual PLF for 2008-09 but relaxed PLF

for the years 2009-10 onwards and allowed the benefit of full fixed cost recovery at the relaxed PLF for the years 2009-10 to 2011-12 and onwards.

8. The brief facts of the case in Appeal no. 82 of 2013 are as under:-

(A) Recovery of fixed cost:

EIPL had claimed fixed charges for 80% Plant Load Factor including the deemed generation for the FY 2008-09 as it had declared 80% PLF based on capacity availability tests conducted in the presence of the Assam Discom for the FY 2008-09 and other years. 80% PLF could not be actually achieved by them for the year 2008-09 primarily due to the reasons of non-availability of fuel which is a deemed

generation situation as per the PPA. Therefore, the State Commission ought to have allowed for 80% PLF, (corresponding to actual + deemed generation) but it has allowed the same corresponding to only 66.46% and 68.49% (actual + deemed) for Adamtilla and Banskandi respectively. For the year 2009-10, 2010-11, 2011-12 as well the Appellant conducted capacity availability tests whenever gas was available, in the presence of Assam Discom representative and on that basis had committed 80% PLF for the plant for these years. Accordingly, the State Commission ought to have allowed payment of fixed charges and incentive up to 80% of PLF (actual + deemed) as less generation was only because of non-availability of gas for which deemed

generation has to be allowed as per the terms of PPA.

(B) Return on Equity:

PPA provided for Return on Equity of 16% up to 68.49% PLF considering both actual and deemed generation. However, the State Commission has erroneously allowed Return on Equity at 14% as per its Regulations of 2006 which are not applicable to them as these Regulations are applicable only to the new power stations.

(C) Grossing Up of Income Tax:

According to the PPA, the actual fixed charges recoverable on the specified PPA shall be inclusive of *inter alia* taxes on income payable by the company. The word “payable” used in

the PPA actually means tax payable on power derived income from the projects of Adamtilla and Banskandi. According to the PPA the generating company is not required to pass on any benefits, rebates, concession and the like in taxation obtained by it as a result of any tax planning or otherwise. Thus, the benefit of any less tax paid as per the law is not to be passed on to the Assam Discom. The State Commission insistence for the tax challans, will mean passing on the benefits of the tax planning to the distribution company which will be against the provisions of the PPA. Tax saving as a result of prudent tax planning such as combining the income from different projects of the company other than the projects which supply electricity to the Assam

distribution licensee, the Appellant minimized the tax liability for the FY 2008-09 and paid the taxes accordingly. The tax challans will show overall tax paid by the Appellant's company for its total operations and therefore cannot be used as proof of tax paid for by the projects in question. Only the grossed up calculated payable income tax value has the relevance in this context.

D) Plant Heat Rate:

The Station Heat Rates stated in the PPA are design Stations Heat Rates as stated by the State Commission in the tariff order dated 20.10.2011 and such Station Heat Rates are only applicable for operation of the plants in ideal conditions like full load operation, continuous operations, stable grid, etc.

However, due to short supply/non-supply of gas, unstable grid, backing down due to evacuation problems, etc., the actual gas bills for the plants by Assam Gas Company should be considered as a pass-through and reimbursed at actuals to EIPL.

E) Deemed generation:

The State Commission has allowed the deemed generation but limited the actual plus deemed PLF to 66.46% and 68.49% for the FY 2008-09 and 61.46% and 63.49% for the years beyond 2008-09 for Adamtilla and Banskandi Power Plants respectively. The deemed generation should have been allowed to the extent that PLF including the deemed generation is 80%. Therefore, incentive has also to be paid up to 80% PLF as the short fall

in generation is not attributable to them. For initial one or two years, the Electricity Board jointly signed the log sheets for recording various information for computation of deemed generation but later on Assam Discom stopped signing, but the EIPL has been religiously furnishing the duly signed log sheets every month to Assam Discom.

F) Meter at Generator Terminal:

According to the PPA, the actual generation is to be metered at generator terminals. Accordingly, the Appellant be permitted to allow actual generation to be measured at the generator terminal as per the PPA. According to the minutes of the meeting dated 22.9.2000 and 27.5.2000 entered into between the

parties, actual generation should be measured at generator terminals.

G) Variable charges:

The State Commission has approved the variable charges as per the design heat rate. The State Commission should have allowed the actual consumption of fuel and variable charges computed at the actual consumption of fuel as higher fuel consumption is attributed to operation of gas turbines at low load due to insufficient gas supply, fluctuating load due to fluctuating grid conditions, running of the power plant in isolation on partial loads due to grid not being available, grid failures, multiple starts and stops due to grid fluctuations/failures and backing down of

generation due to insufficient load, which are beyond the control of the generating company.

H) Interest on working capital:

The State Commission allowed the interest on working capital at 9.5% whereas the actual interest rate on working capital for the year 2008-09 onwards has been in the range of 12.25% to 14.5%. Thus, the interest rate of at least 12.25 % should have been allowed.

I) Payment of arrears with interest:

Arrears arising on account of tariff order for FY 2008-09 to FY 2012-13 should be paid along with simple interest @ 12% per annum till the payments are actually made.

9. As some of the issues raised in these Appeals and the impugned order are the same, a common judgment is being rendered.

10. We have heard Ms. Swapna Seshdri, learned counsel for Assam Discom and Shri S. Ganesh, learned Sr. Advocate for EIPL, the generating company.

11. The following questions would arise for our consideration in these Appeals:

(i) Whether the State Commission has erred in passing order in the review petition filed by the distribution company in favour of the other party i.e. the generating company, by modifying the tariff decided in the main order?

(ii) Whether the State Commission has erred in extending the scope of the review petition filed

by the distribution company to modify the main order in favour of the other party i.e. the generating company?

(iii) Whether the State Commission has fixed the normative PLF of the generating stations in violation of the Tariff Regulations of 2006?

(iv) Whether the State Commission has erred in fixing the Station Heat Rate of 2500 Kcal/Kwh for Adamtilla and 2100 Kcal/Kwh for Banskandi in violation of the Tariff Regulations, 2006 which provided for Station Heat Rate of 1950 Kcal/kWh?

(v) Whether the State Commission has erred in allowing higher additional capitalization on account of initial spares in contravention of the Tariff Regulations?

(vi) Whether the State Commission has erred in allowing actual debt equity ratio in contravention of the Tariff Regulations of 2006?

(vii) Whether the State Commission has erred in allowing full fixed cost recovery without the generating company achieving even the relaxed normative Plant Load Factor and also extending the same benefit in subsequent years from FY 2009-10 and beyond?

(viii) Whether the State Commission should have allowed deemed generation on account of non-availability of gas upto 80% PLF to allow the incentive due to the generating company as per the terms of the PPA?

(ix) Whether the State Commission should have allowed ROE of 16% instead of restricting it to 14%?

(x) Whether the State Commission has erred in not allowing grossed up income tax payable on power derived income alone without considering the benefits, rebates, concessions obtained by the generating company as a result of prudent tax planning?

(xi) Whether the State Commission should have allowed actual cost of gas billed to the generating company as a pass through in the variable charges in view of gas shortage and operational constraints being experienced by the generating company which are beyond its control?

(xii) Whether the generating company be permitted to meter the generation at the generator terminal?

(xiii) Whether the State Commission has erred in allowing interest rate of 9.5% on working capital instead of the prevailing interest rate of 12.25%?

(xiv) Whether the generating company is entitled to payment of arrears arising out of the tariff order of the State Commission with carrying cost of 12%?

12. The first two issues are interconnected and are being considered together.

13. The issues raised by the Distribution Licensee are:

(i) The State Commission ought not to have entertained the contention of EIPL in a review petition filed by them to vary the tariff decided in the main tariff order in favour of the generating

company, rejecting the contentions raised by them in the review petition.

(ii) The State Commission has erred in going beyond the scope of the review petition filed by the Assam Discom to vary the tariff in favour of EIPL not only for FY 2008-09 but extending the benefit to FY 2009-10, 2010-11, 2011-12 and beyond.

14. According to Ms. Swapna Seshdari, learned counsel for Assam Discom, at the maximum the State Commission could have dismissed the review petition but they could not be placed in a worse off position after the review. She has referred to Banarsi V. Ram Phal (2003) 9 SCC 606 and ICICI Ltd. vs. Ahmedabad Mfg. & Calico Printing Co. Ltd. (2004) 9 SCC 747 in support of her arguments. Further, according to her, relaxation of Plant Load Factor and allowing recovery of full fixed charges to

EIPL from 2009-10 onwards was beyond the scope of the proceedings before the State Commission.

15. Shri Ganesh, learned Sr. counsel for EIPL submitted that after the tariff order dated 20.10.2011, they had filed the affidavit dated 19.12.2011 requesting the State Commission to extend the validity of the tariff order dated 20.10.2011 for further years till a specific new order is issued. Further, vide Petition/affidavit dated 22.12.2011, they had appealed to the State Commission to review the various aspects of the tariff order. Further they filed the reply dated 30.1.2013 praying the State Commission to issue necessary amendments to tariff order *inter alia*, including the requests made vide Petition dated 22.12.2011 and 19.12.2011. In support of his arguments he referred to Section 94(1)(f) of the

Electricity Act, 2003 and Section 40 and 41 of Conduct of Business Regulations and Section 15 of the Tariff Regulations, 2006. However, according to him, no change was done by the State Commission with respect to tariff/charges for the FY 2008-09. The State Commission only extended the tariffs determined for FY 2008-09 for further years on account of new developments.

16. Let us examine the sequence of events leading in the impugned order.

(a) The State Commission by its order dated 12.5.2009 determined the provisional tariff for the power plants of EIPL for FY 2008-09. This order was challenged by EIPL by way of an Appeal being Appeal no. 136 of 2009.

(b) This Tribunal by order dated 20.1.2011 disposed of the Appeal by permitting EIPL to withdraw the Appeal with liberty to raise all the contentions of facts and law as raised in the Appeal before the State Commission for determination of final tariff. Both the parties were given liberty to produce any other relevant documents before the State Commission. The State Commission was directed to determine the final tariff.

(c) Thereafter, the State Commission after public hearing in the matter of determination of tariff for FY 2008-09, passed the main tariff order dated 20.10.2011.

(d) Thereafter, the Distribution licensee filed a review petition in respect of following issues:

- (i) Plant Load Factor
- (ii) Gross Station Heat Rate

- (iii) Additional capital spares
- (iv) Debt Equity ratio
- (v) Deemed generation.

Assam Discom did not point out any error apparent on the face of the records or any new facts in the Petition which necessitated the review but only requested the State Commission to determine the tariff as per its Tariff Regulations, 2006.

(e) During the pendency of the review petition, there was some correspondence before EIPL with the State Commission regarding gas supply to their power plant.

(f) The State Commission did not allow the review petition on any of the issues raised by the Assam Discom and reaffirmed the norms and tariff for FY 2008-09 as per the main tariff order dated

20.10.2011. The State Commission also did not allow the contention of the EIPL for allowing deemed generation upto 80% for the purpose of incentive.

(g) However, the State Commission also considered an issue relating to curtailment of gas supply to Banskadi Plant by the Gas Companies due to non payment of gas bills w.e.from November, 2010 by EIPL. The State Commission noted that even though the issue was not directly related to the subject matter of review, in view of urgency of the matter and running of the plant in the power starved Cachar District for the benefit of the consumers called for early solution of the matter. Therefore, the State Commission deemed it appropriate to take up the matter for deliberations in the hearing to resolve the issue. It was found by

the State Commission that Assam Discom was not making payment as per the tariff order dated 20.10.2011 on the ground that they had filed the review petition resulting in accumulation of outstanding payment. Consequently, the payment for gas supply by the EIPL to the gas supplier was affected who in turn curtailed gas supply to the power plant of EIPL. Therefore, the State Commission directed the Distribution Licensee to make payment as per the tariff order dated 20.10.2011. The State Commission also extended the tariff order dated 20.10.2011 to FY 2009-10 onwards.

17. Thus, in the review order the State Commission did not accept the issues raised by the Distribution Licensee to alter the tariff. The State Commission also did not accept the issues raised

by the Generating company to alter the tariff by not allowing deemed generation and incentive upto 80% PLF. However, the State Commission considered an emergent situation which had emerged during the pendency of the review petition due to non payment of dues of the fuel supplier by EIPL which had affected power supply in some part of the State and passed consequential orders, even though the matter was not the subject matter of the review filed by Assam Discom.

18. According to Assam Discom, the State Commission ought not to have passed the orders to give benefit to the generating company by extending the scope of the review petition filed by them.

19. We find that the State Commission in the impugned review order dated 12.2.2013 has not altered the tariff for FY 2008-09 which was the subject matter of the main order as well as the review petition. However, the State Commission has extended the tariff determined for the FY 2008-09 and also allowed recovery of full fixed charges when the actual PLF is less than the normative PLF, as done for FY 2008-09 in the main order to subsequent years.

20. The State Commission u/s 94 of the Electricity Act, 2003 for the purpose of proceedings under the Act, have same powers as are vested in a civil court under Code of Civil Procedure 1908 in respect of *inter alia* reviewing the decisions, directions and orders. Regulation 34 of the Conduct of Business Regulations also provide for review of the decision,

directions and orders of the State Commission on application by the aggrieved party. Regulation 41 also allows review of any decision, direction or order by the State Commission on its own motion. However, the State Commission cannot enlarge the scope of the review beyond the subject matter.

21. In the present case the State Commission in a review of its tariff order for FY 2008-09 also extended the tariff determined for FY 2008-2009 to the subsequent years and also gave directions for recovery of full fixed charges for the subsequent years. In case there was an emergent situation, the State Commission could have initiated a separate *suo motu* proceedings and given necessary interim orders to remedy the emergent situation. Therefore, the State Commission has erred in expanding the scope of the review beyond the

review petition and even beyond the main order by extending the tariff determined for FY 2008-09 to the subsequent years.

22. We feel that determination of tariff from FY 2009-10 onwards has to be carried out by the State Commission according to Section 62 and 64 of the Act, after obtaining the objections and suggestions of the public on the proposal of the generating company. In fact there has been inordinate delay in determination of tariff for FY 2008-09. The tariff for FY 2008-09 was only determined on 20.10.2011 i.e. after 2½ years of commencement of FY 2008-09. Further, the tariff for FY 2009-10 onwards has not been determined by the State Commission even though the FY 2013-14 is already over and the current FY is 2014-15. Till now only provisional tariff is being

paid by Assam Discom, which resulted in the financial crunch for EIPL. We, therefore, direct the State Commission to determine the tariff for EIPL's projects for the period 2009-10 to 2014-15 at the earliest.

23. In view of above we set aside the impugned order of the State Commission with regard to tariff for FY 2009-10 onwards. However, we feel that in the interest of sustaining generation at EIPL's plants and maintaining power supply to the consumers in the interim period, we have to pass some orders for interim tariff for FY 2009-10 to FY 2014-15 at which payment will be made by the Assam Discom to the EIPL till the tariff is determined by the State Commission for the period from FY 2009-10 till the current year.

24. The tariff for FY 2008-09 was finally determined by order dated 20.10.2011. However, the final tariff

for FY 2009-10 onwards was not determined even though the main order regarding tariff for FY 2008-09 was passed during the FY 2011-12. Till passing of the impugned order dated 12.2.2013, Assam Discom was still paying provisional tariff from 2008-09 to 2012-13 and even for FY 2008-09, the arrears on account of final determination of tariff by the State Commission had not been paid on the plea that review petition had been filed even though there was no stay on operation of the main order, thus creating financial difficulty for the generating company resulting in their default in payment for gas supply.

25. We find that the final tariff determined by the State Commission for FY 2008-09 vide order dated 20.10.2011 comprised the Return on Equity, depreciation, O&M expenditure, interest on

working capital and variable charges based on normative Station Heat Rate and cost of fuel. There is no component of interest on loan. Thus, the tariff for FY 2009-10 to 2014-15 is likely to be of the same order as the tariff determined for FY 2008-09 or may be more due to escalation in O&M expenditure. We also note from the impugned order dated 12.2.2013 that the deemed generation mechanism had not been put in place despite clear direction in the main order regarding the plant generation scheduling to be linked with SLDC through robust real time communication link for integrated operation of the power plants of the generating company with the grid.

26. In view of above, we direct that in the interim period the Distribution Licensee will make payment for the electricity supplied by the Generating

company from 2009-10 onwards at the tariff determined by the State Commission for FY 2008-09 in the main tariff order dated 20.10.2011 till the tariff for the FY 2009-10 onwards is decided by the State Commission. Full Fixed charges will also be paid for FY 2009-10 onwards as per the directions given in the tariff order dated 20.10.2011 for FY 2008-09 till the State Commission decides this issue while deciding the tariff for the FY 2009-10 onwards. These charges will be subjected to adjustment on final determination of tariff for FY 2009-10 onwards by the State Commission. If some amount is payable to Assam Discom after adjustment of final tariff, then EIPL will pay the same with interest at a rate as decided by the State Commission. Accordingly, decided.

27. Let us now take up the third issue regarding normative PLF.

28. According to the Ms. Swapna Seshadri, learned counsel for Assam Discom, the State Commission should have decided the PLF norms as per its Tariff Regulations, 2006. PPA itself provided for application of all further change in law including the Tariff Regulations.

29. According to Shri Ganesh, learned Sr. counsel for the Generating company, the terms of PPA cannot be changed by the State Commission and the State Commission has to determine the tariffs/charges payable as per the terms of PPA. Further, the Tariff Regulations explicitly state that they are applicable only to plants commissioned

after the date of issue of the Regulations i.e. year 2006.

30. Let us first examine if the State Commission is legally required to determine the tariff as per the terms of the Power Purchase Agreement or as per the Regulations.

31. We find that the 2006 Tariff Regulations were notified on 28.4.2006. However, these Regulations are applicable to all the generating companies operating in the State who are not subjected to the jurisdiction of the Central Commission. It is correct that some norms specified in the Regulations are applicable to the generating units which are commissioned on or after these Regulations came into force. However, some Regulations are applicable to both the new plants

and the plants which were existing prior to the date of notification of the 2006 Regulations. There are also some specific Regulations for the plants which were existing prior to the date of the notification of the 2006 Regulations.

32. Hon'ble Supreme Court in PTC India Ltd. vs. CERC (2010) 4 SCC 603 held as under:

“Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have

been done across the board by an Order of the Central Commission under Section 79 (1)(j)”.

33. Thus, the Tariff Regulations notified by the State Commission being in the nature of subordinate legislation, the same will have the effect of interfering and overriding the terms of the PPA entered into between the parties.

34. We find that the State Commission after noting the PLF norms laid down in the Tariff Regulations, 2006 has decided as under:

“As the Power Stations at Adamtilla & Banskandi were commissioned in the FY 1997-98, their performance cannot be compared with the PLF achieved by the new generating stations. Therefore the normative PLFs of Adamtilla and Banskandi have been considered from the PPA of February, 1995. In view of the above, the Commission has allowed

the normative PLF of Adamtilla and Banskandi plant as 66.46% and 68.49% respectively. However, the petitioner has claimed the committed PLF of 80% for both of their plants. From the submissions of Plant Performance data of both the Power Stations it is seen that average PLF of Adamtilla and Banskandi power stations are 36.92% and 55.19% respectively.

The Commission, therefore, after careful examination of the matter, considered PLF as under:

	<i>Normative</i>
<i>1. Adamtilla</i>	<i>66.46</i>
<i>2. Banskandi</i>	<i>68.49”</i>

Thus, the State Commission decided the normative PLF as per the PPA in view of the fact that the plants of EIPL were commissioned in FY 1997-98 and their performance cannot be compared with new generating stations. In the

review order dated 12.12.2013 also the State Commission reiterated its decision of the main order.

35. Let us examine the Tariff Regulations, 2006. The relevant Regulation is Regulation 39 which is reproduced below:

“39. Norms of operation

39.1 The norms of operation as given hereunder shall apply:

Target Availability for recovery of Full Capacity (Fixed) charges for thermal power stations

<i>Namrup</i>	<i>50</i>
<i>Lakwa</i>	<i>50</i>

Target Plant Load Factor for Incentive

<i>Namrup</i>	<i>50</i>
<i>Lakwa</i>	<i>50</i>

39.2 For stations commissioned on or after these Regulations come into force the factors shall be as follows:

Target Availability for recovery of full Capacity (Fixed) charges for Thermal Power Stations 80%

Target Plant Load Factor for Incentive 80%”

Thus, the target availability for recovery of full fixed charges and target PLF for incentive for Namrup and Lakwa Power Plants which are old plants operating in the State is 50%. For stations commissioned after the date of coming into force of the Regulations i.e. 28.4.2006, the target availability for recovery of full fixed charges and target PLF for incentive is 80%. Thus, the norms provided for under Regulation 39.2 would not be applicable to the power plants of the Appellant Generating company which were commissioned

during FY 1997-98. The Regulations also do not specify norms for Adamtilla and Banskandi.

36. In view of above, we find no infirmity in the order of State Commission deciding to adopt normative PLF for the power plants of EIPL as per the PPA, as the Tariff Regulation specifies normative PLF of 80% for only new plants commissioned after the notification of the Regulations. The State Commission specified normative PLF for some old plants of Assam at 50% but the normative PLF for the EIPL's plants was not specified. The State Commission correctly felt that the PLF provided for the PPA were appropriate for the plants of EIPL in view of their age. Accordingly, this issue is decided against the Distribution Company.

37. The fourth and eleventh issues regarding Station Heat Rate and recovery of variable charges as per actual fuel consumption are interconnected and are being dealt with together.

38. Learned counsel for the Distribution Company has argued that the State Commission should have taken the Station Heat Rate (“SHR”) norms as per the Tariff Regulations.

39. According to learned Sr. counsel for the EIPL, the SHRs stated in the PPA are design SHRs and such SHRs are only applicable for operation of the plant under ideal conditions like full load operations, continuous operation, stable grid, etc. However, due to short supply of gas, unstable grid, backing down due to evacuation problems, the

actual SHR is more and therefore, the actual gas cost as billed by the gas supplier should be reimbursed at actuals to them as variable charges.

40. The findings of the State Commission in the main order are as under:

*“5.1.3 **Gross Station Heat Rate (SHR):** The petitioner is claiming SHR for their plants as stipulated in Clause 3.11.2 of the PPA as under:*

Adamtilla 2500 Kcal/Kwh

Banskandi 2110 Kcal/Kwh

After scrutiny of the relevant documents like SHR curve etc. supplied by the manufacturer Allison Engine Co. USA and as per the DPR submitted by EIPL, the designed SHR of the EIPL plants are noted to be same as above.

APDCL apprised that the SHR for both the plants was 2000 Kcal/Kwh as per DPR based on GOI guidelines and after due consideration in line with CERC regulations, APDCL agreed

and approved enhanced rate of 2240 kcal/Kwh for Adamtilla and 2110 Kcal/Kwh for Banskandi.

After careful consideration, the Commission approves the following gross SHR values for Adamtilla and Banskandi plants for computation of fuel cost on normative basis.

Adamtilla 2500 Kcal/Kwh

Banskandi 2110 Kcal/Kwh”.

Thus, the State Commission approved the SHRs as per the provisions of the PPA.

41. We find that the Regulations specify SHR for the stations commissioned on or after the Regulations come into force. The SHR of EIPL's power plants has not been specified in the Regulations. Therefore, the State Commission had

to decide the SHR specifically for the Appellant generating company's Power Plants.

42. There has been considerable advancement in the technology and design of the Gas turbines over the years since the commissioning of the Gas turbine plants of the Appellants, resulting in improvement in the efficiency or the Heat Rate. Therefore, the SHR specified for Gas Turbine Plants which are commissioned after the notification of the Regulations of 2006 cannot be applied to the Appellant Generating company's plants which were commissioned in the FY 1997-98.

43. We find that EIPL in the petition before the State Commission had indicated SHR of 2500 Kcal/kWh for Adamtilla and 2110 Kcal/kWh for Banskandi. The same SHRs were agreed to in the

PPA. Accordingly, the State Commission in the main order after giving reasons adopted the same SHRs as indicated by EIPL as normative SHR for determination of variable charges. In the review order dated 12.2.2013 the State Commission reaffirmed its finding in the main order. In the review proceedings also EIPL has supported the decision of the State Commission in the determination of normative SHR. EIPL is now contending that the SHR agreed to in the PPA was design SHR which is obtained at ideal operating condition like full load operation, continuous operation, etc. These arguments are being rendered by EIPL for the first time in the Appeal which is not permissible. However, it is open for EIPL to make submission in this regard during the tariff determination for 2009-10 onwards and the

State Commission shall consider the same and decide as per law.

44. According to the Generating company, the variable charges should be paid on the basis of actual cost of fuel billed by the gas supplier as per clause 3.2 (b) of the PPA and Regulation does not have application in their case as their plants were commissioned much before the date on which the Regulations were made effective.

45. We have already dealt with the issue of applicability of Regulation in determining the tariff of EIPL and held that the tariff has to be determined according to the Regulations. Therefore, we reject the contention of the Generating company that tariff is to be determined strictly in terms of the PPA. The Regulations

provide for determination of the variable charges on the basis of normative Station Heat Rate and therefore, the variable charges cannot be allowed on the basis of the actual fuel bill of the gas supplier. Thus, the contention of EIPL in Appeal no. 82 of 2013 is rejected.

46. The fifth issue is regarding allowance of higher additional capitalization on account of initial spares.

47. According to Ms. Swapna Seshadri, learned counsel for the Distribution Company, by allowing additional capitalization of initial spares, the total cost of initial spares work out to 11.37% of the original capital cost of Rs. 112.82 crores. This approval is in direct conflict with Regulation 35.3 (b) of the 2006 Tariff Regulations which provide for

capitalized initial spares upto 4% of the original approved cost.

48. According to Shri Ganesh, learned Sr. counsel for EIPL, Regulation 35.1 provides that the actual capital expenditure as on the date of commercial operation in case of new investment shall be subject to prudence check by the State Commission. Regulation 35.2 provides that where the PPA provides for ceiling on capital cost, the capital cost to be considered shall not exceed the ceiling. The State Commission has given detailed reasons for allowing additional capitalization.

49. The Regulation 35 regarding capital cost is as under:

“35. Capital Cost

35.1 The actual capital expenditure as on the date of Commercial Operation in the case of new investment shall be subject to prudence check by the Commission.

35.2 Where PPA provides for a ceiling on capital cost, the capital cost to be considered shall not exceed the ceiling.

35.3 The capital cost may include capitalized initial spares as follows:-

(a) Up to 2.5% of original approved cost in case of coal based generating stations;

(b) Up to 4% of original approved cost in the case of gas turbine/combined cycle generating stations.

35.4 Scrutiny of the cost estimates by the Commission shall be limited to the

reasonableness of the capital cost, financing plan, interest during construction, use of efficient technology and such other matters for determination of tariff.

35.5 In case of any abnormal delay in execution of the project causing cost and time overruns, attributable to the failure of the generator in executing the project the Commission may not approve the capitalization of interest and overhead expenses in full but limit it to a reasonable amount only...”.

Thus, the Regulations provide that the capital cost may include capitalized initial spares upto 4% of the original approved cost in the case of Gas turbine/combined cycle generating stations.

50. Let us examine the findings of the State Commission on this issue. The relevant extracts are as under:

“The admissibility of Additional capital spares of Rs. 9.821 Cr. was clearly dealt with in section 5.2.1 of the order. As mentioned therein, the relevant provision of AERC Tariff Regulations, 2006 could not be applied in case of EIPL plants as they were commissioned in 1997-98, much before notification of AERC Regulations, 2006. Therefore, the Commission was guided by the CERC (Tariff) Regulations, 2001 which stipulates that the project cost shall involve reasonable amount of capitalized initial spares. Apart from the above, the PPA sub-clause 1.7.7 also specifies that the total project cost will cover all expenditure till the C.O.D. plus additional cost which, inter-alia, includes cost of initial spares for five years of operation, metering equipment, communication equipment etc.

The Commission thoroughly examined item wise details of statement of spares indicating part no. and details of expenditure amounting to Rs. 10.59 Cr. submitted by EIPL including physical utilization certificate certified by their Chartered Accountant based on which, the Commission noted that almost 93% of the additional capital spares were utilized by 2002-03 i.e. five years from C.O.D. Accordingly, the Commission approved Rs. 9.821 Cr. against Rs. 10.59 Cr. claimed by EIPL.

The Commission observed that Rs. 125.637 Cr. was approved as total capital cost for both EIPL plants which includes Rs. 1.0043 Cr. as cost of initial spares purchased after C.O.D. Accordingly, the total additional capital cost works out to be Rs. 10.825 Cr. which is 8.6% of the approved capital cost.

While allowing additional cost, the Commission has followed the principles of CERC Tariff order dated September, 2005 and February, 2008 for

similar plant i.e. Agartala CCGT of NEEPCO commissioned in 1998-99 wherein additional capital cost allowed was 12.31% upto 2005-06”.

51. The finding of the State Commission is that the plants of the Appellants were commissioned during 1997-98 much before the notification of State Commission's Regulations of 2006. The PPA also provided that the total project cost will cover all expenditure upto CoD including cost of initial spares for five years of operation. The State Commission did prudence check of the expenditure incurred by the Generating company on initial spares and also found that 93% of the additional capital spares were utilized by 2002-03.

52. We are in full agreement with the findings of the State Commission. The Generating plants of

the Generating company were commissioned much before the notification of the 2006 Tariff Regulations and they actually procured the initial spares as per the PPA. Further 93% of the additional capital spares have been actually utilized much before the notification of the Regulations. Therefore, the State Commission was correct in allowing the expenditure incurred on additional capital spares after prudence check.

53. Therefore, the issue relating to additional capital spares is decided against Assam Discom.

54. The sixth issue is regarding debt equity ratio.

55. According to Ms. Swapna Seshadri, learned counsel for the Distribution Company, the State

Commission ought to have allowed debt equity ratio according to the Tariff Regulations.

56. Shri S. Ganesh, learned Sr. counsel for EIPL argued that PPA does not specify debt equity ratio and therefore, the State Commission has correctly considered the actual infusion of equity by them to meet the total capital cost, after prudence check. EIPL was also forced to infuse additional equity on account of the Assam Discom defaulting on payments and not opening LC or the escrow account as per the commitment made in the PPA.

57. The 2006 Tariff Regulations provide for debt and equity ratio as under:

“32. Debt-equity ratio

For the purpose of determination of tariff, debt-equity ratio in the case of a new generating station commencing commercial operations after

the notification of these Regulations shall be 70:30. Where equity employed is more than 30%, the amount of equity for the purpose of tariff shall be limited to 30% and the balance shall be treated as loan. Where actual equity employed is less than 30%, the actual equity employed shall be considered. In the case of Assam Power Generation Corporation Ltd. the debt equity ratio as per the Balance Sheet on the date of the Transfer notification will be the debt equity ratio for the first year of operation, subject to such modification as may be found necessary upon audit of the accounts if such Balance Sheet is not audited”.

58. The 2006 Tariff Regulations provide for debt equity ratio of 70:30 for new generating stations commencing CoD after the notification of the Regulations. In the case of existing stations of the State Generating company the debt equity ratio has been specified as per the balance sheet on the date

of the transfer notification i.e. as per actuals. However, no debt equity ratio has been specified for the EIPL's plants. However, the same principle as applicable to the Power Plants of the State Generating Company which were existing before the notification of the Tariff Regulations, 2006 should be applicable to EIPL's power plants.

59. The State Commission in the original order dated 20.10.2011 held as under:

“5.2.2 Debt : equity ratio: While the provisions of the PPA is silent on the approved financial structuring in terms of debt : equity ratio, the same has been shown as 70:30 in the DPR.

The regulation 32 of AERC tariff regulation 2006 specified Debt: Equity ratio of 70:30 for a new generating station. However, no debt: equity ratio has been notified for the existing plants of EIPL. The debt: equity ratio agreed

and prescribed in the PPA is different from the normative debt: equity ratio of AERC 2006 Tariff Regulation. As at the time of conclusion of the PPA no normative debt: equity ratio was in place, the actual infusion of equity by the IPP was therefore considered for the financial closure. In view of the above, the Commission has approved the final debt: equity ratio of the plants based on equity infusion by the Developer upto the FY 2000-01 after prudence check.

CERC under their order of 9th September, 2005 (Section 37) while approving the tariff of Agartala Gas based Thermal Power Plant (AGTPP) of NEEPCO against the Petition No. 32/2003 considered debt: equity ratio as 50:50 based on the petitioner's claim of equity infusion. This is as per CERC's notification dated 26th March, 2001, wherein debt: equity ratio was computed as per financial package approved by CEA or Appropriate Independent Agency as the case may be. In the instant case,

the debt: equity ratio as prescribed in the PPA approved by ASEB with concurrence of Government of Assam has also been referred by the Commission for determining debt: equity ratio based on submissions by the petitioner at actuals after prudence check. The debt: equity ratio @ 70:30 is applicable from 2004-05 with the notification of CERC Tariff Regulations, 2004 for central sector and from 2006-07 for state sector as per AERC Tariff Regulations, 2006.

The additional capital cost allowed by the Commission is treated as equity in addition as the expenditure has been met by EIPL from the internal accruals of the company”.

The same finding has been reiterated by the State Commission in the review order dated 12.2.2013.

60. We are in full agreement with the above findings of the State Commission. The Tariff Regulations provide for debt equity ratio of 70:30 for new plants. For existing plants of the State Generating company, the Regulation specifies debt equity ratio as per actuals as reflected in the balance sheet. No debt equity ratio has been specified for the EIPL's Plants. The power plants of the EIPL were commissioned much before the notification of the Regulations. The PPA also does not specify debt equity ratio. EIPL has funded the equity more than 30% in the absence of any provision in the PPA. Thus, EIPL is entitled to debt equity ratio as per actuals as decided by the State Commission after prudence check. Similar approach has been specified in the Tariff Regulations for the power plants of the State owned

Generating company which were existing prior to the date of notification of the Regulations.

61. Accordingly, we reject the contention of the Assam Discom regarding the debt equity ratio.

62. The seventh issue is regarding full fixed cost recovery without the Generating company achieving even the normative PLF.

63. Ms. Swapna Seshadri, learned counsel for the Discoms has argued that as per the Grid Code notified by the Central Commission and also as per the PPA, the generating company is bound to give the schedule of generation/declaration of availability to the SLDC in order to give the schedule. However, the generating company never gave schedule to the SLDC despite the SLDC pursuing to get such schedule from the generating

company. In the absence of any schedule submitted by the generating company, the actual generation has been considered for the purpose of computation of PLF. The shortage of gas was also due to default of payment on behalf of the generating company. According to her, the deemed generation should not be allowed to the generating company on account of non-availability of gas.

64. Shri Ganesh, learned Sr. counsel submitted that the Generating company had declared the capacity of the plant equivalent to PLF of 80% based on capacity test conducted in presence of the distribution company and protocol signed. The distribution company had forwarded to the generating company a format of log sheet vide letter dated 14.12.2000 for recording various information for computation of deemed generation approved by

their Board. For initial one or two years the EIPL and Electricity Board/Assam Discom jointly signed the log sheets and the bills were paid considering the deemed generation but after that the Assam Discom stopped signing. But, the EIPL has been religiously furnishing these log sheets duly signed to Assam Discom. He also submitted that the EIPL had been giving its generation schedule to SLDC in the beginning of every 7 day period, but they could not achieve the scheduled generation due to non-availability of gas and other reasons not attributable to them.

65. The findings of the State Commission in the impugned order are as under:

“Observations of the Commission: Under clause 6 of the tariff order, the Commission clearly explained as to why full fixed charges recovery was allowed for 2008-09 as a onetime

measure. The Commission could not evaluate the quantum of deemed generation due to inadequate, infirm data and information which were not jointly certified by APDCL and EIPL. Therefore, the Commission in its directives, ordered that the plant generation scheduling be linked with SLDC through robust real time communication link for integrated operation of the EIPL plants with the grid.

However, the Commission has observed that the deemed generation mechanism has not been put in place till date despite the above directives.

It is also noted that the mechanism set out under clause 3.9.3 for ascertaining the deemed generation aspect was not followed by the signatories of the PPA, thus precluding the Commission from taking any prudent decision on the matter.

Under clause 5.2.9 of the tariff order dated 20.10.2011, it is clearly mentioned that incentive in terms of PLF is payable only on actual generation exceeding targeted PLF as per AERC tariff Regulations, 2006. Therefore, no incentive on PLF is payable in the instant case.”

66. The State Commission in the main order had given directions that the plant generation schedule be linked with SLDC. In the impugned review order, the State Commission has observed that deemed generation mechanism had not been put into place despite the above directions. The State Commission has also observed that the mechanism set out under the PPA for ascertaining the deemed generation aspect was not followed by both the parties.

67. We find that in the review petition Assam Disom had only stated that the State Commission

had allowed full fixed cost recovery despite not achieving even relaxed normative PLF and the same was required to be reviewed. Alternatively it was prayed that since the State Commission had stated that this was only a special relaxation for FY 2008-09, the additional burden on them on this account be passed through in the distribution tariff. However, in the Appeal, the Distribution company has raised a number of issues like the Generating company not giving the generation schedules to SLDC, etc. The State Commission in the impugned order has observed that the deemed generation mechanism has not been put into place due to which it was not possible for them to evaluate the deemed generation. The State Commission has also made the following observation in the impugned review order:

“Review of normative PLF: *The Commission deems it appropriate to review the normative PLF as mentioned in the PPA on the basis of past performance data and other operating conditions affected by the gas supply position. The actual PLF figures in percentage available with the Commission for both the EIPL plants for the period are as under:*

	<u>2008-09</u>	<u>2009-10</u>	<u>2010-11</u>	<u>2011-12</u>
<i>Banskandi</i>	52	46	44	44
<i>Adamtila</i>	33	24	4	

After detailed analysis of the facts, the Commission is convinced that the EIPL plants were available with adequate capacity to generate at normative PLF as mentioned above for the said period. But due to various reasons like short/non supply of gas, backing down due to evacuation problems, lack of real time scheduling mechanism with SLDC etc., which may be attributable to both of the parties, the

actual generation is much lower than the normative PLF, approved by the Commission.”

68. We find that according to Article 3.9.3 of the PPA, the deemed generation includes the energy that could have been generated by the Project and which could not be generated due to any non supply or short supply of gas which is beyond the control of the company. Further, as per Article 3.9.2 of the PPA, in computing PLF, actual generation shall be increased by Deemed Generation.

69. Thus, the State Commission was correct in allowing the deemed generation due to non-supply or short supply of gas and permit recovery of full fixed cost for FY 2008-09.

70. According to Assam Discom, the same dispensation shall not have been allowed for FY 2009-10 onwards.

71. We have already remanded the matter regarding determination of tariff for the period 2009-10 to FY 2014-15 to the State Commission. We also direct the State Commission to give detailed directions to EIPL, Assam Discom and SLDC to ensure that the scheduling of the power plants of EIPL through SLDC as per its directions given in the main tariff order are implemented. However, till the scheduling through SLDC is put into place as per the directions of the State Commission, the State Commission shall determine the deemed generation after prudence check of the records as has been done for FY 2008-09 to 2011-12 in the impugned order.

72. The eighth issue is regarding allowance of deemed generation and incentive due to non-availability of gas upto 80% PLF.

73. According to Shri S. Ganesh, the Generating company had declared the capacity of the plant to be equivalent to PLF of 80% based on the capacity tests conducted in the presence of the distribution company team and protocol signed. Hence, they are entitled to be paid equivalent to 80% PLF (actual plus deemed generation) as against the normative PLF allowed by the State Commission.

74. According to Regulation 47 of the 2006 Tariff Regulations, incentive is payable at a flat rate of 25 paise per kWh for ex-bus scheduled energy corresponding to scheduled generation in excess of the ex-bus energy corresponding to target PLF.

Thus, incentive is payable only if the actual generation is more than actual generation/scheduled generation corresponding to the normative PLF. In the present case, the actual energy generation was less than the energy generation corresponding to normative PLF and, therefore, the State Commission has correctly rejected the claim of EIPL for incentive.

75. Accordingly, the issue regarding payment of incentive is decided as against EIPL.

76. The ninth issue is regarding return on equity.

77. Shri S. Ganesh, learned Sr. counsel for the Generating company argued that ROE should have been allowed as per the PPA which provided for ROE of 16% and the Tariff Regulation regarding

ROE of 14% would not apply to them. According to him as per Regulation 33.1, ROE shall be computed on the equity base determined in accordance with Regulations 32 and 33 and shall not exceed 14%. Regulation 32 provides for debt equity ratio for the new power plants. As such it is apparent that Regulation 33.1 would not apply to the EIPL's plants.

78. We find that this issue was not raised in the review proceedings and was not considered by the State Commission in the impugned order. In the main tariff order the State Commission has held on this issue as under:

“5.2.3 Return on equity: EIPL has claimed 16% return on equity on attaining a PLF of 68.49% (actual and deemed generation) as per the provisions of PPA [Clause 3.3(b)].

However, the return on equity is payable @ 14% (max.) as per tariff regulation, 2006 (33) of AERC w.e.f. 24th May, 2006. The Commission has therefore allowed return on equity @ 14% for computation of tariff.”

Thus, the State Commission has allowed ROE of 14% as per the Regulations.

79. We find the Tariff Regulations regarding ROE are quite clear and ROE of only 14% is permissible to a generating company.

80. Regulation 32 has a provision of debt equity ratio of 70:30 for new plants. Regulation 32 also has provision for existing plants of Assam Power Generation Corporation Limited, a state generating company, where the actual debt equity ratio has been allowed as per the Balance Sheet. Regulation 33 specifying ROE of 14% is also applicable to the

power plants of the State Generating Company which has been allowed ROE as per the balance sheet i.e. as per actuals. The State Commission has also allowed a higher equity than 30% as per actuals to the EIPL. Thus, we do not find any merit in the contention of learned Sr. counsel for EIPL that Regulation 33.1 regarding allowance of ROE of 14% would not be applicable to them. EIPL has already been allowed a higher equity than 30% permitted under the Regulation for the new plants. We do not find any merit in the contention of the EIPL regarding ROE and accordingly reject the same.

81. The tenth issue is regarding Income Tax.

82. Learned Sr. counsel for the EIPL has argued that PPA provides for taxes payable by EIPL has to be paid by Assam Discom and it would mean that

tax payable on power derived income from the projects of Adamtilla and Banskandi has to be paid by Assam Discom. PPA does not use the word “tax paid” because the actual tax paid by any company is on the basis of its overall tax liabilities which in turn depends upon income from all operations of the company, as well as, on allowable deductions and provisions. According to PPA, EIPL is not required to pass on any benefits, rebates, concessions, etc., in taxation obtained by it as a result of any tax planning or otherwise. Thus, the State Commission’s insistence for tax challans, will mean passing on the benefit of tax planning to Assam Discom, which is against the provisions of the PPA.

83. According to Shri S. Ganesh, learned Sr. counsel for EIPL, as a result of prudent the planning i.e. by combining the income from different projects of the company other than Adamtilla and Banskandi Projects, EIPL minimized the liability for FY 2008-09 and paid taxes accordingly. The tax challan of the company will show the overall tax paid by the company for its total operations during the financial year and, therefore, cannot be used as proof of tax paid for Adamtilla and Banskandi Projects alone. Only the grossed up calculated payable income tax value has the relevance in this context. The 2009 Tariff Regulations of the Central Commission also provides for pre-tax on equity grossed up at applicable tax rate.

84. According to Ms. Swapna, learned counsel for Assam Discom, this issue was decided by the State Commission in order dated 20.10.2011 and there is no finding on this issue in the Review order dated 13.2.2013 since EIPL did not challenge the order dated 20.10.2011 by filing an appropriate appeal or seek review or even file cross objection in the review petition filed by Assam Discom, the issue cannot be permitted to be raised in the present appeal. Further, PPA provides for taxes paid to be a pass through and there is no grossing up allowed. If the generating company has not paid any tax at all then there is no question of passing on the same to the consumers by way of tariff.

85. We find that tax issue has not been raised in the review proceedings. However, in the main order the State Commission has held as under:

(i) Clause 3.6 of the PPA stipulates that all taxes payable on power sale by the company shall be refunded by the Electricity Board at actuals.

(ii) 2006 Tariff Regulations stipulates that tax on income streams of a generating company from its core business shall be computed as an expense and shall be recovered from the beneficiaries/consumers. However, the benefit of tax holding has to be passed on to the consumers.

(iii) EIPL in its tariff petition has claimed grossed up income tax of Rs. 339 lakhs for 2008-09 certified by the auditor.

(iv) The State Commission vide letter dated 16.8.2011 directed EIPL to submit detailed information on actual income tax paid for their Adamtilla and Banskandi plants for 2008-09 certified by the auditor including any benefit of tax

holiday availed by the company under North-Eastern Industrial Policy of 1997 and 2007 wherein 100% income tax exemption is allowed as incentive.

(v) EIPL vide letter dated 2.9.2011 expressed inability to furnish actual tax payment record for their EIPL plant on the plea that tax is paid for the company as single entity based on cumulative profit/loss of various business operations belonging to the company.

(vi) The State Commission vide letter dated 16.9.2011 once again directed EIPL to provide detailed information of income tax paid for FY 2008-09 by the company as a whole and give specific directions to State if tax holiday was availed by the company for the power plants of Assam.

(vii) A reply was submitted by the company vide letter dated 20.9.2011 but the reply has not been made adequate and the desired information has not been made available to the satisfaction of the company.

(viii) Subsequently, the EIPL vide letter dated 13.10.2011 informed that benefit of tax holiday is not applicable to them. Further, tax holiday is not allowed beyond 10 year period which is over for their plant in 2007.

(ix) The State Commission has not considered the income tax in tariff calculations as EIPL has not provided adequate information/documents to verify that tax has actually been paid and the financial statements of the company for 2008-09 show a net loss of 11.12 crores and no provision for current taxation (MAT/corporate tax) was made.

86. Thus, the State Commission did not consider Income Tax as claimed by EIPL as the company failed to provide the necessary information and the financial statements of the company for FY 2008-09 showed a loss of 11.12 crores.

87. Let us examine the relevant parts of Regulation 20 of 2006 Regulations regarding tax on income.

“20. Tax on income

20.1 Tax on the income streams of the licensee or the generating company, as the case may be, from its core business, shall be computed as an expense and shall be recovered from the beneficiaries/consumers.

Provided that tax on any income stream other than the core business shall not constitute a pass through component in tariff and tax on such other income shall be payable by the

licensee or the generating company as the case may be.

20.2 Any under-recoveries or over-recoveries of tax on income shall be adjusted every year on the basis of income-tax assessment under the Income-Tax Act, 1961, as certified by the statutory auditors.

20.3 The benefits of tax holiday and the credit for carrying forward losses applicable as per the provisions of the Income Tax Act, 1961 shall be passed on to the customers.

Provided further that the generating station-wise profit before tax in the case of the generating company estimated for a year in advance shall constitute the basis for distribution of the corporate tax liability to all the generating stations”.

88. The Tariff Regulations provides as under:

(i) Tax on the income of the generating company from its core business shall be computed

as an expense and shall be recovered from the customers. However, tax on any income other than the core business shall not be a pass through in tariff.

(ii) Any under-recovery or over-recovery of tax on income shall be adjusted on the basis of income-tax assessment, as certified by the statutory auditors.

(iii) The benefits of tax holiday and carrying forward losses applicable as per the Income Tax Act shall be passed on to the customers. The generating station-wise profit before tax estimated for a year in advance shall constitute the basis of the tax liability to all the generating stations.

89. Thus, according to the Tariff Regulations when the tariff of a generating station is determined in advance before the commencement of the ensuing

financial year or during the ensuing financial year, the State Commission would compute the income tax on the basis of estimated profit before tax. Accordingly, the estimate has to be based on ROE allowed in the tariff at the applicable tax rate, to be grossed up as the reimbursement of tax by the customer is also taxable. The under recovery or over recovery of tax will be adjusted in subsequent year on the basis of income tax assessment as certified by the statutory auditor for which the generating company will have to furnish the necessary documents to the State Commission. When tariff is determined after the year is over as in the present case, the State Commission shall allow the income tax as per actual income tax paid as per the Income Tax Act. If the company has not paid the income tax at all, no income tax has to be

considered. In case a company is filing the income tax for its generation business along with other businesses, the proportionate income tax paid on account of net profit before tax of generating stations alone is to be considered. The income tax paid on the other business streams shall not be considered in the tariff. We feel that 2009 Tariff Regulations of CERC have no application in this case as 2006 Tariff Regulations of the State Commission alone have to be considered.

90. In view of above, we do not find any infirmity in the findings of the State Commission regarding income tax for FY 2008-09.

91. The findings given by us on income tax shall be considered as guidelines by the State Commission for future.

92. The twelfth issue is regarding metering of generation at the generator terminal.

93. According to the Generating Company, the actual generation is to be metered at generator terminal as per clause 1.1 and 1.34 of the PPA.

94. We find that this issue has not been raised in the proceedings before the State Commission and accordingly we do not find any findings of the State Commission on this issue in the impugned order. We are, therefore, not inclined to consider this issue at appeal stage. We, however, give liberty to the EIPL to raise the issue in the proceeding for tariff determination for FY 2009-10 onwards.

95. The thirteenth issue is regarding interest rate on working capital.

96. According to Shri S. Ganesh, learned Sr. counsel for the Generating company, the actual interest rates for working capital for FY 2008-09 onwards has been in the range of 12.25% to 14.5%. EIPL had requested for only 12.25% per annum.

97. We find that this issue was not raised in the review proceedings. However, in the main order the State Commission has considered interest rate at 9.5% on the basis of SBI PLR rate as on 1.4.2008.

98. According to the Tariff Regulation 64, the rate of interest shall be on normative basis and shall be equal to the short term PLR of SBI as on 1st April of the financial year for which tariff is determined. Thus, the State Commission has correctly decided

the interest rate on working capital in accordance with the Regulations.

99. As far as the interest on working capital for the subsequent years from 2009-10 onwards is concerned, the same shall be considered by the State Commission in the tariff determination exercise for FY 2009-10 onwards as per its Regulations.

100. The fourteenth issue is regarding carrying cost on the payment of arrears.

101. EIPL has submitted that they may be allowed the amounts of arrears payable considering full fixed cost and variable charges for the period 2008-09 upto 2012-13 as per the tariffs payable with simple interest @ 12% from the dates the

payments were due upto the date when the payments are actually made.

102. As far as payment of interest on arrears for FY 2008-09 on the basis of tariff order dated 20.10.2011 is concerned, EIPL is entitled to delayed payment surcharge as per the 2006 Tariff Regulations on the bills raised by EIPL after passing of the main tariff order. We find from the impugned order dated 12.2.2013 that the Assam Discom had not paid the arrears due to EIPL as per the main tariff order. The State Commission had not passed any interim order for stay of its main tariff order dated 20.10.2011 and, therefore, Assam Discom was bound to make payment of arrears as per the tariff order dated 20.10.2011 for FY 2008-09. In the Appeal 76 of 2013 this Tribunal had also not granted any stay of the tariff

order dated 20.10.2011 and the review order dated 12.2.2013. Therefore, the Distribution Company is liable to pay delayed payment surcharge to the EIPL as per the Regulation.

103. As far as carrying cost for arrears from the due date of payment is concerned, this issue had not been raised before the State Commission in the main Appeal and in the review. Therefore, we are not inclined to go into the same. However, EIPL is at liberty to raise this issue before the State Commission in the tariff proceedings for determination of tariff for FY 2009-10 to 2014-15 and the State Commission shall decide the issue as per law.

104. Summary of our findings:

(i) Modification of tariff and extension of the scope of Review Petition:

We find that in the impugned review order dated 12.2.2013, the State Commission has not altered the tariff for FY 2008-09 which was the subject matter of the main order as well as the review petition. However, the State Commission has erred in extending the scope of review beyond the review petition and even beyond the main order by extending the tariff determined for the FY 2008-09 to the subsequent years. The tariff for FY 2009-10 onwards has to be determined according to Section 62 and 64 of the Act, after obtaining the objections and suggestions of the public on the proposal of the generating company. In

view of above, we set aside the impugned order of the State Commission only to the extent of the tariff for FY 2009-10 onwards. However, since the tariff for the FY 2009-10 and onwards has not been determined so far, we have given some interim direction for payment of tariff to ensure operation of the plant for the interim period till the tariff is determined by the State Commission. Accordingly, in the interim period, the Assam Discom will make payment to EIPL as per our interim direction given in paragraph 26 of this judgment. The State Commission is also directed to determine the tariff for the period 2009-10 to 2014-15 at the earliest.

(ii) Normative PLF:

We do not find any infirmity in the State Commission's order.

(iii) Station Heat Rate:

We find that the findings of the State Commission are perfectly in order. Regarding contention of EIPL for higher Station Heat Rate due to operation of the plant at partial load, grid interruption, etc. , we give liberty to EIPL to raise these issues while determination of tariff for FY 2009-10 onwards. We also reject the contention of EIPL that variable charges have to be determined strictly in terms of the PPA.

(iv) Additional capitalization on account of initial spares:

We do not find any infirmity in the findings of the State Commission.

(v) Recovery of full fixed cost:

We find that the mechanism for ascertaining deemed generation has not been put into place by the parties despite the order of the State Commission. We direct the State Commission to give detailed directions to EIPL, Assam Discom and SLDC to ensure that the scheduling of the power plants of EIPL through SLDC as per the directions given in the main tariff order are implemented. However, till the scheduling through SLDC is put into place, the State Commission shall determine the deemed generation after prudence check of the records as has been done for FY 2008-09 to 2011-12 in the impugned order. We also find that the State Commission was correct in allowing the deemed generation due to non-supply or short supply of

**gas and permit recovery of full fixed cost for
FY 2008-09.**

**(vi) Incentive due to non-availability of gas
upto 80% PLF:**

**We do not find any merit in the contention
of EIPL.**

(vii) Return on Equity:

**We do not find any merit in the contention
of EIPL.**

(viii) Income-Tax:

**We do not find any infirmity in the findings
of the State Commission regarding Income tax
for FY 2008-09. However, for future we have
given some guidelines for the State
Commission.**

(ix) Metering of generation at the generator terminal:

We find that this issue has not been raised in the proceedings before the State Commission and we do not find any findings of the State Commission on this issue in the impugned order. We are, therefore, not inclined to consider this issue at this stage. We, however, give liberty to the EIPL to raise this issue in the proceeding for tariff determination for FY 2009-10 onwards.

(x) Interest rate on working capital:

We do not find any infirmity in the findings of the State Commission regarding tariff for 2008-09. As far as interest on working capital for subsequent years is concerned, the same shall be considered by the State Commission in

**the tariff determination exercise for
FY 2009-10 onwards as per its Regulations.**

(xi) Carrying cost on the payment of arrears:

**As far as interest on arrears for
FY 2008-09 on the basis of tariff order dated
20.10.2011 is concerned, EIPL is entitled to
delayed payment surcharge as per the 2006
Tariff Regulations on the bills raised on Assam
Discom as per the main tariff order. Assam
Discom should have paid the tariff as
determined by the State Commission by main
order dated 20.10.2011 as pendency of review
and appeal before this Tribunal cannot be a
reason for non-payment of arrears. This**

Tribunal had not granted any stay on the order of the State Commission.

As far as carrying cost for arrears from the due date of payment is concerned, this issue had not been raised before the State Commission in the main Appeal and in the review. Therefore, we are not inclined to go into the same. However, EIPL is at liberty to raise this issue before the State Commission in the tariff proceedings for determination of tariff for FY 2009-10 to 2014-15 and the State Commission shall decide the issue as per law.

105. In view of above, Appeal No. 76 of 2013 is allowed only to the extent of extension of review proceedings beyond the scope of the review petition and the main tariff order by extending the tariff for

FY 2008-09 to subsequent years. Appeal No. 82 of 2013 is dismissed. However, we have given some directions to the State Commission regarding interim tariff to be paid from 2009-10 onwards. No order as to costs.

106. Pronounced in the open court on this **12th day of August , 2014.**

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

√
REPORTABLE /NON-REPORTABLE
Vs