

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APPEAL No. 214 OF 2016

&

APPEAL No. 75 OF 2018

Dated: 9th July, 2024

**Present: Hon'ble Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member**

APPEAL No. 214 OF 2016

IN THE MATTER OF:

M/s Everest Power Pvt. Ltd.

Through its authorised signatory

Mr. Nitin Sharma, GM

Having its Corporate Office at:

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...Appellant

VERSUS

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Mr. Amit Kapur
Mr. Apoorva Misra
Ms. Poonam Verma Sengupta
Mr. Vishrov Mukherjee
Ms. Raveena Dhamija for R-3

APPEAL No. 75 OF 2018

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Mr. Yashaswi Kant
Mr. Ameya Vikram Mishra
Mr. Girik Bhalla
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JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The captioned appeals being Appeal No. 214 of 2016 and Appeal No.75 of 2018 have been filed by the M/s Everest Power Pvt. Ltd. (in short "EPPL" or "Appellant") challenging the order dated 31.08.2015 (in short "Impugned Order-

214”) in Petition No.37 of 2014 alongwith Order dated 29.01.2016 (in short “RP Order-214”) in Review Petition no.09 of 2015 and order dated 18.12.2017 (in short “Impugned Order-75”) in Petition No.17 of 2017 passed by the Punjab State Electricity Regulatory Commission (in short “PSERC” or “State Commission”).

Description of the Parties:

2. The Appellant is a generating company and has developed 100 MW Malana-II Hydro Electric Project (in short “Project”) in District Kullu, Himachal Pradesh.

3. The Respondent No.1 is the Punjab State Electricity Regulatory Commission (‘PSERC’), which is the Appropriate Commission under the Electricity Act 2003 for the purpose of determining the tariff of the Appellant.

4. The Respondent No. 2, Punjab State Power Corporation Ltd (in short “PSPCL”), is a successor company of the erstwhile Punjab State Electricity Board (in short “PSEB”), vested with the responsibility of generation and distribution of power in the State of Punjab.

5. The Respondent No. 3, M/s PTC India Ltd (in short “PTC”), is a trading licensee within the relevant provisions of the Act and has been granted Inter-State trading licence by Central Electricity Regulatory Commission (in short “CERC”).

Factual Matrix of the Case (Appeal No.214 of 2016)

6. The Appellant and the Govt. of Himachal Pradesh (GoHP) signed a Memorandum of Understanding (in short "MOU") on 27.05.2002, for implementation and development of 100 MW Malana II Hydro-electric Project of the Appellant, and an Implementation Agreement (in short "IA") on 14.01.2003 for the implementation of the Project.

7. Thereafter, on 15.10.2004, the Himachal Pradesh State Electricity Board granted Techno-Economic Clearance (in short "TEC") to the Project.

8. On 25.07.2005, Power Purchase Agreement (in short "PPA" was signed by the Appellant and the PTC, subsequently amended vide Amendment No.1 dated 22.02.2013.

9. Subsequently, on 23.03.2006, a back-to-back Power Sale Agreement (in short "PSA") entered into between the PTC and the PSPCL for sale of entire capacity generated from the Project net of auxiliary consumption and free power to the home State, subsequently amended vide Tripartite Agreement dated 03.01.2013.

10. The State Commission passed an order dated 24.01.2007 in Petition No.11 of 2006 filed by Respondent No.2, granting conditional approval to the PSA and reiterating that the Appropriate Commission would determine the Tariff of the Project.

11. The Project achieved Commercial Operation (in short "CoD") on 12.07.2012.

12. On 17.08.2012, the PSERC disposed of the Petition No.34 of 2011, filed by PTC, holding *inter-alia* that it had the power to determine the tariff.

13. In October, 2012, the Appellant filed Petition No.54 of 2012 before the State Commission for approval of Capital Cost of the Project and determination of tariff for sale of electricity generated from the Project.

14. Separately, on 06.11.2012, the PSERC disposed of the Review Petition No. 55 of 2012 in Petition No.34 of 2011 amending its Order dated 17.08.2012.

15. The PSA dated 23.03.2006, was amended on 03.01.2013 through a Tripartite Agreement (in short "TPA") entered between the Appellant, the PSPCL and the PTC, and was filed before the State Commission as part of the Petition No.54 of 2012, already filed before the State Commission.

16. On 17.01.2013, the State Commission granted an interim tariff of 358 paise/kWh to the Appellant to be applicable till disposal of Petition no.54 of 2012, *inter-alia* observing that as per the amendments in the Clause 10.1 of the PSA through TPA, the Tariff payable by PSPCL to PTC including all aspects of the Tariff element would be determined by the PSERC.

17. Further, on 22.02.2013, the Appellant and PTC amended the PPA dated 25.07.2005 incorporating amendments made by the Parties to the PSA dated 23.03.2006 vide TPA dated 03.01.2013.

18. On 27.11.2013, the PSERC approved the Capital Cost of the project and determined the tariff / Annual Fixed Cost (AFC) of the Project for FY 2012-13 and FY 2013-14.

19. On 10.01.2014, the Appellant and the Respondent No.2 filed Cross Appeals Nos. 30 and 35 of 2014 before this Tribunal against Order dated 27.11.2013.

20. Meanwhile, on 12.06.2014, the Appellant filed Petition No.37 of 2014 for truing up of Annual Fixed Cost for FY 2012-13 and FY 2013-14 provisionally approved vide Order dated 27.11.2013 in Petition No.54 of 2012 and determination of Annual Fixed Cost for FY 2014-15, subsequently, the Appellant filed a 'Revised Petition' dated 10.02.2015 pursuant to the order dated 04.12.2014 passed by the State Commission in Petition No.54 of 2012.

21. This Tribunal vide judgment dated 12.11.2014 disposed of the Appeal Nos. 30 and 35 of 2014, *inter-alia* partly upholding the order of the State Commission passed in Petition No.54 of 2012.

22. On 04.12.2014, the State Commission passed the Consequential Order approving the Capital Cost of the Project and determining the Annual Fixed Cost for FY 2012-13 and FY 2013-14, and also directed Respondent No.2 to pay the said Annual Fixed Costs along with Carrying Cost.

23. On 24.04.2015, the PSPCL filed Civil Appeal No. 3346-3347 of 2015 before the Supreme Court challenging the judgment dated 12.11.2014 passed by this Tribunal and also Consequential Order dated 04.12.2014 issued by PSERC, which was disposed of by Hon'ble Supreme Court vide Order dated 24.04.2015, which paved way for payment of the determined tariff by PSPCL to the Appellant.

24. Thereafter, on 31.08.2015, the State Commission passed the Impugned Order dated 31.08.2015 in Petition No.37 of 2014 vide which the State

Commission has Trued Up the AFC for 2012-13 and FY 2013-14 and approved the AFC (provisional) for FY 2014-15.

25. Being aggrieved, the Appellant, on 28.10.2015, filed a Review Petition bearing No. 09 of 2015 in Petition No.37 of 2014 seeking review of the Impugned Order dated 31.08.2015 on the errors apparent on the face of the record considering that relevant regulations had been overlooked while passing the Impugned Order dated 31.08.2015.

26. On 29.01.2016, the State Commission passed the Impugned Order dated 29.01.2016 in the Review Petition No.09 of 2015, thereby, only partly allowing the Review Petition.

Factual Matrix of the Case (Appeal No.75 of 2018)

27. The facts, as repeat of factual matrix in Appeal No. 214 of 2016, are not repeated here for the sake of brevity.

28. On 26.06.2013, the Appellant entered into an Agreement with M/s Balaji Operations & Maintenance Service Pvt. Ltd. (in short "Balaji") for providing various technical services which inter-alia included Regulatory, Advisory, Commercial, financial and Legal functions with a deferred payment liability, to be paid after completion of the tariff determination process for sale of electricity from the Project for a lumpsum fee of Rs. 4,50,00,000/- plus applicable service tax.

29. Thereafter, on 31.03.2014, M/s Balaji raised its invoice for the services performed under the Agreement dated 26.06.2013 and the expense to the tune

of Rs. 5.06 Cr was entered into the Books of Accounts as expense in the FY 2013-14.

30. On 01.07.2014, Appellant and M/s Balaji entered into negotiations, wherein the time for payment of the lumpsum fees was extended till the date of final determination of the tariff by the PSERC and conclusion of all legal proceedings between the Appellant and PSERC.

31. On 15.07.2014, Appellant reversed the entry of Rs. 5.06 Cr. in its books of accounts in terms of the negotiations held in July, 2014 for FY 2014-15 with M/s Balaji Operation & Maintenance Services Pvt Ltd. which amount had in fact, not been paid to M/s Balaji during FY 2014-15.

32. Subsequently, in May, 2015, Petitioner started realizing the outstanding amount of tariff determined for sale of energy generated from the Project from PSPCL.

33. On 20.05.2015, M/s Balaji Operation & Maintenance Services Pvt Ltd. raised fresh invoice for the service performed for an amount of Rs. 5.06 Cr. in terms of the Agreement dated 26.06.2013 and Appellant accordingly booked as expense in its books of accounts in FY 2015-16.

34. On 31.08.2015, Respondent No. 1 passed an Order in Petition No. 37 of 2014 filed for True Up of AFC for FY 2012-13 and FY 2013-14 and AFC (provisional) for FY 2014-15, however, the amount of Rs. 5.06 Cr. which was actually reversed by the Appellant in the books of accounts, was erroneously considered by the State Commission as a Non-Tariff Income and the amount of Rs. 5.06 Cr. was deducted from the AFC fixed for FY 2014-15.

35. On 28.10.2015, Appellant filed a Review Petition No. 09 of 2015 in Petition No.37 of 2014 seeking review of the Impugned Order dated 31.08.2015, however, the State Commission vide order dated 29.01.2016, disposed of the Review Petition No.09 of 2015, thereby, partly allowing the Review Petition, but reiterating its decision to deduct the amount of Rs. 5.06 Cr. was deducted from the AFC fixed for FY 2014-15.

36. Being aggrieved, the Appellant, on 15.03.2016, filed Appeal bearing No. 214 of 2016 challenging the Order dated 31.08.2015 & 29.01.2016 passed by the Respondent No.1.

37. On 03.03.2017, Appellant filed a True-up Petition bearing No 17 of 2017 before the PSERC for approval of AFC for FY 2015-16 inter-alia praying for determination of AFC as Rs. 171.99 Crores, which includes the adding back of the wrongly deducted amount of Rs. 5.06 Cr.

38. On 18.12.2017, the State Commission passed the Impugned Order and allowed the AFC for FY 2015-16 as Rs. 166.68 Cr instead of Rs. 171.99 Cr. while failing to consider the effect of an expenditure of an amount of Rs. 5.06 Cr, which was to be legally added to the AFC for the FY 2015-16.

Submissions of the Appellant in Appeal No. 214 of 2016

39. Issue 1 – O&M Expenses.

40. The Appellant submitted the details of O&M Expenses claimed: -

S.N.	Year	O&M Expenses @ 2% of Capital cost of the Project.	O&M Expenses allowed by PSERC on Actuals.
1.	FY 2012-13 (Part Year)	12.08 Cr.	8.16 Cr.

41. Further, argued that the Impugned Order is contrary to Order dated 27.11.2013, wherein, PSERC had allowed O&M expenses of Rs.9.13 cr. for AFC of FY 2012-13 (from 12.07.2012 to 31.03.2013) worked out as 2% of DPR cost of Rs.633.47 cr. being original Project cost, as per Regulation 19(f)(v) of CERC (Terms and Conditions of Tariff) Regulations, 2009, which reads as under: -

“19. Operation and Maintenance Expenses. Normative operation and maintenance expenses shall be as follows, namely:

(f) Hydro generating station.

(v) In case of the hydro generating stations declared under commercial operation on or after 1.4.2009, operation and maintenance expenses shall be fixed at 2% of the original project cost (excluding cost of rehabilitation & resettlement works) and shall be subject to annual escalation of 5.72% per annum for the subsequent years.”

42. Also informed that the aforesaid order dated 27.11.2013 was upheld by APTEL in Appeal No.30 of 2014 and Appeal No.35 of 2014 which reads as under: -

“232. In view of the above, the State Commission considered it appropriate to apply Central commission’s Regulations, 2009 as mandated in the present case and allow the O&M expenses amounting to Rs.912.89 lacs for the part of the FY 2012-13 which was worked out as 2% of the original cost of the project i.e. Rs.63346.83 lacs.

233. In view of the above situation, we cannot conclude that the calculation made in respect of O&M expenses by the State Commission is wrong”

43. The Appellant submitted that PSERC, despite following CERC Regulations, 2009 in its Order dated 27.11.2013 for calculation of O&M expenses of the Project, erroneously deviated from application of CERC Regulation, 2009 and wrongly applied the principle of, “lower of actuals and normative”, when there is no provision in CERC Regulations which provides for determination of O&M expenses on the principle of “lower of actuals and normative”.

44. Further, argued that the PSERC itself approved the capital cost of the Project at Rs.837.28 cr., calculated the base O&M expenses at 2% worked out to Rs.16.77 cr. for FY 2012-13 and Rs.12.08 cr. from 12.07.2012 to 31.03.2013, however, despite calculating the base O&M expenses as per CERC Regulation, 2009, the State Commission wrongly applied Regulation 28 of PSERC Regulation (Terms and Conditions for Determination of Tariff) Regulation, 2005, while determining O&M expenses for part year of FY 2012-13 and allowed only the actual O&M expenses instead of “Normative”.

45. It is his submission that although, for part FY 2012-13, PSERC have allowed actual O&M expenses, however, for FY 2013-14 and FY 2014-15,

instead of allowing actual O&M expenses, PSERC has allowed O&M expenses on “Normative” basis and not on actuals. Summary on O&M expenses allowed by PSERC is provided below:

S.N.	Year	O&M expenses claimed as per actuals	Normative O&M expenses allowed by PSERC
1.	FY 2013-14	25.12 Cr.	17.75 Cr.
2.	FY 2014-15	24.09* Cr.	18.10 Cr.

46. Submitted that because, PSERC, ought to have allowed O&M expenses for FY 2013-14 and FY 2014-15 on actuals basis, instead of Normative, in line with its decision for FY 2012-13 (Part year), wherein, O&M expenses have been allowed on actuals, incurred by Appellant, if the O&M expense for base year is being allowed on actuals, then, for subsequent years i.e. FY 2013-14 and FY 2014-15, PSERC should have allowed O&M expenses on actuals basis, only.

47. The appellant contended that the PSERC cannot be allowed to allege that the Appellant itself had claimed O&M expenses on actuals, since, if such averment is accepted then, the claim towards O&M expenses for subsequent years should also be allowed on actuals only, which is much higher than Normative O&M expenses for such subsequent years, if the Claim of O&M expenses for FY 2012-13 (Part year) is to be taken as Rs.8.64 cr. (actuals), then, by the same principle the claim for subsequent years i.e. FY 2013-14 & 2014-15 should be considered and examined by PSERC on the basis actuals instead of Normative.

48. Also, claimed that Impugned Order on O&M expenses is violative of Clause 5.3(f) of Tariff Policy reads as under: -

“f) Operating Norms

*Suitable performance norms of operations together with incentives and dis-incentives would need be evolved along with appropriate arrangement for sharing the gains of efficient operations with the consumers. Except for the cases referred to in para 5.3 (h)(2), **the operating parameters in tariffs should be at ‘normative levels’ only and not at ‘lower of normative and actuals. This is essential to encourage better operating performance....”***

49. Reliance was placed upon this Tribunal judgment dated 29.04,2015 in Appeal No. 99 of 2013 PowerGrid Vs. CERC, wherein the Tribunal has held as under:

*“There may be cases where actual may be lower than the normative. **However, the principle is that once the norms are notified, the same will be applicable”.***

50. The Appellant also quoted the judgment dated 24.05.2011 in Appeal Nos. 100 of 2009, 103 of 2009, 146 of 2010 & 151 of 2010 passed by this Hon’ble Tribunal, where it has been held that:

“It is expected that if NTPC performs better than the operational norms it will be rewarded for efficiency and if it performs at lower than normative parameters it will have to bear the consequential loss.”

51. Accordingly, submitted that O&M Expenses for FY 2012-13 be allowed on Normative basis at Rs.12.08 Cr. in terms of findings of PSERC.

52. Issue 2 - Wrongful Deduction of Rs.5,05,62,000/-

53. The Appellant submitted that the State Commission erred in considering 'Creditors written back' as 'Non-Tariff Income' and deducted the same from AFC of FY 2014-15, relevant dates of subject claim are as under:

S.N.	Particulars	Financial Year
1.	Commercial operation date of the Project.	12.07.2012
2.	Consultant engaged by Appellant for carrying out regulatory, commercial, legal function for a lump sum cost of Rs.4.50 cr. + taxes = Rs.5.06 cr.	Year, 2012
3.	Services rendered by consultant.	FY 2012-13 & FY 2013-14
4.	Invoice raised by Consultant for Rs.5.06 cr.	31.03.2014
5.	Appellant accounted Rs.5.06 cr. in its books of accounts.	FY 2013-14
6.	Accounting entry of Rs.5.06 cr. reversed by Appellant in its books based on agreement with consultant that payment would be made on realization of the revenues.	FY 2014-15
7.	Net effect of reversal of entry of Rs.5.06 cr. in the books of accounts of Appellant.	NIL

8.	PSERC wrongly deducted Rs.5.06 cr. from AFC considering it to be a “Non-Tariff Income” from: -	FY 2014-15
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54. Further, submitted that the Project got commissioned in July, 2012, thus major portion of services rendered by consultant were in FY 2012-13 and FY 2013-14 whereas residual services were carried out in FY 2014-15, consequently, the consultant raised invoice dated 31.03.2014 and the Appellant accounted the same in its books of accounts for FY 2013-14, however, the Appellant and consultant agreed that payment under the Agreement shall be due on realization of the tariff as per the final order, accordingly, the invoice was reversed in FY 2014-15.

55. Thus, amount booked as expense in FY 2013-14 and reversed in FY 2014-15, as such, the net effect of the same is 'NIL' upto FY 2014-15, the reversal of expenses consequent to renegotiation cannot be considered as Misc. Receipt in FY 2014-15 and deduction of same as Non-Tariff Income is not justifiable as there is no actual receipt/income and it is just an accounting entry resultant to the renegotiations which deferred the due date of such expenses.

56. Subsequently, the consultant, raised the invoices in FY 2015-16 as the revenue realization started only in May, 2015, after the Supreme Court order dated 24.04.2015, therefore, the invoice was booked and was paid in FY 2015-16, added that after considering the applicable service tax, such lump-sum fee of Rs. 4.50 Cr. amounts to Rs. 5.06 Cr.

57. Therefore, argued that the amount of Rs.5.06 cr. should not have treated as 'Non-Tariff Income/Miscellaneous Receipt' and deducted from AFC for FY 2014-15.

58. Issue No. 3- Deduction of Rs.76,74,098/- towards 'Reimbursement of SOC MOC' from AFC of FY 2014-15 considering as 'Non-Tariff Income'

59. The Appellant claimed that Rs.0.77 Cr. booked in the audited accounts of FY 2014-15 pertaining to reimbursement of System Operation Charges (in short "SOC"), Market Operation Charges (in short "MOC"), Unified Load Despatch and Communication (in short "ULDC") Charges & National Load Despatch Centre – Powergrid portion (in short "NLDC") Charges, the said charges were reimbursed by PTC to the Appellant, as the same were recoverable from beneficiaries in accordance with Regulation 42A of the CERC (Terms and Conditions of Tariff) Regulations.

60. Further, argued that Clause 4.6 of Power Purchase Agreement (in short "PPA") and Clause 4.7 of Power Sale Agreement (in short "PSA") also provide that PTC/ PSPCL shall bear all applicable RLDC/SLDC charges, in fact, these expenses/charges have already been excluded under the Tariff Filing Forms of the 'O&M Expenses' for FY 201415, and the Appellant has not claimed such charges in FY 2014-15 under O&M Expenses.

61. It is the submission that the reimbursement of expenses is neither an income nor an expense in hand nor the Appellant has earned any income on account of such reimbursement collected from the PTC, when an expense is considered on normative basis, income associated with the same cannot be considered on actual basis.

62. Thus, contended that, Rs.0.77 cr. towards 'Reimbursement of SOC, MOC ULDC & NLDC Charges' cannot be treated as 'Non-Tariff Income/ Miscellaneous Receipt' and deducted from AFC of FY 2014-15.

63. Issue No. 4 - 'Audit Fees' not allowed on Actual Basis

64. The Appellant submitted that Proviso to Regulation 28 (2) (b) of the PSERC Tariff Regulations *inter alia* states as below:

“Provided that any expenditure on account of license fee, initial or renewal, fees for determination of tariff and audit fee shall be allowed on actual basis over and above the A&G expenses approved by the Commission.”

65. Therefore, argued that the PSERC wrongly disallowed **Audit fees** in violation of Regulation 28(2)(b) of the PSERC Tariff Regulations, which clearly provides that **Audit fees** shall be allowed on actual basis over and above A&G expenses approved by the Commission.

66. The Appellant claimed that the finding disallowing the expenses towards **Audit fees** is based on an erroneous conclusion that commission has determined base O&M expenses for FY 2012-13 as 2% of Project cost, which is factually incorrect as PSERC has allowed O&M expenses for FY 2012-13 (Part year) on actuals.

67. Therefore, argued that the **Audit fees** of Rs.23.93 lacs for FY 2012-13 (Partial Year) and Rs.14.89 lacs for FY 2013-14 may be allowed, on actual basis over and above the A&G expenses approved by the Commission.

68. Issue No. 5 - Deduction of 'Income from Unscheduled Interchange'

69. The Appellant submitted that the deduction is contrary to Regulation 34 of PSERC Tariff Regulations, 2005.

70. The details of income and expenses associated with Unscheduled Interchange as submitted are as under:

(Rs. Cr.)

S.N.	Particulars	FY 2012-13	FY 2013-14
1.	Income associated with UI	1.64	1.16
2.	Expenses associated with UI	0.00	0.74

71. Breakup of expenses associated with UI is as below:

(Rs. Lacs)

S.N.	Particulars	FY 2012-13	FY 2013-14	Remarks
1.	POC Charges	-	20.49	Appearing under Format 14 of Tariff Filing Forms under head 'Technical Fee'
2.	Transmission Deviation Charges	-	22.60	
3.	UI Revision Charges	-	27.65	
4.	UI Consumption for Auxiliary/Transmission	-	3.42	
5.	Total:	-	74.16	

72. Argued that the UI /Deviation Charges, is an arrangement completely outside the purview of tariff determination process and is purely an arrangement between the entity (generator in this case) and the Grid, the beneficiary, is entitled at all times to receive its scheduled power, or UI revenue in case of any shortfall, and therefore is totally neutral to any revenue or cost to the generator towards UI/Deviation, in any case the energy charges

are levied by the Appellant on the basis of Scheduled Energy, and therefore, UI charges and expenses/Deviation Charges (paid and received) have to be on account of the generator and not to be accounted in the AFC.

73. In the instant case, while approving AFC, any income i.e. UI/Deviation charges (received) cannot be deducted from AFC under the head 'Other Income', accordingly, corresponding UI/Deviation charges (paid) should also not be considered by the PSERC while approving AFC.

74. Also contended that if UI/Deviation charges (received) are to be deducted from AFC, under 'Non-Tariff Income', then the expenses of UI/Deviation charges (paid) should also be allowed as part of AFC.

75. Therefore, Income and Expenses associated with UI should not be considered as non-tariff income.

76. Issue No. 5 - Wrongful computation of one of the components of working capital i.e. 'receivables' by not considering the precedence followed by the State Commission in orders dated 27.11.2013 and 04.12.2014 in petition no. 54 of 2012.

77. The Appellant submitted that as per Regulation 30 of PSERC Tariff Regulations, Working Capital includes O&M Expenses for one month, Receivables equivalent to two months and Maintenance spares @ 15% of O&M Expenses.

78. While approving AFC vide Orders dated 27.11.2013 and consequential Order dated 04.12.2014, the State Commission had considered 'Receivables' as Annual Fixed Cost approved for FY 2012-13 (Partial Year)

and FY 2013-14 prior to adjustment of 'Non-Tariff Income', such methodology of computation of Working Capital was upheld by this Tribunal vide Judgment dated 12.11.2014 in Appeal Nos.30 and 35 of 2014 and Supreme Court vide Order dated 24.04.2015 in Civil Appeal Nos. 3346-3347 of 2015 and also stands implemented vide consequential Order dated 04.12.2014.

79. However, vide Impugned Order, PSERC has considered "Receivables" as AFC for 2 months after deducting Non-Tariff Income because "Receivables" is the amount to be received by the Petitioner after adjusting Non-Tariff Income, thus, computation of "Receivables" is contrary to PSERC's own methodology adopted vide Orders dated 27.11.2013 and consequential Order dated 04.12.2014, wherein, PSERC had considered 'Receivables' as Annual Fixed Cost approved for FY 2012-13 (Partial Year) and FY 2013-14 prior to adjustment of 'Non-Tariff Income'.

80. Thus, Interest on Working Capital Loans is required to be revised as under: -

S.N.	Amount	Percentage (%)	Financial Year
1.	Rs. 3.48 Cr	13.95%	FY 2012-13
2.	Rs. 4.85 Cr.	14.02%	FY 2013-14
3.	Rs. 4.99 Cr.	14.30%	FY 2014-15

81. Issue 6 - Wrongful deduction of Rs.3,09,93,185/- towards insurance

82. **The Appellant is not pressing the above ground** as the insurance amount of Rs.3.10 cr. was held to be a "other income/Non-Tariff Income",

vide Order dated 20.12.2016 in Petition No.55 of 2015 for True-Up of AFC for FY 2014-15. Relevant extracts of the Order dated 20.12.2016 reads as under: -

“2.8.4 Based on information provided by EPPL vide letter no. EPPL/PSERC/Reply/160101 dated 01.01.2016, the actual R&M expenses have already been reduced by Rs.4.65 crore in Para 2.1.2 of this Tariff Order out of which Rs.3.10 crore has been received as ‘On Account’ payment of Rs.3.10 crore is not being considered as ‘other income’/Non-Tariff Income”.

Submissions of the Appellant in Appeal No. 75 of 2018

83. Issue 2 - Wrongful Deduction of Rs.5,05,62,000/-

84. Relevant dates of subject claim are as under: -

S.N.	Particulars	Financial Year
1.	Commercial operation date of the Project.	12.07.2012
2.	Consultant engaged by Appellant for carrying out regulatory, commercial, legal function for a lump sum cost of Rs.4.50 cr. + taxes = Rs.5.06 cr.	Year, 2012
3.	Services rendered by Consultant.	FY 2012-13 & FY 2013-14
4.	Invoice raised by Consultant for Rs.5.06 cr.	31.03.2014

5.	Appellant accounted Rs.5.06 cr. in its books of accounts.	FY 2013-14
6.	Accounting entry of Rs.5.06 cr. reversed by Appellant in its books based on agreement with consultant that payment would be made on realization of the revenues.	FY 2014-15
7.	Net effect of reversal of entry of Rs.5.06 cr. in the books of accounts of Appellant.	NIL
8.	PSERC wrongly deducted Rs.5.06 cr. from AFC considering it to be a “Non-Tariff Income” from: -	FY 2014-15 Challenged in Appeal No.214 of 2016
9.	Appellant paid 5.06 Cr. to consultant.	FY 2015-16
10.	PSERC vide Impugned Order disallowed the said expense which resulted in non- consideration of Rs.5.06 Cr. in AFC for FY 2015-16.	Subject matter of present Appeal.

85. Because R-1 erred in failing to appreciate that AFC for FY 2015-16 ought to have been allowed for Rs. 171.99 Cr. instead of 166.68 Cr. while failing to consider the effect of an expenditure of an amount of Rs. 5.06 Cr., being the expenditure incurred by Appellant in FY 2015-16 towards consultancy charges paid to M/s Balaji.

86. Because PSERC had deducted Rs. 5.06 Cr. from AFC of FY 2014-15, while erroneously considering the same as “**Non-Tariff Income**” (Subject

matter of Appeal No.214 of 2016). Thus, the said amount ought to have been added back while determining AFC for FY 2015-16, when the said amount had actually been incurred and paid by the Appellant.

87. Because the expense pertains to the amount which booked as an expense in FY 2013-14 and reversed in FY 2014-15. As such, the net effect of the same is 'NIL' upto FY 2014-15 and thus, the amount of Rs. 5.06 Cr ought not to have been deducted from the AFC of FY 2014-15 as Non-Tariff Income and when the same was deducted from AFC of FY 2014-15, then, the amount of Rs. 5.06 Cr ought to have been added to the AFC for FY 2015-16, when the said amount was actually incurred by the Appellant.

88. Because the services rendered by the consultant were spread over 3 financial years and based on the renegotiations were finally accounted in one FY 2015-16 based on the accounting standards.

89. Because all the three events: a) raising of Invoice by the consultant at the first instance; b) renegotiation with the consultant and c) finality of the revenue realization as per the final order, have occurred in three different Financial Years i.e. 2013-14, 2014-15 and 2015-16 which has resulted into depiction of the same in the respective year end statement of accounts (i.e. Balance Sheet and Profit & Loss Account).

90. Because Rs 5.06 Cr which was considered as Non - Tariff Income was finally booked and paid by EPPL to Consultants in FY 2015-16. Accordingly, Hon'ble Tribunal is requested to please consider the facts in its entirety and approve (-) Rs.5.06 Cr. (minus Rs.5.06 Cr), under Creditor Written Back as part of Non-tariff Income leading to addition in the overall AFC for FY 2015-

16 (true-up). Accordingly, Hon'ble Tribunal is requested to allow Creditors Written Back in AFC for FY 2015-16.

Submissions of PSPCL

91. O&M Expenses

92. The PSPCL submitted that the Appellant has contended that while fixing the AFC, the State Commission has applied the principle of "lower of normative vs. actual", this is misconceived.

93. The Project of the Appellant was declared under Commercial Operation on 12.07.2012, therefore, FY 2012-13 was to be the "base year" for the purposes of computation of AFC of the Project, and the power of the State Commission to undertake suitable assessment of base expenses of a new generator can be traced to Regulation 28 (5) (b) of Punjab State Electricity Regulatory Commission (Terms & Conditions for Determination of Tariff) Regulations 2005 (as amended) which reads as under:

"28(5). OPERATION & MAINTENANCE EXPENSES

.....

b) In case of a new generating company (s), the Commission shall make suitable assessment of base O&M expenses of the new licensee (s) and allow O&M expenses for subsequent years for the new licensee (s) on the basis of such estimation and principle as given in clause (2) (b) above. However, for employee cost the principle specified in clause (3) above will be followed."

94. What bears importance is the fact that the State Commission was determining the base cost of the Project, for a normative parameter to be determined and thereafter fixed, the State Commission primarily requires certain benchmark figures it can lean on and It needs to reiteration that benchmark costs are always fixed by observing the actual numbers, thus, the State Commission, since, was fixing the base cost, therefore necessarily it is only the actual numbers which can be taken into account, for this very reason the applicable regulations do not even use the word “*normative*”.

95. In fact, even before the State Commission the Appellant had claimed O&M expenses at actuals for FY 2012-13, the Appellant has urged that for subsequent years i.e., FY 2013-14 and 2014-15, the State Commission has thereafter deviated from its earlier methodology and instead of actual numbers fixed the O&M expenses by taking normative numbers, this is misconceived.

96. As per Regulation 28 (5) (b) of PSERC (Terms & Conditions for Determination of Tariff) Regulations, 2005 (as amended), the O&M expenses for subsequent years is to be adjusted based on such estimation and principle as provided in clause 2(b) of Regulation 28 of said regulations. Regulation 28 (2)(b) reads as under:

“28(2) (b) *Base O&M expenses (except employee cost) as above shall be adjusted according to variation in the average rate (on monthly basis) of Wholesale Price Index (all commodities) over the year to determine the O&M expenses for subsequent years.*

Provided that any expenditure on account of license fee, initial or renewal, fees for determination of tariff and audit fee shall be allowed on actual basis over and above the A&G expenses approved by the Commission.

97. As per regulation 28 (5)(b), the employee cost of a new generating company is to be determined as per principle prescribed in Regulation 28 (3) which reads as under:

“28. (3) the employee cost for a distribution licensee(s) shall be determined as follows:

(a) The employee cost as claimed by the distribution licensee (s) shall be considered in two parts:

(i) Terminal Benefits such as Death-cum-Retirement Gratuity, Pension, Commuted Pension, Leave Encashment, LTC, Medical reimbursement including fixed medical allowance in respect of pensioners and share of BBMB employee expenses and

(ii) All other expenses accounted for under different sub-heads of employee cost taken together. The cost component of terminal benefits and BBMB expenses shall be allowed on actual basis and increase in all other expenses under different sub-heads shall be limited to the increase in Wholesale Price Index (all commodities) as per clause (2) (b) above.

(b) Exceptional increase in employee cost on account of pay revision etc. shall be considered separately by the Commission.

(c) *The additional employee cost in case of New installations/Network for the year of installation shall be considered separately by the Commission on case to case basis keeping in view the principles and methodologies enunciated in these regulations. (Emphasis added)”*

98. From a bare reading of the above regulations, the O&M expenses is to be increased/adjusted limited to the increase in Whole Sale Price Index for employee cost and expenses other than employee cost, the word “*normative*” has not been mentioned in Regulation 28, the words “*limited to increase in Whole Sale Price Index*” and “*adjusted according to variation in the average rate (on monthly basis) of Wholesale Price*” in the applicable regulations makes clear the intention that the O&M expenses are to be increased on actual subject to the maximum increase in Whole Sale Price Index, therefore, the State Commission has rightly restricted the O&M expenses for FY 2012-13 (partial year) base year to the actual numbers and thereafter escalated the base O&M expenses of Rs. 16.77 crore to the maximum of WPI increase for FY 2013-14 and FY 2014-15 in accordance with the regulations.

99. Thus, it is not that the State Commission has applied the principle of lower of actual or normative, the State Commission has merely determined the base cost, and thereafter year on year has applied indexation (as per the applicable regulations) on the same to arrive at the AFC.

100. The contention of the Appellant that the State Commission has deviated from the principle adopted in the previous order dated 27.11.2023, which is as per CERC Regulations, is not correct, the order dated 27.11.2023 was passed in the absence of materials available on record, for this purpose,

awaiting the full details to be available for the purpose of computing the base cost, the State Commission had computed the O&M Expenditure.

101. This is also noted by the judgment of the Hon'ble Tribunal dated 12.11.2014 against the said order dated 27.11.2023, wherein it has been held as under:

“231. As per the information furnished by the Everest Power before the State Commission it is stated that it was not feasible to determine the base for allowable O&M expenses for the FY 2012-13. Though the expenses for the part of the FY 2012-13 are available, the same are insufficient for making suitable assessment of base O&M expenses as per Punjab State Electricity Regulatory Commission Regulations, 2005.

232. In view of the above, the State Commission considered it appropriate to apply Central Commission' Regulations, 2009 as mandated in the present case and allow the O&M Expenses amounting to Rs. 912.89 lacs for the part of the FY 2012-13 which was worked out as 2% of the original cost of the project i.e., Rs. 633346.83 lacs.

233. In view of the above situation, we cannot conclude that the calculation made in respect of O&M expenses by the State Commission is wrong.”

102. The materials available then were insufficient for making a suitable assessment of the base O&M expenses, at the stage of the impugned order in the present case, since sufficient material were available, and the claim of

the Appellant itself was for Rs. 8.24 Crores, after adjusting the minor figure of Rs. 0.08 Crores, the base O&M expenditure has been allowed by the State Commission at Rs. 8.16 Crores, any other interpretation would result in a situation wherein the generator did not provide sufficient materials for determination of base O&M expenses at the initial stage, and the same would benefit the generator by allowing higher cost than the actual cost. The actual cost becomes the basis of the base O&M expenses, as correctly determined by the State Commission.

103. It is further submitted that the escalation is only on WPI index to the base O&M Expenditure as provided in Regulation 28 (2)(b).

104. It is further submitted that the position in law has been settled, namely, that when there are Regulations of the State Commission, there can be no direction to follow the Regulations of the Central Commission.

105. **Consultancy charges**

106. The case of the Appellant is that since during the initial stages of implementation of the Project it did not have the financial wherewithal, therefore it had to hire a consultant with a deferred payment liability, further, it is submitted that the Appellant cannot seek to have the entire cost as a pass through merely because the same was incurred, even, under the scheme of tariff determination, A&G expenses in terms of the applicable regulations are allowed to a generator, the entire scope of work purported to have been outsourced to the consultant falls squarely within the purview of the A&G Expenses, if that be the case, no cost on actuals can be awarded as pass through, the scheme of the Electricity Act, 2003, seeks to protect the interests of both the generators as well as the consumers.

107. During FY 2013-14, the Appellant had hired a consultant to carry out its functions, which otherwise had to be executed by itself, based on the consultant' invoice, the Appellant booked "Consultancy Charges" in its audited annual accounts for FY 2-13-14.

108. The State Commission in the True Up for FY 2013-14 (vide Order dated 31.08.2015) allowed the A&G Expenses of Rs. 6.96 Crores which included the Consultancy Charges, thereafter, in the audited annual accounts for FY 2014-15, the Appellant had had itself recorded an income of Rs. 5.06 Crores as "*Creditors Written Back*" under the head "*Other Income*", accordingly, the State Commission in its Order dated 20.12.2016 in Petition No. 55 of 2015 for True Up for FY 2014-15 included Rs. 5.06 Crores as part of Non-Tariff Income, the true up Order for FY 2014-15 has not been challenged by the Appellant and has thus attained finality.

109. In Petition No. 17 of 2017 for True Up for FY 2015-16, the Appellant submitted that "*Creditors Written Back*" amounting to Rs. 5.06 Crores was merely an accounting entry which was accounted for in FY 2013-14 and was reversed in FY 2-14-15, actual expense was booked and paid by the Appellant in FY 2015-16.

110. During truing up for FY 2015-16, the Appellant had claimed dual benefit of the Consultancy Charges of Rs. 5.06 Crores in FY 2015-16 one in the forms of A&G expense and other in the form of reduction/reversal of income.

111. The State Commission by way of the impugned Order (in Appeal No. 75 of 2018) has duly considered the actual A&G expenses and allowed A&G Expense of Rs. 6.77 Crores based the applicable regulations.

112. It is submitted that merely since an expense has been incurred or claimed to be incurred, does not automatically permit the generator to claim the said amount as a pass through in tariff, for the purposes of tariff only certain expenditures are allowed.

Submissions of the PSERC

113. The Commission submitted that the present appeal raises an issue that the Commission failed to increase the Annual Fixed Cost by Rs.5.06 Crore, which was spent by the appellant as payment to M/s. Balaji Operation & Maintenance Service (P) Ltd., which amount was earlier reversed by the appellant in its book in view of the specific agreement between the two, it is further pleaded that the Commission has erroneously considered it to be a non-tariff income.

114. Also, added, that the appellant has further submitted that the State Commission has not considered the Chartered Accountant's Certificate dated 07.12.2016 filed alongwith the True-Up Petition No. 17 of 2017, (of FY 2015-16), wherein, it has been specifically certified that the reversal of entry in the books of Accounts have actually not resulted in any sort of income for the Appellant, the State Commission has deducted the amount of Rs.5.06 crore from the AFC of FY 2014-15 by considering the same as "Non-Tariff Income". However, the same was not a "Non-Tariff Income" and was a reversal entry effected as the Appellant had no amount available to pay the consultancy charges on account of non-realization of the determined tariff due to pendency of disputes between The Appellant and PSPCL.

115. It is submitted that the Appellant has claimed dual benefit of the Consultancy Charges of Rs.5.06 crore in FY 2015-16, one in the form of an expense as part of A&G expenses and other in the form of reduction/reversal of income as a negative 'Non-Tariff Income' (which in effect is also like an expense leading to enhanced AFC), the Commission had considered the actual A&G expenses (including the said consultancy charges of Rs.5.06 crore) of The Appellant and allowed the requisite A&G expense in accordance with relevant PSERC Regulations during FY 2015-16.

116. It is further submitted that all the documents filed by the Appellant along with the True-Up Petition (No.17 of 2017) including the said CA Certificate, have been duly considered by the Commission while approving the AFC for FY 2015-16 (vide order dated 18.12.2017), however, the Commission determines the components of AFC on the basis of PSERC Regulations and no expense can be allowed only on the basis of a certificate, all documents furnished, be it a Chartered Accountant's Certificate has to be examined in the light of the PSERC Regulations.

117. That the issue of "Creditors Written Back" raised by the appellant in the present appeal relates to FY 2013-14, which had a consequential effect on subsequent years of FY 2014-15 and FY 2015-16, brief year-wise background of the issue is submitted as follows;

- i. During the **Financial Year 2013-14**, the appellant had hired an agency/consultant to carry out its regulatory, commercial and legal functions (including tariff determination) in June, 2013, accordingly, as per the appellant, it entered into an agreement with M/s. Balaji Operation & Maintenance Service Pvt. Ltd. ('Balaji' or 'Consultant') for providing various technical services which inter-alia included regulatory, advisory, commercial, financial and legal functions with

- a deferred payment liability, to be paid after completion of the tariff determination process for sale of electricity from the project for a lump sum fee of Rs.4.50 crore, plus applicable service tax, which comes to the tune of Rs.5.06 crore.
- ii. On completion of the work, the Consultant raised an invoice of Rs.5.06 crore on 31.03.2014, and based on the said invoice, the appellant booked consultancy expenses (under the head “Consultancy & Professional Charges” in “Operating and other expenses”) and liability towards creditors, in its Annual Accounts of FY 2013-14.
- iii. The Commission, in the **True-Up of FY 2013-14** (vide order dated 31.08.2015 in Petition No.37 of 2014), duly considered the actual A&G expenses Rs.12.01 crore which included Consultancy Fee of Rs.5.06 crore (as per the Audited Annual Accounts of Appellant for FY 2013-14), however, the Commission ultimately allowed the A&G expense of Rs.6.96 crore in accordance with the relevant PSERC Regulations, the extract from order dated 31.08.2015 is as under:

“....The provision of Regulation 28 of Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 (as amended) for determination of O&M expenses provides as under:

28. OPERATION & MAINTENANCE EXPENSES

(1) ‘Operation & Maintenance expenses’ or ‘O&M expenses’ shall mean repair and maintenance (R&M) expenses, employee expenses and administrative & general expenses (A&G) including insurance.

(2) O&M expenses for distribution licensee (s) shall be determined by the Commission as follows:

(a) O&M expenses as approved by the Commission for the year 2011-12 (true-up) shall be considered as base O&M expenses for determination of O&M expenses for subsequent years.

(b) Base O&M expenses (except employee cost) as above shall be adjusted according to variation in the average rate (on monthly basis) of Wholesale Price Index (all commodities) over the year to determine the O&M expenses for subsequent years.

Provided that any expenditure on account of license fee, initial or renewal, fees for determination of tariff and audit fee shall be allowed on actual basis over and above the A&G expenses approved by the Commission.

(c) In case of a new distribution licensee (s), the Commission shall make suitable assessment of base O&M expenses of the new licensee(s) and allow O&M expenses for subsequent years for the new licensee (s) on the basis of such estimation and principle as given in clause (b) above. However, for employee cost the principle specified in clause (3) below will be followed....

.....After applying the WPI increase of 5.98% on the base of Rs.1.66 crore of employee cost for FY 2012-13, the employee cost of FY 2013-14 work out to Rs.3.61 $[(1.66 * 16.77 / 8.16) * (1.0598)]$ crore, the R&M expenses of FY 2013-14 works out to Rs.7.18 $[(3.3 * 16.77 / 8.16) * (1.0598)]$ crore, the A&G expenses for FY 2013-14 work out to Rs.6.96

*[(3.2*16.77/8.16)*(1.0598)] crore for FY 2012-13, the allowable O&M expenses for FY 2013-14 works out to Rs.17.75 (3.61+7.18+6.96) crore”.*

iv. Thereafter, in the Annual Accounts for the **Financial Year 2014-15**, the appellant had recorded an income of Rs.5.06 crore as ‘creditors written back’ under the head “Other Income”, accordingly, the Commission in its order dated 20.12.2016 (in Petition No.55 of 2015), for the **True-Up of FY 2014-15**, included Rs.5.06 crore as part of Non-Tariff Income (which consequentially reduced the AFC) as the same was recorded by The Appellant under the head “Other Income” in its financials of FY 2014-15, in this regard, the relevant extract from the said Order dated 20.12.2016 is as under:

....As per Audited Annual Accounts of EPPL for FY 2014-15, Other income amounting to Rs.38.90 crore has been booked which includes carrying cost on differential tariff (Rs.29.52 crore), Insurance claim received (Rs.3.10 crore), Creditors written back (Rs.5.06 crore), reimbursement of SOC, MOC Charges received (Rs.0.76 crore), Interest Income (Rs.0.46 crore) and Miscellaneous income. The Commission re-determined Non Tariff Income for FY 2014-15 in its Review Order in petition no. 9 of 2015 dated 29.01.2016 of Rs.38.90 crore to Rs.9.37 crore....

....Based on information provided by EPPL vide letter no. EPPL/PSERC/Reply/160101 dated 01.01.2016, the actual R&M expenses have already been reduced by Rs.4.65 crore in Para 2.1.2 of this Tariff Order out of which

*Rs.3.10 crore has been received as 'On Account' payment from Insurance company in FY2014-15. Therefore, the amount of Rs.3.10 crore is not being considered as 'other income'/Non Tariff Income. **All other incomes amounting to Rs.6.28 crore i.e. Rs.5.06 crore on account of Creditors written back, Rs.0.76 crore on account of reimbursement of SOC, MOC Charges received and Rs.0.46 crore on account of Interest Income are considered as 'Non Tariff Income' for FY 2014-15....***

118. That in Petition No.17 of 2017 for **True-Up of FY 2015-16**, the appellant had submitted that 'Creditors written back' amounting to Rs.5.06 crore was merely an accounting entry which was accounted for in FY 2013-14 and was reversed in FY 2014-15, actual expense of Rs.5.06 crore was finally booked and paid by The Appellant to its Consultant in FY 2015-16.

119. In the said Petition (No.17 of 2017), as stated earlier, the Appellant had claimed dual benefit of the Consultancy Charges of Rs.5.06 crore in FY 2015-16, one in the form of an expense as part of A&G expenses and other in the form of reduction/reversal of income as a negative 'Non-Tariff Income' (which in effect is also like an expense and will enhance the AFC).

120. The Commission, in its order dated 18.12.2017 (for True-Up of FY 2015-16), duly considered the actual A&G expenses (including the said consultancy charges of Rs.5.06 crore) of the Appellant and finally allowed A&G expense of Rs.6.77 crore based on the relevant PSERC Regulation. Additionally, Audit fee and License fee to the tune of Rs.0.30 (0.16+0.14) crore was also allowed. The Commission held;

“....4.2 EPPL in its Petition no. 17 of 2017 for true up of FY 2015-16 has claimed Rs.6.96 crore as A&G expenses for FY 2015-16 on normative basis as per the Commission’s Order dated 31.08.2015. Actual A&G expenses submitted by EPPL are of Rs.12.33 crore in FY 2015-16, which includes Rs.5.06 crore on account of consultancy charges.

4.3 The said consultancy charges of Rs.5.06 crore were first accounted by EPPL in its financials of FY 2013-14. The Commission, in the True Up of FY 2013-14 (vide order dated 31.08.2015), had allowed the A&G expenses of Rs.6.96 crore on normative basis, against the actual expenses of Rs.12.01 crore which included consultancy charges.

4.4 Since no such expense was actually incurred in FY 2013-14, EPPL reversed the entry relating to the said invoice / expense of Rs.5.04 crore and entered it as “Creditors written back” in its financials of FY 2014-15 under other income. The Commission in its order dated 20.12.2016, in the True Up of FY 2014-15, included Rs.5.06 crore as Non-Tariff Income as the same was recorded by EPPL under the head “Other Income” in its financials of FY 2014-15. The Commission allowed A&G expenses of Rs.5.36 crore on actual basis in True Up of FY 2014-15.

4.5 In the instant Petition for True Up of FY 2015-16, EPPL has submitted that the consultancy charges of Rs.5.06 crore have been paid in FY 2015-16, thus, have now been accounted in financials of FY 2015-16.

4.9.... Therefore, total A&G expenses work out to Rs.6.77 (6.76+0.01) crore against normative A&G expenses of Rs.6.96 crore determined by EPPL. In addition to A&G expenses on normative basis, EPPL has shown Audit fee and licence fee to

the tune of Rs.0.30 (0.16+0.14) crore which are allowed as per Regulation 28 of PSERC Regulations, 2005 (amended vide notification no. PSERC / Secy / Regu.74 dated 17 Sep, 2012). Accordingly, the Commission allows Rs.7.07 (6.77+0.30) crore as A&G expenses for FY 2015-16”.

121. Further, with respect to Non-Tariff Income the Commission in the True-Up of FY 2015-16, observed as under:

“9.2 EPPL in its Petition No. 17 of 2017 for true up for FY 2015-16 has claimed Non-Tariff Income of (-)Rs.4.83 crore inclusive of Rs.0.23 crore as other income and (-)Rs.5.06 crore relating to “Creditor Written Back”. However, audited accounts of EPPL depict other income of Rs.0.23 crore. The consultancy charges of Rs.5.06 crore have been booked by EPPL under A&G expenses which have been considered in Para 4 (Para 4.1 to 4.9) of this Order. Hence, there is no case for considering the consultancy charges again as minus income i.e. expenditure under the head non-tariff income.

9.3 As per Audited Annual Accounts of EPPL for FY 2015-16, other income amounting to Rs.0.23 crore has been booked which is approved. No effect has been given on account of creditors written back in the financials of FY 2015-16. Accordingly the Commission allows Rs.0.23 crore as Non-Tariff Income for FY 2015-16 based on Audited Annual Accounts of EPPL”.

122. Hence, it is submitted that the said consultancy charges of Rs. 5.06 crore as recorded in expense in the Annual Accounts of the Appellant for FY 2013-14, was duly considered by the Commission while determining the A&G

expenses, which were finally allowed in accordance with the relevant PSERC Regulations.

123. In the Annual Accounts of FY 2014-15, the appellant itself recorded an income of Rs.5.06 crore as 'creditors written back' under the head "Other Income", accordingly, the Commission in its order dated 20.12.2016 (in Petition No.55 of 2015), for the True-Up of FY 2014-15, included Rs.5.06 crore as part of Non-Tariff Income.

124. In the True-Up of FY 2015-16, the Appellant had claimed dual benefit of the Consultancy Charges of Rs.5.06 crore, one in the form of an expense as a part of A&G expenses and other in the form of reduction/reversal of income in the form of a negative 'Non-Tariff Income' (which in effect is also like an expense and will enhance the AFC), the Commission, in its order dated 18.12.2017 (for True-Up of FY 2015-16), had very much considered the said consultancy charges as a part of actual A&G expenses and had ultimately allowed the A&G expense based on the relevant PSERC Regulation.

125. That without prejudice to the above it is pertinent to mention that the Appellant submitted at the time of True-Up of FY 2014-15, that the Commission had erroneously considered Rs.5.06 crore as 'Non-Tariff Income' in the said True-Up, and therefore, the said amount ought to have been added back while determining the AFC of FY 2015-16.

126. In response to above it is most respectfully submitted that the appellant had never contested the Commission's Order (dated 20.12.2016) for True-Up of FY 2014-15, wherein Rs.5.06 crore was considered as 'Non-Tariff Income' based on the Audited Annual Accounts of FY 2014-15 of the

Appellant, accordingly, its claim for reversal of amount determined in FY 2014-15, in Tariff Order for FY 2015-16, is not in accordance with law and is devoid of merits.

Our Observations & Conclusion

127. Issue 1 – O&M Expenses.

128. We have examined the claim of the Appellant regarding O& M expenses for the FY 2012-13 (part year) as 2% of project cost (proportionate) and the counter-argument of the PSPCL, the PSERC has not submitted their views.

129. It cannot be disputed that the O&M expenses are always allowed as “Normative charges” or otherwise specifically specified through the law, the Tariff Policy notified by the Government of India under section 3 of the Act is a guiding principle and specific mandate therein has to follow, or otherwise, any deviation therein have to be reasoned by the State Commission.

130. The Tariff Policy clearly prescribe that the O&M charges have to be “Normative” and therefore, any decision contrary to it is bad in law.

131. We are satisfied with the contention of the Appellant that the Impugned Order is contrary to Order dated 27.11.2013, wherein, PSERC had allowed O&M expenses of Rs.9.13 cr. as “Normative” as per Regulation 19(f)(v) of CERC (Terms and Conditions of Tariff) Regulations, 2009.

132. The detailed examination of the State Commission's order in true up petition No. 37 of 2014 on O&M expense revealed that the State Commission adopted an inconsistent and different approach in the treatment of the same item, without mentioning "normative", the State Commission as per its convenience allowed value which is lower of actual or value computed as per norm.

133. In 2012-13 as per norms (2% of capital cost) the value for O& M part year was Rs 9.189 Cr. (proportionate amount of Rs 16.77 Cr.) which was earlier granted in the original petition and reaffirmed in order in petition No 54 of 2012 after this Tribunal's Remand Order but the State Commission reversed its own decision and in true Up petition allowed Rs 8.16 Cr. which was actual expenditure for a part year.

134. In 2013-14, the State Commission allowed O& M expenses as per Norms, First-year expense escalated by WPI i.e $16.77 * 1.0598 = 17.75$ crs which is less than the actual expenditure of Rs 25.12 Cr. claimed by the Appellant, this amount is further shown to be sub-divided under different heads using the ratio of the previous year's actual expenditure, but the total amount allowed Rs 17.75 cr. is derived using norms.

135. Hence instead of following a consistent principle, in the same order for the same head (O& M expenses) for two years, two different methodologies were adopted, in 2012-13 is as per actual expenditure, and in 2013-14, it is as per Norms because the value derived using norms is lower than actual, hence the State Commission effectively uses "whichever is lower" principle contrary to the Tariff Policy.

136. The PSERC itself assessed the O&M expenses as per Regulation 19(f)(v) CERC tariff Regulation 2009 in its order dated 27.11.2013 and allowed 2% of the project cost as an O&M charge.

137. Further, consequent to APTEL judgment, PSERC vide its order in petition no 54/2012 dated 4.12.2014 has retained the same amount of O&M expenses for 2013-14, the relevant extract is reproduced as under:

“ III. Annual Fixed Cost In compliance with the Hon’ble APTEL judgment dated 12.11.2014, the Annual Fixed Cost for FY 2012-13 (12.07.2012 to 31.03.2013) and for FY 2013-14 works out as in the following Table:

(₹ lac)

Sr. No.	Item of Expenses	FY 2012-13 (12.07.2012 to 31.03.2013)		FY 2013-14	
		Already approved by Commission	Revised by Commission	Already approved by Commission	Revised by Commission
1	Return on Equity	2877.98	2805.37	3994.15	3893.38
2	Interest on Loan	5653.41	5503.22	7177.06	6971.51
3	Depreciation	3016.75	2939.60	4194.64	4087.37
4	Operation & Maintenance Expenses (As per Order dt. 27.11.2013)	917.89	917.89	1339.41	1339.41
5	Interest on Working Capital	322.28	315.25	429.30	419.75
	Total	12788.31	12481.33	17134.56	16711.42

138. However, the commission while deciding to truing up petition No 37 of 2014 for 2013-14 and 2014-15 in its order dated 31.8.2015 reduced the O&M expense to Rs 8.16 crs, this is contrary to orders of this Tribunal and Supreme Court that items which have attained finality could not be reopened and only true up of the capital cost is permissible.

139. However, the PSPCL submitted that the State Commission has notified PSERC (Terms & Conditions for Determination of Tariff) Regulations 2005 (as amended), whereby, the State Commission has to undertake a suitable assessment of base expenses of a new generator under Regulation 28(5)(b), the relevant Regulation reads as under:

“28(5). OPERATION & MAINTENANCE EXPENSES

b) In case of a new generating company (s), the Commission shall make a suitable assessment of the base O&M expenses of the new licensee (s) and allow O&M expenses for subsequent years for the new licensee (s) based on such estimation and principle as given in clause (2) (b) above. However, for employee cost the principle specified in clause (3) above will be followed.”

140. We agree that once Regulations are notified, then these are binding and any measures or orders passed by the State Commission have to be in consonance with the Regulations framed, reliance was placed on ***PTC India Limited V. Central Electricity Regulatory Commission (2010) 4 SCC 603, para 54 to 56.***

141. It is, therefore, important to note here the fact that these Regulations were in existence when the order dated 27.11.2013 was passed by the PSERC, and the decision of the PSERC vide said order was upheld by this Tribunal, thereby, upholding the methodology adopted by the State Commission.

142. We are satisfied that the State Commission must have acted in consonance with the said Regulations and have, after assessing the base expenses, determined the O&M expenses for the Appellant.

143. From the submission of the PSPCL and the Regulations, we are inclined to accept that the said Regulations only provide that “the Commission shall make a suitable assessment of base O&M expenses of the new licensee (s)”, however, there is no methodology specified for assessing such expenses.

144. This Tribunal while considering the above has upheld the order dated 27.11.2013 passed by PSERC in Appeal No.30 of 2014 and Appeal No.35 of 2014 which reads as under: -

“231. As per the information furnished by the Everest Power before the State Commission it is stated that it was not feasible to determine the base for allowable O&M expenses for the FY 2012-13. Though the expenses for the part of the FY 2012-13 are available, the same are insufficient for making a suitable assessment of base O&M expenses as per Punjab State Electricity Regulatory Commission Regulations, 2005.

232. In view of the above, the State Commission considered it appropriate to apply Central Commission’s Regulations, 2009 as mandated in the present case and allow the O&M Expenses amounting to Rs. 912.89 lacs for the part of the FY 2012-13 which was worked out as 2% of the original cost of the project i.e., Rs. 633346.83 lacs.

233. In view of the above situation, we cannot conclude that the calculation made in respect of O&M expenses by the State Commission is wrong.”

145. Undisputedly, within the powers of the State Commission, it has assessed and determined the O&M expenses based on the CERC norms, which has also been upheld by this Tribunal, thus, this principle of computation of base year O&M charge by the State Commission has attained finality as no further appeal was made, the PSERC now cannot revert to a different principle of determining base year O&M expense.

146. Therefore, at this stage of Truing up, it cannot be allowed to decide contrary to its decision which has been upheld by this Tribunal and cannot be said to be contrary to the PSERC Regulations.

147. It is also a settled principle of law that the methodology cannot be revised or changed at the stage of Truing up of accounts.

148. Further, the PSERC itself approved the capital cost of the Project at Rs.837.28 cr., and after that, calculated the base O&M expenses at 2% worked out to Rs.16.77 cr. for FY 2012-13 and Rs.12.08 cr. from 12.07.2012 to 31.03.2013.

149. Although the PSERC neither in its 27.11. 2013 order nor in its Impugned Order mentioned the word “normative”, but the principle adopted in the order dated 27.11.2023 is that O& M charges are approved based on norms rather than actual, and this is based on the underlying principle that there should be certainty of O&M expenses and the efficiency gain should be incentivized and hence , this is in accordance with Tariff Policy and such

underlying principle also been upheld in various order of this Tribunal as it is in the consumer interest.

150. The submission of the PSPCL is also rejected because the Appellant himself has asked O&M based on actual expenses, any claim contrary to the law is certainly bad in law and cannot be accepted.

151. Therefore, we agree with the Appellant's contention that the O&M expenses as granted vide order dated 27.11.2013 are final, and accordingly, the Issue is decided in favour of the Appellant.

152. **Issue 2 - Wrongful Deduction of Rs.5,05,62,000/-**

153. The issue relates to the booking of consultancy charges to the consultant for providing services during the period 2013-14 and 2014-15.

154. The claim of the Appellant for consultancy charges and views of PSPCL and PSERC were examined in detail along with True up orders of the State Commission for the years 2012-13 to 2015-16.

155. As mentioned earlier in the discussion of O&M charges, the State Commission after computing O&M expenses under different heads as per Norms used to allow O&M expenses based on 'lower of actual or Norms'.

156. Therefore, first, it needs to be examined whether the Appellant received the consultancy charges in 2013-14, in 2013-14 The claim of the petitioner and expenses approved by the State Commission are tabulated below:

(Rs. in Crs)

O&M head	Actual Expense	Approved by the Commission
Employee expense	3.23	3.16
Repair and Maintenance	10.69	7.18
Administrative and General expense	11.36	6.96

157. As A&G expense approved by the State Commission is less by 4.4 crs than the actual expenditure claimed, so some part recovery of consultancy charges (5.06-4.4= 0.66 crs) has been made by the Appellant through approved A&G charges.

158. The Appellant made payment of consultancy charge of 5.06 crs in 2015-16 and claimed it under A&G charges in 2015-16.

(Rs in crs)

O&M head	Actual Expense	Approved by the Commission
Employee expense	3.96	3.70
Repair and Maintenance	7.18	6.98
Administrative and General expense	12.33 inclusive of 5.06 crs on account of consultancy charges	7.07

Note : (Para 4.2 of Order in Petition No. 17 of 2017.)

159. The State Commission approved A&G expense less by Rs 5.26 crs than the actual expenditure claimed, therefore, no recovery of consultancy

charges (5.06 crs) has been made by the Appellant through approved A&G charges.

160. Hence, we find the State Commission's contention that consultancy charges have been paid under A& G charges is erroneous.

161. It is important to note that as per the methodology of computation of O&M charges under different heads adopted by the State Commission, based on base year charges and escalation, it is not possible to recover such onetime payments made in later years because in the base year such expenditure was not there or not covered under 2% limit, also as mentioned earlier in case of O& M expense, the State Commission is adopting "lower of actual or norm".

162. In case, the commission sticks to payment of O&M expenses through norms, then through retention of efficiency gain, gradually it could have been recovered.

163. Also, the recovery of one-time expenditures like consultancy charges can be possible by considering this under additional capitalization and recovering through tariff or one-time payment recovered through tariff in that particular year.

164. Hence, the Appellant's proposal to consider as negative Non-tariff income (expense) and add into AFC is worth considering after adjusting part recovery in 2013-14.

165. Therefore, as per analysis, it is clear that consultancy charges have not been paid to the Appellant in 2015-16, hence the State Commission is directed to review its decision regarding this specific expenditure.

166. **Issue No. 3- Deduction of Rs.76,74,098/- towards 'Reimbursement of SOC MOC' from AFC of FY 2014-15 considered as 'Non-Tariff Income'.**

167. The Respondents have not filed any written submissions on the issue.

168. The Appellant claimed that Rs.0.77 Cr. booked in the audited accounts of FY 2014-15 about reimbursement of System Operation Charges (in short "SOC"), Market Operation Charges (in short "MOC"), Unified Load Despatch and Communication (in short "ULDC") Charges & National Load Despatch Centre – Powergrid portion (in short "NLDC") Charges, and are recoverable from beneficiaries in accordance with Regulation 42A of the CERC (Terms and Conditions of Tariff) Regulations.

169. It is important to note here that these charges are regulated as per CERC Regulations.

170. Also, Clause 4.6 of the Power Purchase Agreement (in short "PPA") and Clause 4.7 of the Power Sale Agreement (in short "PSA") provide that PTC/ PSPCL shall bear all applicable RLDC/SLDC charges, in fact, these expenses/charges have already been excluded under the Tariff Filing Forms of the 'O&M Expenses' for FY 2014-15, and the Appellant has not claimed such charges in FY 2014-15 under O&M Expenses.

171. Undisputedly, these charges like reimbursement in accordance with CERC Regulations, therefore, such reimbursement of expenses is neither an income nor an expense in the hand of the Appellant, further, the Appellant has not earned any income on account of such reimbursement collected from the PTC.

172. We are satisfied that the State Commission has erred in considering the Rs.0.77 cr. towards 'Reimbursement of SOC, MOC ULDC & NLDC Charges' as 'Non-Tariff Income/ Miscellaneous Receipt' and deducting it from AFC of FY 2014-15.

173. The Impugned Order is set aside on this count, and Issue No. 3 is decided in favour of the Appellant.

174. **Issue No. 4 - 'Audit Fees' not allowed on Actual Basis**

175. The Appellant submitted that Proviso to Regulation 28 (2) (b) of the PSERC Tariff Regulations *inter-alia* states as below:

“Provided that any expenditure on account of license fee, initial or renewal, fees for determination of tariff and audit fee shall be allowed on actual basis over and above the A&G expenses approved by the Commission.”

176. It is clear from the said Regulation that Audit fees shall be allowed on an actual basis over and above A&G expenses approved by the Commission, therefore, the PSERC wrongly disallowed Audit fees in violation of Regulation 28 (2) (b) of the PSERC Tariff Regulations.

177. As already noted, the Regulations once framed and notified are binding, and the State Commission cannot act contrary to the Regulation.

178. The Respondents have not filed their written submissions on the issue except that the PSPCL as part of its reply has contended that the said provision is only applicable to the Government Companies where the audit is mandated and needs to be done, the same cannot be simply applied to the Appellant especially when it is not clear as to why the audit is mandatory or compulsory for the Appellant.

179. We decline to accept such a contention as the State Commission has not made any observation on whether such an audit is allowed or not, instead, only disallowed the same stating that it has been part of the O&M expenses.

180. Therefore, the Audit fees have to be allowed over and above the A&G expenses, the Issue No. 4 is decided in favour of the Appellant.

181. **Issue No. 5 - Deduction of 'Income from Unscheduled Interchange'**

182. The Appellant submitted that the deduction is contrary to Regulation 34 of PSERC Tariff Regulations, 2005, the UI /Deviation Charges, is an arrangement completely outside the purview of tariff determination process and is purely an arrangement between the entity (generator in this case) and the Grid, the beneficiary, is entitled at all times to receive its scheduled power, or UI revenue in case of any shortfall, and therefore is neutral to any revenue or cost to the generator towards UI/Deviation, in any case the energy charges are levied by the Appellant on the basis of Scheduled Energy, and therefore,

UI charges and expenses/Deviation Charges (paid and received) have to be on account of the generator and not to be accounted in the AFC.

183. In the instant case, while approving AFC, any income i.e. UI/Deviation charges (received) cannot be deducted from AFC under the head 'Other Income', accordingly, corresponding UI/Deviation charges (paid) should also not be considered by the PSERC while approving AFC.

184. Also contended that if UI/Deviation charges (received) are to be deducted from AFC, under 'Non-Tariff Income', then the expenses of UI/Deviation charges (paid) should also be allowed as part of AFC.

185. Therefore, the Income and Expenses associated with UI cannot be considered as non-tariff income, the issue is decided in favour of the Appellant.

186. **Issue No. 6 - Wrongful computation of one of the components of working capital i.e. 'receivables' by not considering the precedence followed by the State Commission in orders dated 27.11.2013 and 04.12.2014 in petition no. 54 of 2012.**

187. The PSPCL prefers not to file any objection to the pleadings of the Appellant, however, have filed a reply to the Appeal on 26.12.2016, stating that that there is no error in the above computation, it is wrong and denied that the methodology followed by the State Commission is against the methodology followed in the Orders dated 27.11.2013 & 04.12.2014.

188. However, the Appellant submitted that as per Regulation 30 of PSERC Tariff Regulations, Working Capital includes O&M Expenses for one month,

Receivables equivalent to two months and Maintenance spares @ 15% of O&M Expenses.

189. The State Commission vide Orders dated 27.11.2013 and consequential Order dated 04.12.2014, had considered 'Receivables' as Annual Fixed Cost approved for FY 2012-13 (Partial Year) and FY 2013-14 before adjustment of 'Non-Tariff Income', such methodology of computation of Working Capital was upheld by this Tribunal vide Judgment dated 12.11.2014 in Appeal Nos.30 and 35 of 2014 and Supreme Court vide Order dated 24.04.2015 in Civil Appeal Nos. 3346-3347 of 2015 and also stand implemented vide consequential Order dated 04.12.2014.

190. Further, claimed that the PSERC in the Impugned Order has considered "Receivables" as AFC for 2 months after deducting Non-Tariff Income because "Receivables" is the amount to be received by the Petitioner after adjusting Non-Tariff Income, thus, computation of "Receivables" is contrary to PSERC's methodology adopted vide Orders dated 27.11.2013 and consequential Order dated 04.12.2014, wherein, PSERC had considered 'Receivables' as Annual Fixed Cost approved for FY 2012-13 (Partial Year) and FY 2013-14 prior to adjustment of 'Non-Tariff Income'.

191. Considering, that the methodology cannot be changed or revised during the True Up stage, the order of the State Commission is erroneous, accordingly, this Issue is decided in favour of the Appellant.

192. **Issue 7 - Wrongful deduction of Rs.3,09,93,185/- towards insurance**

193. The Appellant submitted that they are not pressing the said issue as such the issue stands dismissed.

Conclusion

194. It is, therefore, concluded that Issues 1, 3, 4, 5, and 6 are decided in favour of the Appellant, Issue 7 is disposed off as not pressed, and Issue 2 is remanded to the State Commission for fresh consideration strictly in terms of the conclusion made herein above.

195. The O&M expenses shall be as approved in terms of PSERC Regulations on Normative terms, and the O&M expenses for the first year shall be as granted as per principle adopted by the Commission in its Order dated 27.11.2013 and which was upheld by this Tribunal in Appeal No 30 of 2014 and Appeal No 35 of 2014 i.e. Rs. 12.08 crs as worked out by the State Commission its order No 37 of 2014 dated 31.8.2015, but erroneously reduced to 8.16 crs.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeals Nos. 214 of 2016 & 75 of 2018 have merit and are allowed.

The Impugned Orders i.e. order dated 31.08.2015 passed in Petition No.37 of 2014, order dated 29.01.2016 passed in Review Petition no.09 of 2015, and order dated 18.12.2017 in Petition No.17 of 2017 by the Punjab State Electricity Regulatory Commission are set aside to the limited extent of observations and conclusion made herein above.

The State Commission shall pass consequential orders afresh in strict terms as noted herein.

Needless to say, that the consequential orders shall be passed expeditiously but not later than three months from the date of this judgment.

The captioned Appeals and IAs if any are disposed of in the above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 9th DAY OF JULY, 2024.

(Virender Bhat)
Judicial Member
pr/mkj

(Sandesh Kumar Sharma)
Technical Member