

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

Appeal No. 174 of 2012

Dated: 11th September, 2014

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

In the matter of:

Punjab State Power Corporation Limited,
(Successor of Punjab State Electricity Board),
The Mall, Patiala – 147001,
Punjab.

..... Appellant/Petitioner

Vs.

Punjab State Electricity Regulatory Commission,
SCO NO 220-221, Sector-34-A,
Chandigarh-160022.
Respondent

....

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

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

JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The present appeal under Section 111 of the Electricity Act, 2003 has been preferred by the Punjab State Power Corporation Limited, a

generation and distribution Company in the State of Punjab, against the order dated 16.07.2012, passed by the Punjab State Electricity Regulatory Commission (hereinafter referred to as the 'State Commission') in Petition No. 69 of 2011, whereby the State Commission has approved the Annual/Aggregate Revenue Requirements of the appellant and determined the retail supply tariff for the appellant for FY 2012-13 and reviewed the finances of the appellant for FY 2011-12.

2. The appellant has raised the following issues in the present appeal before this Tribunal :-

- (i) O & M and Employees cost,
- (ii) Improvement in efficiency and loss level,
- (iii) Return on Equity,
- (iv) Generation Norms and Target for Recovery of Fixed Charges and Incentive,
- (v) Interest and Finance Charges on working capital,
- (vi) Reduction of Interest and Finance Charges due to Diversion of Funds.

3. Thus the main grievances of the appellant by challenging the impugned order before this Tribunal are that the State Commission has not fully allowed the revenue requirements of the appellant and it has also not fully allowed the employees cost, interest and finance charges of the appellant. On the contrary, the State Commission has reduced the employees cost by an ad hoc amount of 17.22% without considering the impact of pay revision in terms of the 6th Pay Commission recommendations which were applicable for the period from 2006-07.

The State Commission has further not allowed the provisions of the tariff regulations with regard to the provision of return on equity and the normative plant availability level and generation incentives.

4. that it has been mentioned in the impugned order that the State Commission has, in its previous nine Tariff Orders, determined tariff in pursuance of the ARRs and Tariff Applications submitted by the Punjab State Electricity Board (the Board) for the years 2002-03 to 2006-07, 2008-09, 2009-10, 2010-11 and Punjab State Power Corporation Limited (PSPCL) for FY 2011-12. Tariff Order for the FY 2007-08 had been passed by the Commission in suo motu proceedings.

5. that the appellant Punjab State Power Corporation Ltd. (hereinafter called the 'PSPCL') has filed the ARR for FY 2012-13 on November, 30, 2011 submitting that it is one of the successor entities of the erstwhile Board duly constituted under the Companies Act, 1956, on April 16, 2010 after unbundling of the Board by the Government of Punjab (GoP) vide notification No. 1/9/08/EB(PR)/196 dated April 16, 2010 under the "Punjab Power Sector Reforms Transfer Scheme" (Transfer Scheme). The balance sheet appended to the Transfer Scheme is provisional and the Final Transfer Scheme for PSPCL has not been notified yet. Hence, forecast of various financial parameters have been made on the basis of assumptions detailed in the ARR petition. PSPCL has, therefore, requested the State Commission to consider its **petition as provisional ARR petition**, subject to finalization of the Transfer Scheme by Government of Punjab (GoP) in due course of time.

6. that the State Commission in the tariff order for FY 2011-12 had observed that the provisional balance sheets of the two successor entities, ending March, 31, 2009, as appended to the above mentioned

Transfer Scheme showed significant variations when compared to the audited balance sheet of the integrated utility. Therefore, the Commission deemed it proper to rely on the information filed by the erstwhile Board in its ARR petition for FY 2010-11 and not on the provisional balance sheet for the purpose of tariff determination for FY 2011-12. On the same lines, for FY 2012-13 also, the Commission has determined the ARR and tariff based on the submissions of PSPCL in its ARR petition for FY 2012-13 (impugned petition). The Commission has adhered to existing norms and principles for the review of FY 2011-12.

7. It may be mentioned here that in the ARR petition for FY 2012-13, PSPCL has worked out a cumulative revenue gap of Rs. 8983.97 crore for FY 2012-13 including amortization of the regulatory asset, gap of previous year and carrying cost of previous year gap as well as the regulatory asset. Since the instant petition of the appellant PSPCL did not contain any proposal to cover this gap, a letter dated 15.12.2011 was issued to PSPCL asking it to submit a tariff or any other proposal to cover this gap. PSPCL in its response on 06.01.2012, replied that the State Commission may determine the gap and fix the tariff based on the details furnished by the PSPCL in its ARR. The State Commission took the ARR on record on 01.12. 2011. On scrutiny, it was found by the State Commission that the ARR was deficient in some respects and then in further communications relevant informations were furnished by the PSPCL.

8. that while passing the impugned order, the State Commission has clearly mentioned in the impugned order that the Annual Revenue Requirements determined by the State Commission in the impugned order is based on the petition

filed by PSPCL, operating as utility performing functions of generation, distribution and trading of electricity and tariff determination by the Commission is based on the revised estimates of FY 2011-12 and projections of FY 2012-13 as submitted by the appellant-PSPCL.

9. A public notice was published by the PSPCL in various newspapers inviting objections from the general public on the ARR petition filed by the PSPCL by making the copies of the ARR petition available on the website of PSPCL and in its office and other relevant offices, advising the objections to be filed with the Secretary of the State Commission within 30 days of the publication of the notice and then many stake holders filed their objections . Thereafter, public hearing was held by the State Commission on different dates. State Advisory Committee was also constituted under Section 87 of the Electricity Act, 2003 and after considering the material on record and hearing rival submissions of the parties, the State Commission has passed the impugned order which is under challenge before us in the instant appeal.

10. We have heard Mr Anand K. Ganesan, learned counsel for the appellant and Mr Sakesh Kumar, learned counsel for the respondent and have also gone through the material on record as well as the respective written submissions filed by the rival parties. The following issues arise for our consideration in the present appeal:-

- (i) Whether the State Commission is justified in not allowing the employees cost, as claimed by the appellant, in reducing the same by 17.22%?
- (ii) Whether the State Commission is justified in applying the Wholesale Price Index (WPI) to increase in employees cost and dearness allowance?

- (iii) Whether the State Commission is justified in reducing the claim of interest and finance charges on account of alleged diversion of funds?
- (iv) Whether the State Commission is justified in disallowing the interest and finance charges on the loans taken by the appellant to meet its revenue deficit?
- (v) Whether the State Commission is justified in not providing the return on equity in terms of the tariff regulations by grossing up pre-tax rate of return on equity by the tax rate?
- (vi) Whether the State Commission is justified in not following the provisions of the tariff regulations for generation target availability for recovery of fixed charges and incentive?
- (vii) Whether the State Commission is justified in penalizing the appellant for the shortfall in revenue which required the appellant to take loans to meet the additional working capital requirements.

11. **Issue Nos. (i) & (ii)**

Since both these issues are inter-connected, they are being considered and decided simultaneously.

12. The following submissions have been made on behalf of the appellant on these issues:-

12.1. that the State Commission, has in the impugned order, effected a reduction of 17.22% in the employees cost of the appellant on the ground that the employees cost of the appellant are high. This reduction has been effected by the State Commission on the arrears of pay and the impact of the pay revision also.

12.2. that the employees cost of the appellant is higher and the appellant does not have control over the employees cost and the appellant is bound to pay the pay scales as per the prevalent rules and the agreements with the employees. This is particularly after the unbundling of the appellant

and the pay and allowances of the employees cannot be inferior to the employees of the erstwhile Punjab State Electricity Board, as provided under Section 133 of the Electricity Act, 2003.

12.3. that the same issue was raised in the previous year and was allowed by this Tribunal by judgment dated 02.03.2012 in Appeal No. 76 of 2011 in the case of Punjab State Transmission Corporation Ltd. Vs. PSERC and others, and the present issues raised are fully covered by the aforesaid decision of this Appellate Tribunal.

12.4. that all the issues raised in the present appeal are covered by the judgment dated 18.10.2012 of this Tribunal passed in Appeal Nos. 7, 46 & 122 of 2011 titled as Punjab State Power Corporation Ltd. V. Punjab State Electricity Regulatory Commission & Ors.

13. **Per contra**, the following arguments, on these issues have been made by Shri Sakesh Kumar, learned counsel appearing for the respondent/State Commission.

13.1. that some of the issues decided by this Appellate Tribunal in its judgments dated 02.03.2012 and 18.10.2012 noted above are needed to be gone into by this Tribunal.

13.2. that Regulation 28 of the Punjab State Electricity Regulatory Commission Regulations, 2005 which governs the issue of Operation & Maintenance Expenses is relevant for this purpose as stated in the various tariff orders passed by the State Commission for different years that employees cost of the erstwhile Board and the successor utilities has been tremendously higher, hence, the State Commission, right from the beginning, took a very strict view of the matter to shield the consumer from such uncontrolled expenses. Likewise, this Appellate Tribunal in

Appeal Nos. 153 of 2007, 196 of 2009, 99 of 2009 and 40 of 2010 approving the view of the State Commission also took a very strict view of the same while considering the issue of employees cost.

13.3. that this Appellate Tribunal in Appeal No. 40 of 2010 in Mawana Sugar Ltd. Vs. PSERC & Anr. has held as under:-

“It appears that in the ARR for 2009-10, the Commission by its order dated 08.09.2009 approved Rs. 1856.60 crore as employees cost from Rs. 3454.68 crore as was projected by the Board. As such, it cannot be said that the Commission’s approach to the issue is unjustified; on the contrary, the Commission adopted a consistent reasonable approach throughout the year preceding the FY 2010-11. This issue is answered accordingly.”

13.4. that this Appellate Tribunal in its judgment dated 02.03.2012, passed in Appeal No. 76 of 2011, could not consider the judgments rendered by it in Appeal Nos. 153/07 & batch and in Appeal No. 40/10 in which this Tribunal had taken a very strict view of the matter to shield the consumer from such uncontrolled expenses and approving the approach of the State Commission in observing in its earlier tariff orders that the employees cost of the erstwhile Board and the successor utilities has been tremendously higher. Hence the same may be considered per incuriam.

13.5. that this Hon’ble Tribunal in the above-mentioned Appeal No. 76 of 2011 found that the reduction of arrears by 28.48% consistently was not in the sound logic and the Commission needs to give a re-look to the reduction and decide the employees cost based on the Regulation and other attending circumstances.

14. According to the appellant, the same issue regarding reduction of employees cost came up for consideration before this Appellate Tribunal in Appeal No. 76 of 2011 decided on 02.03.2012 and also in Appeal Nos. 7, 46 & 122 of 2011 decided on 18.10.2012. Both these issues in the instant appeals are fully covered by the judgment dated 02.03.2012 and 18.10.2012 passed by this Appellate Tribunal. In Appeal No. 76 of 2011, the appellant was one of the successor entities of the erstwhile Punjab State Electricity Board and hence the reasoning assigned on account of that issue is equally applicable to the instant appeal. The State 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 State 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.

15. We deem it necessary to reproduce and consider the judgment dated 18.10.2012 passed by this Appellate Tribunal in Appeal Nos. 7, 46 and 122 of 2011 in which the law laid down in our earlier judgment dated 23.03.2012 passed in Appeal No. 76 of 2011 was also taken into consideration. The relevant portion of the judgment dated 18.10.2012 passed in Appeal No. 7, 46 and 122 of 2011 is reproduced as under:-

“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) of the Tariff Regulations 2005, 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 arrears 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. 2.55 crore 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 core. 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 2011-2012 the 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.”

16. We have carefully perused the above quoted portion of the aforesaid judgment dated 18.10.2012 and we find ourselves fully in agreement with the same.

17. We are unable to accept the contention of Mr. Sakesh Kumar, learned counsel appearing for the respondent-State Commission to the effect that the earlier judgments of this Appellate Tribunal pronounced in Appeal No. 153 of 2007 and batch & 40 of 2010 since could not be cited before this Tribunal when this Tribunal was deciding Appeal No. 76 of 2011 and Appeal No. 07 of 2011 & batch regarding strict approach adopted by the State Commission having been approved by this Tribunal, hence the judgments passed in Appeal No. 76 of 2011 & in Appeal No. 07 of 2011 & batch, be treated as per incuriam. Since the strict approach of the State Commission was continuing year after year causing a number of problems and also causing injustice to the successor entities of the Punjab State Electricity Board, this Tribunal considered the pros and cons including the State Regulations, 2005 as

subsequently amended in the year 2009 which were amended by the State Commission only after a mandamus issued by this Tribunal, the said judgments cannot be said to be per incuriam because all the aspects including relevant Regulations at the appropriate time have been considered by this Appellate Tribunal in order to do justice to the rival parties and to maintain balance keeping in view the efficient and proper functioning of the generation, transmission, distribution and power trading in the State of Punjab.

18. We agree to the findings and law laid down by this Appellate Tribunal in its aforementioned judgment dated 02.03.2012 and re-affirmed in judgment dated 18.10.2012. We do not find any cogent or sufficient reasons to deviate from the said law laid down. The said judgments do not require any re-look at this stage by this Appellate Tribunal. Consequently, both the issues are decided in favour of the appellant and the findings recorded in the impugned order to the contrary are liable to be set aside since the said findings of the State Commission are perverse and suffer from error of law.

19. Issue Nos. (iii), (iv) & (vii)

Since these issues are also inter-woven, we are considering them together. On these issues, the contentions of the appellant are as under:-

19.1 that the State Commission in the impugned order has made disallowances to the appellant on account of alleged diversion of funds in the hands of the erstwhile Punjab State Electricity Board. The above relates to the period prior to the constitution of the State Commission when the funds available to the Electricity Board for capital purposes were allegedly used for revenue purposes to satisfy the revenue deficit.

19.2 that this Appellate Tribunal in the past including its decision dated 18.10.2012 in Appeal No. 7, 46 & 122 of 2011, upheld the decision of the State Commission.

19.3 that the appellant has been deprived of the amounts on account of alleged diversion of funds for many years. The appellant is an unbundled entity and a public utility. The appellant ought not to be prejudiced over and over again on account of the past actions which were even prior to the constitution of the State Commission. The tariff in the past prior to the constitution of the State Commission was not determined reflective of the costs. Infact for many years, there was no increase in the tariff and in the circumstances the Electricity Board was constrained to use funds available to cover the revenue deficit.

19.4 that the State Commission as a Regulatory Authority ought to ensure that the reasonable costs and expenses are recovered and the appellant operates in a viable and sustained manner to serve the public at large. Hence, the issue of interest and finance charges on account of alleged diversion of funds ought to be re-looked and re-considered.

19.5 that the State Commission has failed to consider the interest on working capital based on the actual working capital loans in the hands of the appellant. The State Commission has merely allowed the interest on working capital based on the working capital requirements as per the Regulations, without considering the case of the appellant for relaxation of the Regulations in the peculiar facts of the case.

19.6. that as of March, 2012, the appellant had a total working capital loans of over Rs. 10,000/- crores, which is primarily on account of the tariff not covering the costs and expenses of the appellant. Continuing

to bear such loans without the same being serviced would only result in greater losses to the appellant.

19.7. that this Appellate Tribunal in its judgment in Appeal Nos. 7, 46, 122 of 2011, rejected the claim of the appellant for relaxation of the Regulations for the said year. Considering the facts of the present case and the actual financial position and also that the revenue gap and loans are ever increasing, the State Commission ought to re-consider the position and allow the servicing of the loans in hands of the appellant, subject to prudence check.

20. **Per contra**, the learned counsel for the respondent/State Commission has made following contentions on these issues:-

20.1. that the issue of interest and finance charges on account of diversion of funds is covered by the judgment dated 18.10.2012 of this Appellate Tribunal in Appeal Nos. 7, 46 & 122 of 2011 titled as Punjab State Power Corporation Ltd. V. Punjab State Electricity Regulatory Commission & Ors.

20.2. that the appellant's submission requesting this Appellate Tribunal to have a re-look in the matter is not tenable because the present proceedings are not in the nature of review.

20.3. that the issue relating to interest on working capital is also covered by the judgment dated 18.10.2012 of this Tribunal in Appeal Nos. 7, 46 & 122 of 2011, as stated above and does not deserve to be given a fresh look.

21. After going through the judgment dated 18.10.2012 passed in Appeal Nos. 7, 46 & 122 of 2011 titled as Punjab State Power Corporation Ltd. V. Punjab State Electricity Regulatory Commission &

Ors., we do not find any merits in the submissions of the appellant to have a fresh look or re-look on the same issues. There is no sufficient material on record warranting us or authorizing us to re-look or consider afresh the same issues which have recently been decided by this Tribunal in the aforesaid batch of appeals in the judgment dated 18.10.2012.

22. We fully agree to the aforesaid judgment dated 18.10.2012 passed by the Co-ordinating Bench of this Tribunal and there is no reason to differ therefrom on any of these issues. Thus, we adhere to and agree to the judgment passed by this Tribunal in Appeal Nos. 7, 46 & 122 of 2011 titled as Punjab State Power Corporation Ltd. V. Punjab State Electricity Regulatory Commission & Ors.

23. The State Commission, in the impugned order, has not penalized the appellant as contended by it before us. If the appellant could not control its imprudent expenses and could not improve its working capital, the State Commission cannot legally help the appellant. The State Commission, in the impugned order, has rightly dis-allowed the appellant's interest and finance charges for diversion of funds. The appellant has not continuously been deprived of the amounts on account of so called diversion of funds for many years. This cannot be legally pleaded by the appellant that the tariff in the past, prior to the constitution of the State Commission, was not determined reflective of costs and for many years there was no increase in the tariff and the erstwhile Electricity Board, predecessor of the appellant, was constrained to use the funds available to cover the revenue deficit. The appellant itself is responsible for its past negligence and lapses. Had the appellant taken due care and precaution with prudence check it could have controlled its costs and expenses to a reasonable level. If the appellant is

not operating in a viable and sustained manner to serve the public at large, the appellant itself is responsible for its poor economic state and the negligence, inefficiency, inaction or slackness on the part of the appellant cannot be allowed to be shifted upon shoulders of the consumers because at the same time it is our duty to see that the consumers of the appellant are not unduly or unreasonably burdened or made to suffer because of the imprudence of the appellant. The State Commission has not found any cogent reason to relax the relevant Regulation of the State Commission to help the appellant and the said discretion has rightly and legally been exercised against the appellant by the State Commission.

24. Further, the State Commission has rightly ignored the interest on working capital based on the actual working capital loans in the hands of the appellant. The State Commission has properly and legally allowed the interest to the appellant on the working capital based on the working capital requirements as per the Regulations. The State Commission has rightly disallowed interest on working capital based on the actual working capital loans and we do not find any fault in the just and proper legal approach of the State Commission on this issue. If the appellant is allowed interest on working capital based on its actual working capital loans that would further burden the consumers which is not the purpose of the Electricity Act, 2003. The State Commission is required to act in a just and balancing way between the distribution licensee and the consumers while approving the ARR and determining the retail supply tariff for any particular period.

25. In view of the above discussions, issue nos. (iii), (iv) & (vii) are decided against the appellant as the appellant's submission on the issues are sans merit.

26. **Issue No. (v)**

Now, we are required to see whether the State Commission is justified in not providing the return on equity in terms of the Tariff Regulations by grossing up pre-tax rate of the return on equity by the tax rate. On this issue, following pleas have been raised on behalf of the appellant:-

26.1. that in terms of the judgment dated 18.10.2012 passed by this Tribunal in Appeal Nos. 7, 46 and 122 of 2011 titled as Punjab State Power Corporation Ltd. V. Punjab State Electricity Regulatory Commission & Ors., the return on equity is to be grossed up by the applicable tax rate subject to actual payment of tax and the same ratio ought to be applied in the present case also.

26.2. that that the State Commission, in the impugned order, has restricted the return on equity to 15.5% without grossing up which is against the principle laid down by this Appellate Tribunal in its judgment dated 18.10.2012, passed in Appeal Nos. 7, 46 and 122 of 2011 titled as Punjab State Power Corporation Ltd. V. Punjab State Electricity Regulatory Commission & Ors.

27. **Per contra**, the following submissions have been made on behalf of the respondent/State Commission.

27.1. that this issue is no longer *res-integra* and is covered by judgment dated 18th February, 2014 in Appeal No. 27 of 2013, PSTCL Vs. PSERC & Anr., passed by this very Bench in which this Tribunal has held as under:

“16. It is evident that the learned State Commission in the subsequent order dated 07.01.2013 passed in Petition No. 57 of 2012 (suo-motu) in compliance of this Tribunal’s judgment dated 18.10.2012

in Appeal Nos. 7, 46 and 122 of 2011 had allowed Return on Equity @ 15.5% in place of 14% approved earlier for FY 2009-10. It is true that the State Commission, in the impugned order has allowed Return on Equity @ 15.5% without any grossing up to the Appellant, which is a transmission utility, for FY 2012-13 for the reason, had the Commission allowed Return on Equity at the grossed up rate, it would have amounted to allowing double benefit to the utility to the detriment of the consumers. Since, the Appellant was not liable to pay any income tax or obligatory tax it was not given the benefit of grossing up rate of the Return on Equity. While claiming the grossing up of Return on Equity by the Appellant, its impliedly intension was that the Appellant would claim tax amount in advance whether the liability of the Appellant is to pay the obligatory taxes arises or not. The State Commission in the impugned order has clearly noted that the Petitioner Appellant had not claimed any tax liability for its ARR for the years 2011-12 and 2012-13. The impugned order to allow Return on Equity for FY 2011-12 and 2012-13 @ 15.5% without any grossing up with the tax rate seems to be well considered view.

17. The Regulation 15 of the Central Commission Tariff Regulations, 2009 lays down that the Return on Equity shall be computed on the equity base determined in accordance with Regulation 12 thereof and the 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 15. Clause 3 of Regulation 15 further states that rate of Return on Equity shall be computed by grossing up the base rate with the normal tax rate for the relevant year applicable to the concerned generating company or to the transmission licensee with a proviso which provided that Return on Equity with respect to actual tax rate applicable to the generating company or transmission licensee, 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 by the next tariff period. Since the Petitioner Appellant did not claim any tax liability for its ARR for the years 2011-12 and 2012-13 and the Appellant was a loss making entity, the Return on Equity was allowed @ 15.5% without any grossing up by the tax rate. The application of grossed up rate of Return on Equity is not automatic but will be applied only in case the licensee pays tax on its income. The State Commission was bound to follow or comply with all the provisions with conditions prescribed under Regulation 15 of the Central Commission Tariff Regulations, 2009 and the provision of the same could not be considered in isolation but the cumulative and combined

effect of all the provisions of the said Regulation 15 was to be considered which has been rightly considered by the learned State Commission.

18. The position as admitted by the learned counsel for the contesting parties is that after passing of the impugned order, the State Commission vide Notification dated 17.09.2012 has incorporated an amendment to the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 by making amendment in Regulation 25 relating to Return on Equity. By the said amendment under Regulation 25 of the State Commission Regulations, 2005, Return on Equity shall be computed @ 15.5% on the paid up equity capital determined in accordance with Regulation 24. Thus, after passing of the impugned order, the important amendment has been made in the State Regulations, 2005 by the learned State Commission and the provision of grossing up has been done away with bringing the whole controversy or dispute, which would have arisen in future, to an end.”

28. Before proceeding to decide this issue relating to return on equity, we think it proper to mention that this Tribunal decided Appeal Nos. 7, 46 & 122 of 2011 vide judgment dated 18.10.2012, and the State Commission in the suo motu petition no. 57 of 2012 in compliance of this Tribunal’s judgment dated 18.10.2012, after adopting the procedure provided under the Act and Rules, passed order dated 07.01.2013, whereby the State Commission had allowed return on equity @ 15.5% in place of 14% as approved earlier for FY 2009-10. Thus, the State Commission for the purpose of complying the judgment of this Tribunal passed in Appeal Nos. 7, 46 & 122 of 2011 dated 18.10.2012, initiated suo motu petition being Petition No. 57 of 2012, and after hearing passed order dated 07.01.2013, by which the State Commission allowed return on equity @ 15.5% without any grossing up to the PSTCL which was appellant therein.

29. What the learned counsel for the appellant submits before us in the instant appeal is that the judgment dated 18.10.2012, passed by this Appellate Tribunal in Appeal No. 7, 46 and 122 of 2011, whereby this Tribunal directed the return on equity to be grossed up by the applicable tax rate subject to actual payment of taxes should be complied with.

30. We have already considered the same issue in the aforesaid Appeal No. 27 of 2013 and vide our judgment dated 18.02.2014, we have recently dismissed the said Appeal upholding the Commission's view whereby the State Commission had allowed return on equity @ 15.5% without any grossing up to the appellant PSTCL, a successor utility of the erstwhile Punjab State Electricity Board.

31. From the above discussion, we observe that the contention of the learned counsel for the appellant that this Appellate Tribunal's judgment dated 18.10.2012 rendered in Appeal Nos. 7, 46 & 122 of 2011, be got complied with, appears to be meritless because the State Commission had already in Suo Motu Petition No. 57 of 2012 complied with this judgment as stated above.

32. In the result, this finding of the State Commission regarding return on equity is also valid and legal one, requiring no interference warranted at this stage as the same issue is covered by our judgment dated 18.02.2014 in Appeal No. 27 of 2013 and we approve the same. This Issue No. (v) is also decided against the appellant.

33. **Issue No. (vi)**

Now, we are to consider whether the State Commission is justified in not following the provisions of Tariff Regulations for Generation Target

Availability for recovery of fixed charges and incentive. The following contentions have been made on behalf of the appellant on this issue.

33.1 that the State Commission has not framed any independent Regulations but has simply incorporated by reference the Regulations of the Central Commission as applicable from time to time. The Regulation 20 of the State Commission's Regulations, 2005 provides as under:-

“20. While determining the cost of generation of each thermal/gas/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.”

33.2. that in terms of Regulation 26 of the Central Commission's Regulations, 2009 the target availability for generation is 85% for the period 2009-14. In terms of the State Commission's Regulations, the same was liable to be applied by the State Commission. Contrary to it, the State Commission has approved the generation target availability for the appellant's GGSSTP and GHPT generating stations at much more than 90%, based on the actual for the past three years. For GGSSTP the target availability has been fixed at 94.60% and 96.16% for GHPT.

33.3. that the same issue is also fully covered in favour of the appellant in the judgment dated 18.10.2012 in Appeal Nos. 7, 46 and 122 of 2011 passed by this Appellate Tribunal.

34. **Per contra**, following submissions have been raised on behalf of the respondent/State Commission:-

34.1. that the State Commission, has consistently in the past, followed a transparent methodology for determining incentive/disincentive in case of excess/less generation vis-a-vis targets. The policy followed by the State Commission takes into consideration the actual generation and actual availability (which takes into account maintenance schedules and forced outages during these years) in the past three years. When actual

generation achieved in the past is taken into consideration while determining the generation for the next year, the quality of the fuel, aging of the plant, forced outages and grid conditions automatically factored in.

34.2. Regarding allowing of incentive for higher generation, the State Commission has been allowing incentive at the time of true-up, as and when actual generation is more than as determined/fixed by the State Commission in the first instance, in its various tariff orders.

34.3. Regulations 10, 20 & 44 of PSERC Tariff Regulations, 2005 are relevant for the purpose of deciding this issue which are reproduced as under:-

“Regulation -10 Excess or Under Recovery with respect to norms and Targets

- (1) The generating Company or the licensee, as the case may be, shall retain the entire gain arising from over achievement of the norms laid down by the Commission in these **Regulations or targets set by the Commission from time to time.**
- (2) The generating Company or the licensee, as the case may be, shall bear the entire losses on account of its failure to achieve the norms laid down by the Commission **or targets set by the Commission from time to time.**

Regulation-20: Cost of Generation

While determining the cost of generation of each thermal/gas/hydro electric generating station located within the State, the Commission shall be guided, as far as feasible, by the principle and methodologies of CERC, as amended from time to time.

Regulation-44: Special Provisions

During the period, the PSEB remains as integrated utility, the Commission may waive any of the provisions of these Regulations in any matter if, in the opinion of the Commission, it is impracticable or inexpedient to proceed as per these Regulations. In such a situation, after recording its reasons, the Commission

may adopt any other approach which is reasonable and is consistent with the overall approach of these Regulations.”

34.4. that while filing the ARR for the year 2012-13, PSPCL did not furnish separate figures/accounts for its functions of generation and distribution (retail supply and wheeling) of electricity. It was, therefore, not possible for the State Commission to determine the capacity charges separately for generation function, and then determine and approve the capacity charges on the basis of target availability projected by the PSPCL in the ARR, as per the provisions of CERC Tariff Regulations. Regulation 10 of PSERC Tariff Regulations, 2005 provides for norms laid down or the targets set by the State Commission. The Commission in the absence of availability of fixed cost for each thermal plant separately, adopted the measure of targets set by the Commission in allowing the incentives/dis-incentives in respect of generation business of the PSPCL.

34.5. that the State Commission shall, as per the directions of this Appellate Tribunal in its judgment dated 18.10.2012 in Appeal Nos. 7, 46 & 122 of 2011, examine the issue afresh.

35. Thus, upon consideration of the rival contentions raised by the parties on this issue, the admitted position is that the State Commission is ready to decide the present issue as per the direction of this Appellate Tribunal given in its judgment dated 18.10.2012 in Appeal No. 7 of 2011 & batch.

36. Now, we quote the relevant portion of our judgment dated 18.10.2012 in Appeal No. 7 of 2011 & batch titled as Punjab State Power Corporation Ltd. Vs. PSERC & Ors. which is reproduced below:-

“Issue No.2.....While determining the cost of generation of each thermal /gas/ 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."

37. Learned counsel for the State Commission in support of linking the incentive to target PLF has referred to Regulation 10 regarding excess or under recovery with respect to norms or targets and Regulation 44 which is a special provision for waving any provision of the Regulation if it is impracticable or inexpedient to proceed as per the Regulations. We feel that none of the above Regulations are relevant to determination of fixed charges incentive as per the Regulations. Regulation 10 only provides that the generating company or licensee shall retain the entire gain arising from over achievement of the norms laid down in these Regulations or targets set by the State Commission from time to time. As norms are specifically provided for a certain parameter, the Regulation 10 does not give the choice to the State Commission to adopt either the norms specified in the Regulations or the target set in an order. Only where norms are not specified, the target could be a benchmark for the performance. Regulation 44 is a special provision which is applicable during the period the Punjab State Electricity Board is an integrated utility. The Electricity Board has since been reorganized after notification of the State Reforms Act following which the Board has been bifurcated and Appellant's company and other companies have been formed. Therefore, there is no application of Regulation 44 in the present case.

38. The learned counsel for the State Commission has also stated that the Appellant did not furnish separate figures/accounts for the function of generation and distribution of electricity. It is, therefore, not possible to determine the capacity charges separately for generation function and then determine and approve the capacity charges on the basis of actual plant availability as per the Regulations. We feel that non- furnishing of the accounts in the ARR petition by the appellant cannot be a reason for not following the Regulations. The State Commission is empowered to direct the Appellant to furnish the requisite segregated data/accounts in order to determine the tariff as per the Regulations. The Appellant is also bound to furnish the requisite data as directed by the State Commission. Accordingly, the Appellant is also directed to furnish the requisite data/ accounts as sought to the State Commission. The State Commission in the additional written submissions has submitted that the Commission shall as per the directions of the Tribunal, examine the issue afresh. Accordingly, the State Commission is directed to re-examine the matter and the Appellant shall furnish the requisite data/accounts as required by the Commission in order to determine the incentive in the form of additional capacity charges as per the Regulations.

39. Thus, the finding recorded in our judgment dated 18.10.2012 in Appeal No. 7 of 2011 & batch, the State Commission, as admitted by its learned counsel during arguments of the present appeal, shall now examine the issue afresh. Consequently, the issue no. (vi) is hereby allowed in favour of the appellant.

40. **Summary of Finding**

40.1. The State Commission has, in the impugned order, wrongly effected a reduction of 17.22% in the employees cost of the appellant on the ground that the employees cost of the appellant are high. The approach of the State Commission in reducing the employees cost to the extent of 17.22% on the ground that the employees cost of the appellant is higher and the appellant does not have control over its employees cost is erroneous and arbitrary. Further, the State Commission is not justified in applying the Wholesale Price Index (WPI) to increase in employees cost and dearness allowance. We do not approve this approach of the State Commission. We agree to the findings laid down by this Appellate Tribunal in its judgments dated 02.03.2012 & 18.10.2012 delivered in Appeal No. 76 of 2011 and Appeal No. 7, 46 & 122 of 2011 respectively. Thus, both the issues i.e. Issue Nos. (i) & (ii) are allowed by us directing the State Commission to re-examine both these issues in the light of our findings recorded earlier in the judgments dated 02.03.2012 and 18.10.2012 in Appeal No. 76 of 2011 and Appeal No. 7 of 2011 & batch.

40.2. The State Commission is justified in reducing the claim of interest and finance charges on account of the alleged diversion of funds. The State Commission is also justified in dis-allowing the interest and finance charges on the loans taken by the appellant to meet its revenue deficit. The State Commission has not penalized the appellant for the shortfall in revenue which required the appellant to take the loans to meet its additional working capital requirements. Thus, the approach of the State Commission in deciding Issue Nos. (iii), (iv) & (vii) against the appellant is perfectly legal, just and correct one to which we agree.

40.3. The State Commission is legally justified in not providing the return on equity in terms of Tariff Regulations by grossing up pre-tax rate of return on equity by the tax rate. The approach of the State Commission while deciding Issue No. (v) is perfectly legal and valid one. Our finding while considering the same issue in Appeal No. 27 of 2013 decided on 18.02.2014 is re-affirmed by us.

40.4. The State Commission is not justified in applying the provisions of Tariff Regulations for generation target availability for recovery of fixed charges and incentive. The said approach of the State Commission while deciding issue no. (vi) is illegal and ill-founded. We have decided issue no. (vi) in favour of the appellant as the same issue is covered by the earlier judgment of this Appellate Tribunal dated 18.10.2012 passed in Appeal No. 7 of 2011 & batch wherein it was 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. The State Commission has indicated that in the absence of segregated accounts for generation, the incentive cannot be worked out as per the Regulations for which we have given certain directions under paragraph 38. Accordingly, the State Commission shall examine the same issue afresh as per the directions given by this Appellate Tribunal in the aforesaid judgment dated 18.10.2012.

41. In the result, the instant appeal partly succeeds and is partly allowed subject to the observations made by us in respect of the concerned issues. The State Commission shall pass appropriate order treating the matter as remand in respect of those issues which have been

allowed by us in this appeal, of course, upon hearing the parties. No costs.

Pronounced in open Court on this 11th day of September, 2014.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

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