APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 06 of 2017

Dated : 14th September, 2019

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

In the matter of:

Punjab State Power Corporation Limited
The Mall
Patiala – 147 001 **…. Appellant**

VERSUS

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

2. **Steel Furnace Association of India (Punjab Chapter)**
   c/o Upper India Steel Mfg. & Engg. Co. Ltd.
   Dhandari Industrial Focal Point,
   Ludhiana – 141 010

3. **M/s Mawana Sugars Ltd**
   Unit, Siel Chemical Complex,
   Vill Khadoli, Rajpura, District Patiala, Punjab
   Through its authorized representative
   Ms. Vani Chandrashekhar **…. Respondents**

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

Counsel for the Respondent(s): Mr. Sakesh Kumar
Ms. Gitanjali N Sharma for R-1

Mr. Aditya Grover for R-2

Mr. Sanjay Sen, Sr. Adv.
Mr. Praveen Kumar
Ms. Subhi Sharma for R-3

J U D G M E N T

PER HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

1. Punjab State Power Corporation Limited, Patiala (in short, the "**Appellant**") has filed the present Appeal, under Section 111 of the Electricity Act, 2003 ("**Electricity Act**") challenging the Order dated 18.10.2016 passed by the Punjab State Electricity Regulatory Commission (hereinafter called the '**State Commission**') in Petition No. 64 of 2016 whereby the State Commission has determined the issue of giving concessional tariff beyond threshold limit and directed the Appellant to only consider the Appellant's consumption for calculating maximum annual consumption in any of the last two financial years which is to be taken as threshold limit under para 7.4.3 (i) and also for calculating consumption of Large Supply Industrial category consumers eligible for base rate of Rs. 4.99/kVAh under para 7.4.3 of the Tariff Order for Financial Year 2016-17.

1.1 The Appellant's contention is that the promotional and concessional tariff of Rs. 4.99/-kVAh was provided for in the tariff order of the State Commission and also by way of the Order dated 26.07.2016 of the State Commission in Petition No. 70 of 2015 as a promotional measure to encourage new industries and higher consumption in the State and utilize the stranded capacity available. The intention was not to merely re-allocate the existing capacity and

claim the benefit of the concessional tariff. The State Commission has, thus, erred in not considering the consumption of power from open access for calculating the threshold limit.

1.2 In the circumstances, the Appellant has preferred the present appeal before this Tribunal praying for the following reliefs:

(a) Allow the appeal and set aside the order dated 18.10.2016 passed by the State Commission to the extent challenged in the present appeal

(b) Pass such other Order(s) and this Hon'ble Tribunal may deem just and proper.

2. Brief facts of the Appeal:

2.1 Punjab State Power Corporation Limited, Appellant herein, is a company incorporated under the provisions of the Companies Act, 1956 and an unbundled entity of the erstwhile Punjab State Electricity Board and has been vested with the functions of generation and distribution of electricity in the State of Punjab.

2.2 Punjab State Electricity Regulatory Commission, first Respondent herein, is the State Electricity Regulatory Commission for the State of Punjab, exercising powers and discharging duties under the provisions of the Electricity Act, 2003.

2.3 Steel Furnace Association of India (Punjab Chapter), second

Respondent herein, is an association of steel industries in the State of Punjab. The members of the Respondent No. 2, apart from being consumers of the Appellant and also take supply from open access sources, primarily by means of short-term open access from the Power Exchange.

2.4 M/s Mawana Sugars Ltd, Unit, Siel Chemical Complex, third Respondent herein, is a registered company engaged in production of sugar in the State of Punjab and apart from taking supply from the Appellant also takes supply of electricity from open access sources.

3. The instant appeal has been filed by the Appellant under Section 111 of the Electricity Act, 2003 on the following questions of law.

A. Whether the State Commission is justified in clarifying that the threshold limit for calculation of consumption would only be considering the consumption from the Appellant?

B. Whether the State Commission is justified in providing the concessional tariff even for reallocation of the existing capacity of the consumers from various sources?

C. Whether the State Commission is justified in holding that the threshold capacity for applying the concessional tariff for increase in capacity is only the consumption from the Appellant and not the total consumption of the consumers?

4. Written submissions filed by the learned counsel, Mr. Anand K. Ganesan, appearing for the Appellant are as under:

4.1 The impugned Order dated 18.10.2016 has been passed by the first Respondent in Petition No. 64 of 2016 whereby the State Commission by entertaining a Petition seeking clarification of the Tariff Order for FY 2016-17 dated 27.07.2016, granted the concessional tariff beyond threshold limit and directed the Appellant to only consider the consumption from the Appellant only and not the total consumption of the consumer.

4.2 For the year 2016-17, the Government of Punjab had proposed to grant a concessional tariff to the new industries to be established in the State of Punjab by providing a concessional tariff of Rs. 4.99/- (energy charges) for a period of 5 years. This was proposed to achieve various objectives including industrialization and increase in demand in the electricity consumption, utilizing the stranded capacity and relieving the burden on the existing consumers, economic and social development, fiscal improvement of the State, higher taxation revenue etc. For this purpose, the Appellant filed a petition being Petition No. 70 of 2015 before the State Commission which was disposed of by the State Commission vide its Order dated 26.07.2016 wherein the State Commission after recording the submission of the State Government that it would provide a subsidy for the difference in the cost to supply

and therefore approved the tariff of Rs. 4.99/- as was proposed. On 27.07.2016, the State Commission passed the tariff order for the year 2016-17 wherein the State Commission incorporated the new tariff of Rs. 4.99/- per unit to be provided and also extended its applicability to the existing industries for the increased demand.

4.3 The basis and rationale of granting the concessional/promotional tariff to the existing industries was that when the new industries are given a benefit for establishing capacity in the State which would help the economic, social and fiscal development of the State, an existing industry which also expands its capacity should also be given the same benefit. In the circumstances, the Appellant applied the promotional tariff for the increase in capacity over the existing consumption of the industries. The existing consumption was taken as the total consumption of the existing industries irrespective of the source, as the promotional tariff was on the increased consumption and not reallocation of the existing consumption.

4.4 The Respondent No. 2 filed Petition No. 64 of 2016, purporting to seek a clarification of the Tariff Order dated 27.07.2016 on the issue of computation of the threshold limit beyond which the concessional tariff was to be granted. By the Impugned Order, the State Commission has clarified that only the power supplied by the Appellant in the previous

year will be considered for the calculation of threshold limit and also for calculating current year consumption of Large Supply Industrial category consumers eligible for base rate of Rs. 4.99 per unit. The State Commission has, inter-alia, concluded that the intention of the State Commission in granting concessional tariff was to discourage open access. Further, the sole purpose was only to increase the sale of electricity by the Appellant and therefore the said objective is achieved by the threshold being only the supply by the Appellant for the past years and not the total consumption by the consumer.

4.5 The impugned order is erroneous in as much as, the impugned order:

(a) Modifies the tariff order and proceeds to grant a substantive relief to the Petitioners while purporting to entertain a petition seeking clarification of the tariff order;

(b) Proceeds completely contrary to the terms of the tariff order wherein the conditions for availing the concessional tariff is specified;

(c) Proceeds completely contrary to the stated intention of the tariff order and the purpose of introducing the concessional tariff to new industries in the State;

4.6 On the point of application for clarification was not maintainable and the impugned order has modified the tariff order, which could not be done, learned counsel for the Appellant submitted that the petition

filed by the Respondent No. 2 before the State Commission was an application for clarification. However, the effect of the prayers sought and which have been granted amounts to modifying the terms of the tariff order and granting a substantive relief which was specifically not granted in the tariff order. Such an application was not maintainable. The conditions imposed in the Tariff Order dated 27.07.2016 for extending the benefit of the concessional tariff for the existing industries is very clear, namely based on the maximum annual consumption. The criteria is with regard to the maximum annual consumption of the consumer and has no correlation to the sources from which the power is procured and, further, the Tariff Order specifically states that the reduced rates shall be allowed to the consumer as and when the consumption of the consumer exceeds the maximum annual consumption.

4.7 The Tariff Order does not restrict the threshold to the quantum of supply by the Appellant – distribution licensee, but specifically to the maximum annual consumption of the consumer. When the terms of the Tariff Order are abundantly clear, the question of the State Commission modifying the same by means of clarification does not arise. The well settled principle of law is that power of clarification cannot be used to modify, alter or add to the terms of the original decree so as to have the effect of passing an effective judicial order after the judgment in the

case. In this regard, the Appellant craves leave to refer to the decision of the Hon'ble Supreme Court in the case of *Ram Chandra Singh v. Savitri Devi &Ors, (2004) 12 SCC 713*, as under:

> *"**13.** It is now well settled that an application for clarification or modification touching the merit of the matter would not be maintainable. A court can rehear the matter upon review of its judgment but, therefore, the procedure laid down in Order 40 Rules 3 and 5 of the Supreme Court Rules, 1966 as also Article 137 of the Constitution are required to be complied with as review of a judgment is governed by the constitutional as well as statutory provisions.*
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> ***14.** The applicants herein did not appear at the time of hearing. They, as noticed hereinbefore, have not to contend that there exist errors in the judgment which are apparent on the face of the records except the typographical. The prayer of the applicant is that apart from the corrections which are required to be made in the judgment, as noticed hereinbefore, the merit of the matter may also be considered, inter alia, with reference to the pleadings of the parties. Such a course of action, in our opinion, is not contemplated in law. If there exist errors apparent on the face of the record, an application for review would be maintainable but an application for clarification and/or modification cannot be entertained unless it is shown that the same is necessary in the interest of justice. An application which is in effect and substance an application for review cannot be entertained dehors the statutory embargo contained in Order 40 Rules 3 and 5 of the Supreme Court Rules, 1966.*
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> ***15.** In Gurdip Singh Uban [(2000) 7 SCC 296] the law has been laid down in the following terms: (SCC p. 309, para 17):*
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> > *"17. … This procedure is meant to save the time of the Court and to preclude frivolous review petitions being filed and heard in open court. However, with a view to avoid this procedure of 'no hearing', we find that sometimes applications are filed for 'clarification', 'modification' or 'recall' etc. not because any such clarification, modification is indeed necessary but because the applicant in reality wants a review and also wants a hearing, thus avoiding listing of the same in chambers by way of circulation. Such applications, if they are in substance review applications, deserve to be rejected straight away inasmuch as the attempt is obviously to bypass Order 40 Rule 3 relating to circulation of the application in chambers for consideration without oral hearing. By describing an application as*

one for 'clarification' or 'modification', — though it is really one of review — a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly obtain a hearing in the open court. What cannot be done directly cannot be permitted to be done indirectly."

16. *In Common Cause [(2004) 5 SCC 222] Lahoti, J. (as the learned Chief Justice then was) speaking for a Division Bench observed: (SCC pp. 222-23, para 2)*

"2. … We are satisfied that the application does not seek any clarifications. It is an application seeking in substance a review of the judgment. By disguising the application as one for 'clarification', the attempt is to seek a hearing in the open court avoiding the procedure governing the review petitions which, as per the rules of this Court, are to be dealt with in chambers. Such an attempt on the part of the applicant has to be deprecated."

17. *Recently in ZahiraHabibullah Sheikh v. State of Gujarat [(2004) 5 SCC 353 : 2004 SCC (Cri) 1613] referring to Order 40 Rule 3, this Court opined: (SCC pp. 358-59, para 6-7)*

"6. As noted by a Constitution Bench of this Court in P.N. EswaraIyer v. Registrar, Supreme Court of India [(1980)4SCC680] , Suthendraraja v. State[(1999) 9 SCC 323 : 2000 SCC (Cri) 463] , Ramdeo Chauhan v. State of Assam[(2001) 5 SCC 714 : 2001 SCC (Cri) 915] and Devender Pal Singh v. State, NCT of Delhi [(2003) 2 SCC 501 : 2003 SCC (Cri) 572] notwithstanding the wider set of grounds for review in civil proceedings, it is limited to 'errors apparent on the face of the record' in criminal proceedings. Such applications are not to be filed for the pleasure of the parties or even as a device for ventilating remorselessness, but ought to be resorted to with a great sense of responsibility as well.

7. In Delhi Admn. v. Gurdip Singh Uban [(2000) 7 SCC 296] it was held that by describing an application as one for 'clarification' or 'modification' though it is really one of review, a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly obtain a hearing in the open court. What cannot be done directly cannot be permitted to be done indirectly. The court should not permit hearing of such an application for 'clarification', 'modification' or 'recall' if the application is in substance a clever move for review."

18. *Thus, the applicants cannot be permitted to raise any contention which had not been raised before this Court at the hearing.*

19. *It is no doubt true that in appropriate cases this Court may pass an order ex debitojustitiae by correcting mistakes in the judgment but inherent power of this Court can be exercised only when there does not exist any other provision in that behalf. Clerical or arithmetical mistake or an error arising from an accidental slip or omission and to vary its judgment so as to give effect to its meaning and intention is permissible as has been held in SamarendraNath Sinha [(1967) 2 SCR 18 : AIR 1967 SC 1440] . But in this case nothing has been shown as to why inherent power of this Court is required to be exercised except for correcting the typographical errors.*

20. *B. Shivananda [(1994) 4 SCC 368] also relates to a case where clerical or arithmetical mistakes have occurred in the judgment and decree which could be corrected.*

21. *In Jayalakshmi Coelho [(2001) 4 SCC 181] whereupon Mr Mishra relied upon, this Court observed: (SCC pp. 188-89, para 13)*

> *"13. So far as the legal position is concerned, there would hardly be any doubt about the proposition that in terms of Section 152 CPC, any error occurred in the decree on account of arithmetical or clerical error or accidental slip may be rectified by the court. The principle behind the provision is that no party should suffer due to mistake of the court and whatever is intended by the court while passing the order or decree must be properly reflected therein, otherwise it would only be destructive to the principle of advancing the cause of justice."*

22. *This Court upon analysing some earlier decisions of this Court opined: (SCC p. 189, para 13)*

> *"13. … To illustrate the point, it has been indicated as an example that in a case where the order may contain something which is not mentioned in the decree would be a case of unintentional omission or mistake. Such omissions are attributable to the court which may say something or omit to say something which it did not intend to say or omit. No new arguments or reararguments on merits are required for such rectification of mistake. In a case reported in Dwaraka Das v. State of M.P. [(1999) 3 SCC 500] this Court has held that the correction in the order or decree should be of the mistake or omission which is accidental and not intentional without going into the merits of the case. It is further observed that the provisions cannot be invoked to modify, alter or add to the terms of the original decree so as to in effect pass an effective judicial order after the judgment in the case."*

4.8 In view of the settled position of law, the question of the State Commission entertaining an application seeking clarification does not arise. By virtue of the impugned order, the Respondents have been granted a substantive relief in modification of the tariff order passed, which is impermissible and, therefore, in the light of the above, the impugned order is liable to be set aside for this reason alone.

4.9 The impugned order proceeds completely contrary to the terms of the tariff order wherein the conditions for availing the concessional tariff is specified and the Tariff Order dated 27.07.2016 specifically uses the expressions maximum annual consumption qua the consumer and also that the reduced rates shall be allowed to the consumer as and when the consumption of the consumer exceeds the maximum annual consumption. The Tariff Order does not state that the reduced rates shall be allowed when the consumption of consumer exceeds the supply taken from the Appellant for the previous year. However, by the Impugned Order, the very basis of the decision in the main Tariff Order has been changed. The State Commission has now held that the Appellant is directed to consider only PSPCL consumption and not the total consumption of the consumer. The very nature of the consideration has been changed from qua the consumer to qua the supply taken from the Appellant. This amounts to changing the very terms of the tariff order. The tariff order is passed following the procedure prescribed

under Section 62 and 64 of the Electricity Act and is an order in rem. Such orders cannot be amended and modified by the State Commission as has been done, resulting in changing the very basis on which the tariff order has been passed.

4.10 The Impugned Order passed by the State Commission goes contrary to the basic intention and purpose of the tariff order in introducing concessional tariff to industries in the State. The concessional tariff was intended to be given only to new industries to be established in the State as per the stated objective of the Government of Punjab. For this purpose, the specific petition being Petition No. 70 of 2015 was filed by the Appellant before the State Commission. By order dated 26.07.2016, the State Commission approved the concessional tariff of Rs. 4.99/- per unit (energy charges) to new industries to be established in the State, also considering the fact the Government of Punjab had agreed to provide subsidy to the Appellant for the loss on account of charge the concessional tariff.

4.11 The purpose of the State Government proposing the concessional tariff and also agreeing to provide the subsidy was to invite investments into the State of Punjab. The concessional tariff was provided to those industries who would invest in the State pursuant to the Progressive Punjab Investors Summit organized by the State Government. The

primary objective was to invite investments, which would have multiple benefits for the State including increase in electricity demand, less stranded capacity, higher employment in the State, social economic development of the State, infrastructural development in the State, increased tax revenues and other fiscal levies in the State etc. In terms of the above, the additional supply by the Appellant was only one of the objectives, amongst many.

4.12 By the tariff order dated 27.07.2016, the State Commission extended the benefit of the concessional tariff to the existing industries also subject to conditions imposed. The condition was for increase in maximum annual consumption of the industries. In other words, when the existing industries would also increase their manufacturing/ production capacity, the effect of the same would be as that of establishment of a new industry with the very same benefits of the new industries. Considering that existing industries also expanding their capacity would have the same benefits to the State as that of a new industry being established, the concessional tariff was extended.

4.13 It was not the case of the only objective being increase in supply by the Appellant. If that was the only objective for this concessional tariff, there was no reason to restrict the concessional tariff for increase in demand by only the existing industries, but the said benefit would

have been granted to all consumers in the State who would increase their demand from the Appellant. In such an event, the restriction of granting the concessional tariff only to industries does not arise.

4.14 The concessional tariff which was granted only to new industries was also extended to expanded capacity of the existing industries in the State which would also have the various benefits, one of which is the increase in demand from the Appellant. The effect of the impugned order is only that the existing industries who do not in any manner expand their manufacturing/production capacity, by merely reallocating the existing demand between the Appellant and open access sources, are getting the benefit of the concessional tariff. In other words, the existing consumers with the very same existing demand, but only reducing the open access purchase and increasing the purchase from the Appellant are seeking to take the benefit of the concessional tariff, which is impermissible.

4.15 Further, the reliance placed by the State Commission in the impugned order of the report of IIM-Ahmadabad is also completely misplaced and in fact the State Commission has gone contrary to the said report. Firstly, the report was available to the State Commission at the time of passing of the tariff order dated 27.07.2016. Further the report specifically proceeds to examine the growth rates for the

industrial sector in the State and recommends the promotion of the industrial sector for overall growth and to provide employment opportunities to the people in the State of Punjab. In this regard, it is inter-alia, been observed as under:

> *"…….The growth in the industrial sector has slowed down and is below the national growth rate. In line of these and national 'Make in India' campaign, there is a significant opportunity to promote the secondary (industry) sector in order to increase the overall SGDP growth and to provide employment opportunities to the people of Punjab. It has been recommended in the report by the Consultant that industrial sector needs to be promoted in the State. Therefore, the Commission decides to decrease the tariff for various industrial categories i.e SP, MS& LS and no change in tariff for other categories, as given in Table 9.1"*

4.16 As is evident from the above, the report of the consultant was used by the State Commission for tariff design for others and not in relation to the concessional tariff to be granted beyond the threshold limit. The same has no correlation to the decision at para 7.4.3 of the tariff order, which is clearly on the applicability and eligibility criteria and, further, even assuming the report of the consultant to be relevant, the report clearly states the purpose and steps to be taken to increase industrial growth which would provide additional employment opportunities in the State of Punjab. By this very logic, the consumption for threshold limit has to be the total consumption of the consumer. Only increase in manufacturing/production capacity would lead to higher employment opportunities and not merely reallocation of the existing demand to the Appellant and open access sources.

4.17 In the facts and circumstances mentioned above, the impugned order of the State Commission is erroneous, the petition for clarification was not maintainable and the impugned order goes contrary to the specific terms of the tariff order dated 27.07.2016 and also the intention and purpose of the said order. Therefore, the impugned order is liable to be set aside.

5. Learned counsel, Mr. Sakesh Kumar, appearing for the first Respondent/PSERC submitted the following:

5.1 The present appeal filed by the appellant is against the order of the State Commission clarifying its tariff order for 2016-2017. Vide the impugned judgment and order, the commission has clarified the application of base rate of Rs. 4.99 per kwh under para 7.4.2 of the tariff order of 2016-2017. Hence, the present appeal is in fact against the tariff order of the year 2016-2017 and not against any adjudication of dispute between the parties. The impugned order being only clarificatory in nature, it is incumbent upon the appellant to challenge the tariff order of FY 2016-2017 if it wanted to and if it seeks to challenge the application of the rate of Rs.4.99/unit on the additional consumption over and above the threshold consumption as well as current year consumption of a consumer as determined by the tariff order. It is, therefore, clear that the present appeal, in absence of the appeal against the main tariff order, is not maintainable. A clarification

issued by an authority/regulator may not be a subject matter of an appeal until and unless the order which has been clarified is appealed against and while giving the clarificatory order the Commission has considered the background of the case and underlying principles enshrined in the Act and the Commission has considered in detail all the factors while giving relief to the industrial consumers for the additional consumption.

5.2 The State of Punjab has surplus power which is not used and commitment charges are paid to the IPPs as per the contract signed with them. The Commission while considering the ARR filed by the Appellant for the year 2016-2017 had engaged the Indian Institute of Management (IIM) Ahmadabad as a consultant to study the prevailing power sector scenario and to suggest ways and means to utilize the surplus power in the state. The Commission accepted the report of IIM Ahmadabad. It has cautiously tried to give relief to Industry and at the same time promote use of PSPCL/Appellant power and save it from paying fixed costs. Also the Commission felt that more industrial production would result in higher job creation, more realization of taxes for the Government and this situation would have a cascading effect for the growth of the economy of Punjab State.

5.3 Further, as per the Act and the principles adopted to determine the tariff, it is the duty of the Commission to keep in view the interest of the consumers at large, growth and development of the industry in the state while keeping in view the interest of the utility at the same time. This Tribunal in *Tata Power Company Ltd. v. M.S.E.R.C and ors. [2013 ELR (APTEL) 0225]* has held that the object of Electricity Act of 2003, is to take measures conducive to development of both electricity industry and to promote competition therein while protecting the interest of the consumers at large and, therefore, rebates, discounted tariffs, subsidy and surcharge are permissible under the Act and it is fair to the commission to apply these principles where ever it deems fit and necessary.

5.4 It is apparent from the reading of Para 7.4 of the tariff order which leaves no doubt that the intention of the Commission while introducing the scheme of threshold power at Rs.4.99/unit was to incentivize consumption of power from the Appellant/PSPCL and the Commission was of the considered view that this was the easiest and quickest way to utilize the surplus power available in the state and also to discourage drawl of open access power by the industrial consumers.

5.5 The appellant has tried to challenge the main tariff order in the garb of challenging the clarification order. The Hon'ble Supreme Court

and this Tribunal have held that the tariff fixation is legislative in nature and ought not to be stayed as an interim measure. If a tariff undergoes a change during the appeal the same is implemented as modified by the Appellate Courts. It is always the prerogative of the Appellate Courts to pass directions as to how a modified tariff be given effect to but it is most respectfully submitted that it can only be on the final outcome of an appeal.

5.6 It is denied that the Commission chose to interpret the promotional tariff as per the interpretation of the appellant. Rather the appellant tried to implement the para 7.4.1 to 7.4.3 of Tariff Order for FY 2016-17 by interpreting the same in a way convenient and suitable to it. And in a way had tried to create the substantive rights in its favour by implementing the tariff order by following its own methodology for which it is not mandated by the Act. The methodology which was adopted by the appellant was never approved by the Commission. Aggrieved by the implementation of methodology by the Appellant, the respondent no. 2 approached the Commission by way of Petition no.64 of 2016 on 23.08.2016 for clarification of interpretation for the methodology to be adopted for the implementation of the Tariff Order. The Appellant was well heard in this petition and the Commission gave a reasoned Order on 18.10.2016 in the Petition No. 64 of 2016. Moreover, the duty of determining the Tariff is mandated by the Act to State Commission,

which it has done. The Commission was always of the view to utilize the surplus energy in the state for the benefit of its industry and therefore, by the tariff order of 2016-2017 the Commission approved for a reduced tariff for the additional consumption by the industry to utilize the surplus energy. The Commission in the tariff order thought it fit to advance this relaxation to all the industries across the line instead of the new industry etc. It is wrong and denied that the existing consumption was taken as the total consumption of the existing industry irrespective of the source. Once the object was to utilize the surplus energy available with the state there was no reason whatsoever to calculate the other sources of energy in the given circumstances including the open access. The intention of the commission is amply clear in the tariff order that the objective of the commission has been to use the surplus energy available in the state. Therefore, the Commission took a considered view with the objective to utilize the surplus energy and therefore clarified that the energy taken through open access shall not be computed for the calculation of threshold limit and also for calculating current year consumption.

5.7 It is, therefore, respectfully prayed that the instant appeal filed by the Appellant may kindly be dismissed.

6. Written submissions filed by the learned counsel, Mr. Aditya Grover, appearing for the Respondent No.2/Steel Furnace Association of India are as under:

6.1 The Appellant by way of the captioned appeal has wrongly challenged the impugned order dated 18.10.2016 passed by the State Commission in Petition No. 64 of 2016, preferred by Respondent No.2. In fact, the ibid order passed by the first Respondent/State Commission is well reasoned, just, equitable, legal, fair, sustainable and deserves to be upheld by this Tribunal.

6.2 The legal soundness of the order of the Punjab Commission dated 18.10.2016 under challenge is reflected from the fact that the State Commission is competent to decide tariff and terms of conditions of tariff as well as give clarification as provided in Section 61 of Electricity Act 2003 and Section 60.5 of PSERC MYT Determination of Tariff Regulations 2014. Section 61 of the Electricity Act 2003 very clearly provides that it is the prerogative of the Appropriate Commission to fix terms and conditions for determination of tariff and Section 62 empowers the Appropriate Commission to determine tariff for retail sale of electricity based on various considerations as given in the Section. These aforesaid sections/sub sections of the Electricity Act, 2003 clearly provides that the State Commission is competent to determine tariff, which reflect commercial principles and also safeguard consumer interest and recovery

of cost of electricity in a reasonable manner. In the present case, the State Commission has followed these principles while clarifying the threshold consumption definition as petitioned by Respondent No.2. Section 60.5 of the MYT Regulations for determination of Tariff also provides that "Notwithstanding anything contained in these regulations, the State Commission shall at all times have the authority, either suo motu or on a petition filed by any interested or affected party, to determine the tariff, including terms and conditions thereof, of distribution licensee, transmission licensee or generating company. Further, Condition No 23 of General Conditions of Tariff provides regarding interpretation of tariff order as under:-

> ***"23. Interpretation of Tariff***
>
> *If a question arises as to the applicability of tariff to any class of consumer or as to the interpretation of various clauses of tariff or General Conditions of Tariff, decision of the Commission shall be final."*

Since, the Appellant-PSPCL has not disputed this fact, it is well taken that the State Commission has power to announce tariff, tariff rebates and concessional tariff as well as interpret the tariff so determined as it deemed fit and reasonable and Commission clarification will be final.

6.3 The Appellant has wrongly equated the order passed by the State Commission, which is under challenge in its Appeal No 6 of 2017 with order given by PSERC in Petition No 70 of 2015, which is applicable to

only those consumers who set up new industries in Punjab under Invest Punjab policy in which difference of Tariff applicable and Rs 4.99 is to be given by Government of Punjab as subsidy while the Appellant will get full tariff rate. The chief purpose of order in Petition No 70 is to promote industrialization of the State by incentivizing the setting up of new industries. In the present order, which is under challenge, State Commission proposed suo motu to increase sale of surplus power and in this lower tariff of Rs 4.99 was restricted only for incremental consumption over threshold consumption and no subsidy is to be given by Government of Punjab and as such no permission is required from Government of Punjab. Therefore, the Appellant is wrongly equating both. The main purpose of threshold consumption based lower tariff in the tariff order FY 2016-17 was to minimize the fixed cost of surrender of power estimated at about Rs. 15000-16000 crore for the period 2014 to 2020 (Rs.5970 crore during FY2014-15 and about Rs.10500 crore estimated for FY 2017-2020) which has been/is to be charged from consumers of the State while giving zero return for such enormous cost. Actual cost of surrendered power would be more or less based on fixed cost of surrendered power, which generally grows over the years.

6.4 The indifference of the Appellant for such huge monetary cost due to large amount of surrender of power is because of the fact that all

such cost is being recovered from consumers through ARR. Therefore, power sold or surrendered has no meaning for the Appellant. If the Appellant sold this power to consumers, it will get revenue from sale otherwise it will get revenue as fixed cost of surrendered power from consumer through ARR. Only consumers suffered and the Appellant has no cost to bear for that loss caused by faulty planning of the Appellant in setting up such huge power generation capacity. Charging of full fixed cost of surrendered power/ capacity from consumers through ARR year after year without giving any value to them in return; Appellant's failure of selling this power to any other entity/utility/consumer year after year; continuance of surrender of power, its affects upon increasing power cost year after year making industry uncompetitive in the State. This in turn, reduces demand for the Appellant power which could make PSPCL unviable within the next few years were State Commission's primary concerns, which were addressed by giving threshold based incentive. In addition to above reasons, it was State Commission's legal duty to mitigate the suffering of consumers in the State due to this surplus power, which is becoming costlier year after year. Further, if power tariff in the State rise continuously due to unproductive reasons like cost of surrendered power, State Commission's flexibility to charge cross subsidy over and above cost of supply from industry by increasing the tariff so as to give

relief to other needed sectors like agriculture would have reduced drastically. This, in turn would have crippled whole financials of the Appellant and fixation of tariff in Punjab. Only remedial measure was to find innovative ways to increase the Appellant sale of power by utilizing surrender power rather than to continue paying fixed charges and continue to surrender power and burdening the consumers of the state.

6.5 It is also wrong on Appellant's part to state that threshold consumption definition would lead to mere relocation of power from open access to the Appellant. The State Commission did not curtail open access in anyway, for which a robust system under Open Access Regulations exist even today. In case the Appellant has any doubt in this regard, a separate petition could be filed by the Appellant to the State Commission. In competitive market scenario, Generator of power is free to determine its price while bidding irrespective of its impact upon its competitors. A too high price will make the Generator uncompetitive. Similarly, a too less price will make its operations unviable. Similarly an open access supplier/purchaser, (be it is the Appellant or Generator or trader) can fix any price at the time of bidding and does not require any permission from the State Commission or the Appellant to increase or decrease the same. Similarly, Pricing of the Appellant power, giving rebate/incentive on its sale and conditions attached to it are in the State

Commission's preview under Section 62 of the Electricity Act and MYT Regulations of Tariff Determination. This provision empowering the State Commission to fix Appellant power tariff and conditions attached thereto in no way contravenes the Open Access Regulations. As such, it cannot constrain open access power coming in the State. None such provision has been pointed out by the Appellant in its Appeal. The Appellant has not mentioned any violation of Open Access Regulations committed by PSERC in giving clarification of threshold consumption definition in its order under challenge as no such violation has ever happened. Fixing of Discom's power tariff and conditions related thereon are decided under MYT Tariff determination regulations of the State Electricity Regulatory Commission while Open Access supplier is free to price its power. State Electricity Regulatory Commission has no control over price of Open Access Power charged by its supplier. Both are independent of each other's. The Statement of Objects and Reasons of the Electricity Act, 2003 mentioned in introduction of the Act, para 4(x) reads,

> *"where there is direct commercial relationship between a consumer and a generating company or a trader, the price of power would not be regulated and only the transmission and wheeling charges with surcharge would be regulated."*

6.6 Further, any favor or discrimination to open access power can be done by State Commission only through Open Access Regulations,

which is not even touched upon by any party i.e. State Commission, the Appellant or Consumer and no reference made to this effect by any party. In fact, there are no such two categories from consumer's point of view like open access power or Appellant power. It is the competitive cost of power, which matters for consumers. The Appellant intended to exploit the consumers of power in State believing that in the absence of open access, which fell to almost zero, it can sell power with no reference to cost of power and if failed to sell power, the fixed cost of surrendered power would be recovered through ARR. The IIM study referred to by the State Commission in the Tariff Order 2016-17 and the order under challenge has made observations contrary to such perception and observed that without reduction in cost of power, extra power cannot be sold. The finding of the IIM study was also corroborated from the fact that despite of open access power reduced to almost zero in the State of Punjab, the power consumption from the Appellant did not grow on its own in any significant way as mentioned in Tariff Order 2015-16 and 2016-17. Only after threshold incentive scheme as decided by the State Commission in Tariff order FY 2016-17 and clarified in this order, which is under challenge, power consumption increased. This position is accepted by the State Commission in its tariff order FY 2017-18, which decided to continue threshold consumption in 2017-18 and FY2018-19 as well.

6.7 Further, when the open access power became uncompetitive due to higher landed cost by imposition of cross subsidy surcharge, wheeling charge (first partially then fully) and then by imposing additional surcharge, its consumption also dropped to almost zero. Thus, open access or Appellant power, cost has to be competitive else demand will not rise or may even reduce. Power cost has no religion. The logic is lower cost of power, which is more than 40% to 70% in steel conversion and in chemical plant conversion cost helps a factory to compete with other suppliers situated outside the state and from import also. Only if power cost is competitive, mills in Punjab can consume more power to produce more. The criticality of lower cost of power than existing at that time was well captured in IIM study, which the commission got conducted and reproduced in the order under challenge also. The same is mentioned below:

> *"The affordability of industry in enhancing power consumption by expansion is not great unless the landed cost of power tariff is not reduced substantially to the additional consumption of existing industries and even the consumption of existing industries…. This would send a clear signal for industry revival."*

6.8 In Tariff Order FY 2014-15, the State Commission clearly mentioned that threshold consumption will be power consumption including open access but the same is not the case in the related tariff order 2016-17 and order under challenge. The State Commission only

mentioned threshold consumption and no mention to open access power were made in tariff order 2016-17. Later on, in clarification order, the State Commission clarified that only the Appellant power to be considered for working out threshold consumption. With the experience of more than 13 years after enactment of Electricity Act, 2003, the wisdom emerged at national level that a common policy related to fixation of power tariff or any related aspects cannot be implemented for different States uniformly to balance the interests of different stakeholders, which seem contradictory some times. Only the State Commission of a State is most competent & informed body having full knowledge of the State specific issues, Discom's financial position and other ground realities. Therefore, the State Commission is to be given full freedom to deal with the tariff related issues presented before it and be trusted to balance different stakeholders' interests keeping the local situations, which would not be appreciated fully from outside. For illustration, National Tariff Policy amended in 2016 to empower the State Commission to deal with cross subsidy surcharge formula according to peculiar requirement of the State, which varies from State to State. In proposed amendment in the National Tariff Policy in 2018, the above statement is retained. It is pertinent to note that the above statement was missing in National Tariff Policy 2006 and added in 2016. The experiences of different States of 10 years (2006-2016)

leads to insertion of this statement in National Tariff Policy in 2016 and retained in 2018 proposed amendment.

6.9 The above mentioned facts clearly show that lawmakers in the country have well acknowledged and accepted the fact that State Electricity Regulatory Commission of any State is most competent and in possession of sufficient knowledge, past experiences etc. to apply sufficient reasonableness in fixing tariff and related matters including giving clarifications and commercial evaluations of different options placed before it. Commercial decisions are taken by any State Commission like tariff fixation etc. on various permutations and combinations, keeping past experiences in mind and like-hood outcomes in state specific situation. Therefore, it should be accepted on its face value until or unless some violation of Electricity Act 2003/relevant regulation is apparently made. At the time of tariff determination exercise, revenue projections related to tariff and effect of various incentives on power consumption are made, which may come true or may not come true later on. Both such outcomes happened in the present case. In the State Commission Tariff Order FY 2014-15, Rs.1/unit rebate was given following a particular formula. It did not yield expected results and rebate was withdrawn subsequently in 2015-16. But threshold based incentive of lower tariff was given based on a new

formula, which worked well as admitted in subsequent tariff orders and still continuing in FY 2018-19 also. It helped in saving crores of rupees for the Discom, reduced the fixed cost of surrendered power and given some relief to consumers also in terms of lower power cost than otherwise.

6.10 Further, the State Commission has not committed any procedural errors, none such error has been pointed out by the Appellant. State Commission considered all alternatives of threshold consumption, listened to all parties and also kept in focus the central purpose of the threshold consumption based incentive scheme and findings of the IIM study. Therefore, there is no rationale to question the prudence exercised by the State Commission in defining threshold consumption in the order under challenge. The State Commission, since FY 2014-15 onward is dealing with serious problem of surrendered power cost. The Appellant is not able to sell this power and paying fixed cost charges to IIPs and others & then claiming the same in ARR, burdening the consumers of the State. As per State Commission tariff orders, 46314 MU were surrendered and Rs. 5970 crore were charged from consumers during 2014-17. This has resulted into increase of cost of power year after year. Based on the State Commission orders, it is estimated that this fixed cost of surrendered power , charged from

consumers through ARR for the period FY 2017-2020, is/will be more than Rs.10,500 crore. Taken together, about 15000-16000 crore will be burdened on consumers in the 5 year period. As a result of surrendered power's fixed cost, a self-propagating cancerous cycle of high power cost and low consumption started in Punjab.

6.11 To meet the demand of power, Appellant has set up its own thermal and hydro plants and has also made agreements with independent Power Producers (IPPs) in the State and Central generating stations and renewable projects. Appellant is bound to procure power from all these contracts. As actual demand for such power did not materialize due to various reasons, Appellant ended up with surplus energy and the quantum of such surplus power increased year after year. The Appellant in the ARRs is projecting the surplus energy and fixed costs associated with it and seeking its pass through to consumers in tariff. The ARR petitions submitted till date by the Appellant have no proposals/new initiative for increasing the consumption in the state. Thus, the State Commission was left with no other option but to see that fixed cost associated with surplus power be minimized to the extent possible. The State Commission announced rebate of Rs1/unit to all consumers who consume more than threshold limit in tariff order 2014-15. It is pertinent to note that threshold definition

here was including open access power. As the Appellant projected no increase in the consumption and no gain, the same was withdrawn in Tariff order 2015-16. Further, the State Commission directed Appellant to review agreements with IPPs in its tariff order 2015-16 and while continuing its efforts for sale of surplus power and decrease the liability of fixed charges associated with surrendered surplus power, the State Commission in 2016-17 took a number of measures such as:

(a) To allow 50 MVA power against 35 MVA demand allowed earlier at 66 KV and 4 MVA demand at 11 KV instead of 2.5 MVA earlier. This helped 66 and 11 KV consumers to increase their load and consumption. In addition PLEC was withdrawn completely and TOD Tariff was introduced with reduced peak charges and night rebate, cross subsidy burden on industry was rationalized etc.

(b) To ensure additional sale of power through increase in consumption by existing industrial units based on consumption in 2016-17 than previous years, the State Commission announced concessional tariff of Rs.4.99/unit for consumption over and above the threshold consumption of last two years. However, there was no clarity regarding calculation of threshold consumption i.e. last year's consumption means total consumption (Appellant plus open access consumption) or only Appellant consumption. It is pertinent here to mention that in Tariff order of FY2014-15, the State Commission has categorically mentioned that threshold consumption will be worked out including open

access (Para 7.6.3 of Tariff Order 2014-15) whereas, there was no such stipulation regarding open access power in TO 2016-17.

(c) The said clarification was rendered vide the order dated 18.10.2016 passed in petition no.67 filed by Respondent 2, before the State Commission. While rendering clarification, the State Commission has given detailed reasoning and ensured that concessional tariff be given only when sale of surplus power of Appellant increases, so that fixed cost of surrendered power passed on to consumers gets reduced.

Therefore, the commercial interest of Appellant and consumer interest were balanced in compliance to Sections 61 and 62 of the Act, which also ensured economic use of resources and safeguarding of consumer interest. The Appellant was able to recover the full variable cost of power plus a part of the fixed cost of power which would have otherwise surrendered, thus reducing their fixed cost burden with each unit of extra sale of the Appellant power.

6.12 The State Commission while passing the order dated 18.10.2016 has considered all relevant facts, evaluated all exhaustive alternative definitions of threshold consumption, did not violated any Open Access regulation, which could be harmful to Open Access supplier, stay well within tariff determination regulations and provision of section 61 and

section 62 of the Electricity Act, 2003 for giving clarification of its own order. This way the State Commission has chosen the best option for the Appellant as well as consumers balancing the interests of both in line with statutory obligations under Section 61 of the Act.

6.13 Therefore, it is immaterial for the Appellant as to from where, why and how the Appellant sale of power increases so far as it increases over the power consumption from the Appellant from maximum of last two years. Here it is pertinent to reiterate that fixing tariff for Discom power is independent to price of open access power. By giving clarification to the definition of threshold consumption mentioned in tariff order FY2016-17, PSERC has not violated any Open Access Regulations as none has been pointed out by the Appellant. Threshold consumption based lower tariff fixation as well as definition of threshold consumption for this purpose came under the State Commission MYT Regulations of Tariff determination, which are independent to Open Access power, its pricing and related regulations. As the open access power supplier is not concerned about the Appellant power tariff and does not require the State Commission / Appellant consent for fixing price of its power, same way the Appellant power tariff fixation or related clarification has no relation with Open Access power price or its competitiveness. This fact is also mentioned clearly in Statement of

Objects and Reasons of Electricity Act, 2003, para 4(x), which states, " *where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only the transmission and wheeling charges with surcharge would be regulated."*

6.14 The interests of open access power supplier are protected under the State Commission Open Access Regulations. The Appellant has not mentioned to any such clause of the Act, 2003 or the State Commission Open access Regulations, which are violated as none was actually violated. In free market economy, power sourcing do shift from one supplier to another, whether from the Appellant to Open access Supplier or vice-versa as happened in the past when some part of the Appellant power shifted to open access also. Therefore, till any clause of the PSERC Regulations is violated either by the State Commission or by the Appellant or Open Access Consumer, both Appellant and Open Access power supplier are free to compete with each other and no restriction has been placed on free competition between them. The Appellant has been playing mischief to misguide and confuse the matter of the case.

6.15 The Respondent No. 2 in support of its case, further lays down all possible situations of defining threshold consumption that the Appellant

shall only be benefited by the methodology derived out by the State Commission by way of the order dated 18.10.2016 and consumer's interest are also secured.

6.16 In the light of above facts, it is per se apparent that:

(a) The State Commission is well within its right to give concessional tariff of Rs.4.99/unit to industrial units consuming more power from Appellant in current year over maximum power consumed in any of the last two years from Appellant disregard of the fact that more sale of Appellant came from increase in overall consumption of the industrial unit or shift of consumption from open access/CPP to Appellant supplied power by industrial unit. The aim is to maximize Appellant power sale and to minimize Appellant surrender of surplus power, which is result of Appellant's faulty planning. The consumer has no fault in this but still have to bear the full fixed cost of surrender power.

(b) The sale of surplus power to industrial consumer can be increased only by defining threshold consumption as power purchased from Appellant in previous and current year to increase the chances of sale of surplus power. No other method can offer possibility to sell more power than this method.

(c) That the State Commission has introduced this scheme under para titled "Sale of Surplus Power" (Para 7.4.2 of Tariff Order 2016-17) in which the Commission stated:

> *7.4.2 Now with the Commissioning of additional units of various IPPs in Punjab, more of surplus power needs to be utilized to reduce the burden of fixed cost of the surrendered power on the consumers of the state. One more chance needs to be given to the consumers of state to utilize surplus power. Therefore, the Commission approves base tariff rate of Rs.4.99 per kVAh for Large Supply Industrial category consumers, who consume power above threshold limit as per para 7.4.3. All other surcharge and rebates as approved by the Commission and Govt. levels as notified by the State Government shall be charged extra. The Commission expects that this will result in reducing extra fixed cost of surrendered power to some extent, the actual quantum of which will only be known at the end of FY 2016-17 and shall be considered by the Commission at the time of true up.*

From the above, it is apparent that supplying power at Rs.4.99/unit, which is above threshold limit, is a tool to sell surplus power of the Appellant, so as to reduce fixed cost burden passed on to consumers which is independent of the earlier scheme and on which no subsidy will be rendered by the State Government. The concessional tariff will only reduce the fixed cost burden of surrendered power and help the Appellant to recover fixed cost fully or partially. Therefore, the Appellant, in the instant appeal, has wrongly/intentionally intermingled the concessional tariff of Rs.4.99/unit with other and separate scheme of giving subsidized power of Rs.4.99/unit to new units in which subsidy will be given by government which is aimed at increased industrialization in the state, so as to mislead this Tribunal in order to derive undue benefit out of the episode.

6.17 It is further submitted that the contention of the Appellant with regard to providing Promotional and Concessional tariff of Rs 4.99 vide order dated 26.7.2016 in Petition No 70 of 2015 are totally irrelevant, misconceived, mischievous and misplaced. The said Promotional and concessional tariff of Rs 4.99 is applicable to only new LS industries and is further subject to the condition that the difference between normal tariff and concessional tariff is paid by GOP as subsidy as per Para (v) below Table 9.1 of the Tariff Order 2016-17 extracted as below:-

> *(v) As per policy of Government of Punjab applicable to the industries, the energy charges for new/prospective industries which come up through Progressive Punjab Investors Summit, 2015, will be @ 499 paise per kVAh (excluding FCA). The other terms and conditions shall be as applicable to the relevant industrial tariff category. GoP shall pay subsidy for difference in tariff applicable to relevant industrial category as approved by the Commission in Table 9.1 and Special Tariff @ 499 paise per kVAh announced by the State Government.*

However, the base tariff of Rs 4.99, the subject matter of the present Appeal is as per para 7.4 of the Tariff Order 2016-17 provided for incremental consumption over the threshold limit, only for those large supply industrial consumers which were existing on 1.4.2014. There is no subsidy payable by GOP for such base tariff. This base tariff has been determined by the State Commission in Petition No 79 of 2015 for Approval of ARR and Tariff Determination for the Year 2016-17, etc. in due discharge of its duties as per Section 62 of the Act and no parallel can be drawn between the two tariffs, while the concessional

tariff of Rs 4.99 to new industries is approved with subsidy by Government of Punjab on a Petition submitted by Appellant, the base tariff of Rs 4.99 to industry operating in 2016-17 from a date prior to 1.4.2014 is approved by the State Commission on its own. The tariff for new industry is for the total consumption whereas base tariff is only for incremental consumption over the threshold limit. The purpose of concessional tariff was to bring in new investment under Industrial Policy of the state whereas the purpose of base tariff was better utilization of existing industries, etc.

6.18 In-fact, the Appellant is getting full tariff of Rs 6.22/6.03 from new industries (4.99 from consumer plus subsidy from GOP) whereas, the Appellant is to get Rs 4.99 from existing industry for incremental consumption only. ED and IDF is waived on promotional tariff as per industrial policy whereas base tariff attracts ED and IDF in present case. It suffice to state that the State Commission vide order dated 14.10.16 also approved the same concessional tariff of Rs 4.99 per unit to Small Power (SP) Category as per Government of Punjab (GOP) letters dated 26.9.16 and 12.10.16 after GOP committed to compensate the difference of the State Commission determined Normal Tariff of Rs 547 paisa and concessional tariff of Rs 4.99 per unit. However, Appellant has not even uttered a single word about the same in the

captioned Appeal due to reasons best known to them. It is further submitted that though all these tariffs of Rs 4.99 are for the year 2016-17 but each one is subject to different set of conditions and have no relation with each other and Appellant attempt to interlink the first two appeals to be only a mischievous attempt and, further, in the instant matter the Appellant is wrongly blaming the global slowdown as the sole reason of non industrialization of the state. In fact, it is due to the faulty planning of the Appellant due to which the demand of power in the state has not picked up substantially.

6.19 It is reiterated that the instant matter has no relevance with petition no. 70 of 2015, which was filed by the Appellant for implementation of the state policy. However, the instant matter relates to only a clarification of threshold consumption purely with an objective for utilization of surplus power available with the Appellant, which shall ultimately culminate into mitigating burden on consumer by reducing the cost of surplus power. The Appellant has intentionally intermingled the two orders rendered by the State Commission on different footings, so as to mislead this Tribunal in order to derive undue benefit. The Promotional Tariff has been rendered to new consumers and for only such existing consumers who increased their existing capacities with prior approvals under state industrial policy, however, the order under

challenge relates to only utilization of surplus power available with Appellant based on threshold consumption calculation methodology. Respondent No.2 had filed the Petition no. 64 of 2016 before the Ld. PSERC seeking clarification of the definition of Threshold limit and its application on the current consumption, as Appellant was not clarifying the matter and Respondent No.2 apprehended wrong interpretation by Appellant. Appellant is purposely confusing the capacity and consumption to justify its contentions which are totally against the spirit of the contents of Para 7.4 of the Tariff Order to deny the benefit to Respondent No.2 and similarly placed consumers.

As already explained above by Respondent No.2, there is no relation between the tariff of Rs 4.99 approved for new industry and existing industrial consumers for crossing the threshold limit. In fact, Appellant is wrong in its submission that the purpose of concessional tariff is to add new capacity to ensure development of the State, and no benefit is to be given for mere relocating of power consumption from open access to Appellant. As also explained above, the purpose of base tariff to existing unit is to help Appellant sell more power whether overall consumption in the State increases or not. Thus, the State Commission has rightly provided the interpretation/clarification and the Appellant may kindly be directed to comply with the order dated

18.10.2016, passed by the State Commission in Petition No. 64 of 2016, which deals with threshold consumption and utilization of surplus power to reduce the burden on consumers in forms of fixed cost of surrendered power through ARR.

6.20 The State Commission in its Tariff Order for the year 2017-18 has categorically observed that the rendering of incentive to the large supply consumers of the Appellant has laid positive impacts as the consumption of Electricity has increased. The relevant extract of the Tariff Order for 2017-18 in this regard is reproduced below:

> *"6.1.3 The Commission has also analyzed the energy sale figures of Large Supply industrial category during FY 2016-17 and observed that the energy sales of the utility for LS category has increased from 10087 MU in 2015-16 to 11115 MU in 2016-17, indicating that the incentive has indeed yielded result....."*

6.21 The Appellant must realize and appreciate the above mentioned development and should not be permitted to frustrate the efforts of the State Commission for promoting increased consumption thro' incentives and may kindly be restrained from creating road blocks in its efforts to increase the sale of surplus power (in the current year) by dismissing the Appeal under consideration which will:

(a) Help Appellant to reduce surrender power to the extent possible and increase sales and revenue.

(b) Reduce burden of surrendered power on all the consumers of the State, which works out to About Rs. 15000-16000

crore during FY 2014-FY 2020.

(c) Help the State Government to earn more revenue in terms of more Electricity Duty, more Infrastructure Development Cess and more GST on addition production and sale of goods in the State, and

(d) Help industry to use more electricity at competitive rates, which would be surrendered otherwise causing them resulting in unproductive expenses in terms of surrender of fixed power.

6.22 As per the settled cannons of law, the Authority which is vested with a power to review its order is also permitted to render clarification to its order. Section 94 of the Electricity Act provides for the powers of the Appropriate Commission. As per Section 94(f), the State Commission is vested with powers to review its decision/direction and orders. Thus, the State Commission being the Author of its order is well within its power to render clarification of its order so as to clarify the intents and contents of the order. The State Commission has rightly entertained the Petition filed by Respondent No.2 and after proper adjudication of the matter the State Commission has rightly passed the order dated 18.10.2016 in petition no. 64 of 2016, which deserves to be upheld by this Tribunal, the order dated 18.10.2016 passed by the State Commission is well reasoned, just, equitable, legal, fair, sustainable and deserves to be upheld by this Tribunal.

6.23 The State Commission has continued with the threshold rebate scheme in the subsequent year of 2017-18 and PSPCL has linked the threshold rebate with this present Appeal. Thus, the consumers will suffer heavily if the contentions of the Appellant are accepted as the order will be made applicable not only for 2016-17 but 2017-18 also. Appellant commercial circular no 49/2017 dated 10.11.2017, relevant extract is reproduced below:

> *"All other terms and conditions, including determining of threshold limit, shall remain same as approved in the Tariff order for FY 2Ot6-L7 (CC no' 3tl20L6) read with order of the commission dated 18.10.2016 in Petition No. 64 0f 2016' However decision pending in Appeal no. 06/2017 filed by PSPCL before APTEL, New Delhi, against PSERC order dated 18.10.2016 in Petition No. 64 of 2016, shall be applicable'"*

In light of the facts and submission made above, it is reiterated that there is no merits in the present appeal and the same is liable to be dismissed, thus the Order dated 18.10.2016 passed by the State Commission in Petition No. 64 of 2016 deserves to be upheld by this Appellate Tribunal.

7. Written submissions filed by learned senior counsel, Mr. Sanjay Sen, appearing for the Respondent No.3/M/s Mawana Sugar Limited are as under:

7.1 The present appeal is not maintainable before this Tribunal as the Tariff Order dated 27.07.2016 has not been challenged by the Appellant. The appellant has only challenged the Order dated

18.10.2016 which is not the Tariff Order and is just a clarification order clarifying the methodology of calculation of threshold limit provided in the Tariff Order. The appellant having not challenged the Tariff Order dated 27.07.2016 is estopped from raising any grievance under the Tariff Order. Meaning thereby it is not open to the appellant to challenge the grant of base tariff of Rs. 4.99 per kwh to existing LS industry consumers which has been so given under the Tariff Order dated 27.07.2016. The 3rd Respondent places reliance upon judgment in the case of *Hooghly Chamber of Commerce & Industry Vs. West Bengal Electricity Regulatory Commission & Anr. Appeal No. 77 of 2014 decided on 13.05.2015*, wherein it has been held that no challenge to tariff order is maintainable under the garb of challenging the subsequent orders, if the main tariff order remains to be challenged and attains finality.

7.2 The following are the submissions of the Appellant in the instant appeal:

7.2.1 The State Commission has modified the tariff order dated 27.07.2016 and has granted a substantive relief to the existing LS Industrial Consumers in a clarification petition, a tariff which is not provided in the Tariff Order;

7.2.2 The State Commission did not have the power to issue a

clarification order;

7.2.3 The impugned order is contrary to the stated intention of the tariff order and purpose for introducing concessional tariff to new industries in the state;

7.2.4 Open access power ought to have been included in calculation of maximum annual consumption for determining threshold limit;

7.2.5 The impugned order is contrary to the stated intention of the tariff order and purpose for introducing concessional tariff to new industries in the state.

Issue-wise submissions on behalf of the 3rd Respondent are as under:

7.3 *Issue No.I*

7.3.1 For better appreciation of the present issue, the relevant extract of Chapter No.7 in Tariff Order dated 27.07.2016 is reproduced as below:

> ***"7.4 Sale of Surplus Power:***
> *7.4.1 PSPCL in the ARR for FY 2016-17 has projected surplus power of 18124 MU during FY 2016-17. The surplus power projected by PSPCL from the central generating stations and IPPs in the State of Punjab has been proposed to be surrendered, as per merit order of power purchase from these thermal and gas plants. PSPCL has not submitted any proposal to utilize/sell this power within the State or outside the State. The financial impact of the power to be surrendered during FY 2016-17 has not been projected by PSPCL in the ARR for FY 2016-17. However, the Commission has worked out*

the financial impact of power to be surrendered, on the basis of data supplied by PSPCL in the ARR, as ₹2075 crore during FY 2016-17. In the Tariff Order for FY 2014-15, the Commission, after working out the average per unit cost of the surplus power and with the view to reduce the extra fixed cost of surrendered power to some extent, had approved rebate of ₹1/kWh (or kVAh) on the category-wise tariffs for all categories for consumption over and above threshold limit, except Street Lighting and AP categories.

PSPCL in its submissions in ARR FY 2015-16 had stated that the desired purpose of increase in energy sales was not achieved even with the incentive in the form of rebate of ₹1/kWh (or kVAh) approved by the Commission for increase in energy consumption beyond a threshold limit. Even, the normal increase in energy sales in respect of various categories of consumers during FY 2014-15 was generally less than as estimated by PSPCL/Commission and as such, there may not be any tangible decrease in the fixed cost of the surrendered power during FY 2014-15. The Commission therefore decided in Tariff Order for FY 2015-16, not to continue with the rebate as approved in Tariff Order for FY 2014-15.

7.4.2 Now with the Commissioning of additional units of various IPPs in Punjab, more of surplus power needs to be utilized to reduce the burden of fixed cost of the surrendered power on the consumers of the state. One more chance needs to be given to the consumers of state to utilize surplus power. Therefore, the Commission approves base tariff rate of ₹4.99 per kVAh for Large Supply industrial category consumers, who consume power above threshold limit as per para 7.4.3. All other surcharge and rebates as approved by the Commission and Govt. levies as notified by the State Government shall be charged extra. The Commission expects that this will result in reducing extra fixed cost of surrendered power to some extent, the actual quantum of which will only be known at the end of FY 2016-17 and shall be considered by the Commission at the time of true up.

7.4.3 The criterion for allowing rate of ₹4.99 per kVAh shall be as under:

(i) It shall be allowed for any consumption during the financial year exceeding the consumption worked out on the following methodology: The maximum annual consumption in any of the last two financial years shall be taken as threshold. In case, period is less than two financial years i.e. if connection has been released after 31.03.2014, tariff @ ₹4.99 per kVAh shall not be permissible. Further, in case, there is reduction or extension in load/demand, threshold consumption for a financial year shall be worked out on

pro-rata basis. (ii) The billing at the reduced rate shall be done once the consumer crosses the target consumption as worked out under Step (i), e.g. if a consumer has maximum annual consumption in any of two financial years as 10000 kVAh, the consumer shall be entitled for billing at the reduced rate for any consumption exceeding the threshold consumption of 10000 kVAh during FY 2016-17. The reduced rates shall be allowed to the consumer as and when the consumption of the consumer exceeds 10000 kVAh."

7.3.2 A bare perusal of the aforesaid extract of the Tariff Order 27.07.2016 underlines the objective of the State Commission to ensure more consumption of the Appellant power, lessen the burden of fixed cost of surplus/surrendered power,increase drawl of power from the Appellant by incentivising Appellant power. The clarification offered by the State Commission vide impugned order was only with regard to calculation of maximum annual consumption for determining threshold limit and the only aspect considered was as to whether the open access power can be included while calculating maximum annual consumption.

7.3.3 The State Commission has succeeded in achieving the target of consumption of surplus power and reducing fiscal burden on the Appellant which would have been passed on the consumers in subsequent tariff orders. The data showing increased consumption in subsequent years stands testimonial to the fact that the base tariff of 4.99 per unit above threshold limit has borne desired results. The State Commission has, therefore,

adopted the same methodology of calculation of maximum annual consumption in subsequent tariff orders. The relevant extract of Tariff Order for 2017-18 in this regard is reproduced as under:

> *"6.1.3 The Commission has also analysed the energy sale figures of Large Supply Industrial Category during FY 2016-17 and observed that the energy sales of the utility for LS category has increased from 10087 MU in 2015-16 to 11115 MU in 2016-17 indicating that the incentive has indeed yielded result….."*

Thus, it is apparent that the consumption of surplus capacity went up by 13.8% in 2017-18 as compared to 2016-17.

Surplus capacity with fixed cost liability year wise as per Tariff Order:

FY 2014-15	FY 2015-16	FY 2016-17	FY 2017-20
12807 MU Rs. 1706 Crore	15383 MU Rs.2189Crore	18124 MU Rs. 2075 Crore	24884 MU 26037 MU 24957 MU Rs. 10500 Crore

PSPCL Power Sale for Large Supply Category

S.No	Description	UOM	FY15-16	FY16-17	FY17-18	FY18-19
1.	Actual Metered Sale	MU	10087	11115	NA	NA
2.	Revised Projected Metered Sale	MU	-	-	12648	13187

7.4 *Issue No.II*

7.4.1 The clarification is in consonance with law as section 94 of the Electricity Act 2003 empowers the commission to review its own orders and power to review includes power to clarify. Further

impugned order also cannot be faulted with as the State Commission is authorised to issue interpretation as per Condition No 23 of "General Conditions of Tariff" provided as per Annexure I of Volume 2 of tariff order 2016-17 which states as under:-

> *"23. Interpretation of Tariff*
>
> *If a question arises as to the applicability of tariff to any class of consumer or as to the interpretation of various clauses of tariff or General Conditions of Tariff, decision of the Commission shall be final."*

Moreover, it is settled position in law that power of review includes power of clarification and thus no error has been committed by the State Commission in clarifying its Tariff Order. The State Commission is duty bound to interpret the Tariff Order in order to achieve the Objectives of Electricity Act, 2003.There is no requirement of any approval from the Government of Punjab as no subsidy was to come from Government of Punjab in the case of existing LS consumer. In this regard the objects and reasons as contained in para 3 as under:

> *3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonizing and rationalizing the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act 1948 and the Electricity Regulatory Commissions Act, 1998, in a new self-contained comprehensive legislation arose.*

Thus, the Impugned order is in conformity with the

Electricity Act, 2003 as also the Tariff Policy which enjoins the responsibility on the Regulatory Commissions of balancing interests of consumers and need for investment while prescribing rate of return. This has been held by the Hon'ble Supreme Court in the judgment of *PTC India Ltd. Vs. CERC, (2010) 4 SCC 603*.

7.4.2 The Appellant has relied on various judgments to support that that the State Commission did not have the power to interpret/clarify its own orders. It is stated that the judgment of Hon'ble Supreme Court in Ramchandra Singh, Gurdip Singh, Common Cause case deals with power of review/clarification of Supreme Court under Supreme Court Rules, 1966 and has no application to the present case. It is a settled position of law that a judgment is an authority for what it decides and not what follows from it. Even the judgment in Zahira Sheikh is not relevant as it pertains to power of review in a criminal proceeding. In Samarendra Nath Sinha, B Shivananda, Jayalakshmi, and Dwarka Das case, the Hon'ble Supreme Court decided power of correction of a decree and did not deal with power of clarification. The judgments relied upon by Appellant are thus distinguishable and are not applicable to the present case. It is thus further stated that the impugned order does not grant any substantive relief to the existing LS Industrial Consumer and only lays down the

methodology for computation of threshold limit for availing base tariff of Rs. 4.99 per KVAH. Substantive relief of base tariff above threshold limit has been granted under the Tariff Order dated 27.07.2016 which has not been challenged by the Appellants and has attained finality.

7.5 *Issue No.III*

7.5.1 The base tariff is applicable on existing consumers like Respondent No.3 and is not applicable on connections taken after 31.03.2014. It is further stated that the base tariff has been made applicable in the state of Punjab as in order to decrease the fixed cost of surplus capacity of the Appellant.

7.5.2 It is stated that closure of large number of existing LS Industrial Consumer would result in more stranded power thereby creating an anomalous situation which would frustrate the scheme of the State Commission in reviving LS Industrial Consumer and stabilizing the Appellant by encouraging consumption of stranded/ surplus power. It may be relevant to note that the Commission has, as a matter of fact observed on page 18 of order dated 18.10.2016 that if open access is included for the purpose of calculating threshold limit it would lead to incentivizing drawl of power from open access (at the cost of the Appellant power and would be against the spirit of Non-Discriminatory approach mandated under the Act). The interpretation

offered by the State Commission is pragmatic and in consonance with the Industrial Policy of the government and is otherwise also well-reasoned, beneficial and conforms to the Electricity Act, 2003.

7.5.3 The new industry definitely leads to higher employment, additional taxes, social development in the state and also better management of power purchase capacity available for the State but a similar or rather more disastrous effects would follow if the existing industry gets closed and with this in mind the Commission has approved base tariff of Rs. 4.99 per kVAh for the existing LS Industrial Consumer for consumption above threshold limit which consumption was incentivized in the previous tariff orders as well. Needless to say, this initiative by the Commission would reduce cost of power and resultant cost of production for the consumer and increase economic activity in the State of Punjab. It is incorrect to say that the base tariff is given to reallocation of existing consumption rather it is given to increase Appellant consumption and lessen the stranded capacity and will also check resultant increase in tariff in the succeeding years on account of fixed cost of stranded power which has to be passed on to the consumers through tariff. The results shown in the subsequent years have proved that the scheme of giving base tariff above threshold limit has been successful.

7.6 *Issue No.IV*

7.6.1 Open Access has been categorically excluded as it was not mentioned in the Tariff order for 2016-17 and the clarification offered is very much in consonance with the Tariff Order and the policy of government of Punjab.

a) Tariff Order 2014-15

7.6.2 In 2014-15, the Commission in Para 7.6 of Tariff Order titled "Sale of Surplus Power", approved rebate of □1/- on the category-wise tariff for all categories, except Street Lighting and AP categories. As per Para 7.6.3.(i), the rebate was to be allowed for any consumption during the financial year exceeding the consumption worked out on the basis of the average consumption (including purchase of power under open access) of three years taken as threshold for allowing rebate. In case, period is less than three years or there is reduction or extension in load/demand, average consumption shall be worked out on prorata basis. The Appellant took no action during 2014-15 for allowing rebate as it reported that change of software is taking time. Finally, when it was allowed after consumers filed Petition before the State Commission and the Appellant was directed to do so. There, the Appellant worked out threshold limit by average of sum of the Appellant and open access power for the years 2011-12 to 2013-

14 but allowed rebate only when consumption of the Appellant power alone in the year 2014-15 exceeded the threshold limit.

b) Tariff Order 2015-16

7.6.3 The rebate of threshold limit was not approved during 2015-16 as the Appellant intimated that there is loss of revenue due to such rebate in 2014-15. The State Commission under Para 5.5 titled "Sale of Surplus Power" decided as under:-

> *In view of the above and the submissions of PSPCL that the impact of rebate provided has only proved a financial loss to PSPCL, rather than any positive movement towards the objective of increase in consumption at a faster rate and that proposal of rebate needs to be reconsidered and withdrawn, the Commission decides not to continue with the rebate as approved in para 7.6 of the Tariff Order for FY 2014-15. PSPCL is directed to pursue vigorously with regard to directive of the Commission in the matter of Review of PPAs with Generators/Traders for purchase of power from outside the State of Punjab (Refer Directive at Sr. No. 6.17). Further, sincere efforts should be made to sell the surplus power at reasonable rates to reduce the burden of fixed charges on the consumers of the State.*

c) Tariff Order 2016-17

7.6.4 During 2016-17, the State Commission again introduced the concept under Para 7.4 titled "Sale of Surplus Power" in the Tariff Order 2016-17. Para 7.4.3.(i) providing for calculation of threshold limit provided as under:-

> *7.4.3 The criterion for allowing rate of □4.99 per kVAh shall be as under:*
> *(i) It shall be allowed for any consumption during the financial year exceeding the consumption worked out on the following methodology:*

> *The maximum annual consumption in any of the last two financial years shall be taken as threshold. In case, period is less than two financial years i.e. if connection has been released after 31.03.2014, tariff @ ₹4.99 per kVAh shall not be permissible. Further, in case, there is reduction or extension in load/demand, threshold consumption for a financial year shall be worked out on pro-rata basis.*

Therefore, Appellant's contention of interlinking these two tariff orders is wrong and rightly rejected by the State Commission. There is no mention of "Open Access Power' in Tariff Order 2016-17 whereas there was specific mention of inclusion of open access power in 2014-15 and for this reason Open Access power cannot be included for calculation of Threshold Limit. Moreover, it is strange to see the Appellant which has not left a stone unturned to scuttle Open Access in the State of Punjab is advocating about mandate of Electricity Act, 2003 to promote open access.

7.6.5 The inclusion of open access in calculation of threshold limit would be violative of Article 14 of the Constitution of India as it discriminates with existing LS industry which is taking power through Open Access as against those not taking open access power. The appeal thus filed is misconceived and liable to be dismissed.

7.7 *Issue No.V*

7.7.1 The State Commission vide order dated 26.7.2016 in Petition No. 70 of 2015 approved Special Tariff of Rs. 4.99 per unit for new industries which would be established as a result of Progressive Punjab Investors Summit 2013 and 2015. The Respondent No.1 then passed the Tariff Order dated 27.07.2016 wherein it provided for base tariff of Rs. 4.99 per kVAh for incremental consumption above threshold limit by the existing industry. The two categories are different and the appellant has erred in proper understanding of the various categories under the Tariff Order. The two categories are explained as under:

SPECIAL TARIFF OF RS. 4.99 PER UNIT FOR NEW INDUSTRY:

7.7.2 The Appellant had filed Petition No. 70 of 2015 for approval of the State Commission for special tariff of Rs 4.99 for new industries which would be established as a result of Progressive Punjab Investors Summit 2013 and 2015. The Special Tariff was approved on the basis of GOP subsidy with aim of promoting industry in Punjab to increase employment and tax revenue of the state. The salient features of this category are as under:

(a) Special Tariff of Rs 4.99 per unit approved for new industries coming up in the state in view of new investment coming in Punjab with the condition that

subsidy of difference of Normal tariff (Rs 6.22/6.03 for PIU/General category respectively) is payable by GOP.

(b) Tariff is available to those industries which are set up through Invest Punjab Summit 2013 and 2015 or through MOU with Punjab Investment Bureau under the industrial policy of GOP titled 'Fiscal Incentives for Industrial Promotion (Revised)-2013.

(c) Tariff is available for the full consumption of the unit.

(d) Unit will also avail other fiscal benefits like exemption of ED, IDF on power consumed, VAT, Octroi etc.

(e) The lower tariff is also available for consumption of power for any extension in load carried out under FIIP-2013.

(f) Lower Tariff will be available for the duration covered by FIIP 2013.

BASE TARIFF OF RS. 4.99 PER KVAH FOR EXISTING LARGE SUPPLY INDUSTRIAL CONSUMERS CONSUMING POWER ABOVE THRESHOLD LIMIT:

7.7.3 The Appellant in Petition No 79 of 2015 sought approval of ARR and Tariff Determination for the Year 2016-17 etc. This Petition also stated that Appellant has large surplus capacity contracted under long term PPAs but the Petition contained no proposal for improving the sales of surplus capacity/unutilized

contracted capacity. It simply stated that it has contractual obligation of PPAs for generation capacity on long term basis but the consumption of power will be much less than availability. The ARR petition sought recovery of full revenue required through tariff. The State Commission engaged IIM Ahmedabad to study the prevailing power sector scenario in Punjab and to suggest ways and means to utilize the surplus power available in the State. The consultant submitted the report in May 2016 which was considered by the State Commission while determining tariff for FY 2016-17. In order to encourage consumption of surplus power available in the State, the Commission in para 7.4 of the Tariff Order underlined its views unambiguously and also laid down mechanism to incentivize higher consumption by the industrial consumers. In this manner the State Commission after due deliberations approved the base tariff of Rs 4.99/unit for the LS Industry consuming power above the threshold limit. It is important to state that the Appellant neither filed any appeal nor review petition against this part of the tariff order. The salient features of this category are as under:

(a) The tariff of Rs 4.99 is not linked with GOP subsidy.

(b) This tariff is up to 31.3.2017 i.e. for the current year only as per tariff order. The concession may or may not be

extended as decided by the State Commission.

(c) Tariff is available for incremental consumption over and above the consumption of the threshold limit only from the Appellant.

(d) The maximum annual consumption in any of the last two financial years shall be taken as threshold.

(e) In case, period is less than two financial years i.e. if connection has been released after 31.03.2014, the tariff is not available. Thus this proposal is not for new industries.

(f) It is for LS category of industrial consumers only. SP and MS categories not covered.

(g) In case, there is reduction or extension in load/demand, threshold consumption for a financial year shall be worked out on pro-rata basis.

Thus, if industry has added any new machinery in the two previous years or in the current year and has increased its demand with the Appellant to consume more electricity, Its threshold limit is to be increased on prorata basis and only the incremental consumption above the reworked out threshold limit will be eligible for the base tariff of Rs 4.99. On the other hand if

the industry has reduced its capacity, threshold limit has to be reduced on prorata basis and only incremental consumption above the reworked out threshold limit will be eligible for the base tariff of Rs. 4.99.

Hence, it is clear that Tariff for Rs 4.99 for new industries envisage setting up new plant and machinery or additional plant and machinery with extension of load on a future date whereas threshold tariff is available to an existing industry set up prior to 1.4.14. Tariff of Rs 4.99 for new industries is available on full consumption whereas threshold tariff is available only for incremental consumption above the threshold limit. An industry can avail only either of these two. If the industry claiming threshold tariff has added new machinery or has reduced some existing machinery after 1.4.14 and consequently has increased or decreased its Contract Demand with the Appellant, the threshold limit is to be adjusted pro rata for the current CD and that adjusted consumption will be taken as threshold limit. The Appellant will get full tariff for consumption by new industries i.e. Rs 4.99 from the consumer and balance from GOP whereas threshold tariff is a base tariff for consumption above the limit and no subsidy is to flow from GOP.

7.8 The impugned order clarifies the method of determination of threshold limit for applicability of base tariff of Rs. 4.99 per kVAh for existing LS Industrial Consumers consuming Appellant power above threshold limit and does not deal with Special Tariff of Rs. 4.99 per unit for new industry. The Impugned order is not contrary to the Tariff Order dated 27.7.2016 as base tariff of Rs. 4.99 per unit for consumption above threshold has been provided in the Tariff Order itself in Clause 7.4.

7.9 The Impugned Order does not extend the scheme of Special Tariff of Rs. 4.99 per unit to the existing industry and does not over burden the Government of Punjab which has to pay subsidy. Subsidy has to be paid by GOP only to new industry for special tariff as per clause 9.4.3 of the Tariff order dated 27.07.2016 at page 272 of tariff order and no subsidy has to be paid for base tariff to existing LS Industries.

7.10 The State Commission is authorized to interpret its own orders and clarify the same in case of ambiguity as per Condition No. 23 of "General Conditions of Tariff" provided as per Annexure I of Volume 2 of tariff order 2016-17.

7.11 The determination of threshold limit has to be done on the basis of consumption from the Appellant only and cannot include Open

Access power as any such attempt will be contrary to Tariff Order and unconstitutional.

7.12 Learned counsel for the 3rd Respondent, therefore, submitted that the present appeal deserves dismissal in view of the fact that no challenge has been made to Order dated 27.07.2016 i.e. Tariff Order as the provision for base tariff of Rs. 4.99 per kVAh for consumption by existing industry above threshold limit is provided in the Tariff Order which was only clarified in order dated 18.10.2016 and having not challenged the Tariff Order no challenge can be made to the Impugned Order.

8. We have heard learned Counsel appearing for the Appellant and the learned Counsel appearing for the Respondent Nos. 1, 2 and 3 at length and gone through the written submissions filed by both the parties carefully and after thorough critical evaluation of the relevant material available on records, the only issue that arises for our consideration in the instant appeal is:

Whether, in the facts and circumstances of the case, the State Commission is justified in holding that the threshold capacity for applying the concessional tariff for increase in capacity is only the consumption from the Appellant and not the total consumption of the consumers?

9. OUR CONSIDERATION & FINDINGS:

9.1 The learned counsel for the Appellant submitted that with an objective of industrialization and increase in demand in the electricity consumption, utilizing the stranded capacity and relieving the burden on the existing consumers, the Government of Punjab proposed to grant a concessional tariff to the new industries to be established in the State of Punjab by providing a concessional tariff of Rs. 4.99/unit for the period of five years. Further, he submitted that rationale of granting the promotional tariff to the existing industries also was that when the new industries are given a benefit for establishing capacity in the State which would help the economic, social and fiscal development of the State, an existing industry which also expands its capacity should also be given the same benefit. In the circumstances, the Appellant applied the promotional tariff for the increase in capacity over the existing consumption of the industries by considering the existing consumption as the total consumption irrespective of the source, as the promotional tariff was on the incremental consumption and not reallocation of the existing consumption.

9.2 Learned counsel alleged that the State Commission while disposing a clarificatory petition No. 64 of 2016 filed by the 2nd Respondent erroneously held that only the power supplied by the Appellant in the previous year will be considered for the calculation of

threshold limit and also for calculating the current year consumption of large supply industrial category consumers eligible for base rate of Rs. 4.99 per unit. While issuing the above clarifications, State Commission has, inter-alia, concluded that the intention of the State Commission in granting concessional tariff was to discourage open access consumption and the sole purpose was only to increase the sale of electricity by the Appellant.

9.3 Learned counsel vehemently submitted that the impugned Order is erroneous in as much as it modifies the tariff order and proceeds to grant a substantive relief to the Petitioners while purporting to entertain a petition seeking clarification of the tariff order.

9.4 Learned counsel was quick to submit that the petition filed by the 2nd Respondent before the State Commission was for a clarification. However, the effect of the prayers sought and granted amounts to modifying the terms of the tariff order dated 27.07.2016 which is not permissible under the law. The main tariff Order does not restrict the threshold to the quantum of supply by the Appellant–distribution licensee, but specifically to the maximum annual consumption of the consumer irrespective of the source of supply. Learned counsel contended that it is the well settled principle of law that power of clarification cannot be used to modify, alter or add to the terms of the

original decree so as to have the effect of passing an effective judicial order after the judgment in the case. To substantiate his submission, learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in the case of *Ram Chandra Singh v. Savitri Devi &Ors, (2004) 12 SCC 713*.

9.5 Learned counsel emphasised that in the light of the above judgment of the Hon'ble Apex Court, the impugned order which has granted a substantial relief to the petitioners in modification of the original tariff order is liable to be set aside for this reason alone.

9.6 Learned counsel, further, contended that the impugned order passed by the State Commission goes contrary to the basic intention and purpose of the main tariff order in introducing the concessional tariff to the industries in the State. By the Tariff Order dated 27.07.2016, the State Commission extended the benefit of the concessional tariff to the existing industries also subject to certain conditions imposed such as increase in maximum annual consumption of the industries by way of enhancing their existing manufacturing/production capacity. However, the effect of the impugned order is only that the existing industries who do not in any manner expand their manufacturing/production capacity, by merely reallocating the existing demand between the Appellant and open access sources, are getting the benefit of the concessional tariff.

9.7 Learned counsel invited our reference to the Report of Indian Institute of Management (IIM) Ahmadabad on which reliance has been placed by the State Commission. Learned counsel, further, emphasized that the said report was available to the State Commission at the time of passing the main tariff Order dated 27.07.2016, but nothing has been specifically indicated in the tariff order. While looking at the recommendations in the report, it is evident that the State Commission used the Report of the consultant for tariff design for others and not in relation to the concessional tariff to be granted beyond the threshold limit. In fact, the same has no correlation to the decision at para 7.4.3 of the tariff order, which is clearly on the applicability and eligibility criteria for application of concessional tariff. While summing up his arguments, learned counsel for the Appellant contended that the impugned Order of the State Commission is erroneous and, accordingly, liable to be set aside.

9.8 ***Per-contra***, learned counsel for the Respondents submitted that the present appeal in fact is against the tariff order for the year 2016-17 and not against any adjudication of dispute between the parties. The impugned order being a clarificatory in nature, it is incumbent upon the appellant to challenge the main tariff order if it wanted to and if it seeks to challenge the application of the rate of Rs.4.99/unit on the additional

consumption over and above the threshold consumption. Learned counsel vehemently submitted that the present appeal is, therefore, not maintainable as in the name of challenging the clarificatory order of the Commission, the Appellant has questioned the legality of the main order. It is an established law that a clarification issued by an authority may not be a subject matter of an appeal until and unless the order which has been clarified is appealed against.

9.9 Learned counsel for the Respondents, further, submitted that the State of Punjab which has surplus power and upon being not used, commitment charges are paid to the generators as per the contract signed with them. With this background, the State Commission while considering the ARR filed by the Appellant for the year 2016-2017 had engaged the Indian Institute of Management (IIM) Ahmadabad as a consultant to study the prevailing power sector scenario and to suggest ways and means to utilize the surplus power in the state. The State Commission accepted the report of IIM Ahmadabad and it has cautiously tried to give relief to Industry and at the same time promote the use of Appellant' surplus power and save it from paying fixed costs.

9.10 Learned counsel for the Respondents emphasized that as per the Act and the principles adopted to determine the tariff, it is the duty of the Commission to keep in view the interest of the consumers at large,

growth and development of the industry in the state while keeping in view the interest of the utility at the same time. To strengthen their submissions, learned counsel for the Respondents relied upon the judgment of this Tribunal in *Tata Power Company Ltd. v. M.S.E.R.C and ors. [2013 ELR (APTEL) 0225]*.

9.11 Learned counsel were quick to point out that it is apparent from the reading of Para 7.4 of the tariff order which leaves no doubt that the intention of the Commission while introducing the scheme of threshold power at Rs.4.99/unit was to incentivize consumption of power from the Appellant/PSPCL and the Commission was of the considered view that this was the easiest and quickest way to utilize the surplus power available in the state and also to discourage drawl of open access power by the industrial consumers.

9.12 Learned counsel alleged that the Appellant has tried to challenge the main tariff order in the garb of challenge the clarification order which is impermissible under the settled principles of law. Learned counsel for the Respondents reiterated that the Commission was always of the view to utilize the surplus energy in the State for the benefit of its industry and, therefore, by the tariff order of 2016-2017, the Commission approved for the referred reduced tariff for the additional consumption with a sole objective of utilization of the surplus energy available with the Appellant.

9.13 Learned counsel for the Respondents submitted that the Appellant has wrongly equated the order passed by the State Commission, which is under challenge in its Appeal No 6 of 2017 with order given by the Commission in Petition No 70 of 2015, which is applicable to only those consumers who set up new industries in the State of Punjab under Invest Punjab Policy under which difference of Tariff applicable and Rs 4.99 per unit is to be given by the Government of Punjab as subsidy while the Appellant will get full tariff rate. In contrast, in the present order, which is under challenge, the State Commission has proposed suo motu to increase sale of surplus power and in this lower tariff of Rs 4.99/unit has been restricted only for incremental consumption over and above threshold consumption and no subsidy is to be given by Government of Punjab.

9.14 Learned counsel for the Respondents vehemently submitted that indifference of the Appellant for such huge monetary cost due to large amount of surrender of power is because of the fact that all such cost is being recovered from consumers through ARR. Therefore, power whether sold or surrendered has no meaning for the Appellant.

9.15 Learned counsel for the Respondents also submitted that it is wrong on the part of the Appellant to state that threshold consumption definition would lead to mere relocation of power from open access to

the Appellant because the State Commission has in no way curtailed open access for which a robust system under Open Access Regulations exist even today. Further, any favor or discrimination to open access power can be done by the State Commission only through Open Access Regulations, which has not been touched upon by any party i.e. State Commission, the Appellant or Consumer.

9.16 For advancing the arguments further, learned counsel for the Respondents highlighted that the State Commission has not committed any procedural error as it considered all alternatives of threshold consumption, heard all parties and also kept in focus the main purpose of threshold consumption based incentive scheme and recommendations of IIM, Ahmadabad Report. While looking at various previous tariff orders, the State Commission has been directing the Appellant to review its agreements with IPPs, continuing its efforts for sale of surplus power and decrease the liability of fixed charges associated with surrendered surplus power, besides taking a number of measures on its own by the Commission.

9.17 Regarding contention of the Appellant that the clarifications issued by the State Commission are not valid in the eyes of law, learned counsel for the Respondents contended that as per settled cannons of law, the Authority which is vested with a power to review its

order is also permitted to render clarification to its order as stipulated under Section 94 of the Electricity Act, 2003. Learned counsel for the Respondents, further, contended that thus, the State Commission being the Author of its order is well within its power to render clarification of its order so as to clarify the intents and contents of the order.

9.18 Learned counsel for the Respondents drew our attention to the fact that the State Commission has succeeded in achieving the target of increasing the consumption of surplus power and reducing the fiscal burden on the Appellant which would have been otherwise passed on the consumers in subsequent tariff orders. The State Commission has, therefore, adopted the same methodology of calculation of maximum annual consumption in subsequent tariff orders. The relevant extract of Tariff Order for 2017-18 in this regard is reproduced as under:

> *"6.1.3 The Commission has also analysed the energy sale figures of Large Supply Industrial Category during FY 2016-17 and observed that the energy sales of the utility for LS category has increased from 10087 MU in 2015-16 to 11115 MU in 2016-17 indicating that the incentive has indeed yielded result….."*

9.19 Learned counsel also pointed out that the number of judgments relied upon by the Appellant are not relevant to the present case in hand and are distinguishable. While summing up their arguments, learned counsel for the Respondents reiterated that the impugned Order passed by the State Commission is a well reasoned order and any interference by this Tribunal does not call for.

10. OUR FINDINGS:

10.1 We have carefully considered the rival contentions of the learned counsel for the Appellant as well as learned counsel for the Respondents and also taken note of various judgments relied upon by the parties.

10.2 It is not in dispute that the Government of Punjab proposed to grant a concessional tariff to the new industries to be established in the State under Invest Punjab Policy which was proposed to achieve economic, social and fiscal development of the State. Under the said Policy, it was envisaged to provide electricity @ Rs. 4.99/ unit which was adopted by the State Commission while disposing the Petition No. 70 of 2015 filed by the Appellant.

10.3 The above tariff was a subsidized one and difference of the applicable tariff and Rs.4.99 per unit was to be compensated by the State Government in the form of subsidy. Therefore, the State Commission has also granted the concessional/promotional tariff to the existing industries on the premise that when the new industries are given a benefit for establishing capacity in the State which would help the economic, social and fiscal development of the State, an existing industry by expanding their capacity would contribute to the development of the State and should also be given the same benefit.

Accordingly, the Appellant applied the promotional tariff to the existing industries for the incremental consumption over and above the threshold limit. The actual dispute arose after 2nd Respondent filed a petition, being No. 64 of 2016, purporting to seek a clarification of the tariff order dated 27.07.2016 on the issue of computation of the threshold limit beyond which the concessional tariff was to be granted. By the impugned order, the State Commission clarified that only the power supplied by the Appellant in the previous year will be considered for the threshold limit and also for calculating the current year consumption of large supply consumers eligible for base rate of Rs. 4.99/unit. It is pertinent to note that the intention of the State Commission in granting concessional tariff to existing industries also was to discourage open access and to enhance the sale of electricity by the Appellant so as to minimize the burden of fixed charges.

10.4 It is the contention of the Appellant/Distribution Licensee that the main tariff order dated 27.07.2016 does not restrict the threshold to the quantum of supply by the Appellant – distribution licensee, but specifically to the maximum annual consumption of the consumer irrespective of the source of supply. Learned counsel for the Appellant has repeatedly submitted that when the terms of the main tariff order are abundantly clear, the question of the State Commission modifying the same by means of clarification order does not arise. To

substantiate his contention, learned counsel for the Appellant has placed reliance on number of judgments of the Hon'ble Apex Court to contend that any clarification order cannot be used to modify, alter or add to the terms of the original decree so as to have the effect of passing an effective judicial order after the judgment in the case.

10.5 The Appellant contends that by the impugned order in the name of clarifications, the Respondents have been granted a substantial relief in modification of the main tariff order which is impermissible under the law. Regarding the recommendations of IIM, Ahmadabad Report, the Appellant contends that the findings in the report are general in nature and does not specifically relate to the applicability of the promotional tariff and its conditions whatsoever such as threshold limit, etc. On the other hand, learned counsel for the Respondents has pointed out that the present appeal in the absence of appeal against the main tariff order is not maintainable as the clarification issued by an authority/regulator may not be a subject matter of an appeal until and unless the order which has been clarified is appealed against.

10.6 While referring to previous tariff orders of the Commission, it is relevant to notice that the State Commission has been constantly directing the Appellant to minimize the burden of fixed charges being paid to a number of generators and to devise ways and means to

increase the consumption of surplus energy available with it meticulously so as to reduce the tariff burden on the consumers. The State Commission, on its own, appointed IIM, Ahmadabad as consultant to suggest as how to go ahead in the electricity sector for promotion of the industries (new and existing) increase in consumption of surplus energy available with the Appellant for the ultimate benefit of consumers at large. Based on its experience in the sector as a regulator, the State Commission decided to apply promotional/concessional tariff to the existing industries for their incremental consumption of energy from the Appellant with sole objective of utilizing the surplus energy so as to reduce the fiscal burden of the Appellant which is being passed on the consumers as part of ARR. However, for the purpose, the State Commission prescribed certain threshold limit over and above which only the concessional tariff of Rs. 4.99/unit would apply. For meeting the threshold limit, the State Commission had originally considered the total consumption of power annually by the large supply industrial consumers but, vide clarificatory order under challenge, it clarified that threshold limit would be the consumption from the Appellant and none else.

10.7 As the Appellant considered itself an aggrieved party on account of modifying the threshold limits by taking the consumption only from

the Appellant through the impugned order, it has preferred present appeal on which the respondents have raised the question of maintainability. It is a fact that under the garb of challenging clarificatory order of the Commission, the Appellant has stretched its scope to perceive that it is challenging the contents of the main order dated 27.07.2016. However, after categorical analysis of the facts and circumstances of the case and taking note of a number of judgments of the Hon'ble Apex Court as well as this Tribunal, we opine that the appeal is maintainable and deserves to be considered on merits.

10.8 Regarding the decision of the Commission, on redefining the threshold consumption by considering the consumption only from the Appellant' source of supply contrary to the earlier considerations, we are of the opinion that the State Commission has analyzed all associated pros and cons in the matter based on its prudence practices as well as recommendations of the IIM, Ahmadabad and it is well within the mandate of the Commission. In fact, the sole objective of the Commission behind the alleged clarification has been to promote consumption from the Appellant source of supply which is bogged down by fiscal burden of paying the fixed charges to the generators for the surplus energy which otherwise results into undue burden to the consumers. It is also relevant to note that the grant of concessional tariff to new industrial consumers and grant of concessional tariff at Rs. 4.99 /unit to the existing consumers

over and above the threshold consumption are clearly distinguishable in lieu of their methodology for computation and tariff/subsidy being payable. In other words, while Government of Punjab has to provide subsidy for the difference in applicable tariff and Rs. 4.99/unit being extended to new industrial consumers, however, for existing consumers there is no subsidy and the concessional tariff is applicable only for the entitlement of incremental consumption over and above the threshold limit of consumption from the Appellant source of supply.

10.9 It is significant to note that the State Commission has succeeded in achieving the target of increasing the consumption of surplus power and reducing fiscal burden on the Appellant which would otherwise have been passed on to the consumers. The relevant extract of tariff order for 2017-2018 in this regard is reproduced as under:

> *6.1.3 The Commission has also analysed the energy sale figures of Large Supply Industrial Category during FY 2016-17 and observed that the energy sales of the utility for LS category has increased from 10087 MU in 2015-16 to 11115 MU in 2016-17 indicating that the incentive has indeed yielded result….."*

10.10 In view of the above, we are of the considered opinion that the State Commission, based on all relevant material placed before it, has passed the impugned order judiciously and has made efforts to strike a balance between all the stakeholders. Accordingly, our interference in the matter does not call for.

O R D E R

For the forgoing reasons, as stated supra, we are of the considered opinion that issues raised in the present Appeal, being Appeal No. 06 of 2017, are devoid of merits. Hence, the Appeal is dismissed.

The impugned Order dated 18.10.2016 in Petition No. 64 of 2016 passed by the Punjab State Electricity Regulatory Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **14th day of September, 2019.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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