Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 198 of 2011

Dated: 27th July, 2012

Present: MR. JUSTICE P. S. DATTA, JUDICIAL MEMBER
MR. V J TALWAR, TECHNICAL MEMBER,

IN THE MATTER OF:

M/s Waryam Steel Castings (P) Ltd.
Through its Authorised Representative
Kanganwal Road, VPO Jugiana,
Ludhiana, Punjab – 141 120 .....Appellant

Versus

1. Punjab State Power Corporation Limited
The Mall, Patiala, Punjab -147001

2. Punjab State Electricity Regulatory Commission,
SCO 220-221, Sector 34-A,
Chandigarh-160022 ...Respondents

Counsel for the Appellant: Mr Laliet Kumar

Counsel for the Respondent : Mr Anand Ganeshan for R-1
Mr Sakesh Kumar for R-2

JUDGMENT

PER MR. V J TALWAR TECHNICAL MEMBER

1. The Appellant, Warayam Steel Casting (P) Limited is a HT Consumer of electricity in the State of Punjab having a contracted load of more than 2500 kVA. The Punjab State Power Corporation Limited (Power Corporation) is the sole distribution licensees in the

state of Punjab and is the 1st Respondent herein The Punjab State Electricity Regulatory Commission (State Commission) is the 2nd Respondent.

2. In compliance with this Tribunal's order dated 16.7.2010, the State Commission had passed an order on 19.1.2011 re-determining the voltage surcharge recoverable from the Power Intensive Units (PIUs) including the Appellant in the State of Punjab.

3. Being aggrieved with the impugned order dated 19.1.2011, the Appellant have filed this appeal.

4. The facts of this case, leading to the filing of this Appeal are as follows:

i. The Appellant have got large supply of electricity connection having the contract demand of more than 2500 kVA and have been paying the electricity bills regularly. At the time of grant of electricity connections, an agreement was entered into between the Appellant and the Punjab State Electricity Board, predecessor of the Power Corporation, the 1st Respondent herein. As per the agreement, it was the duty of the Electricity Board to lay transmission network and to provide electricity connections through its own electrical lines and electricity plants. The Electricity Board has distributed electricity through the three voltage supply system viz., LT, HT and EHT systems. Since the Board had sanctioned the power connections to the Appellant at 11 kV supply voltage, the Appellant deposited the entire expenses for laying down the 11 kV lines from distribution mains of Respondent – 1 to premises of the Appellant with the Electricity

Board in accordance with the Clause VI(b) of the Schedule of Indian Electricity Act 1910.

ii. In the year 1995, the Electricity Board issued a Memo to the PIUs including the Appellant and other prospective induction furnaces units having load above 1500 kVA, instructing them to shift from 11 KV to 66 kV voltage supply or else they would be liable to pay surcharge @ 17.5%. Questioning this, the Appellants and others took up the matter with the State Government. Thereupon the State Government constituted a High-Powered Committee to go into the matter. Ultimately, the High-Powered Committee recommended for the withdrawal of memo of conversion to 66 kV thereby all the existing units could be allowed to run on 11 kV voltage supply without payment of any surcharge.

iii. On receipt of the recommendations of this High-powered Committee, the State Government constituted another Committee, comprising of the members of the Electricity Board as well as its Members of industries. In that Committee also, it was decided that all existing units should be exempted from converting to 66 kV and exempted from the levy of 17.5% surcharge. On 08.06.1999, the Electricity Board issued circular accepting the above recommendations of the Committee and withdrawing its memo imposing the surcharge. It further directed that the surcharge already paid would be adjusted against the future bills.

iv. The Electricity Board filed ARR & Tariff petition before the State Commission for the FY 2003-04 with a proposal to charge 17.5% surcharge on induction furnaces who have not shifted to 66 kV supply voltage. The Furnaces Association filed objection against

the proposal and brought to the notice of the State Commission about the issuance of the circular dated 08.06.1999 by the Electricity Board withdrawing the proposal to impose surcharge. In response to the said objection, the Electricity Board itself submitted a reply dated 17.03.2003 admitting the previous withdrawal of instructions to impose surcharge @ 17.5%.

v. Thereupon, on 11.10.2004, the Electricity Board issued another circular for imposing levy of additional billing of 10% on consumption recorded at 11 kV corresponding to demand recorded above 2500 kVA. Accordingly, the State Commission passed the tariff order for the FY 2004-05 holding that all consumers with contract demand exceeding 2500 kVA and up to 4000 kVA have to pay 10% extra on energy supply at 11 kV and consumers having demand of above 4000 kVA to pay a surcharge of 17.5%. However, on the representation by various Industrial Consumers Associations, the Electricity Board withdrew the implementation of the circular dated 11.10.2004. Even then, the tariff order for FY 2006-07 was passed by the State Commission fixing the surcharge @ 10% for consumers with contract demand exceeding 2500 kVA and up to 4000 kVA catered at 11 kV. Against this order the Associations filed a Review Petition before the State Commission, which in turn dismissed the same.

vi. The Appellants thereupon filed a Writ Petition before the High Court as against the demand for high voltage surcharge and ultimately the High Court dismissed the Writ Petition with the observation that the Appellant shall approach the Appellate Tribunal for Electricity. In spite of this direction, the Appellants had

chosen to file the Appeal against the order as LPA before the Division Bench of the High Court.

vii. Thereafter, the impugned tariff order was passed in respect of the FY 2009-10 by the order dated 08.09.2009 by the State Commission reiterating that the large supply consumers with a contract demand exceeding 2500 kVA and up to 4000 kVA catered at 11 kV are liable to pay a surcharge of 10% on consumption charges including demand charges as compensation for transformation losses and incremental line losses. Similarly, the large supply consumers having contract demand exceeding 4000 kVA catered at 11 kV are levied a surcharge of 17.5%.

viii. Aggrieved by the order dated 8.9.2009 passed by the State Commission some of the large industrial consumers (including the Appellant in the present appeal) filed an appeal being No. 192 of 2010 before this Tribunal. The Tribunal passed the judgment in Appeal 192 of 2009 on 16.7.2010 directing the State Commission to re-determine the Voltage surcharge.

ix. In compliance of the judgment and order of this Tribunal dated 16.7.2003 the State Commission passed the impugned order dated 16.1.2011 re-determining the voltage surcharge in accordance with the directions of this Tribunal.

x. Hence the Appellants have presented this Appeal alleging that the State Commission had not followed the directions of the Tribunal in determining the voltage surcharge in letter and Spirit.

5. During the pendency of the appeal, one important development had taken place in regard to the issue under consideration. Since

this development may have impact on the final outcome, it would be desirable to discuss this before we examine the case on merits.

6. As pointed out in para 4(vi) above some of the large industrial consumers including the Appellants had filed a Writ Petition before the High Court of Punjab and Haryana as against the demand for voltage surcharge and ultimately the High Court dismissed the Writ Petition with the observation that the Appellant shall approach the Appellate Tribunal for Electricity. In spite of this direction, the Appellants had chosen to file an Appeal against the order as LPA being no. 605 of 2009 before the Division Bench of the High Court. On 9.9.2011 the Division Bench of the High Court dismissed the said LPA upholding the levy of voltage surcharge @ 10% from the consumers having contract demand between 2500 kW to 4000 kW and 17.5% from the consumers having contract demand of more than 4000 kW. The relevant portion of the High Court's judgment is reproduced below:

> *"25. The perusal of the tariff order dated 30.11.2004 further shows that insistence of the Board for conversion of supply of Large Scale Power Consumers to 66 KV supply has a public purpose. It was explained that supply at higher voltage levels causes significant cost saving to the Board in terms of infrastructure provisioning for supply and associated savings in technical losses. The connections at higher voltage are to avoid the technical losses, transformation losses and line losses. Therefore, while giving incentives to large supply consumers getting supply at 33 kV or above, the levy of surcharge on the consumers, who are not availing connections of higher voltage serves the public purpose.*
>
> *26. Still further, the categorization of consumers having contract demand of more than 2500 kVA after June, 1995 and pre June, 1995 is not justified. Both set of consumers are power intensive units. There is no reason as to why pre June 1995 consumers should be dealt with separately and*

distinctively except for the reason that they are old units. Being old units, they may require additional time to shift to supply at 66 kV. But even after 16 years, such units have not shifted to supply at 66 kV.

27. In view of the said fact, we find that not only the Board has proposed surcharge in respect of consumers of prior to June 1995 period, but also the Commission has discussed and approved such surcharge. The failure to mention such surcharge in the abridged Public Notice is inconsequential, when the complete Annual Revenue Requirement was available on the website of the Commission as also of the Electricity Board. The contents of Annual Revenue Requirement were known to the Induction Furnace units, which is evident from the fact that objections were filed and dealt with by the Commission.

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30. Therefore, we do not find that claim of surcharge from the large industrial consumers for not shifting to 66 kV suffers from any illegality or irregularity. The learned Single judge has examined the tariff order from various angles and did not find any illegality. We have re-examined the issue and find No. illegality in the tariff order claiming surcharge.

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35. It is, thus, argued that now the Appellants have been issued demands not in respect of surcharge on the consumption more than 4000 kVA or consumption over and above 2500 kVA, but on the entire consumption. Since the Appellants have set up their industrial units after the aforesaid communication contained in Commercial Circular No. 52/2004 dated 11.10.2004 (Annexure P-2 in LPA No. 298 of 2009), therefore, the Board is estopped to claim any other tariff then what was circulated in the aforesaid Circular.

Reliance is placed upon LML Ltd. v. State of Uttar Pradesh and Ors.: (2008) 3 SCC 128 and Badri Kedar Paper Private Limited v. Uttar Pradesh Electricity Regulatory Commission and Ors. : (2009) 3 SCC 754.

36. We do not find any merit in the said argument as well. Soon after the Commercial Circular No. 52/2004 (Annexure P-2 in LPA No. 298 of 2009) was issued on 11.10.204, the tariff order was published on 30.11.2004 though made effective from 01.10.2004 i.e. prior to the date of issuance of said circular. The Tariff Order passed by the Commission does not contemplate that surcharge has to be on the consumption after giving benefit of 2500 kVA or 4000 kVA, as the case may be. After the Act came into force, the Board can charge for consumption of electricity only in terms of the Tariff Order. There cannot be any variation by the Board unilaterally against the terms of the Tariff Order. Since the Circular has the effect of variation of the Tariff Order, therefore, such Circular is contrary to law and violates the mandate of the Act and the Regulations framed there under.

37. The doctrine of promissory estoppel sought to be invoked against the Board is not applicable to the facts of the present case, as on the day when such promise was made, it was against Statute i.e. the Act and the Tariff Regulations. Such terms of the Commercial Circular were against the Tariff Order for the year 2004-05 as well as for the subsequent Tariff Orders. Any promise, which is contrary to law, cannot be enforced. Therefore, the judgments referred to by the learned Counsel for the Appellants are not applicable.

38. Another argument, which is required to be noticed, is that the Circular dated 28.11.2007 cannot withdraw the manner of calculations of surcharge conveyed vide Circular dated 11.10.2004. In the Circular dated 28.11.2007, it has been pointed out that the Commercial Circular earlier issued on 11.10.2004 is against the Tariff Order and has no effect. It is to give the effect to law i.e Tariff Order, the said Circular has been issued. It is not the retrospective withdrawal of the Circular, but only to state that the surcharge is to be levied only in terms of Tariff Order.

39. In view of the above, we do not find any merit in the second set of appeals as well.

40. However, we find merit in the arguments raised by the Appellants that the surcharge is being claimed from 01.04.2004 though the tariff order for the year 2004-05 was made effective from 1.10.2004. ***In view of the said fact, we are of the opinion that such surcharge can be claimed from the power intensive units such as the Appellants from 01.10.2004 alone in terms of the tariff order Annexure P-21 and not from any date earlier than the date notified by the Commission. Therefore, the appeals are allowed to the limited extent that the surcharge at the rate of 10% from units having sanctioned contract demand of 2500 kVA to 4000 kVA and at the rate of 17.5% from the units having contract demand of more than 4000 kVA shall be applicable from 01.10.2004." {emphasis added}***

7. Perusal of the judgment of the High Court would reveal that the High Court has laid down the following propositions:

i. The levy of surcharge on the consumers, who are not availing connections at higher voltage serves the public purpose.

b. The demand for categorization of consumers having contract demand of more than 2500 kVA after June, 1995 and pre June, 1995 is not justified

c. The claim of surcharge from the large industrial consumers for not shifting to 66 kV does not suffer from any illegality or irregularity.

d. The Tariff Order passed by the Commission did not contemplate that surcharge has to be on the consumption after giving benefit of 2500 kVA or 4000 kVA, as the case

may be. After the Act came into force, the Board can charge for consumption of electricity only in terms of the Tariff Order. There cannot be any variation by the Board unilaterally against the terms of the Tariff Order.

e. The doctrine of promissory estoppel sought to be invoked against the Board is not applicable to the facts of the present case, as on the day when such promise was made, it was against the Act and the Tariff Regulations. Such terms of the Commercial Circular were against the Tariff Order for the year 2004-05 as well as for the subsequent Tariff Orders. Any promise, which is contrary to law, cannot be enforced.

f. **The surcharge at the rate of 10% from units having sanctioned contract demand of 2500 kVA to 4000 kVA and at the rate of 17.5% from the units having contract demand of more than 4000 kVA shall be applicable from 01.10.2004. {Emphasis Added}**

8. Clearly, the High Court has upheld the validity of the levy of surcharge at 10% and 17.5% from the units having contracted demand of 2500 kVA to 4000 kVA and above 4000 kVA respectively in the State Commission's Tariff Order for the year 2005-06. It also held that such levy of surcharge is for the public purpose. As per Article 227 of the Constitution of India, the High Courts have general power of superintendence over all the Courts and Tribunals in the State. It is the settled law that the High Court exercises its jurisdiction of superintendence over all courts and Tribunals where the cause of action originates. The order of state Commission having been subjected to the constitutional

jurisdiction of the High Court was examined by the High Court which passed the aforesaid order that binds the State Commission, all concerned including the Power Corporation, the Appellants as also this Tribunal, no matter whether this Tribunal is or is not physically located in the State.

9. The Appellant contended that this judgment of High Court would not have any impact on the present case as it was delivered in Appeal against the State Commission's Tariff Order for the year 2005-06. The present appeal is against the order of the State Commission passed in compliance with the Tribunal's order dated 16.7.2010 passed in appeal no. 192 of 2009 against the Tariff order for the year 2009-10. Each tariff order stands on its own footing and accordingly has to be dealt with on its own merits.

10. We do not agree with the above contention of the Appellant. It is true that each tariff order is separate and has to be dealt with its own merits. But, for the purpose of achieving greater predictability and certainty in the tariffs to attract investments in the power sectors, the principles adopted in various tariff orders has to be same unless modified through Regulations or by an order of Superior court. Thus, the principle enunciated by the High Court that the State Commission has powers to prescribe voltage surcharge of 10% and 17.5% on the consumers having contracted demand of 2500 kVA to 4000 kVA and more that 4000 kVA respectively without questioning its rationality or basis is binding on subsequent tariff orders also.

11. In view of above discussions and in the light of High Court's judgment in LPA 605 of 2009 dated 9.9.2011, the Appeal is liable

to be dismissed. However, in view of the fact that the Appellant has alleged that the State Commission has not implemented the Tribunal's directions in appeal no. 192 of 2009, we are inclined to examine the issue on its merits.

12. The learned counsel for the Appellant has raised many grounds including the applicability of the surcharge. Most of the grounds raised by the Appellant had been raised in the LPA being No. 605 of 2009 before the High Court and had been rejected by the High Court. During the proceedings the learned counsel for the Appellant conceded some of the issues including the applicability of surcharge.

13. The Appellant has pressed for the following issues:

i) The cut off point as 2500 kVA for charging voltage surcharge, has been fixed by the Commission. The surcharge is levied on total load of the consumers having CD exceeding 2500 kVA, whereas there is no surcharge levied on consumers having CD less than 2500 kVA. Therefore, the petitioners are also entitled to pay no surcharge on the load upto first 2500 kVA. As such, the surcharge levied on the whole load is in violation of Article 14 of the Constitution of India.

ii) That the Order of the Tribunal clearly mentions in Para 48 (iii) that "…….The levy of the surcharge which is said to be compensatory in nature has to be rational……", meaning thereby that the surcharge 'has to be compensatory in nature and not punitive.' But penal element has been added

by the Commission in violation of the directions of the Tribunal.

iii) That the Commission has wrongly accepted the data supplied by Power Corporation as correct and authentic and made the calculations to compute surcharge based on this data. The data supplied by Power Corporation was erroneous, incorrect and unauthentic. The calculations supplied by the Appellants were completely ignored by the State Commission.

14. We shall now deal with each of the issues raised by the Appellant. The first issue is related to levy of surcharge on complete consumption instead of consumption over and above the threshold limit of 2500 kVA and 4000 kVA as the case may be. This issue had been dealt with by the High Court and had been decided against the Appellant. The findings of the High Court in para 36 of its judgment is reproduced below:

"36. We do not find any merit in the said argument as well. Soon after the Commercial Circular No. 52/2004 (Annexure P-2 in LPA No. 298 of 2009) was issued on 11.10.204, the tariff order was published on 30.11.2004 though made effective from 01.10.2004 i.e. prior to the date of issuance of said circular. The Tariff Order passed by the Commission does not contemplate that surcharge has to be on the consumption after giving benefit of 2500 kVA or 4000 kVA, as the case may be. After the Act came into force, the Board can charge for consumption of electricity only in terms of the Tariff Order. There cannot be any variation by the Board unilaterally against the terms of the Tariff Order. Since the Circular has the effect of variation of the Tariff Order, therefore, such Circular is contrary to law and violates the mandate of the Act and the Regulations framed there under."

15. The applicability of voltage surcharge is not akin to domestic tariff which is based on slab wise consumption by the consumer. The rationale behind voltage surcharge is that a surcharge is to be levied on consumers taking supply of electricity at a voltage level lower than the designated voltage level and cannot be telescopic for the reason explained below:

16. Consider a consumer taking supply of electricity to the extent of 3000 kVA will need to take all the 3000 kVA at the designated voltage level of 66 KV and not that up to 2500 kVA at 11 KV and the balance 500 kVA at 66 KV. In the circumstances, the cost, expenses and losses to the Power Corporation and also the savings in additional investments to the consumers is on the entire load of 3000 kVA. This is the essential difference and flaw in the contention of the Appellants while comparing the voltage surcharge to tax slabs etc. These cannot be split into two or more slabs for the purpose of calculation and levy of voltage surcharge.

17. In the light of the above discussions and the decision of the High Court, which is binding on this Tribunal as well, the issue is decided against the Appellant.

18. The second issue raised by the Appellant is related to the Penal Element included in the voltage surcharge. The learned counsel for the Appellant has stated that this Tribunal in its Judgment and Order dated 16.7.2010 in Appeal No. 192 of 2009 had held the voltage surcharge has to be compensatory in nature and must not include any penal element. The State Commission has violated the directions of this Tribunal by including the penal element in the voltage surcharge.

19. The learned counsel for the State Commission reiterated the views of State Commission expressed in the Impugned Order dated 16.1.2011 as well in the Order dated 23.10.2011 rejecting the Review Petition no. 13 of 2011 filed by another industrial consumer. It also relied on the Judgment of High Court in LPA No. 605 of 2009 dated 9.9.2011.

20. This issue had also been considered by the Division Bench of the High Court in LPA 605 of 2009 and had been decided against the Appellant. The findings of the High Court in para 25 of its Judgment reads as under:

> *"25. The perusal of the tariff order dated 30.11.2004 further shows that insistence of the Board for conversion of supply of Large Scale Power Consumers to 66 KV supply has a public purpose. It was explained that supply at higher voltage levels causes significant cost saving to the Board in terms of infrastructure provisioning for supply and associated savings in technical losses. The connections at higher voltage are to avoid the technical losses, transformation losses and line losses. Therefore, while giving incentives to large supply consumers getting supply at 33 kV or above, the levy of surcharge on the consumers, who are not availing connections of higher voltage serves the public purpose."*

21. The directions of this Tribunal in Appeal No. 192 of 2009 relating to compensatory nature of voltage surcharge is contained in para 48(iii) of the judgment dated 16.7.2010 and is reproduced below:

> "48 (iii) Even though the State Commission while fixing the tariff shall ensure that the tariff shall reflect the cost of electricity, in this case, the State Commission had neither determined the cost of supply to different classes and categories of consumers, nor it determined the difference in cost of supply at different voltage levels to the category of Appellants while deciding the surcharge and has simply accepted the suggestion of the Board. The State

> Commission cannot mechanically accept the suggestion made by the Electricity Board and fix the surcharge @ 10% and 17.5% respectively. **The levy of surcharge which is said to be compensatory in nature has to be rational.** Therefore, the finding about the rate of surcharge is not based on the correct reasoning."

22. The total Perusal of the judgment would reveal that it was the Appellant who themselves made the submissions that levy of surcharge is compensatory is in nature and the Tribunal accepted the stand placed before the Tribunal. Accordingly, this observation of the Tribunal cannot be held as direction of this Tribunal. Further, the Tribunal in para 33 of its Judgment dated 16.7.2010 has expressed its concern over the defiant attitude of the Appellants in that Appellants in that Appeal in these words:

> *"33. As mentioned above, by statutory dispensation, the Appellants were to take supply at 66 kV and not at 11 kV since the year 2000. By resisting the move to the voltage at which the Appellants were required to take supply, the Appellants were defiant and contravention of the law and direction. The surcharge has been levied on the Appellants as per the tariff order dated 30.11.2004 which was passed for the FY 2004-05. This tariff order clearly deals with the Appellants objections to the levy of surcharge on the induction furnace consumers catered supply at 11 kV. In rejecting the objections of the Appellant, the State Commission clearly observed that as per the then present policy, the Appellants, if catered at 11 kV have to compensate the Electricity Board by making payment of surcharge for transformation losses and incremental line losses and service charge, etc, incurred in this regard. Therefore, this contention urged by the Learned Counsel for the Appellant would also fail."*

23. It is settled law that any person who contravenes or violates the law is liable to pay penalty.

24. Let us now examine the findings of the State Commission in the Impugned Order. The relevant portion of the Impugned Order reads as under:

> *"8. ... However, if the surcharge payable is determined on the basis of these costs alone then there might be no incentive to shift to the requisite voltages while considerations of public policy, on the other hand, dictate that it would be desirable to ensure that the shift to the prescribed voltages be effected. With a view to attain this objective, the Commission deems it necessary to add a penal element while determining surcharges that need to be imposed. Accordingly, the Commission deems it fair and reasonable that those consumers who do not comply with rational policy prescriptions on supply voltage must bear extra cost as compared to those who have made additional investments and are obtaining supply at the requisite voltages. ..."*

25. In the light of above findings and the decision of Division Bench of the High Court this issue is also decided against the Appellant.

26. The third issue raised by the Appellant is regarding correctness of the data submitted by the Power Corporation to the State Commission.

27. The learned Counsel for the Appellant contended that the data submitted by the Power Corporation suffered from many infirmities and the State Commission had erroneously accepted the same as correct and accurate and re-determined the voltage surcharge based on this inaccurate data. The inaccuracies in the data pointed out by the learned counsel for the Appellant are related to (i) Cost of equipment, (ii) Higher Transformation losses and (iii) Double accounting of O&M charges.

28. The learned Counsel for the Power Corporation vehemently refuted the contentions of the Appellant. He submitted that the

Commission has correctly determined the voltage surcharge based on the data submitted by the Power Corporation which was correct and accurate.

29. We have heard the learned counsels for the Appellant and the Respondents on these points. We would now deal with each of the points raised by the Appellant listed above one by one.

30. First point raised by the Appellant is related to cost of equipment adopted by the State Commission in determining the charges for use of the system. The Learned Counsel for the Appellant made elaborate submissions on this point which are summarised below:

i. The Tribunal had directed the Respondent Commission to fix the "charges for use of additional 66/11Kv transmission system for Appellant and similarly placed consumers". The Tribunal has no where directed the Respondent Commission to recover the cost of lying down the new net work of 66KV by the Respondent Power Corporation. The intent and object of the order was to calculate the charges for the use of 66/11kv transmission system.

ii. Since the Petitioner was consumer of Electricity prior to 1995 and no new system had been/was to be laid by the respondent utility and therefore, the State Commission was only required to hypothetically calculate the charge based on 1995 rates.

iii. The State Commission had wrongly calculated the charges by taking into consideration the capacity/rating of the existing power transformers (which were installed in the year 1995)

and had further taken in to account the rates of 2009-2010 for the total cost of transformer (including cost of line ,allied equipment, land& departmental charges) feeding the consumer.

iv. The Tribunal in its judgment had permitted to calculate the charges for "USE" of the 66/11kv transmission system and had not asked the State Commission to calculate the cost of 'laying down" of 66/11kv transmission system. The word 'USE' only signifies the existence of the network and, therefore, the Respondent Commission has committed an error in taking in to account the rates of 2009.

v. If the rates of 2005-2006 were taken in to account then the charges would have come down to 4.55% and 3.82% instead of 5.88% and 4.96% respectively

31. The learned counsel for the State Commission vehemently refuted the contentions of the Appellant and submitted that the Tribunal in its Judgement in Appeal No. 192 of 2009 had not directed the State Commission to determine the voltage surcharge using the charges for use of existing system. On the contrary, the direction was to determine the charges for use of additional 66/11 kV transmission system. The relevant portion of the judgment is quoted below:

> *"39...Difference in cost of supply to the category of Appellants at 11 kV compared to 66 kV would be on account of transformation loss for step down from 66kV to 11 kV, incremental transmission losses at 11 kV, and charges for use of* ***additional 66/11 kV transmission system****." {emphasis added}*

32. Charges for use of additional 66/11 kV system can only be determined using the cost of equipment prevalent at the time of laying of such system.

33. The findings of the State Commission on this point are set out below:

> *"8. To ascertain the reasonability of the levy of 10 and 17.5% surcharge, the Commission has also attempted to ascertain the extra expenditure that would be incurred by those consumers who shift from 11 KV and obtain supply at 33/66 KV. The relevant data was obtained from PSPCL for the year 2009-10 which indicates that consumers with contract demand above 4000 KVA required to be catered at 66 KV would bear additional cost for creation of a 66 KV sub-station and associated infrastructure which corresponded to 6.74% surcharge after accounting for 3% rebate availed at this voltage. In the case of consumers with contract demand between 2500 and 4000 KVA, proposing to obtain supply at 66 KV, the surcharge equivalent would work out to 5.68%. It is, thus, seen that the figures of surcharge leviable on the basis of assumed transformation/line losses and carrying cost as brought out in para 7 above correspond roughly to the results obtained when additional cost incurred by consumers shifting to higher voltages is taken into account. However, the Commission, in line with the directions of APTEL is inclined to rely on figures obtained after working out actual carrying cost and transformation/line losses. However, if the surcharge payable is determined on the basis of these costs alone then there might be no incentive to shift to the requisite voltages while considerations of public policy, on the other hand, dictate that it would be desirable to ensure that the shift to the prescribed voltages be effected. With a view to attain this objective, the Commission deems it necessary to add a penal element while determining surcharges that need to be imposed. Accordingly, the Commission deems it fair and reasonable that those consumers who do not comply with rational policy prescriptions on supply voltage must bear extra cost as compared to those who have made additional investments and are obtaining supply at the requisite voltages. Taking*

this into account, the Commission determines that consumers presently liable to pay surcharge of 10 and 17.5% will pay a revised surcharge of 7 and 10% respectively."

34. Perusal of findings of the Commission on the point would reveal that the Commission has used 'cost of replacement method', which, in our opinion, is a correct approach to determine the charges for the additional 66/11 kV system.

35. The second point raised by the Appellant is related to higher transformation losses. The learned counsel for the Appellant contended that the State Commission had erred in adopting transformation losses at 0.5% as furnished by the Power Corporation. The transformation losses, as per the tender floated by the Power Corporation, must not exceed 0.2 %.

36. The learned counsel for the State Commission submitted that the Tribunal had directed the State Commission to determine the difference in cost of supply to the category of Appellants at 11 kV as compared to 66 kV taking into account the transformation loss for step down from 66kV to 11 kV and also the incremental transmission losses. The State Commission has assumed transformation losses at 0.5% and incremental transmission losses are likely to occur on 2 kM long 11 kV line at 2.05%.

37. In order to decide this contentious issue it would be desirable to set out the relevant portion of this Tribunal's Judgement in Appeal No. 192 of 2009 which reads as under:

"42. It is contended on behalf of the Appellants that the levy of surcharge at 10% and 17.5%, which is compensatory in nature, has no rational or connection with the actual loss of

2% incremental transmission loss and 0.5% transmission loss i.e. total of 2.5%.

43. It is, however, observed that 0.5% transformation loss indicated by the Commission on pages 70 and 99 of the impugned order as quoted by the Appellants relates to transformation loss of generator transformer at a generating station. The generator transformer is a different and more sophisticated class of transformer compared to 66/11 kV transformers used in the distribution system. The transformation losses as applicable to generator transformers cannot be applied to distribution transformers which are likely to have higher transformation losses."

38. Perusal of the above would make it clear that the Appellants had contended before this Tribunal in Appeal No. 192 of 2009 that the actual incremental transmission losses were 2% and transformation losses were 0.5%. The Appellants cannot be permitted to take an entirely different stand and claim that the voltage surcharge should have been determined taking into account transformation losses at 0.2% only. Accordingly, this point is also decided against the Appellant.

39. Third and last point raised by the Appellant is related to O&M expenses. The Appellant has alleged that the State Commission has erred in including O&M expenses twice in the charges for additional 66/11 kV system. At first place, these charges should not have been included at all. In case these charges were required to be included, it should have been included only once and not twice. While pressing for this contention, the Appellant has referred to the Annexure to the Impugned Order. According to the Appellant, the carrying cost (19%) shown in Col (G) of the Annexure includes Return on Equity (14%) and O&M expenses (5%). However, the Commission had considered O&M expenses

at 5% again as indicated at col (I) of the Annexure. The Appellant further contended that O&M expenses should not have been included in the charges for use of additional 66/11 kV system as these have already been considered in the tariff. Inclusion of these charges again in the charges for use of additional system would amount to double charging.

40. We are unable to accept the plea of the Appellant for exclusion of O&M expenses from charges for use of additional system on the ground that these charges have already been included in the tariff. The Tribunal had categorically directed to determine charges for use of additional 66/11 kV transmission system. Determination of transmission charges or wheeling charges have to be carried out in accordance with the regulations specified by the State Commission and would include Return on Equity, Depreciation, O&M expenses, interest on loan and working capital etc.

41. It would be pertinent to mention that the Appellants in Appeal No. 192 of 2009 had taken similar plea in regard to losses and the Tribunal in para 32 of its judgment has expressed the following observations:

> *"32. The next contention urged by the Learned Counsel for the Appellants is that the recovery of surcharge for transformation and incremental line losses are included in the tariff. According to the Learned Counsel for the Appellants, since tariff for transmission and distribution are required to be separately determined in accordance with provisions of the sub-sections (2) and (5) of section 62 of the Electricity Act, 2003, the loss on account of various attributes including the transformation and incremental line losses are required to be included in the transmission tariff and if the consumer is required to pay compensatory surcharge towards transformation and incremental line losses, then the*

same will tantamount to double recovery. This contention, in our view, does not deserve acceptance mainly because the transformation losses and incremental line losses which would occur due to the failure of the conversion from 11 kV to 66 kV as directed by the Electricity Board are entirely different from the transmission and distribution losses of the system."

42. As regards the alleged inclusion of O&M charges twice, the learned counsel for the Respondent Power Corporation gave detailed clarification as under:

i. The State Commission has not taken the O&M expenses twice but has considered the same only once.

ii. In the calculation sheet reproduced as Annexure to the Impugned Order, the column number (G) showing 'Carrying Cost of the power transformer etc attributable to the consumer & borne by PSPCL' does not include any part of the O&M expenses, but only includes the Return on Equity/interest at the rate of 14% on the capital cost and depreciation at the rate of 5%.

iii. Therefore, 5% included in the Column (G) is the depreciation and not the O&M expenses. These are all capital cost elements and are not revenue cost elements such as O&M expenses.

iv. The O&M expenses taken as 5% are shown in Column (I) which is a distinct element considered by the State Commission independent of depreciation at the rate of 5%.

43. In view of the detailed clarification submitted by the Respondent, we are of the opinion that the State Commission had considered

O&M expenses only once and not twice as alleged by the Appellant. This point is also decided against the Appellant.

44. In the light of our above findings, we do not find any reason to interfere with the impugned order of the State Commission. The State Commission has implemented this Tribunal's Judgment and Order in Appeal No. 192 of 2009 in letter and spirit. The Appeal is accordingly dismissed being devoid of merits. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice P. S. Datta)
Judicial Member

Dated: 27th July, 2012

REPORTABLE/~~NOT REPORTABLE~~