Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal Nos .7of 2011, 46 of 2011 and 122 of 2011

Dated 18th October, 2012

Coram : Hon'ble Mr. Rakesh Nath, Technical Member

Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of

Punjab State Power Corporation Limited
(Successor of Punjab State Electricity Board)
The Mall, Patiala – 147 001,
Punjab

…. Appellant(s)

Vs.

Punjab State Electricity Regulatory Commission
SCO No. 22-221, Sector-34-A,
Chandigarh – 160 022.

Counsel for the Appellant(s) : Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan,
Ms. Swapna Sheshadri,
Ms. Sneha Venkataramani

Counsel for the Respondent(s) : Mr. Sakesh Kumar

JUDGEMENT

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

1. In Petition No.1 of 2009 filed by the appellant, Punjab State Power Corporation Ltd., a successor entity for generation and distribution of electricity of the erstwhile Punjab State Electricity Board, the sole respondent Punjab State Electricity Regulatory Commission passed an order on 8.9.2009 in respect of the Aggregate Revenue Requirement and determination of tariff for the appellant for the Financial Year 2009-10 as also truing up of the financials for Financial Years 2007-08 and 2008-09. Against the said order dated 8.9.2009, the appellant preferred a review application before the Commission itself being review petition no.23 of 2010 upon which the Commission passed an order on 16.4.2010 allowing partly the review petition and partly dismissing the same and it is the said order dated 16.4.2010 which has merged in the original order dated 8.9.2009 that is the subject matter of the appeal before this Tribunal in Appeal no.7 of 2011 wherein the appellant raised the issues on a) disallowance on return on equity, b) issue concerning target availability of Guru Nanak Dev Thermal Plant (GNDTP) at Bhatinda and other power stations, c) auxiliary consumption of GNDTP, d) disallowance of interest on working capital, e) disallowance of interest paid on loans taken for Special PurposeVehicle (SPV) of the Board, f) T&D loss and AP consumption, g) treatment of terminal benefits, h) Station Heat Rate, i) disallowance of additional UI Surcharge on overdrawal of power.

2. The Commission upon another petition filed by the same appellant passed an order on 23.4.2010 in respect of Aggregate Revenue Requirement and determination of tariff for the Financial Year 2010-11 as also true-up of the financials for the year 2008-09 and revising the estimates for the year 2009-10 against which the appellant preferred a review petition no.23 of 2010 in respect of which the Commission passed an order dated 6.1.2011 whereby the Commission partly allowed the review petition against which this present Appeal no. 46 of 2011 has been preferred by the appellant raising a) denial of administrative and general expenses for Financial Years 2008-09, 2009-10 and 2010-11; b) Refusal of price of coal for estimation of overall cost for Financial Years 2008-09, 2009-10 and 2010-11; c) denial of interest paid on loan for SPV for Financial Years 2008-09 and 2009-10; d) Non-tariff income for Financial Year 2008-09; e) discount to consumers for advance payment of bills for the Financial Year 2008-09; f) incentive / disincentive on generation for the Financial Years 2008-09, 2009-10 and 2010-11; g) disallowance of finance charges for Financial Year 2008-09; h) disallowance of repair and maintenance expense for Financial Years 2009-10 and 2010-11; i) carrying cost on gap for the Financial Years 2006-07, 2007-08, 2008-09 and 2009-10; j) disallowance of employees' expenses; k) interest of finance charges; and l) agricultural pumpset consumption.

3. Before the Commission, the appellant also filed a petition no.49 of 2010 in respect of the Aggregate Revenue Requirement and for determination of tariff for the Financial Year 2011-12 in respect of which the Commission passed an order on 9.5.2011 against which the Appeal no.122 of 2011 has been filed by the appellant challenging the findings

of the State Commission on a) station heat rate; b) fuel cost; c) power purchase cost; d) employees cost; e) return on equity; f) interest on finance charges; g) repair and maintenance charges; h) thermal generation incentive; i) fuel cost adjustment surcharge; and j) regulatory assets.

4. As we find from the above narration that the issues are common in all the three appeals and there is no other third party besides the appellant and the State Commission, it is deemed proper that an analogous judgment is rendered covering the three appeals by a comprehensive treatment in respect of all the issues.

5. The State Commission has not filed any counter-affidavit in respect of any of the appeals but has filed a common written submission in respect of the appeal nos. 7 of 2011 and 46 of 2011 and a separate written submission in respect of the appeal no. 122 of 2011. It is therefore proper that we deal, at appropriate place, with the points raised by the Commission as a reply to the Memorandum of Appeals in the three appeals of the appellant. It is also necessary to dwell on the facts presented by the appellant separately in respect of each of the three appeals.

6. In Appeal No. 7 of 2011 which relates to Aggregate Revenue Requirement and determination of tariff for the Financial Year 2009-2010 the appellant contends as follows:-

a). On return on equity it is the Central Electricity Regulatory Commission TariffRegulations 2009 providing for Return on Equity at 15.5% that should have been applicable instead of 14% of the capital base following the Central Electricity Regulatory Commission Tariff Regulation 2004. The Central Electricity Regulatory Commission revised the rate of return on equity in its Regulations, 2009.

b). On the issue of Thermal Generation in respect of GNDTP at Bhatinda the Commission fixed plant availability at 81.37% while the Board had proposed 77.49% (later revised to 74.57%) on the ground that at least one unit at the said station would be under planned outage for renovation and modernisation for three thirty days during the Financial Year 2009-2010. According to the appellant, the Commission also did not accept the submission of the Board to fix the Plant Availability Factor at 85% in respect of other Thermal Generating Stations as per regulation 26 of the Central Electricity Regulatory Commission Tariff Regulation, 2009 providing for normative annual plant availability factor.

c). As regards auxiliary consumption of GNDTP Bhatinda station the Commission allowed the auxiliary consumption at 10.22% instead of 12% as the Central Electricity Regulatory Commission allows auxiliary consumption of 12% in the case of Tanda Thermal Power Station of the NTPC.

d). Though the Commission allowed the interest of working capital considering two months' fuel cost and one month's maintenance spares for the period 2009-2010 it has not allowed the same in the truing up for the Financials for the period 2007-2008 and 2008-2009.

e). The Commission disallowed the interest cost on the loans taken by the Board on behalf of its SPV and at the same time included the

interest income of Rs. 5.72Crore received from the SPVs as non-tariff income of the appellant.

f). The State Commission while truing up the accounts of 2007-2008 and 2008-2009 has disallowed an Agricultural Consumption of 11.25% and 10.20% respectively and proportionately disallowed the loss level not achieved by the Board for the years 2007-2008 and 2008-2009.

g). On the treatment of terminal benefits pertaining to employees cost the Commission has acknowledged that the employees expenses for the period 2009-2010 is Rs. 2113.36 Crores but has allowed only Rs. 1856.60 crores and disallowed terminal benefits of employees amounting to Rs. 256.76 crores.

h). On the Station Heat Rate for GGSSTP at Ropar the Commission fixed 2500Kcal/Kwh for FYs 2007-2008, 2008-2009 and 2009-2010 as against 2700 Kcal/Kwh claimed by the Board on the basis of the performance of the Ropar Station.

i). On the question of additional UI Surcharge on account of over drawl of power the Commission, it is contended, disallowed the surcharge paid by the Board without any reason.

7. In Appeal No, 46of 2011 which relates to the Aggregate Revenue Requirement and Determination of Tariff for the Financial Year 2010-2011 allow with truing up of the Financials for the Financial Year 2008-2009 the appellant contains as follows:

a). With regard to administrative and general expenses for the FYs 2008-2009, 2009-2010 and 2010-2011 the Commission allowed the same but not in terms of normative methodology while doing the truing

up exercise and considered Rs. 70.95Crore for Financial Year 2008-09as per the books of account of the Board as against Rs.78.44crore on normative basis worked out by the Commission. It is not that the appellant itself had restricted the claim only to the actuals. The normative administrative and general expenses for the Year 2009-2010 as worked out by the Commission was Rs. 82.06Crores but in the impugned orders the same has been restricted to Rs. 75.95 Crore based on the actual expenses of the appellant. The normative administrative and general expenses for the Financial Year 2010-2011 should have been Rs. 82.78Crore but the Commission allowed Rs. 79.75Crore based on the incorrect determination of administrative and general expenses for the previous years.

b). On price of coal for estimation of overall cost for 2008-2009, 2009-2010 and 2010-2011the Commission reduced the price of the coal to the extent of transit losses but the actual coal price submitted by the Board/appellant was exclusive of the transit loss and the same was also pointed out in the review petition. The Commission also has not considered the appellants submissions regarding increase in coal price in the second half of the 2009-2010. Such increase in the coal price has had an overall bearing on the cash flows of the appellant.

c). On SPV the contention of the appellant is the same as was in the Appeal No. 7 of 2011 and we need not repeat the same all over again. The Commission considered interest income of Rs. 46.22Crore received from these SPVs but as on the day appellant has been denied the interest on loan taken on behalf of the SPVs for the Financial Year 2009-2010. The Commission included the interest income of about Rs. 50 Crore received from these SPVs while disallowing the interest paid by the appellant on such loan.

d). As regards non-tariff income for the Financial Year 2008-2009 the Commission allegedly included an amount of Rs. 91.10 Crore although the Commission obscured that the Board has not submitted clarification with respect to the final outcome of the audit notes on the accounts of the Board for the year 2007-2008. According to the audit note, the miscellaneous income was understated to the extent of Rs. 151.10crore and comprised of (a) deposits of Rs.103.89crore outstanding for more than 3years,(b) deposits of Rs. 0.97crore received against burnt meters, and (c) advance of Rs. 46.24crore received against sale of scrap. The State Commission has not considered the final accounts of the Board, wherein post the clarifications issued by the Board, the said audit notes were removed from the annual accounts and the same was duly placed before the State Commission.

e). The State Commission has disallowed an amount of Rs. 52.45croreunder interest and finance charges for Financial Year 2008-09 treating the same as discounts allowed to the consumers for advance payment of bills. The State Commission has held that this amount was being utilized for the Board's/Appellant's revenue expenditure and consequently the working capital was set off to that extent. This observation of the State Commission is factually incorrect. The discounts to consumers forming part of the other interest and finance charges in the Audited Accounts of the Board/Appellant were for the year 2008-2009. Out of the total amount of Rs. 52.45crore included only Rs. 2.77crore of discounts allowed to consumers and the balance was on other accounts.

f). On the question of incentive/disincentive for the years 2008-2009, 2009-2010 and 2010-2011 the Commission disallowed an amount of Rs. 96.29crore on account of underachievement of the target generation

approved for the Financial Year 2008-09.In this respect the Commission deviated from the normative basis and considered the average generation for the past three years which is not in the terms of the regulations. No incentive was allowed for power generation at power plants where the availability was higher than the norms specified in the Central Commission's Regulations.

g). On the question of repair and maintenance expenses for 2009-2010 the Commission allowed Rs. 394.03crore on a normative basis but in the impugned orders in respect of the Financial Year 2009-2010 the Commission allowed Rs. 385.93crore based on the actual of the appellant. For the year 2010-2011 the base expenses considered by the State Commission is Rs. 400.73crore (Rs. 385.93crore +Rs. 14.80crore allowed for additional capitalization for 2009-2010) instead of considering the normative expenses of Rs. 408.83(Rs.394.03crores +Rs. 14.80crores). The State Commission has also not allowed the R & M expenses on account of likely asset addition in 2010-2011 which amounted to around Rs.56crore as estimated by the Board/Appellant.

h). On carrying cost on gap for the period 2006-2007 to 2009-2010 the Commission while determining the revenue gap for 2008-2009, 2009-2010 and 2010-2011, has not considered the carrying cost for 2006-2007 and 2007-2008. Without considering such cumulative gap, the State Commission has only allowed the carrying cost on final revenue gap for consequently the target generation for the year 2008-2009 was determined. In the truing up process, the State Commission has not considered the actual generation during the year 2008-2009 by taking into account the actual forced outages, age of the units, grid conditions etc. while determined the target generation.The State Commission has not adopted a normative approach consistent with the Tariff Regulations

of the Central Commission for fixation of the target availability for the tariff year 2009-2010 and 2010-2011.

i). On disallowance of finance charges it is alleged that the State Commission has disallowed the true-up of finance charges amounting to Rs. 17.04 crores for Financial Year 2008-09 in the tariff order for 2010-2011 on the ground that the Board has claimed higher finance charges than the previous year i.e., 2007-2008. The State Commission has not undertaken the prudence check for the finance charges despite the detailed reasoning given by the Board/Appellant including the various queries raised by the stake-holders in the proceedings before the State Commission.

k). On employees expenses the State Commission had reduced the employees cost of the Board/Appellant for the year 2009-2010 and 2010-2011 by 28.48% on the ground that the employees cost allowed previously was reduced by 28.48% although the Board pleaded that it was required to implement the recommendations of the Sixth Pay Commission and the pay revision to its employees. The State Commission has further disallowed a sum of Rs. 100 crores for the year 2010-2011 on the ground that the Board/Appellant has not drawn up a road map for revising its staff strength.

l). On interest and Finance Charges the State Commission has disallowed a sum of Rs. 100 crores to the Appellant towards cost incurred for the reason that there was diversion of funds by the Board for the year 2010-2011.

m). On the Agricultural Pump-set consumption the State Commission has estimated the Agricultural pump set consumption solely based on the report submitted by the Agency appointed by the State Commission

without considering the details submitted by the Board/Appellant and also the various flaws pointed out by the Board in the report of Tribunal independent Agency in estimating Agricultural pump set consumption. The State Commission has reduced the agricultural pump set consumption by 10.20% as compared to the audited accounts of the Board/appellant for the year 2009-2010 and 2010-2011.

8. In Appeal No. 122 of 2011 that relates to Aggregate Revenue Requirement and Determination of Tariff for the Financial Year 2011-2012 the appellant contends as follows:

a). The State Commission has not considered the age and deterioration factor of the old generating units and in disregard of that continued to determine the station heat rate on a normative basis as provided for in the Tariff Regulations which merely fixed a norm targeted for achievement which is always lower than the possible actual achievement particularly in respect of the old generating station units.

b). In respect of the Financial Year 2010-2011 the appellant projected an escalation of 10% on average coal price on account of imposition of environment tax and entry tax but the Commission while approving the cost of coal for the second half of the Financial Year 2010-2011 and for the Financial Year 2011-2012 did not consider the escalation. With regard to fuel cost and adjustment surcharge, escalation at the rate 10% on the average coal price for the respective stations was allowed till September, 2010 and then a further escalation of 5% was allowed over the price for the second half of Financial Year 2010-11 for computing the fuel cost for the Financial Year 2011-12. Further, any change in fuel cost would be passed on to the consumers and the Commission allowed

fuel cost adjustment at the rate of 8 paise per unit for a metered category and Rs.5/BHP/month for unmetered category for third quarter of Financial Year 2010-11 with effect from 1.4.2011.

c). For the period from April 2009 to September 2009 the Commission allowed power purchase cost on actual basis but form October 2009 to March 2010 i.e. for the second half of the Financial Year 2009-2010 the Commission allowed power purchase cost at the rate of 402.46 paise per unit based on average rate of realisation instead of the actual average price of 673.43 paise per unit for 102.09 MUs incurred by the appellant and this resulted in disallowance of Rs. 27.66 crore. The Commission also disallowed Rs. 8.53 crores on account of unscheduled interchange surcharge for drawl below the frequency of 49.2 Hz for the period from October 2009 to March 2010. Then, for the Financial Year 2010-2011 the Commission in the Tariff Order has capped the power purchase cost at 427.31 paise per unit. In the first half of the Financial Year 2010-2011 the Appellant purchased 2475 MUs of power from traders at the rate of 553.68 paisa per KWH and 1098 MUs through unscheduled interchange at the rate of RS. 479.23 paisa per kWh. As such, the State Commission disallowed Rs. 369.78 crores for the first half of the year Financial Year 2010-2011. For the second half of the year 2010-2011, the State Commission allowed a purchase of 6275 MUs on prorate average cost of power purchased for the first half of the year Financial Year 2010-2011. For the year 2011-2012, the appellant prayed for power purchase to be determined as 18815 MUs. The State Commission has however, allowed the power purchase at 18488 MUs by considering the transmission loss external to the Appellant's and Punjab State Power Transmission Corporation Limited system at 4.83% instead of 5.57% as submitted by the appellant. With regard to power

purchase cost, the Commission disallowed an additional cost of Rs.27.66 crore incurred by the PSPCL for purchase of 102.09 MU at the excessive rate of 270.97 paise per unit. The Commission also did not allow additional UI surcharge leviable for overdrawal of power when frequency is below 49.2 Hz. For the Financial Year 2010-11 the Commission accepted the power purchase cost for the first half of that Financial Year and kept the power purchase price at 427.31 paise per unit for power purchased from traders and through UI. For Financial Year 2011-12, the Commission approved the requirement 18488 MUs as against Board's claim of 18815 MUs. The Commission considered the external loss at a weighted average of 4.83% based on the actual loss in Financial Year 2009-10.

d). In respect of the employees cost the State Commission applied on normative basis in respect of the Financial Year 2010-2011 Wholesale Price Index of 7.55% on the expenses which were allowed for the Financial Year 2009-2010 excluding of course the average number of employees of PSTCL. The Commission further disallowed an amount of Rs. 93.31 crore from the allowable employees cost on the ground that there was failure on the part of the appellant to draw up a road map for rationalisation of man power. Thirdly, for the year 2009-2010 the Commission considered an increase of 5%on the base of employees expenses for the Financial Year 2008-2009 instead of considering the actual employees cost and the Commission reduced the revised pay of Rs. 156.25 crore by 28.48% by following its previous tariff order without any justifiable basis. For the Financial Year 2010-2011 the Commission allowed the employees cost on the basis of old pay scales without considering the additional impact of Rs. 500 crore on account of pay revision. For the Financial Year 2011-2012 the Commission approved

the employees cost on a normative basis by applying Wholesale Price Index of 8.91% on the expenses allowed for the year 2010-2011. Again there was imposition of reduction consistently being carried out though there was revision of pay that resulted in demand of Rs. 342 crore as was projected by the appellant.

e). On return on equity the grievance is that in respect of each of the Financial Years 2009-2010,2010-2011 and 2011-2012 the Commission allowed return on equity at the rate of 14% instead of 15.5% (pre-tax) in accordance with CERC Tariff Regulations, 2009

f). On interest and finance charges the Commission disallowed a sum of Rs. 100 crore for the Financial Year 2009-2010, Rs.89.70 crore for the Financial Year 2010-2011 and Rs. 88.7 crore for the Financial Year 2011-2012 towards interest cost incurred for the reason that there was diversion of funds by the Erstwhile Board. The appellant claimed actual interest paid on working capital loan of Rs. 644.03 crore but the Commission allowed the normative interest of working capital of Rs. 196. 86 crore. The Commission had allowed the interest cost on the approved revenue gap in the Aggregate Revenue Requirement for the year 2009-2010 amounting to Rs. 209.96 crore. It is the case of the appellant that as the revenue gap for the year was met by way of raising working capital loans and the interest on working capital is allowed on normative basis the Commission ought to have allowed the interest on the approved revenue gap as a separate item of expenditure.

g) With respect to repair and maintenance charges the allowable repair and maintenance expenses for the year 2009-2010, in accordance with the Tariff Regulations works out to Rs. 391.26 crores on a normative basis. However, in the impugned orders, the State

Commission has only allowed Rs. 378.16 crores based on the actuals of the appellant. Similarly, for the year 2010-2011, the expenses on a normative basis work out to Rs. 399.71 crores. However, the State Commission has allowed only Rs. 360.28 crores based on the actuals of the appellant. For the year 2011-2012, the base expenses considered by the State Commission is Rs.367.10 crores instead of considering the normative expenses of Rs. 406.53 crores. The State Commission has also not allowed the repair and maintenance expenses on account of likely asset addition in 2011-2012 which amounted to Rs. 38.52 crores as estimated by the appellant. It has been contended that the Commission has been consistently following the principle of allowing the actual cost in case the same is lower than the normative cost or the normative cost whenever actual expenses are higher than the cost on normative basis. The normative cost is the maximum limit up to which the R&M expenses are allowed by the Commission. Regulation 28.5 (a) provides for allowing increase equivalent to average Wholesale Price Index over the expenses approved by the Commission for the previous year which is to be treated at base year. In the instant case also, the Commission took into consideration the approved R&M expenses of Rs.367.10 (Rs. 360.28 crore as the R&M expense approved for the year 2010-11 and Rs.6.82 crore as the additional R&M expenses for the asses added during that year). These base expenses were further escalated by Wholesale Price Index increase of 8.91%, to arrive at the allowable expenses of Rs.399.71 crore.

h). on thermal generation incentive the State Commission has prescribed the norms for generation targets on the basis of actual average generation for the last three years. In the true up for the year 2008-2009, the State Commission has disallowed a sum of Rs. 96.29

crores due to less thermal generation. In the true up for the year 2009-2010, the State Commission has allowed an incentive of Rs. 83.59 crores on account of higher thermal generation. However, the Tariff Regulations provide for determination of generation targets in accordance with the norms prescribed under the Central Commission Regulations.

i) It is contended with respect to fuel cost surcharge that for the true up exercise of the year 2009-2010, the State Commission has held that since the variable cost of fuel has been validated for the year 2009-2010 and the power purchase cost has been allowed on the basis of actual power purchase cost for the year 2009-2010, the petitions filed by the appellant for the third and fourth quarters of the year 2009-2010 are deemed to be accordingly disposed off. The State Commission has held similarly for the petitions filed by the appellant for the first and second quarters of the year 2010-2011. The State Commission has not however considered the financial impact on the appellant arising out of the time lag in deciding the Fuel Cost Adjustments. Further, with respect to the petition by the Appellant for fuel cost adjustment for the third quarter of the year 2010-2011, the State Commission has only allowed an amount of Rs. 61.67 crores as opposed to an amount of Rs. 189.38 crores as claimed by the Appellant. The State Commission has worked out the amount allowed on the basis of the values approved in the review for the year 2010-2011. The State Commission should have allowed carrying cost on the fuel cost surcharge.

j) On regulatory assets the appellant contends that the State Commission has also determined the cumulative revenue gap upto the year 2011-2012 as Rs. 2651.51 crores. However, the State Commission has proceeded to treat 50% of the said gap as a regulatory asset

amounting to Rs. 1325.76 crores and has passed on the balance amount to the consumers as tariff without any basis.

9. As earlier stated, the Commission did not file any counter affidavit but filed written submissions in respect of the issues covered in all the appeals and in support of its order contends as follows:

a). On disallowance of return on equity at 15.5% (pre-tax) to be grossed up to 28.3% on the basis of the Central Electricity Regulatory Commission Regulations 2009 the commission found that the erstwhile Board was unable to effect requisite improvements in critical performance parameters. Secondly, the Commission followed the State Regulations 2004 providing return on equity at 14%.

b). On Plant Availability Factor the Commission based on the maintenance schedules for the year 2009-2010 calculated the Plant Availability of GNDTP at 81.37% though the Board projected the Plant Load Factor of GNDTP for 2009-2010 at 74.57% in the Aggregate Revenue Requirement. Secondly, the Commission followed the past practise of allowing incentive/disincentive with reference to the generation approved for the year depending upon the annual maintenance schedule of the thermal plants as intimated by the Board in the Aggregate Revenue Requirement but no penalty was imposed in case the Plant Load Factor was less than 85%. Thirdly, the Commission while truing up the generation and expenditure figures in respect of the three thermal generating stations of the Board for the year 2009-2010 in its tariff order for Financial Year 2011-2012 upon availability of the audited annual statement of accounts noted that there was increase in thermal generation to the extent of 579MUs as compared to generation

approved in the tariff order for Financial Year 2009-2010 and accordingly approved the net incentive of Rs. 83.59 crore on account of higher generation.

c). On disallowance of interest on loans taken for SPV the Commission contends that since the complete picture of loans raised on behalf of the SPVs, the interest paid/payable thereon and the recovery effected from these SPVs and credited into the accounts of the Board was not made available to the Commission and therefore, the Commission was left with no alternative but to concluded that there was insufficient documentary evidence to substantiate the claim of PSEB/Successor Entity.

d). On employees cost it is contended that the Commission has determined the employee cost as per Regulation 28(4) of the PSERC Regulations 2005. The Regulations clearly stipulate that O&M, which include employee cost, shall be determined on the basis of Wholesale Price Index of the relevant year. It is true that Regulations 28 (3) of Regulations, 2005 says that the Commission shall be guided, as far as feasible by the principles and methodology specified by the Central Electricity Regulatory Commission Regulation of 2004 as amended from time to time. It is clear from the Regulation 28(4) of the Regulations, 2005, that the PSERC Regulations refer it with a very specific rider that in such a determination the Commission will keep in mind the fact that the Central Electricity Regulatory Commission Regulation mainly relate to interstate transmission of higher quantum of energy and on extra high voltage over long distances whereas the transmission tariff to be determined by the Commission will be relating to intra state transmission of lower quantum of energy at relatively lower voltage and over short distances.

e). On interest on working capital the Commission found that the State Regulations as amended with effect from 27.7.2009 could not be given retrospective effect as such in the true up of 2007-2008 and 2008-2009 it did not grant interest on working capital considering two months of fuel cost and one month of maintenance spares.

f). On disallowance of additional UI charges it was based on the recommendations of the Parliamentary Standing Committee. Further, the Commission thought that it should be possible for the Board to take adequate and timely demand control measures so as to ensure that no power is overdrawn when the frequency of the grid was below 49.2Hz.

g). On the station heat rate for GGSSTP the Commission followed the Central Electricity Regulatory Commission norms and also the recommendations of the Central Electricity Authority. Deviation of operating heat rate had no correlation with age or make of the units and that old unit from some of the utilities showed very low deviation.

h). On transmission and distribution loss and agricultural pump set consumption the Commission fixed a phased reduction in six years commencing from Financial Year 2001-2002, which if achieved, would have brought T&D losses down to 19.5% in 2007-2008. There is no force in the plea of the Board that higher T&Dloss should have been fixed because the Commission has reduced A.P. consumption for 2007-2008 and 2008-2009. In fact the A.P. consumption as projected by the Board was inflated on account of the reasons that were clearly brought out in the study that was undertaken at the behest of the Commission. The Commission is of the view that inability of the Board to effect reduction in loss cannot be reason for penalising the consumers by allowing higher T&D losses to the Board.

i)As regards R&M expenses, it is contended by the Commission that in its own submission in the Aggregate Revenue Requirement, PSPCL has admitted that the figures of assets / liabilities are provisional. It may also be added that the assets were not maintained category-wise by the utility as required under the Companies Act.

j) With regard to Interest and Finance Charges, it is contended that in appeal no. 63 of 2008, this Tribunal held that the State Commission correctly decided to burden the appellant (State Govt. therein) with the interested on diverted funds and it was directed that the Board would not pay the amount of Rs.2.92 crores to the State Govt.. The Commission in its Tariff Orders for previous years had observed that the total assets of the Board had fallen short of the amount of capital loans and the equity investment taken together. It is clear that the Board had diverted the capital funds for its revenue expenditure which had resulted in lesser asset creation than the actual investment.

10. On the aforesaid pleadings of the parties need to consider the following points:

1). Whether the Commission was justified in allowing return on equity at 14% instead of 15.5% as claimed by the appellant?

2). Whether the Commission was justified in its treatment of thermal generation units of GNDTP and other thermal power station for plant availability and incentive/disincentive on thermal generation?

3). Whether the Commission was justified in its treatment of auxiliary consumption of GNDTP?

4). Whether the Commission was justified in its treatment of interest on working capital?

5). Whether the Commission was justified in refusing interest on the loan taken for the SPVs?

6). Whether the Commission was justified in refusing employees expenses including terminal benefits actually incurred by the appellant?

7). Whether the Commission was justified in its treatment on A&G and R&M expenses for Financial Year 2008-09, 2009-2010 and 2010-2011?

8). Whether the Commission was justified in its treatment of station heat rate in respect of GGSSTP without considering the age factor of the units?

9). Whether the Commission was justified in its treatment on diversion of fund, interest and finance charges, alleged disallowance of carrying cost and interest on revenue gap?

10). Whether the Commission was justified in its treatment on T&D loss and agricultural pump set consumption?

11). Whether the Commission was justified in its treatment on power purchase cost and price of coal?

12). Whether the Commission was justified in its treatment on additional UI surcharge?

13). Whether the Commission was justified in its treatment on non-tariff income for Financial Year 2008-2009?

14). Whether the Commission was justified in its treatment on regulatory assets?

15). Whether the Commission was justified in its treatment on discount to consumers for advance payment of Bills?

11. **Issue no.1**

With respect to disallowance on return on equity, the appellant claimed Return on Equity at the rate of 15.5% (pre-tax) to be grossed up to 28.3% on the basis of Central Electricity Regulatory Commission Regulations,2009 while the Commission allowed the Return on Equity at 14% of the admitted opening equity of the appellant as on 1.4.2009 in accordance with Central Electricity Regulatory Commission Regulations'2004. Now, the question is whether the Central Electricity Regulatory Commission Regulations'2009 wherein Return on Equity has been allowed at 15.5% (pre-tax) should be allowed. The State Commission by their own Regulations, 2005, regulation 25 (1) provided that Return on Equity shall be computed on the paid up equity capital determined in accordance with regulation 24 and shall be guided by the Central Electricity Regulatory Commission Regulation, 2004 as amended by the Central Electricity Regulatory Commission from time to time. The case of the respondent is that when the tariff petition was filed in December, 2008, no doubt the Central Regulations, 2004 were invoked but the Commission passed the Order on 8.9.2009 when the Central Electricity Regulatory Commission amended their Tariff Regulations and framed Tariff Regulations, 2009in terms of which Return on Equity was to be at the rate of 15.5% and the impugned orders of the Commission ought to have been guided by the Central Electricity Regulatory Commission Regulations, 2009. This point was considered by this Tribunal in Appeal No. 76 of 2011 decided on

02.03.2012 under issue no.5 and we accordingly reproduce our finding on this point in the said appeal herein below and that will conclude our discussion on this issue in the present set of three appeals.

"39. Having heard the submissions of the learned counsel for the appellant and the State Commission it appears that the question is absolutely a legal one in as much as the question is whether return on equity shall be in terms of the regulation 21(iii) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff)Regulations, 2004 or regulation 15 of the CERC (Terms and Conditions of Tariff)Regulations,2009 and answer to this question depends on what exact legal interpretation should we attach to the regulation 25 of the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff)Regulations,2005 which deals with return on equity.

The regulation 25 of the State Regulations, 2005 in its paragraph 1 provides as follows:-
"Return on Equity shall be computed on the paid up equity capital determined in accordance with Regulation 24 and shall be guided by the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations,2004 as amended by the CERC from time to time. The same ***principle*** *will apply for distribution business also as far as possible."*

Regulation 24 of the State Commission's Regulations,2005 deals with Debt –Equity Ratio which unquestionably is the same as in the CERC Tariff Regulations,2004 and the CERC Tariff Regulations,2009.This regulation 24 is parimateria the same as in regulation 20 of the CERC Tariff Regulations,2004 and the regulation 12 of the CERC Tariff Regulations,2009. Now, regulation 21(iii) of the CERC Tariff Regulations, 2004 provides as follows:-

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

Explanation

The premium raised by the generating company while issuing share capital and investment of internal resources created out of free reserve of the generating company , if any, for the funding of the project , shall also be reckoned as paid up capital for the purpose of computing return on equity , provided such premium amount and internal resources are actually utilised for meeting the capital expenditure of the generating station and forms part of the approved financial package."
Then comes regulation 15 of the CERC Tariff Regulations,2009 which is reproduced below:_

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

(2) Return on equity shall be computed on pre-tax basis at the base rate of 15.5% to be grossed up as per clause (3) of this regulation:
Provided that in case of projects commissioned on or after 1st April, 2009, an additional return of 0.5% shall be allowed if such projects are completed within the timeline specified in Appendix II

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

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

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

(4) Rate of return on equity shall be rounded off to three decimal points and be computed as per the formula given below:
Rate of pre-tax return on equity =Base rate/(1-t)
Where t is the applicable tax rate in accordance with clause (3) of this regulation.
Illustration:-

In case of the generating company or the transmission licensee paying Minimum Alternate Tax (MAT) @ 11.33% including surcharge and cess:
Rate of return on equity =15.50/(1-0.1133)=17.481%
In case of generating company or the transmission licensee paying normal corporate tax @ 33.99% including surcharge and cess:
Rate of return on equity = 15.50/(1-0.3399)=23.481%
40. Mr. M G Ramachandran, learned Advocate for the appellant submits as follows;-

The CERC Regulations, 2009 has to be made applicable because when the impugned orders was passed the CERC Regulations, 2009 have since been in force. Section 61 of the Electricity Act, 2003 mandates a State Commission to follow the principles and methodologies specified by the Central Commission. It is not a case of incorporation in specific terms of the provisions of an earlier statute into a later statute, rather it is squarely a case of mere reference to or citation of an earlier statute into a later statute. He refers to the decisions in Collector of Customs v. NathellaSampathuChetty, AIR 1962 SC 316 and Bajaya vs. Gopikabai and another, 1978(2)SCC 542 and an authority, namely Corpus JurisSecundum on the subject. On many a issues e.g., interest on working capital the Commissioned in the impugned orders specifically followed the CERC Regulations,2009 and there is no earthly reason as to why the CERC regulations,2009 shall not be followed particularly when the State Commission in its own Regulations,2005 has not provided for any principles and methodologies.
41. The learned Advocate for the State Commission argued in the main that when the State Commission has its own Regulations,2005 it must follow its own Regulations and its own Regulations refers to the CERC Tariff Regulations,2004 to be followed by it. The learned Advocate placed this argument somewhat in elaborate terms and justifies the Commission's order holding that there was no justification in awarding higher return on equity when the performance of the licensee was no better.

42. Our understanding is that the law is not intended to be case specific and it does not recognise as to who will be the beneficiary or who willface hardship in ultimate terms. Was it the intention of the Authority making the State Regulations,2005 that it would strictly and blindly follow the CERC Regulations,2004 as amended from time to time or it intended to follow the principles and methodologies of the CERC norms which were reflected at that point of time in the CERC Regulations,2004? Before we answer the question we must remind ourselves of the fundamental law which is adumbrated in Section 61 of the Act,2003

*thus:- "The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in so doing , shall be guided by the following, namely:- a)The principles and methodologies specified by the Central Commission for determination of the tariff applicable ton generating companies and transmission licensees. **" In plain terms when a State Commission in its own regulations provides for principles and methodologies then obviously the said Commission has to follow its own regulations. But there is a rider which is that the principles and methodologies as would be provided for in the State Regulations shall be guided by the principles and methodologies specified by the Central Commission for determination of tariff. Again, when there is no existence of any State Regulations at all the State Commission is not debarred from determining tariff but in doing so it shall be guided by the principles and methodologies of the CERC. The rationale is that there must not bea dichotomy between the two laws that would have the ultimate effect of bringing about discrimination between a licensee governed by the CERC and another remaining under the jurisdiction of the State Commission. Secondly, the historical facts are that the PSERC Tariff Regulations,2005 enacted under section 61 read with section 181 of the Act (We have extracted the relevant portion of section 61) came in to force on 21.11.2005. At that point of time the CERC Tariff Regulations, 2004 which came in to effect from 1.4.2004 had already been in the shelves of the statutes. At that point of time the CERC Regulations,2009 could not be in conception. The CERC Regulations, 2009 came in to force from 1.4.2009. The impugned tariff order was passed on 09.5. 2011 i.e. a little over two years after the CERC Regulations, 2009 had been in currency. Thirdly, and by that time the principles and methodologies on return on equity have undergone change either by repeal or amendment or re-enactment (this point we will traverse a little later and the distinction is thin) of the CERC Regulations. Fourthly, in the State Regulations, 2005, no principles and methodologies were spelt out on return on equity at all. Fifthly, in consequence thereof it was provided in the regulation 25 of the State Regulations, 2005 that it will be guided by the principles of the CERC Tariff Regulations, 2004. The reference to the CERC Tariff Regulations, 2004 had no special significance except that at that time itwas the CERC Regulations,2004 that was alone in vogue so that it had no other alternative than laying down so. Sixthly, it must not be missed that the CERC Tariff Regulations,2004 relates to determination of tariff for the period from FY 2004 -05 to FY 2008 -09,and the CERC Tariff Regulations,2009 relates to determination of tariff from the FY 2009-10 to FY 2013-14. The impugned tariff order of the State Commission relates to the period from 01.04.2011 to*

31.03.2012. Seventhly, during the period from 01.04.2011 to 31.03.2012 the CERC Tariff Regulations, 2004 suffered from nihilism so that it could not be made applicable more particularly when re-enactment replaced the earlier one by that time. Eighthly, given a thorough reading of the entire State Regulations, 2005 it gives out that on issues in plurality it will follow the norms, principles and methodologies of the CERC Regulations. Ninthly, in legal parlance the following of the CERC norms, principles and methodologies means those norms, principles and methodologies as would be reflected through a Regulations in force at a given point of time. Tenthly, by way of example, in the matter of interest on working capital it specifically followed the CERC Regulations, 2009 and it preferred not to follow the CERC Regulations, 2004. In the matter of O & M expenses it followed the CERC norms as far as possible as it is so laid down in its own Regulations. Eleventh, and this is important, the impugned orders did never say that legally it is bound by the Central Electricity Regulatory Commission Regulations, 2004 and if it had said so we would have no difficulty in understanding its mind or intention. It is not their order that they would not follow the CERC Regulations, 2009 although it was determining tariff for the FY 2011-12. It is not their case that as its own Regulations speak that it would be guided by the CERC Regulations,2004 it would follow the same, no matter whether the said Regulations had in fact been repealed and a new enactment did come into being. The order simply says that in the past it allowed return on equity @ 14% and the Commission finds no justification for allowing return on equity at a higher rate. It does not say anything more. It only says that the appellant has been unable to effect requisite improvements in critical performance parameters. It does not speak of any law. It is only the learned Counsel through whom supplementary is sought to be introduced. We are unable to accept the same. It is not difficult for us to decipher the intention of the law making body which is in this case the State Commission. Tariff determination is a quasi-legislative function exercisable by the State Commission which again discharges its legislative function in framing its Regulations. If it was the intention of the State Commission that it was bound to follow the CERC Regulations, 2004 it could have said so and there would have been the end of the matter. Twelfth, it cannot be the legal proposition that the CERC Regulations, 2004 and the CERC Regulations, 2009 are two different living laws both being applicableaccording to marriage of convenience because the former expressly says that it will live for five years and when the impugned orders was passed it got eclipsed by its successor, whether one calls the later to be amendment or re-enactment. Thirteenth, there is plethora of case laws on interpretation of statutes that deal with two sorts of distinction. One distinction is drawn between

incorporation and a mere reference of an earlier Act into a later Act. The second sort of distinction occurs when what is referred to is not an earlier Act or any provision from it but law on subject in general. In Collector of Customs (ibid) it has been ruled that the distinction is between "a mere reference to or a citation of one statute in another and an incorporation which in effect means the bodily lifting of the provisions of one enactment and making it part of another so much so that the repeal of the former leaves the latter wholly untouched." Bajaya (ibid) refers to Sutherland: A statute which refers to the law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted. This is nearer to our point. In the case of incorporation any change in the incorporated statute by way of amendment or repeal has no repercussion on the incorporating statute. In a case of reference or citation a modification or repeal or re-enactment that is referred will also have effect for the statute in which it is referred. Ours is not a case of incorporation, for the words ' shall be guided by the CERC Tariff Regulations,2004 as amended from time to time ' cannot be construed to be a case of 'bodily lifting'. It means, in absence of its own regulations clearly specifying its own norms, methodologies and principles it will follow the CERC Regulations, 2004 as amended from time to time. 'As amended from time to time' does not merely mean that it would admit only of those amendments as would be brought out only in 2004 Regulations. The intention of the framers was that it in absence of its proper regulation would continue to follow the CERC Regulations as would be available from time to time. Any other interpretation would defeat the very purpose of the law. Fourteenth, as laid down in Maharashtra State Road Transport Corporation vs. State of Maharashtra, AIR2003SC1909, ultimately it is a matter of probe into legislative intention and / or taking an insight into the working of the enactment if or the other view is adopted. The doctrinaire approach is directed towards that end. The provisions of section 61, the National Tariff Policy which is consistent with the Act, the overall impression created on close reading of the State Regulations, 2005, its treatment in the impugned orders, reliance upon the CERC Regulations, 2009 at times, the legislative history, non- application of the doctrine of the bodily lifting all taken together would point out that regulation 15 of the CERC Regulations,2009 would be applicable on the question on return onequity. Fifteenth, and last but not the least, the argument that the CERC Regulations,2009 is not an amendment of the Regulations,2004 but is altogether a new law pales into insignificance and can be answered with reference to section 8(1) the General Clauses Act,1897 thus: "Where this Act, or any central Act or Regulation made

after the commencement of this Act, repeals and re-enacts, with or without modification , any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted." In the conspectus of the case the re-enactment after repeal cannot be called to be qualitatively different from amendment. Sutherland in his Statutory Construction has observed that the distinction between repeal and amendment as these terms are used by courts is arbitrary though the distinction is followed.

43. So far, we have covered one aspect of the matter. Given the language employed in Regulation 25 of the State Regulations, 2005 we have held that the principles adopted in Regulation 25 was in the light of the regulation 21 (iii) of the CERC Regulations, 2004 and with the change of the Regulations of the CERC, the CERC Regulations, 2009, will apply. This is regulation 15 of the CERC Regulations, 2009. There is a rider in this that CERC Regulations, 2004 which deals with return onequity (regulation 21 (iii)) is intrinsically related to regulation 7 dealing with tax on income. In the State Regulations similar provision has been made in Regulation 32. Since regulation 25 of the State Regulations speaks of being guided by the Central Regulations as amended from time to time and as the CERC has framed new Regulation in 2009 (regulation 15), the said regulation 15 which is applicable in the instant case shall be applied sans the regulation 7 of the Central Regulation, 2004 inasmuch as regulation 15 of the CERC Regulations, 2009 has abolished the provision of regulation 7 of the CERC Regulations, 2004 and there cannot be double advantage accruable to a transmission company who is of course entitled to the benefit of the CERC Regulations, 2009 (regulation 15). Once we hold that regulation 15 of the CERC Regulations, 2009 will become applicable it is implied as also it becomes explicit that tax on income cannot be a pass through to the beneficiaries. Regulation 15 of the CERC Regulations, 2009 has spoken so in express language so that there cannot be any misapprehension on the question of application of regulation 7 of the CERC Regulations, 2004 or regulation 32 of the State Regulations, 2005. A question may arise as to why then regulation 25 read with regulation 32 of the State Regulations, 2005 should not be applied. Answer is twofold, namely,:a) Analysis of regulation 25 of the State Regulations, 2005 as made above makes it clear that it was the intention of the Authority that passed the order impugned to follow the CERC Regulations, 2009. The State Commission was quite conscious of the necessity of following the norms, principles and methodologies enunciated by the CERC. The

norms, principles and methodologies must be such as are prevalent at a given point of time.
b) It is also the settled position of law that if two interpretations are possible then the interpretation which is beneficial to the subject should be accepted."

Accordingly, we decide the issue in favour of the appellant.

12. **<u>Issue no 2.</u>**

On the issue relating to thermal generation of GNDTP operated by the erstwhile Board, the State Commission has fixed the plant availability at 81.37% and the Board proposed 77.49% on the ground that at least one unit at the said station would be under planned outage for renovation and modernisation for 333 days during the tariff period 2009-10. According to the appellant, the Commission did not accept the contention of the Board to fix the plant availability of the Board's other thermal generating power stations at 85% which was provided under Regulation 26 of the Central Electricity Regulatory Commission Tariff Regulations, 2009 where it has been held that the normative annual plant availability factor for all thermal generating stations would be 85% except five plants as mentioned in that Regulation 26 of the Central Electricity Regulatory Commission Tariff Regulations, 2009. Based on the Central Electricity Regulatory Commission Tariff Regulations, 2009, the erstwhile Board approached the State Commission to approve the plant availability factor for the Board's thermal generating stations at 85% but the Commission prescribed plant availability factor at the average actual achieved by the thermal generating stations over the last three years instead of following the above norm. According to the Commission, the erstwhile Board had projected Plant Load Factor of GNDTP for 2009-10 at 74.57% in the Aggregate Revenue Requirement

and then the Board intimated that the GNDTP units would be under renovation and modernization stage and thereafter the Commission based on the maintenance schedule and excluding the forced outages for the Financial Year 2009-10 calculated the Plant Load Factor at 81.37%. According to the Commission, the fact of intimating the revised maintenance schedule of GNDTP units has not been brought out in the Review Petition filed by the appellant before the Tribunal. According to the Commission, it had been allowing the incentive / disincentive with reference to the generation approved for the year depending upon the annual maintenance schedule of thermal power plants and on average of previous three years' Plant Load Factor generation with no penalty having been imposed when achievement of Plant Load Factor was less than 85%.

Having heard Learned Advocates for the parties, we refer to Regulation 20 of the PSERC Tariff Regulations, 2005 which provides as follows:-

"*While determining the cost of generation of each thermal / that/hydroelectric generating stations located within the State, the Commission shall be guided, as feasible, by the principles and methodology of the Central Electricity Regulatory Commission, as amended from time to time*"

The Central Commission in the Central Electricity Regulatory Commission Tariff Regulations, 2009 has provided as under in Regulation 26 –

"*The norms of operation as given hereunder shall apply to thermal generating stations.*

(i) Normative Annual Plant Availability Factor (NAPAS)

(ii) All Thermal Generating Stations, except those covered under clauses (b), (c), (d) & (e) and (f)…85% "

It appears that in terms of the Regulations of the State Commission the principles and methodologies of the Central Electricity Regulatory Commission as was prevalent at the time when the State Commission enacted their own Regulations and as would be amended from time to time would be followed by the State Commission as far as possible. The words 'as feasible' as referred to in the State Commission Regulations' admits of deviation when it would become impossible for the State Commission on objectivity of facts and also on principles to follow the Central Electricity Regulatory Commission norms but when there would arise no difficulty in following the Central Electricity Regulatory Commission principles and methodologies, the State Commission in deviation of its own Regulations cannot adopt a procedure which has not been sanctioned in its own Regulations. The Commission, it appears, disallowed an amount of Rs.96.29 crores on account of under achievement of target generation approved for the year 2008-09 and this disallowance partook of the character of disincentive. No matter whether whatever has been the practice of the Commission in the previous years, the Tribunal would insist that when there is a Regulation of the State Commission and when that Regulation provides for following the Central Electricity Regulatory Commission's principles and methodologies, there is no question of providing incentive or disincentive and the Commission was therefore required to provide for target availability at 80% for the generating stations of the appellant for the Financial Year 2008-09 in terms of Central Electricity Regulatory Commission Regulations, 2004. The matter of the fact is that in the said year 2008-09, the target availability achieved was 80% or more but

was less than the target fixed in the tariff order which appears to be not in conformity with the Regulations concerned. It appears that the State Commission has taken the target availability based on the average availability / generation achieved by the appellant in the past three years and not in terms of the norms as provided for in the Tariff Regulations. For projecting the energy availability from own thermal power stations during the tariff year the State Commission can make the assessment based on average Plant Load Factor / availability for the past three years and the planned maintenance schedule during the tariff year for which Aggregate Revenue Requirement is being decided. However, for the purpose of tariff, the target plant availability as per the Central Commission's Regulations has to be considered. It may be mentioned in this connection that in the case Punjab State Transmission Corporation vs. PSERC, it has been held that when the provisions of the Tariff Regulations of the Central Commission have been incorporated by reference in the Tariff Regulations of the State Commission, the same is required to be followed and cannot be ignored by the State Commission. Accordingly, there is merit in the contention of the appellant and the Commission is required to revisit this issue.

13**.** **Issue No. 3**

In the memorandum of the appeal No. 7 of 2011it has been contended that the Commission committed error in fixing the auxiliary consumption of the Bhatinda station at 10.22% as against the claim of the Board that it should be fixed at 12%. According to the Appellant, the age of the station, the size of the units of the station and the characteristics of the units of the station being similar of the Tanda

station were not considered by the Commission. The Commission also did not consider that the Central Commission allows auxiliary consumption of the Tanda Station at 12%. It is further contended that the Commission failed to appreciate that the figures of the auxiliary consumption submitted to it by the Board was inclusive of the losses in generator transformer, unit auxiliary transformers, station transformers, excitation power, BCW system and cooling water system based on the system followed by the NTPC Ltd. in calculating the auxiliary consumption of the Tanda station. The Commission has revised the auxiliary consumption at 10.22% for GNDTP units 1 and 2 for the year 2008-2009 and 2009-2010 in the Tariff Order for Financial Year 2009-2010 after reducing 1.78% (0.95%+0.83%) from the norm of 12% fixed by the Central Electricity Regulatory Commission for the Tanda Thermal Station. Then the Commission observed that reduction of 0.95% would be inappropriate and then it retained the deduction of 0.83% and then observed that auxiliary consumption for GNDTP unit 1 and 2 would work out to 11.17% but Commission did not allow auxiliary consumption after R&M works of unit 1 and 2 which is in excess of pre-R&M Value Commission concluded that the auxiliary consumption in unit 1 and 2 is less than 11% and that for unit 3 and 4 it is in excess thereof the Commission compositely determined auxiliary consumption for all the four units of GNDTP at 11% for the year 2008-2009 and 2009-2010. It appears to us that the Commission is not oblivious of the provisions of the Central Electricity Regulatory Commission Regulations. It is established that the Central Electricity Regulatory Commission Tariff Regulations, 2009 has provided auxiliary consumption at 12%. If the circumstances applicable to Tanda Stations are applicable to and are not different from GNDTP units then there will be not too much of rationale in deviation from the Central Electricity Regulatory Commission

norms. It appears that in the Tariff order dated 8.9.2009 the Commission in respect of GNDTP units 1 and 2 intended to adopt and apply the norms of the Central Electricity Regulatory Commission Tariff Regulations 2009 although it took the figure at 10.22% after discounting for higher auxiliary consumption at Tanda on account of three staged pumping and bearing cooling water system (0.83%) and losses in generator transformer, unit auxiliary transformers, station transformers and excitation power (0.95%). According to the appellant, the position at GNDTP is also the same as Tanda. If that is so, then the issue would require re-examination. Accordingly, we are of the opinion that the State Commission should examine the issue taking into account the Regulations, 2009 of the Central Commission and the submissions of the appellant. We, therefore, direct the State Commission to pass appropriate order in the light of the above discussion.

14**. <u>Issue No.4</u>**

On this issue, there does not appear to be any *lis* because the State Commission allowed the appellant interest on working capital as per the revised formula notified by the Commission for the year 2009-10 and it allowed fuel cost of two months and cost of maintenance spares for one month for the year 2009-10. The above amendment in the formula for calculation of interest on working capital was made on the basis of the submission of the appellant but now the appellant claims that the revised formula /norms should also be applied for in respect of the year 2007-08 and 2008-09 for which truing up was done by the Commission. The appellant does not appear to be correct in its approach because the amended Regulations came into effect from

27.7.2009 which cannot be applied retrospectively. Therefore, the Commission correctly allowed working capital and interest on working capital on the basis of the amended Regulations for the year 2009-10 but rightly not in the true up proceedings for the year 2007-08 and 2008-09 in the Tariff Order for 2009-10 as claimed by the appellant. The issue is decided accordingly.

15**. Issue No.5**

According to the appellant, the State Commission disallowed the interest cost on the loans taken by the appellant on behalf of the SPV such as Talwandi Sabo Power Ltd., Nabha Power Ltd., Gidderbaha Power Ltd. etc. for the year 2007-08. These projects were, of course, later transferred to third parties but were created by the appellant and it raised loan for these plants. According to the appellant, interest that is carried on the loans is included in the non-tariff income and the appellant claimed interest payable on the loans as an expenditure. Therefore, the interest income received from the SPVs was included in the income of the appellant. For the year 2007-08, the appellant received an income of Rs.5.72 crores from the SPVs which was included in its non-tariff income. The Commission's reasoning was that the interest was to be recovered by the appellant from the SPVs and not from the consumers. In the Review Petition, the appellant provided the specific entry allegedly in the audited accounts of the appellant for the year 2007-08 as 5.72 crores. According to the appellant, it provided the specific entry and account code in support of its contention but the Commission did not consider it.

According to the Commission, during processing of the Aggregate Revenue Requirement for the year 2009-10, in order to verify the claim of PSERB/Successor Entity PSPCL, an examination of Format 16 annexed to Aggregate Revenue Requirement for 2009-10 which details 'Interest and Finance Charges' was made. This format showed interest charges of Rs.1.16 crore on account of loans to TSPL. This amount was disallowed by the Commission since execution of Talwandi Sabo Project was being done by TSPL on Build Own Operate (BOO) basis and such outlays do not form a part of the Investment Plan of PSEB/Successor Entity PSPCL. Maintaining consistency of principle, the Commission did not take into account these interest charges, being interest on loans taken for a company which is executing a project for PSEB on BOO basis, while determining Aggregate Revenue Requirement for the year 2009-10. As there was no change in the factual position on this account, the Commission found no reason to reconsider its decision taken on this issue while determining Aggregate Revenue Requirement for the year 2009-10 in the Tariff Order of 2009-10. Further, the appellant stated that interest income of Rs.5,72,24,573 recovered from these SPV's has been accounted for under Accounted Code 62.280 forming a part of 'other income' of PSEB/Successor Entity for the year 2007-08. PSEB/Successor Entity had pleaded that since this interest income stood accounted for in its non-tariff income, there was no reason to disallow interest paid by PSEB/Successor Entity in raising the loans. Thus, according to the appellant, the State Commission has on the one hand disallowed the interest on loan taken on behalf of the SPVs while at the same time, it included the interest income of Rs.46.22 crores received from these SPVs on such loan as non-tariff income of the appellant for 2008-09 and in respect of the year 2009-10, the

Commission included the interest income of about Rs.50 crore received from the SPVs.

PSEB/Successor Entity's claim that recovery of interest income from TSPL and NPL was reflected in the non-tariff income had also been scrutinized and found wanting. The Commission observes that Schedule 5 of the Statement of Accounts of PSEB/Successor Entity for the year 2007-08 pertained to other income. Account Code 62.280 which is meant for accounting of interest income on fixed deposits and other investments of PSEB/Successor Entity depicted an amount of Rs.6,14,59,097which formed part of total other income of PSEB/Successor Entity. PSEB/Successor Entity's claim that this amount was inclusive of recovery of interest income of Rs 5 crore from TSPL and Rs.0.72 crore from NPL for the year 2007-08 was not substantiated by the appellant with any documentary evidence. A perusal of Schedule 5 of the accounts did not show any receipt of interest from TSPL and NPL. Moreover, Format-15 annexed to the Aggregate Revenue Requirement of PSEB/Successor Entity for the year 2009-10 did not make mention of any loan for Nabha Power Ltd.(NPL) whereas PSEB/Successor Entity claimed a recovery of interest of 0.72 crore from NPL during the year 2007-08. On the other hand, Format 16 of the Aggregate Revenue Requirement showed a recovery on an amount of Rs.5.72 crore on account of TSPL and NPL but did not indicate that this amount stood credited to no-tariff income of PSEB/Successor Entity. It is more than evident that the complete picture of loans raised on behalf of the SPVs, the interest paid/payable thereon and the recovery effected from these SPVs and credited into the accounts of the Board (PSEB) was not made available to the Commission and therefore, the Commission was left with no alternative

but to conclude that there was insufficient documentary evidence to substantiate the claim of PSEB/Successor Entity.

As the Commission concluded that the appellant provided incomplete picture of loans raised on behalf of the SPVs, the interest paid or payable thereon and also the recovery effected from these SPVs and credited to the accounts of the appellant we direct that the Commission shall re-examine the issue and pass appropriate order only when to the satisfaction of the Commission, the appellant would be able to provide with the Commission with all the details as the Commission would be wanting for consideration of the matter in details.

16**. Issue No.6**

For the Financial Year 2009-10, the Board projected net employees cost of Rs.3454.68 crore, in respect of the Financial Year 2008-09 the revised estimate was Rs.2243.60 crore, and the actual amount for the year 2007-08 was Rs.2035.41 crore. Provisionally or 'for the time being', the Commission approved Rs.1856.60 crore for 2009-10. According to the Commission, as per Regulation 28 (4) of the PSERC Regulation, 2005, employees cost which is part of O&M expenses shall be determined on the basis of Wholesale Price Index of the relevant year. Although regulation 28 (3) ofthe Tariff Regulations2005,provides that the Commission shall be guided as far as feasible by the principles and methodologies of the Central Electricity Regulatory Commission Regulations, 2004 as amended from time to time, according to the Commission, the Central Electricity Regulatory Commission Regulations mainly related to inter-state transmission of

higher quantum of energy and an extra high voltage over long distances which is not applicable to the State Commission.

According to the appellant, the Commission reduced the employees cost of the appellant for the year 2009-10 and 2010-11 by 28.48% even for the implementation of the Sixth Pay Recommendations and the pay revision to the employees on the ground that the employees cost allowed previously was 28.48 % claimed by the Board and the Commission further disallowed a sum of Rs.100 crore for the year 2010-11 on the ground that the appellant has not drawn up a road map for revising the staff strength. The appellant contends that a preliminary report has been submitted ordinarily by the appellant for the above purpose and the appellant has been taking prompt action to reduce the employees cost and when there has been increase in the efficiency the employees cost cannot be decreased by the Commission.

This point came up for consideration in Appeal no.76 of 2011 decided on 2.3.2012 and in that case the appellant was one of the successor entities of the erstwhile Punjab State Electricity Board and accordingly the reasoning assigned on account of that issue is equally applicable to this Appeal. It appears that the Commission amended its own Tariff Regulations to provide a two part consideration of employees cost namely a) terminal benefits to the retired employees; and b) other employees cost. For the year 2009-10, the Commission computed the terminal benefits at Rs.737.43 crore in accordance with the Regulations but again after such computation reduced the total employees cost including terminal benefits on the ground that the appellant needed to revise its manpower requirement and reduce the employees cost. In our view, the approach is not sound particularly when Regulations have been framed. In this connection, reference may be made to the decision

of the Supreme Court in West Bengal Electricity Regulatory Commission Vs. Central Electricity Regulatory Commission Ltd.(2002) 8 SCC 715 wherein it has been held that when the utility needs to comply with the lawful agreements entered into with the employees the same cannot be avoided and wriggled out. Now, we quote our observation in appeal no.76 of 2011 as follows:-

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

28. Operation and Maintenance Expenses

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

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

(3) While determining the O&M expenses for transmission functions within the State, the Commission shall be guided, as far as feasible by the principles and methodologies specified by CERC on the matter, as amended from time to time. However, in such determination, the Commission will keep in mind the fact that the CERC regulations mainly relate to inter-state transmission of higher quantum of energy and on extra high voltage over long distances, whereas, the transmission tariff to be determined by the Commission will be relating to intra-state transmission of lower quantum of energy at relatively lower voltages and over short distances.

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

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

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

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

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

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

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

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

distance. The Sub Regulation further provides that the principles and methodologies specified by the CERC shall be followed as far as feasible. Overnight it might not have been possible for the State Commission to lay down its own provision in respect of the O&M expenses for the transmission utility. It was convenient for the Commission to apportion the expenses between the employees attached to distribution business and those attached to the transmission business. It is the grievance of the appellant that while it projected for transmission business a sum of Rs. 268.31 crore the Commission approved 162.82 crore. Now, the appellant also while projecting a sum of Rs. 268.31crore took into consideration an overall average increase of 9.79% over the employees expenses for the FY 2010-11 and the said amount was inclusive of Rs. 21.81 crore as pay arrear. It appears that so far as the SLDC business is concerned there is not so much of variation in respect of employees cost for FY 2011-12 in so far the employees cost is concerned and such variation has been on account of apportionment. Now, the Commission has its own rationale in approving in the ARR for FY 2011-12 a sum of Rs. 162.82 crore because it took into consideration of the fact that the appellant has to pay 40% of the total areas amounting to Rs. 35.49 crore (including SLDC) in FY 2011-12.As per the projection of appellant of the itself, the terminal benefits including pension payment for transmission utility for FY 2011-12 are in the sum of Rs. 32.83 crore which was allowed as was prayed for. Excluding the sum of Rs. 21.81 crore as was originally projected as pay arrear the amount claimed by the appellant for FY 2011-12 was Rs. 213.67 crore, and as earlier noted this figure was reached after increase at random of 8.79% over employees expenses for FY 2010-11. It is important to note that against the tariff order dated 23rd April 2010, that related to the FY 2010 -11 neither the PSEB nor its successor entity preferred in appeal. The appeal against the order dated 23rd April 2010 was preferred by an industrial consumer and the Government of Punjab which have been separately dealt with. While we could advise the Commission to amend its Tariff Regulations and specify normative O&M expenses in line with the Central Commission's Regulations so far as the transmission utility is concerned we cannot find too much fault when the Commission fixed a sum of Rs. 105.04 crore in respect of other employees expenses for transmission utility because for the FY- 2010-11 the Commission approved Rs. 99 crore upon which by applying average annual increase in WPI of 8.91% and after deducting Rs. 2.55crore for SLDC business the Commission reached a figure 105.04 crore, but we do not find any logic behind reducing the arrear pay of Rs.35.49 crore by 28.48%. The Commission's reasoning that in the past

it has been reducing the figure by the said percentage is no ground for maintaining that reduction particularly when the appellant is now a separate entity and as per the Government of Punjab notification the crore. The matter of the fact is that the appellant, it being a new entity, projected all its figures provisionally. The transfer of assets and liabilities of the bifurcated entities are yet to be finalized. There is ample scope for review and true up. Therefore, subject to review as it may happen after the expiry of the current financial year 2011-12 which will happen only after a little over two months the Commission therefore, will re-examine the matter and pass appropriate order"

For the year 2009-2010 the Commission considered an increase of 5% on the base of the employee's expenses for the year 2008-2009 but allegedly did not consider the actual employees cost. For Financial Year 2010-2011 and for Financial Year 2011-2012the normative basis by applying Wholesale Price Index of 7.55% and 8.9% respectively was adopted. A sum of Rs.93.31 Crore as was claimed by the appellant was disallowed by the Commission. Non-allowance of whatever was actually spent without prudence check by the Commission is certainly not desirable. The Commission took the stand that it fails to draw up a road maps for rationalisation of man power. It is alleged by the appellant that the Commission considered the old pay scales and did not consider the additional impact on pay revision. In Appeal No. 76 of 2011 we did not approve of blanket reduction 28.48% in all the successive of the years without any reason. In the case of the employees of the PSPCL, they are regular staff of the Corporation and it being a Govt. company, they are to be governed by the rules and regulations of the Govt. We find merit in the submission of Mr. Ganeshan as he read out the West Bengal decision. Reduction of Rs. 100 crores does not appear to be based on specific premises. Again, reduction as usual on regular basis in terms of the practice of the past by 28.48 % does not appear to be justified. Our finding on this issue is the same plus the observation that

in course of true up in respect of the tariff order for 2011-2012 the Commission will review the matter. The issue is answered in favour of the appellant.

17. **Issue No.7**

On this issue, Commission followed the Regulation 28 of the State Regulations 2005, and it provides for adjusting A&G expenses for the previous years according to average variation in Wholesale Price Index over the year to determine the O&M expenses for the subsequent year. The Commission adheres to the principle of consideration of actual cost while the appellant claims normative consideration. Both the parties relied on Regulation 28 (4) and based on that the Commission for the Financial Year 2008-09 had allowed A&G expenses at Rs.78.44 crores. This appears to be on normative basis but subsequently the Commission proceeded to adjust the same against the actual at Rs.70.96 crore. Consequently, the State Commission has reworked the A&G expenses for the year 2009-10 and 2010-11 at Rs.75.95 crore and Rs.79.95 crore respectively as against the normative expenses of Rs.82.06 crores and Rs.82.78 crore respectively. For R&M expenses, for the year 2009-10, the Commission reduced the expenses to Rs.385.93 from Rs.394.03 which was earlier allowed for the year 2009-10 on normative basis. In true up for the year 2009-10 the Commission fixed the R&M expenses at Rs.378.16 crore as against the normative allowable expenses at Rs.391.26crore, argues the appellant.The State Commission also reworked the R&M expenses for the year 2010-11 at Rs.400.73 crores as against the normative expenses of Rs.408.83

crores respectively. According to the appellant, once the normative approach has been adopted by the Commission, there cannot be any further adjustment on the basis of the actual expenses on account of it being less. When the State Regulations make a provision on this issue no different norm does call for any consideration. The Tariff Regulations, 2005 provided for determination of O&M expenses on normative basis considering the expenses for the year 2005-2006 as the base year with application of escalation factor and this was applied for in the year 2008-2009 but in the impugned orders actuals have been provided for and on the basis of the actuals A&G expenses and R&M expenses were reworked out. In this connection, reference has been made to the decision in Haryana Power Generation Corporation Ltd. Vs. Haryana Electricity Regulatory Commission & Another (Appeals No.42 &43 of 2008 dated 31.07.2009) and NTPC Ltd. Vs. Central Electricity Regulatory Commission &Ors., 2007 ELR APTEL 828. When once norms as per the Regulations were followed it should be followed so far as the Regulations remainunaltered. Regulation 10 of the Tariff Regulations, 2005 specifically provides for the manner in which the under achievement and over achievement of the normative parameters are to be adjusted. In respect of the tariff order for Financial Year 2011-12 the Commission in respect of the R&M expenses allegedly did not allow Rs.38.52crores. Since the true-up for this period is yet to come the Commission will have re-look into the matter according to the Regulations in vogue. We, therefore, direct the Commission to re-examine the point and pass appropriate order according tothe law.

18. **Issue No.8**

The State Commission fixed the Station Heat Rate of Guru Gobind Singh Super Thermal Plant (GGSSTP), Ropar at 2500 Kcal/Kwh for the year 2007-08,2008-09 and 2009-10, while the appellant proposed a rate at 2700 Kcal/Kwh on the basis of the performance of the Ropar Station. The appellant contends that the Ropar Station was 25 year old and its performance cannot be attributed to any fault of the appellant.

The Commission, in its Tariff Order for the year 2009-10 referred to the technical standards and operational norms of the Central Electricity Regulatory Commission which were based on the recommendations of Central Electricity Authority which appointed a Committee. The Committee recommended operational norms for thermal generating unit ranging in size from 210 to 500 MW which have by and large been adopted by the Central Electricity Regulatory Commission. According to the Central Electricity Authority, deviation of operating heat rate showed no co-relation to age or make of the units and that old units from some of the utilities have exhibited very low deviation. The norms of the Central Electricity Regulatory Commission apply to all the central generating stations irrespective of age. The appellant at the time of processing Aggregate Revenue Requirement for Financial Year 2011-12 has intimated that for Station Heat Rate study of thermal unit of GGSSTP they have decided to appoint Central Power Research Institute, Bangalore as consultant. The Commission observed in the tariff order for the year in question that allowance of higher Station Heat Rate for GGSSTP will be considered after receipt of study report of CPRI in the matter of Station Heat Rate. In the Impugned orders the Commission observed that the Commission was not convinced of the need for undertaking another study and was inclined to

go by the Central Electricity Regulatory Commission norms which have been adopted on the basis of a detailed study undertaken of the plants similar in most respect to those of the Board. But in the tariff order for the year 2011-2012 the Commission has reviewed the matter and in respect of the GNDTP units 3 and 4 the Commission decided to continue with Station Heat Rate of 3000 Kcal/Kwh. According to the Commission, since the Central Electricity Regulatory Commission has not specified any norm for 110 MW units the Commission decided to allow Station Heat Rate of 2825 Kcal/Kwh for the GNDTP units 1 and 2 based on the Central Electricity Regulatory Commission norms for Tanda TPS. However, the Commission concluded that as regards the higher Station Heat Rate of GGSSTP it will consider after receipt of study report of CPRI. There is, however, no reason to differ from the view taken by the Central Electricity Regulatory Commission and as Tanda TPS and GGSSTP or GNDTP do not stand on different footing the Commission cannot be faulted with the finding made by it accordingly.

19. **Issue No.9**

The Commission disallowed finance charges for the year 2008-09 to the extent of Rs.17.04 crore on the alleged ground that the appellant claimed higher finance charges without providing for any justification. Now, the appellant contends that it had no control over the finance charges which were in the nature of arranger fees, guarantee fee and other finance charges charged by the banks and other financial institutions, and finance charges cannot be allowed on normative basis. The Commission observed that it correctly disallowed a sum of Rs.100 crores for the year 2009-10,Rs.89.70 crores for the year 2010-11, and

Rs. 88.78 crores for 2011-12 towards interest cost incurred for the reason that there was diversion of funds. The appellant claimed that it had to resort to diversion of capital funds for revenue expenditure as the Govt. had not paid any subsidy. We find that the aspect on diversion of funds was already dealt with by this Tribunal and decided in Appeal nos.5 of 2008, 66 of 2008 and 57 of 2008, but so far as interest and finance charges are concerned, if the appellant has really provided the detailed information month-wise and year wise, there may be scope for the Commission to consider the same but only according to the law. In the Tariff Order for the FY 2009-2010 the Commission approved Finance Charges of Rs. 5.19 crore for the year 2008-2009. In the Aggregate Revenue Requirement of 2010-2011 the Board claimed finance charges of Rs. 22.23 crore. The State Commission has also disallowed the interest of Rs.644.03 lakh paid by the appellant towards short-term loans taken for its working capital requirements and restricted the same to Rs.196.86 crores on normative basis of allowing working capital for the year 2009-10.

The State Commission has similarly restricted the interest on working capital for the subsequent years 2010-11 and 2011-12. The appellant had prayed for allowing the interest on such working capital loans as the same were required to be taken by the appellant for meeting its costs and expenses and deficit in the revenues. Now, as we have found earlier, interest on working capital has been determined as per the Regulations concerned then no review shall be necessary because Regulation30(4) of the Regulations, 2005 provides that the interest on working capital will be normative notwithstanding the actual interest becomes excess or less than the normative interest. This point we have already covered under Issue No. 4, and it has been found that

the Commission followed the revised formula, notified by the Commission for the year 2009-10.

As regards the carrying cost, it is the claim of the appellant that the particulars have been given for the year 2007-08 and 2008-09 but the Commission did not allow carrying cost for the entire revenue gap for the period from 2006-07 to 2009-10 but held that the appellant was entitled to carrying cost for the revenue gap for the year 2008-09 and 2009-10. The Commission held that a maximum period for which carrying cost will be allowed is two years in the case of a gap created during true-up and one year in the case of review and as such the appellant was entitled to have carrying cost only for the gaps of 2008-09 and 2009-10 in the Tariff Order of 2010-11. Now, the fact is that the Commission found a revenue gap for the year 2006-07 and 2007-08 in the true-up exercise which has not been recouped in the tariff for the ensuing year. The cumulative revenue gap, on the other hand, including the gap for the year 2008-09 has been carried forward to the next year. When total deficit comes to Rs.1230.63 crore, the Commission is said to have allowed a carrying cost of Rs.73.66 crores. Carrying cost is normally required to be allowed for late recovery of the revenue requirements and the purpose of carrying costs is to compensate the utility for the revenue requirements that fell short of recovery but to be recovered in future. Therefore, revenue requirements cannot be restricted to a period of two years unless of course the appellant itself is responsible for late submission of true-up petition. In this connection we may conveniently refer to the findings made by us in the Appeal Nos.202& 203 of 2012 which we reproduce below in italics:-

‘’10. The second issue is regarding carrying cost ondeferred recovery.

10.1 This issue pertains to Appeal no. 202 of 2010.

10.2 This issue has already been decided by the Tribunal in its judgment dated 31.8.2012 in Appeal nos. 17, 18 and 19 of 2011 in the matter of Tata Power Company Limited Vs. MERC. The relevant extracts of the judgment are reproduced below:

"26 Issue No.9 According to the Commission due to inadvertence this issue was not properly appreciated and submitted that the effect of thesame would be passed through in the next tariff order. According to the appellant, even after the agreed position as evident from the Counter Affidavit, the MERC has failed to give effect to thecarrying cost on deferred payment in the next tariff order also, i.e. the tariff order passed by the MERC on 15.02.2012 (Tata Power-G and Tata Power-D and 14.02.2012 (Tata Power-T). Such denial is on the premise that carrying cost on disallowed amounts is to only to be provided when the recovery of the amounts is deferred by the MERC or the claim is not approved within reasonable time. This is in contravention of the principles laid downby this Tribunal which provides that the appellant is entitled to carrying cost on its deferred recoveries. The Appellant in its Appeal74/175 of 2009 had submitted that the Appellant is entitled to the carrying costs on deferred payments (Gap/surplus of previous yearcarried forward to the next tariff periods). The MERC ought to have implemented the same as it has been implemented in the past. It cannot apply a new philosophy for interpreting the meaning of the term 'deferred' to deny legitimate entitlementsto the Appellant. It is submitted that carrying cost for the deferred legitimate payments (Gap/Surplus of previous year carried forward to the next tariff periods) would accrue from the end of the respective financial year up till the amount is actually

recovered through tariff payments in the subsequent years. This point was decided by this Tribunal in Appeal no.173 of 2009 as follows:-

"9. The first issue is denial of carrying cost. According to the Appellant disallowance of recovery of carrying cost of Rs. 137 crores on the ground that the carrying cost was not prayed in Appeal No. 60/07 and in the judgment dated 12.05.2008 in the said Appeal, the Tribunal has not given any specific finding about the carrying cost is quite incorrect. It is pointed out that the State Commission has misinterpreted the said judgment and did not appreciate the submissions made by the Appellant before the Tribunal. Similarly, it is wrong on the part of the State Commission to state that the Appellant would be entitled to the carrying cost only on cash component and not on book adjustment.

10. In the petition filed by the Appellant for ARR for FY 2008-09 and for tariff determination for the FY 2009-10, the Appellant mentioned that the cost allowed by the Tribunal by the order dated 12.05.2008 can only be recovered in FY 2009-10 and since cost pertain to FY 2004-05 and 2005-06, th interest for 3 to 4 years would accrue and the Appellant would be entitled to the said interest. It is also noticed from the Appeal filed before the Tribunal in Appeal No. 60/07, it is specifically mentioned that denial of legitimate expenses and assured reasonable return is unjust and the aforesaid unjust denial of legitimate expenses and assured reasonable return and its delayed payment will have a cascading effect and, therefore, the Appellant in such situation is entitled to carrying cost. The Appellant also prayed for allowing the entire legitimate expenditure which includes the carrying cost as well. This Tribunal in the judgment dated 23.05.2007 reported in 2007 ELR (APTEL) 193 has held that once expense is allowed then the Appellant is not only entitled to the expense but is also entitled tothe carrying cost

as its legitimate claim. The relevant observation of the judgment is as follows:

"The appellant is not only entitled to depreciation at this rate but also entitled to a carrying cost as its legitimate claim wasdenied at the appropriate time"

11. Although the Appellant may have accrued income, the cost had already been incurred by the Appellant and here has been cash outflowin respect of the same. On accral income is allowed because corresponding expenses to earn that income had already been incurred. Hence it may not be appropriate to indicate that these accruals are mere book adjustment and do not involve the cash flow. In otherwords, it would not be appropriate to segregate the disallowance of expense into cash and non-cash expenditure. In this context, the following observation made by thisTribunal in the judgment dated 30.07.2010 in the case of New Delhi Power Limited V/s DERC [passed in 153/09 2009(reported in2010 ELR (APTEL) (891) is relevant:

"45. The carrying cost is allowed based on principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the distribution company from lenders and/or promoters and/or accruals, has to be paid for by way of carrying cost. This principle has been well recognized in the regulatory practices as laid down by this Tribunal as well as the Hon'ble Supreme Court. In 2007 APTEL 193, this Tribunal has held that along with the expenses, carrying cost is also to be given aslegitimate expense". Hon'ble Supreme Court in2007 (3) SCC 33 has also held "the reduction in the rate of depreciation is violative of the legitimate expectation of the distribution company to get lawful and reasonable recovery of expenditure."

"58. (iv): The carrying cost is a legitimate expense and therefore recovery of such carrying cost is legitimate expenditure of the distribution company."

Judgment dated 28.08.2009 in Appeal No. 117/08. Relevant extracts are quoted herein below:

"46. Regulations 64.6.2 and 76.8.2 of MERC (Terms and conditions of Tariff) Regulations 2005 read as under: …..

63.6.2 Interest shall be allowed at a rate equal to the Short Term Prime Lending Rate of theState Bank of India as at the date on which the application for determination of tariff is made.

76.8 …..76.8.2 Interest shall be allowed at a rate equal to the Short Term Prime Lending Rate of the State Bank of India as at the date on which the application for determination of tariff is made."

47. As the MERC Regulations deploy the Short Term Prime Lending Rate of State Bank of India for working out interest on Working Capital there is no reason why the same yardstick is not used when it comes to applying interest rate on deferred payments. The licensee shall have to arrange the amount of deferred payment in the same way as the Working Capital. We, therefore, direct the Commission to allow Short Term Prime Lending Rate of SBI for deferred payments and incorporate the same while carrying out the truing up exercise for the year 2008-09"

12. In the judgment dated 06.10.2009 inAppealNo. 16/08 (reported in 2009 ELR (APTGEL) 0880), the relevant extracts are quoted herein below:*

"116 Before parting with the judgment we are to remind the Commission of theobservation in our judgment in Appeal No. 265 of 2006, 266 of

2006 and 267 of 2006 in the case of North Delhi Power Limited Vs. Delhi Electricity Regulatory Commission in which we said the following:

''60. Before parting with the judgment we areconstrained to remark that the Commission has not properly understood the concept of truing up. While considering the Tariff Petition of the utility the Commission has to reasonably anticipate the revenue requested by aparticular utility and such assessment should be based on practical considerations. …. The truing up exercise is meant (sic) to fill the gap between the actual expenses at the end of the year and the anticipated expenses at the beginning of the year. When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same except where the Commission has reason to differ with the statement of the utility and records reasons thereof of where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of "restructuring the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudent.

13. Accordingly, the issue of carrying cost is decided in favour of the Appellant."

10.3 Accordingly, this issue is decided in favour of the appellant.''

11. The third issue is regarding carrying cost on

revenue gap decided on truing up of ARR.

11.1 This issue pertains to Appeal no. 203 of 2010.

11.2 According to the learned counsel for theappellant, the impugned decision is contrary to thefindings of the Tribunal in Appeal no. 117 of 2008 and 173 of 2009.

11.3 According to learned counsel for the State Commission, the claim of carrying cost on the difference between the projection in ARR at the beginning of the year and the actual at the true up is without any statutory or juridical basis. The carrying cost was granted by the Tribunal in several judgments, namely, in NDPL, etc.; and culminating in the Tata Power judgment in Appeal no. 173 of 2009, whereunder the Tribunal has proceeded on the basis that carrying cost must be given to compensate the utility for the deprivation of monies. In those cases where a particular cost or revenue had been disallowed by the Commission and such disallowance was subsequently reversed by the Tribunal and the Tribunal was inter alia, pleased to proceed on the basis that since the utility had been deprived of the use of such cost/revenue, it had to be given carrying cost for such deprivation. Conceptually, the difference between a projection at the beginning of the year in an ARR and actual in a true-up after the year, cannot under any circumstances, be described as a "deprivation".

11.4 The Tribunal has laid down the principle of carrying cost in its judgment dated 15.2.2011 in Appeal no. 173 of 2009 Company Ltd. vs. MERC. The relevant extracts are reproduced below:

"40. The next judgment is dated 6thOctober, 2009 passed in Appeal No. 36 of 2008 reported in 2009 ELR (APTEL) 880). Relevant extracts are quoted hereinbelow:

116) (Reproduced at page 28 of this judgment and therefore not being repeated here).

117) All projections and assessments have to be made as accurately as possible. Truing up is an exercise that is necessarily to be done as no projection can be so accurate as to equal the real situation. Simply

because the truing up exercise will be made on some day in future the Commission cannot take a casual approach in making its projections. We do appreciate that the Commission intends to keep the burden on the consumer as low as possible. At the same time one has to remember that the burden of the consumer is not ultimately reduced by under estimating the cost today and truing it up in future as such method also burdens the consumer with carrying cost.

41. The next judgment is dated 30thJuly, 2010 passed in Appeal No. 153 of 2009 reported as 2010 ELR (APTEL) 0891. The relevant observation is as follows:

45. The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the distribution company from lenders and/or promoters and/or accruals, has to be paid for by way of carrying cost. This principle has been well recognised in the regulatory practices as laid down by this Tribunal as well as the Hon'ble Supreme Court. In 2007 APTEL 193, this Tribunal has held that "along with the expenses, carrying cost is also to be given as legitimate expense". Hon'ble Supreme Court in 2007 (3) SCC 33 has also held "the reduction in the rate of depreciation is violative of the legitimate expectation of the distribution company to get lawful and reasonable recovery of expenditure".

58 (iv). The carrying cost is a legitimate expense and therefore recovery of such carrying cost is legitimate expenditure of the distribution company.

42. The above judgments of the Tribunal lay down the dictum regarding entitlement of carrying cost for deferred recoveries. However, in the

present appeal the Appellant has raised carrying cost as a general issue without reference to any finding of the State Commission in the impugned order or specific claim of interest on deferred recovery. Therefore, while holding the principle of carrying cost on deferred recovery, we are not in a position to give any specific direction to the State Commission in this regard except to take decision on the claim of the Appellant on carrying cost keeping in view of the above judgments of the Tribunal. However, we would like to add that the Appellant is entitled to carrying cost on his claim of legitimate expenditure if the expenditure is:

(a) accepted but recovery is deferred, e.g. interest on regulatory assets;

(b) claim not approved within a reasonable time; and

(c) disallowed by the State Commission but subsequently allowed by the superior authority".

11.5 On the basis of the above findings of the Tribunal we decide as under:

i) When the utility gives its projected expenditure under a head in the ARR, the Commission either accepts it or decides a lower expenditure. However, if in the true up of the ARR subsequently the Commission finds that the expenditure which was denied/reduced earlier under that head needs to be approved then carrying cost may be allowed for such additional expenditure under that particular head which was denied earlier.

ii) The utility is entitled to carrying cost on his claim of legitimate expenditure if the expenditure is:

a) accepted but recovery is deferred e.g. interest on regulatory assets,

b) claim not approved within a reasonable time, and

c) disallowed by the State Commission but subsequently allowed by the Superior Authority.

11.6 If the revenue gap is as a result of routine true up carried out in the time frame specified in the Regulations and not on account of genuine expenditure denied on a claim by the appellant earlier or on account of deferred recoveries then no carryingcost may be admissible as the claim was made for the first time at the time of true up. The State Commission shall decide the claim of the appellant on the above principles. Decided accordingly."

We, therefore, direct the Commission to re-examine the issues upon consideration of the detailed particulars as are and as further may be provided by the appellant before the Commission according to the law.

20. **Issue No.10**

On transmission and distribution loss and agricultural pump-set consumption, the Commission fixed the T&D loss level target for the 2009-10 at 22% based on the actual loss level achieved in the year 2008-09 and the expected deduction in the T&D losses over the previous years' actual loss levels. The Commission however retained the normative loss level at 22% and 19.5% for the tariff year 2007-08 and 2008-09 respectively. The appellant contends that the Commission ought to have considered relaxation in the loss level for the Financial Year 2007-08 and 2008-09 based on the actual performance of the appellant. The Commission's approach does not appear to be wrong because inability on the part of the Board to reduce T&D loss cannot be

the ground for fixing higher T&D loss for the appellant as this would be prejudicial to the consumers. The Commission reasoned that AP consumption as projected by the Board was inflated and keeping in view the actual performance of the Board the Commission retained T&D loss target at 19.5% for the year 2008-09. It isthe argument of the appellant that when the State Commission decided to revise the T&D loss reduction trajectory for the year 2009-2010 on the basis of actual the Commission ought to have considered relaxation in the loss level for the year 2007-2008 and 2008-2009 based on the actual performance of the appellant. It is further submitted that the State Commission ought not to have estimated the agriculture pump-set consumption solely based on the report of the Agency appointed by the State Commission. The State Commission has not considered any of the justifications and materials produced by the Appellant to point out the flaws in the methodology of the Agency appointed to point out the methodology consumption or the justifications provided by the appellant for the methodology adopted by the Appellant. The state Commission needs to consider the same and revise the agricultural pump-set consumption estimated for the year 2009-2010 and 2010-2011. We are unable to agree with the submission of the learned advocate for the appellant on this issue. The Commission fixed 22% as T&D loss for the Financial Year 2009-2010 but this is concession to the appellant. According to the Commission, having found the T&D loss at 27.52% in 2001-2002 the Commission projected a phased reduction in the next six years which if achieved would have brought down the loss level at 19.5%. The Commission was constrained to retain the T&D loss in 2008-2009 at 19.5% finding that the performance of the Board was not above the board. No doubt, the Commission reduced AP consumption in 2007-2008 and 2008-2009 but that is not a ground for reduction of T&D loss which was already decided

for the year 2007-2008 and 2008-2009 and the Commission found that the AP consumption as projected by the Board was inflated. We decide the issue against the appellant.

21**. <u>Issue Nos. 11& 12</u>**

On price of coal the Commission considered the coal cost to be inclusive of transit loss but the calculations show that transit losses were excluded. The Commission found notes that fuel costs for 2008-2009 have been trued up on the basis of the Board's submissions as contained in paragraph 15.5.3 of the Aggregate Revenue Requirement petition for 2010-2011. Therein, it has been clearly stated that the price of coal was inclusive of transit losses. PSPCL cannot at this stage place reliance on formats 2B and 28B as these are supportive documents that are intended to be merely supportive of the main contention as contained in the Aggregate Revenue Requirement petition. In the circumstances, the Commission concludes that there is no scope to review fuel costs for 2008-2009 as determined by the Commission in the Tariff order under review. In respect of the year 2009-2010 and 2010-2011 the appellant regarded fuel cost inclusive of transit loss and now it pleads that the error was inadvertent and no relief was possible. In our estimation if there was any apparent miscalculation of the coal cost and the appellant is found entitled to its legitimate due then the Commission is not powerless to afford appropriate relief. It is the second contention of the appellant that the State Commission has committed error in not considering the increase in coal prices in the second half of the year 2009-2010 and it has an overall bearing on the cash flows of the appellant. According to the appellant, non-consideration of the increase

in the coal price not attributable to the appellant has resulted in adverse financial impact to the tune of Rs. 36.34Crore in 2009-2010 and Rs. 35.34crore in 2010-2011. It appears from the Commission's impugned orders that the commission was not oblivious of this issue. It is the obligation of the commission to ensure that actual enhancement of fuel cost for the two years as mentioned above do not result in late recovery of the expenditure already incurred and it is the consumers who will have to be face the financial burden in ultimate terms. In the tariff order for the year 2011-2012, according to the appellant, the Commission did not consider escalation of 10% in the cost of fuel on account of the imposition of environment tax and entry tax for the second half of the FY 2010-2011 and the Financial Year 2011-2012. It is not clear whether this specific point was raised before the Commission since the Commission's order for tariff period 2011-12 does not show any reflection on this point. It appears that the Commission has not fully allowed the power purchase cost of the appellant for the years 2009-10, 2010-11 and 2011-12. In respect of Financial Year 2009-10, the Commission disallowed to Rs.27.66 crore, while for the first half of the year 2010-11, Commission disallowed a sum of Rs.369.78 crore on the ground that there was a cap in the Tariff Order for the year 2009-10 and 2010-11 on the quantum and price for procurement of electricity from traders and that the appellant procured more quantum of electricity at higher prices from such sources. It is the case of the appellant that since it has universal service obligation and it faced acute shortage of power it had to procure from traders and through UI Mechanism. Now, the National Tariff Policy provides that power purchase is an uncontrollable cost and needs to be allowed on an actual basis except when there is no prudency. Commission's disallowance order does not , of course, expressly contain the ground that power purchase from traders and UI Mechanism was

thoroughly avoidable. Only when it is found that such purchases are without any objective ground then and then only, the Commission would be upon such prudence check be justified in refusing the amount of such purchase. Carrying cost for the delay in passing of the fuel cost adjustment is, of course, admissible. Now, the Commission decided to disallow UI surcharge for over-drawl of power when frequency was less than 49.2 Hz. At this frequency the Board is not expected to overdraw. Regulation 19(2) allows UI charges if power is purchased through UI mechanism in a judicious and economic manner. Such disallowance was on the basis of the decision of the Forum of Regulators dated 1.8.2009 and according to the appellant, it should be only from that date and not for the entire tariff year 2009-10. It appears that the Commission in this tariff order for the year 2011-12 while truing up the figures for Financial Year 2009-10 had observed that the Tariff Order for 2009-10 was issued in the month of September, 2009 as such the Commission did not penalise the appellant for UI drawl below frequency of 49.2 Hz during the first six months of Financial Year 2009-10. The Commission has disallowed the UI charges at frequency below 49.2 Hz. At this frequency, the Board is not expected to overdraw. Regulation 19 (2) allows UI charges if power through UI is purchased in a judicious and economic manner. Accordingly, the Commission disallowed an amount of Rs.8.53 crore which the Board paid as additional UI surcharge during the period from October, 2009. The Commission while truing up the figures for the Financial Year 2007-08 and 2008-09 in its Tariff Orders for the year 2009-10 and 2010-11 has approved the full power purchase cost on the basis of the audited account with no disallowance. The issue does not have any merit.

22**. Issue No. 13**

In respect on non-tariff income commission considered Rs. 91.10crore for the year 2008-2009. According to the appellant, taking cognizance of the audit notes is not a sound practice because the revenues based on audit notes are not included in the actual accounts and when truing-up is based on the actual audited accounts non-tariff income should be worked out on the basis of the auditory statement of accounts. If this is the case of the Commission that a sum of Rs91.10crore has been worked out on the basis of the revenues based on the audit notes then there is scope for review of the matter because the general principle is that true-up is done on the basis of the actuals as compared to was projected in the revenue requirement. The submission of the learned advocate for the appellant that the audit notes are only are in the nature of certain reservations and observations of the auditor and are required to be clarified in the subsequent financial year cannot be rejected outright. The Commission will re-examine the matter and pass appropriate order.

23**. Issue No. 14**

In appeal No. 122of 2011 that relates to determination of tariff for the Financial Year 2011-2012 it has been ventilated that the Commission committed error in treating 50% of the admitted revenue gap as regulatory asset because such a huge treatment does not conform to regulation 11 of the Tariff Regulations and that not only by such treatment there would be shock to consumers and also there would be adverse impact of the cash flow of the appellant. Furthermore, treatment of the 50% of the revenue gap as regulatory asset is contrary

to section 61 of the Electricity Act. Now, in regulation 11 of the Tariff Regulations 2005 it has been provided that in extraordinary circumstances the Commission may allow creation of Regulatory Asset in the case of revenue gap being very substantial and being on account of onetime factors beyond the control of the generating company of the licensee and full recovery in a single year results in tariff shock for the consumers and Regulatory Asset so created along with carrying cost shall be liquidated in a maximum period of three years immediately following in the year in which it is created. The tariff order dated 9.5.2011 it appears that the amount of regulatory asset has been determined at Rs. 1325.76crore to be amortised in subsequent three years. Having considered the amount of the revenue gap the approach of the Commission cannot be said to be imprudent and the matter can be reviewed only in course of true up proceedings in respect of the tariff year in question. The Tribunal also has given a detailed direction in this regard in OP No.1 of 2011 in respect of such regulatory assets and we recall those directions here also. We decide the issue accordingly.

24**. <u>Issue No. 15</u>**

Upon the reading of the order impugned it appears that the approach of the Commission has been technical. True it is, the appellant showed initially a sum of Rs. 52.45 crore in the true-up of 2008-2009 under the head “interest and finance charges” holding that the Board was not entitled to claim this amount as interest and finance charges since it represented discounts allowed to consumers for advance payment of Bills. In the review the appellant claimed that out of total amount of Rs. 52.45 crore depicted as surcharge, a sum of Rs.

49.45 crore pertains to interest paid to coal suppliers/contractors as per award given by the umpire for settlement of disputes between Coal India and PSEB for the period given 1.4.1989 to 31.3.1995 while a smaller sum of Rs. 0.23 crore is interest allowed to DSCs etc. The Commission rejected the contention of the appellant on the ground that it was not a new fact discovered later by the appellant. It could not be disputed that out of Rs.52.45 crore a sum of Rs. 2.77 crore stood as discount allowed to consumers for advance payment of Bills and another sum of Rs. 0.23Crore was on account of interest allowed by DSCs. Even if there was wrong representation the mistake if it is apparent can be rectified and review admits of correction of calculations and arithmetical errors. We therefore direct the commission to reconsider the matter and pass appropriate order.

25. In ultimate analysis the appeal succeeds in part and is allowed subject to observations made in respect of the concerned issues. The Commission will pass appropriate order treating the matter as remand in respect of those issues in respect of which we could not be in concurrence with the Commission, of course, upon hearing the parties. No cost.

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

Reportable/Not reportable

Pratibha