

**APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)**

Appeal No. 192 of 2009

Dated July 16, 2010

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

Appeal No. 192 of 2009

In the matter of:

- 1. M/s Antarctic Industries Limited
C-44/47, Focal Point,
Ludhiana (Punjab)**
- 2. M/s Mukesh Steels Limited
Giaspura Road,
Ludhiana-141 122**
- 3. M/s Paramount Steel Ltd.
Phase-VII, Focal Point
Ludhiana-141 010**
- 4. M/s B.T. Steel Limited
VIII, Jandiali, Chandigarh Road,
Ludhiana-131 112**
- 5. M/s Waryam Steel Castings (P) Ltd.
Kanganwal Road,
VPO Jugiana
Ludhiana-141 120**

- 6. M/s Raj & Sandeep Ltd.
VIII, P.O. Jandiali,
Chandigarh Road
Ludhiana-141 112**
- 7. M/s Garg Furnace Limited
Kanganwal Road
VPO Jogiana, G.T. Road
Ludhiana-141 120**
- 8. M/s Vardhman Industries Limited
G.T. Road, Sahnewal
Ludhiana-141 120**

... Appellant(s)

Versus

- 1. Punjab State Electricity Board, The Mall,
Patiala-147 001**
- 2. Punjab State Electricity Regulatory Commission
SCO 220-221, Sector 34-A
Chandigarh-160 022**

... Respondent(s)

Counsel for Appellant(s)

**Ms. Meenakshi Arora
Mr. Mohit D.Ram
Mr. Laliet Kumar
Mr. Sandeep Jain**

Counsel for Respondent(s)

**Mr. Ravi Shankar Chauhan
Mr. Meet Malhotra for PSEB
Mr. Raghinder Singh for
PSERC, Mr.Sakesh Kumar
Mr. M.S. Gill, Mr.K.S.Momi
Mr. Kulwinder Singh**

JUDGMENT

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. The Appellants 1 to 8 are the companies which own the factories having induction furnaces units in Punjab State. The 1st Respondent is the Punjab State Electricity Board. The 2nd Respondent is the Punjab State Electricity Regulatory Commission. The Appellants have filed this Appeal challenging the tariff order dated 08.09.2009 passed by the Punjab State Electricity Regulatory Commission.

2. The short facts of this case, leading to the filing of this Appeal are as follows.

3. The Appellants have got large supply of electricity connections by the contract demand of more than 2500 kVA. They have been regularly paying their electricity bills. At the

time of grant of electricity connections, an agreement was entered into between the Appellants and the Punjab State Electricity Board, the 1st Respondent herein. As per the agreement, it is the duty of the Electricity Board to lay transmission network and to provide electricity connections through the electrical lines and electricity plants. The Electricity Board has distributed electricity through the 3 voltage supply system. Since the Board had sanctioned the power connections to the Appellants at 11 kV supply voltage, all the Appellants deposited the entire expenses for laying down the 11 kV lines with the Electricity Board. Apart from this, they purchased the land and installed plants and machineries in their factory premises.

4. In the year 1995, the Electricity Board issued a Memo to the Appellants and other prospective induction furnaces units having load above 1500 kVA, instructing them to shift from 11 KV to 66 kV voltage supply or else they would be liable to pay surcharge @ 17.5%. Questioning this, the Appellants and others took up the matter with the State Government. Thereupon the

State Government constituted a High-Powered Committee to go into the matter. Ultimately the High-Powered Committee recommended for the withdrawal of memo of conversion to 66 kV thereby all the existing units could be allowed to run on 11 kV voltage supply without payment of any surcharge.

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

6. Despite this, the Electricity Board filed a petition before the State Commission for grant of tariff order for the FY 2003-04 with a proposal to charge 17.5% surcharge on induction furnaces who have not shifted to 66 kV supply voltage. The Furnaces Association filed objection against the proposal and brought to the notice of the State Commission about the issuance of the circular dated 08.06.1999 by the Electricity Board withdrawing the proposal to impose surcharge. In response to the said objection, the Electricity Board itself submitted a reply dated 17.03.2003 admitting the previous withdrawal of instructions to impose surcharge @ 17.5%.

7. Thereupon, on 11.10.2004, the Electricity Board issued another circular for imposing levy of additional billing of 10% on consumption recorded at 11 kV corresponding to demand recorded above 2500 kVA. Accordingly, the State Commission passed the tariff order for the FY 2004-05 holding that all consumers with contract demand exceeding 2500 kVA and up to 4000 kVA have to pay 10% extra on energy supply at 11 kV and

consumers having demand of above 4000 kVA to pay a surcharge of 17.5%. However, on the representation by various Industrial Consumers Associations, the Electricity Board withdrew the implementation of the circular dated 11.10.2004. Even then, the next tariff order was passed by the State Commission in respect of FY 2006-07 fixing the surcharge @ 10% for consumers with contract demand exceeding 2500 kVA and up to 4000 kVA catered at 11 kV. Against this order the Associations filed a Review Petition before the State Commission, which in turn dismissed the same.

8. The Appellants thereupon filed a Writ Petition before the High Court as against the demand for high voltage surcharge and ultimately the High Court dismissed the Writ Petition with the observation that the Appellant shall approach the Appellate Tribunal for Electricity. In spite of this direction, the Appellants had chosen to file the Appeal against the order as LPA before the Division Bench of the High Court. Thereafter, the impugned tariff order was passed in respect of the FY 2009-10 by the order

dated 08.09.2009 by the State Commission reiterating that the large supply consumers with a contract demand exceeding 2500 kVA and up to 4000 kVA catered at 11 kV are liable to pay a surcharge of 10% on consumption charges including demand charges as compensation for transformation losses and incremental line losses. Similarly, the large supply consumers having contract demand exceeding 4000 kVA catered at 11 kV are levied a surcharge of 17.5%. Hence the Appellants have presented this Appeal challenging the said order dated 08.09.2009 for the FY 2009-10.

9. The Learned Counsel for the Appellants has urged the following contentions in order to substantiate her plea that the order impugned is bad in law.

- (i) The levy of surcharge @ 17.5% for non-conversion from 11 kV to 66 kV by consumers as existing in June 1995 was withdrawn by the Electricity Board through the Circular dated 08.06.1999. Again by

the communication dated 17.03.2003, the Punjab State Electricity Board (Electricity Board) addressed the Punjab State Commission (PSERC) communicating that the earlier proposal for levy of surcharge had been withdrawn. Without taking into consideration the same, the impugned tariff order in respect of the FY 2009-10 has been passed imposing a highly onerous condition on induction furnace units of the Appellants, which were existing prior to June 1995. The Electricity Board stopped recovering the surcharge in view of the stand taken by them through the Circular dated 08.06.1999 and through the communication dated 17.03.2003 sent to the State Commission. Therefore, there is neither any basis nor rationale for reintroduction of the same under the pretext of transformation and incremental line loss.

(ii) Just as the transmission of electric power is accompanied by certain amount of loss of power, the transformation of electric power also involves some loss of power which is called transformation loss. Similarly, when an electric current flows through a circuit, the heat is developed as the current is working to overcome the resistance of the conductor and when the generation of heat during the process of flow of current consumes some of the electric power, there will be some loss. Hence the line losses are an integral phenomenon of flow of current through any circuit. For the purpose of transmission and distribution of electricity separate licenses are required. Consequently separate tariff is required to be determined for transmission and retail supply of electricity. The State Commission is mandated to determine separate tariff for generation, transmission, distribution and wheeling. To this effect, the Tribunal also earlier passed

orders to the State Commission to determine separate tariff for transmission and distribution. But even then, in this case the Electricity Board has failed to submit separate application for determination of tariff for transmission and distribution up to 2009-10. Therefore, the transmission losses including transformation and incremental line losses in the form of surcharge cannot be passed on to the distribution consumers since these losses have already been accounted for, at the time of determining the transmission tariff. If the consumer is required to pay compensatory loss charge towards transformation and incremental line losses, the same will amount to double recovery for the same loss. Therefore, the recovery of compensatory surcharge is bad in law.

- iii) The Electricity Act, 2003 requires that the tariff/surcharge is in direct proportion to cost of

supply. The levy of surcharge without determination of cost of supply is impermissible. Though the Memo. dated 22.05.2003 would show the various component of 10% surcharge, it does not give any basis or rationale for levy of exorbitant 10% surcharge for the supply exceeding 2500 kVA up to 4000 kV and 17.5% surcharge on a contract demand above 4000 kVA. The Electricity Board was not suffering any losses for catering electricity to the consumers beyond 2500 kVA and up to 4000 kVA at 11 kV. Having failed to determine the cost of supply, the Board is not entitled to recover by way of surcharge.

- iv) In view of the data supplied by the Electricity Board to the State Commission, as recorded in the tariff order, the transformation losses can at best be stated to be 0.5% and as per the Memo dated 22.05.2003, the incremental line losses are 2%.

Assuming that the Appellants are liable to pay surcharge, the purported surcharge cannot be beyond 2.5%.

10. The Learned Counsel for the Respondent-1/ PSEB as well as the Learned Counsel for the State Commission (R-2) have pointed out various reasonings referred to in the impugned order passed by the State Commission and contended in justification of the impugned order stating that the order impugned is perfectly valid especially when the order was based upon the Regulations framed by the State Commission as well as in accordance with the provisions of the Electricity Act, 2003. In addition, the Learned Counsel for the Respondent produced the Memo. dated 22.05.2003 fixing the rate of surcharge.

11. The Learned Counsel for the Appellant has cited the following authorities in support of her plea:

- (i) 2007 ELR (APTEL) 931 – *SIEL Limited vs. The Punjab State Electricity Regulatory Commission.*
- (ii) 2008 ELR (APTEL) 50 – *Grid Corporation of Orissa Ltd. ((GRIDCO) Vs. Southern Electricity Supply Company of Orissa Ltd.*
- (ii) Judgment in Appeal Nos. 148/07 and 124/08 dated 28.04.2010 - *Northern Railway (Headquarters)vs. Punjab State Electricity & Anr.*
- (iv) 2008 (13) SCC 597 – *Bharat Sanchar Nigam Ltd. & Anr. Vs. BPL Mobile Cellular Ltd. & Ors.*
- (v) 1996 (4) SCC 686 – *Bihar State Electricity Board Vs. Parmeshwar Kumar Agarwala & Ors.*
- (vi) 2004 (5) ALD 788 – *A.P. State Electricity Board and Anr. Vs. Andhra Sugars Ltd.*

12. On the other hand, the Learned Counsel for the Respondent has cited AIR 1976 SC 127 – *M/s Bisra Stone Lime Co. Ltd. vs. Orissa State Electricity Board and Anr.* and judgment in Appeal No. 244/2006 dated 06.01.2010 – *DDA Vs. DERC.*

13. In the light of the rival contentions as mentioned above, the following questions arise for consideration of this Appeal.

- (i) Whether there is any justification for levying the surcharge on the person like the Appellants for not shifting the industry to 66 kV especially under the circumstances when the tariff is determined on 11 kV after considering all costs or losses incurred by the Electricity Board prior thereto?

- (iii) Whether the Respondents are justified in levying the surcharge without providing the cost of supply in the impugned tariff order which is in violation of the National Electricity Policy and National Tariff Policy?

- (iii) Whether the action of the Electricity Board is hit by the principle of issue estoppel since the Electricity Board has earlier decided to exempt consumers who had power connections existing prior to 1995

from the requirement of shifting from 11 kV to 66 kV and as such whether the Board is estopped from compelling the consumers (Appellants) either to shift to higher voltage level or to pay voltage surcharge?

- (iv) Assuming, while not admitting, that the Appellants are liable to pay surcharge, even so based on the fact that the purported surcharge is compensatory in nature, whether the said surcharge can be beyond 2.5% and that for the demand over and above 2500 kVA.

14. Let us now deal with the questions referred to above.

15. The challenge in the present Appeal is to the aspect of 2009-10 tariff order by which the State Commission imposed the surcharge on the consumption charge of large supply consumers with the contract demand exceeding 2500 kVA catered at 11 kV as applicable to the Appellants. The gist of the submission made

by the Learned Counsel for the Appellants is that the surcharge which had been made earlier in 1995 by the Electricity Board had been subsequently withdrawn in 1999 and as such the State Commission cannot reintroduce the said surcharge in the tariff order on the ground that the surcharge was an existing one without taking note of the fact that the earlier surcharge prior to 1995 was withdrawn in 1999 itself and as such there is no such existing surcharge at the time of the making of the tariff order 2004-05. It is also submitted that assuming that surcharge was liable to be levied, the said surcharge was relatable only to the actual losses suffered by the Board in catering to the contract demand of the Appellants.

16. Let us now consider these submissions. It is not disputed that the contract demand of the Appellants falls in a category which was required to be catered at 66 kV from the year 1995 and not at 11 kV. It is also not disputed that in the Agreement entered into between the Appellants and the Electricity Board, the Appellants had agreed to pay to the Electricity Board as per the

amended rules as and when applicable. In the year 1995, the Board took a policy decision to bring all the induction furnaces, prospective as well as existing furnaces with a load of 1500 kVA and above under the category of 66 kV. In terms of the aforesaid decision, the consumers had clearly the option of shifting to 66 kV and thereby they may avoid paying surcharge. If they had not switched over to 66 kV, they are liable to pay surcharge as per the policy decision.

17. Admittedly, in this case, the Appellants chose not to switch over to 66 kV and at the same time they did not pay the surcharge. As admitted by the Learned Counsel for the Electricity Board, a number of induction furnace units approached the Board to withdraw the circular, i.e. to convert to 66 kV or to pay surcharge. By recommendations dated 19.01.99 and 08.06.99, the Board accepted the request of the Appellants to withhold the circulars. However, in the year 2000 the said policy for industrial connections was reviewed. During that process it was decided the supply voltage limit for release of induction furnace connections

had been revised from 1500 kVA to 2500 kVA for supply at 11 kV. It was also further decided that 17.5% surcharge was not to be charged from the existing or new consumers having contract demand up to 2500 kVA. To this extent the circular endorses the earlier withdrawal of surcharge from consumers such as the Appellants. However, the very same circular again emphasized that the revised supply voltage limit shall, from then onwards for the category of the Appellants contract demand, be 33/66 kV. In continuation of the aforesaid memo the Board again reiterated the same in another Memo. dated 22.05.2003 to the effect that the supply voltage catering to different contract demands emphasising that the contract demand category applicable to the Appellants was to be supplied at 33/66 kV.

18. The aforesaid decision was ratified by the Electricity Board vide CC No. 44 of 2003 dated 24.06.2003. According to the Electricity Board, irrespective of what had happened in the past, i.e. from 1995 to 1999, it is now from 2000 onwards the contract demand in cases such as that of the Appellants was required to be

catered at 33/66 kV and 10% surcharge was reintroduced on the basis of the note of the Chief Engineer, as approved by the Electricity Board.

19. In the meantime Electricity Act, 2003 came into force with effect from 10.06.2003. Thus in legal terms, the terms and conditions including tariff was no longer a matter of contract and agreement between the parties. In other words, after the introduction of Electricity Act, 2003, the tariff was based upon the Regulations being framed by the State Commission which had the exclusive jurisdiction to issue tariff orders on the basis of ARR petition filed by the Electricity Board.

20. It is in these circumstances, the State Commission passed the tariff order for the FY 2004-05 on 30.11.2004 on the basis of the Regulations. This tariff order deals with the Appellants' objection to the levy of surcharge on induction furnace consumers catered supply at 11 kV. While rejecting the said objections, the State Commission observed that as per the then

prevailing policy, the consumers such as the Appellants, if catered at 11 kV, have to compensate the Board by making payment of 10% surcharge toward the transformation losses, incremental line losses, service charges, etc., incurred in this regard.

21. Admittedly, this tariff order for the FY 2004-05 has never been challenged.

22. The Appellants all along had the option of avoiding surcharge by taking the supply at the designated voltage i.e. 66 kV. If the Appellants, in defiance of the existing stipulation for voltage at which their contract demand was to be catered to, continued to draw supply at 11 kV, then the Appellants were bound to pay the surcharge determined earlier by the Electricity Board and accepted by the State Commission. It is pointed out by the Electricity Board that the said levy of surcharge was continuously adopted by the State Commission right up to the impugned tariff order for the FY 2009-10.

23. The tariff order for the FY 2005-06 passed on 14.06.2005 would indicate that the State Commission has taken a decision to continue the existing system. Again this tariff order was never challenged by the Appellants. The State Commission again passed the tariff order on 10.05.2006 for the FY 2006-07, again reiterating the levy of the surcharge.

24. Only thereafter the Appellants gave a representation to the Electricity Board that the levy of surcharge imposed in the tariff order be kept in abeyance. In reply to the said representation, the Electricity Board sent a communication to the Appellants advising the Appellants to directly approach the State Commission by way of review for the above prayer. Accordingly, the Appellants filed a Review Petition before the State Commission. Admittedly the said Review Petition was dismissed by the State Commission by the order date 13.10.2006. In the said order, the State Commission directed the Electricity Board, while declining to review the imposition of surcharge as referred

to in the tariff order for the FY 2004-05 and FY 2005-06 confirming the earlier tariff orders, to raise the bills as per the prescribed tariff order.

25. Accordingly, the bills were issued. The Appellants instead of challenging the tariff orders before the Tribunal chose to challenge the bills raised by the Electricity Board before the High Court by preferring a Writ Petition. Admittedly, the said Writ Petition was dismissed by the High Court by the order dated 27.04.2009 wherein the High Court specifically directed the Appellants to approach the Tribunal by way of filing an appeal as the Writ Petition is not maintainable. Instead of approaching the Tribunal as per the directions of the High Court, the Appellants have filed the LPA before the Division Bench of the High Court against the single judge order dated 27.04.2009 and the same is still pending.

26. In the tariff order for the FY 2007-08, the State Commission relied on the existing and subsisting general

conditions of tariff and schedule of tariff/regulations by reiterating the imposition of surcharge on the Appellants. Similarly for the FY 2008-09 also, the State Commission passed the tariff order reiterating that the existing provisions relating to surcharge for availing supply at different voltages will continue. Similarly, in the impugned tariff order for the FY 2009-10, the State Commission reiterated the order regarding surcharge which had been existing since FY 2004-5 continuously. It is thus clear that by statutory dispensation, the Appellants were to take supply at 66 kV and not at 11 kV in the very least since the year 2000.

27. The perusal of the various tariff orders passed from the FY 2004-05 would reveal that same policy has been reiterated from the beginning. The details of the tariff orders are as follows:

- (i) Tariff order passed by the State Commission for the FY 2004-05 dated 30.11.2004
- (ii) Tariff order passed by the State Commission for the FY 2005-06 dated 14.06.2005

- (iii) Tariff order passed by the State Commission for the FY 2006-07 dated 10.05.2006
- (iv) Tariff order passed by the State Commission for the FY 2007-08
- (v) Tariff order passed by the State Commission for the FY 2008-09
- (vi) Tariff order (impugned order) passed by the State Commission for the FY 2009-10.

28. From the above said orders, the following factors would emerge:

- (i) As per the policy decision taken by the Electricity Board since 1995, all the future connections above 1500 kVA, later changed to 2500 kVA, shall be at 66 kV only.
- (ii) The existing induction furnace consumers having a load above 2500 kVA who had not converted to 66 kV would be liable to pay surcharge @ 10%/17.5% on the tariff already being charged from them.

- (iii) Even though the charge of 10% / 17.5% surcharge to the induction furnace consumers who had not converted to 66 kV had not been fully implemented, nowhere in the tariff orders for the FY 2004-05 to FY 2009-10, it was endorsed that the levy of surcharge had been withdrawn.

29. It is true that the induction furnace consumers were only given some concession by the Electricity Board for some years on the basis of representation. But on that score, the Appellants cannot claim the same privilege as a matter of right, that too for an indefinite period.

30. Further, the perusal of the tariff order dated 08.09.2009 would clearly reveal that the State Commission in the ARR petition filed by the Electricity Board for FY 2009-10 has again reiterated the levy of surcharge and directed the Appellant to convert to 66 kV within a period of 18 months. If the Appellants converted within the said period to 66 kV, then the levy of

surcharge would not be applicable from the date of conversion.

This has not been done so far.

31. Under those circumstances, the contention urged by the Learned Counsel for the Appellants that the Electricity Board is estopped from claiming surcharge as per the agreement entered into earlier, particularly when the terms of the said agreement could not be said to be continued to be applied subsequent to the Regulations being framed by the State Commission and subsequent to the introduction of the Electricity Act, 2003, is misconceived. Various authorities cited by the Learned Counsel for the Appellant, as referred to above, is of no use in this case as in those cases the point in issue has not been discussed. On the other hand, those decisions deal with different facts and different issues.

32. The next contention urged by the Learned Counsel for the Appellants is that the recovery of surcharge for transformation and incremental line losses are included in the tariff. According

to the Learned Counsel for the Appellants, since tariff for transmission and distribution are required to be separately determined in accordance with provisions of the sub-sections (2) and (5) of section 62 of the Electricity Act, 2003, the loss on account of various attributes including the transformation and incremental line losses are required to be included in the transmission tariff and if the consumer is required to pay compensatory surcharge towards transformation and incremental line losses, then the same will tantamount to double recovery. This contention, in our view, does not deserve acceptance mainly because the transformation losses and incremental line losses which would occur due to the failure of the conversion from 11 kV to 66 kV as directed by the Electricity Board are entirely different from the transmission and distribution losses of the system.

33. As mentioned above, by statutory dispensation, the Appellants were to take supply at 66 kV and not at 11 kV since the year 2000. By resisting the move to the voltage at which the

Appellants were required to take supply, the Appellants were defiant and contravention of the law and direction. The surcharge has been levied on the Appellants as per the tariff order dated 30.11.2004 which was passed for the FY 2004-05. This tariff order clearly deals with the Appellants objections to the levy of surcharge on the induction furnace consumers catered supply at 11 kV. In rejecting the objections of the Appellant, the State Commission clearly observed that as per the then present policy, the Appellants, if catered at 11 kV have to compensate the Electricity Board by making payment of surcharge for transformation losses and incremental line losses and service charge, etc, incurred in this regard. Therefore, this contention urged by the Learned Counsel for the Appellant would also fail.

34. The next argument of the Appellant is with regard to the proportionality of the surcharge imposed for the losses suffered by the Electricity Board. In this regard, the Appellant urged that the losses suffered by the Electricity Board would be less than

10% and therefore, the quantum of surcharge imposed by the Electricity Board is arbitrary and irrational.

35. In reply to the above contention, the Learned Counsel for the Electricity Board would submit that the word 'surcharge' has connotation of not only the compensation but also penalty and as such, the imposition of 10% surcharge cannot be said to be arbitrary. In order to substantiate its plea, the Learned Counsel for the Electricity Board has cited some authorities which have been mentioned earlier. The principles laid down in those decisions cannot be disputed. However, we do not think that those decisions, in any way, could be of any help to the Respondent.

36. While determining the tariff under section 62 of the Electricity Act, the State Commission is guided by the provisions of Section 61 of the Electricity Act, which provides as under:

- (i) The tariff progressively shall reflect the cost of supply of electricity and also should reduce the cross subsidy; and
- (ii) Appropriate Commission shall be guided by the National Electricity Policy and National Tariff Policy.

37. According to Section 62(3) of the Electricity Act the Commission could differentiate in the tariff of consumers on the basis of consumer load factor, power factor and voltage of supply, etc.

38. It is pointed out that despite the mandate of the Electricity Act, 2003 for determining the tariff on the basis of cost of supply, the State Commission has not determined the cost of supply, and on the other hand, the State Commission in an ad-hoc manner, without application of mind and without applying the provisions of the Electricity Act, has simply accepted the suggestions of the Electricity Board and imposed surcharge of 10% and 17.5% respectively under the impugned order.

39. Admittedly, the State Commission had neither determined the cost of supply to different classes and categories of consumers nor it determined the difference in the cost of supply at different voltage levels to the category of Appellants while deciding the surcharge. Difference in cost of supply to the category of Appellants at 11 kV compared to 66 kV would be on account of transformation loss for step down from 66kV to 11 kV, incremental transmission losses at 11 kV, and charges for use of additional 66/11 kV transmission system. Under sections 61 and 62, read with section 86 of the Electricity Act, 2003, the State Commission is obliged to enquire into the various component relevant for fixation of tariff and determine the tariff that reflects cost of supply. The determination of cost of supply is integral part of tariff determination.

40. In this regard, the Learned Counsel for the Electricity Board has relied upon the internal memo dated 22.05.2003 to show the various components of the 10% surcharge. Admittedly, this

memo had not been placed before the State Commission while determining the surcharge. Even in this memo dated 22.05.2003, no justification has been given for levy of surcharge of 17.5% for consumers with load exceeding 4000 kVA catered at 11 kV supply. In this context, it would be worthwhile to refer to the relevant portions of the internal memo dated 22.05.2003 giving the reasons for imposition of surcharge. The relevant portions are as under:

“4. In view of the problems faced by industry resulting in reduction in revenue in PSEB, it is proposed that

- (i) Limit of Contract demand may be increased from 2500 KVA to 4000 kVA for general/power industry for supply at 11 kV without changing the contract demand limit for other supply voltages. Technically we can feed this CD up to 4000 kVA at 11 kV without causing any damage to the Distribution system and this is likely to generate **more revenue to PSEB** from the industrial section”*

(ii) The applicant/consumer who want CD up to 4000 kVA to be fed at 11 kV shall be asked to bear transformation losses @ 3% and incremental line losses at 2% in the 11 kV, 5% Operation and Maintenance charges of the feeding 66 kV and above voltage lines and sub-stations”

41. The perusal of this internal memo giving break up of 10% surcharge would show that it does not give any basis for levy of 17.5% surcharge on contract demand above 4000 kVA. It also does not show anything to indicate that there is a necessity for imposition of compensatory or penalty charges. The only reason given in the Memo is that due to the problem faced by industry due to restriction in contract demand with respect to voltage of supply Electricity Board is facing the problem of reduction in revenue, and therefore load up to 4000 KVA could be allowed at 11 kV for which the surcharge can be levied in order to generate more revenue for the Electricity Board.

42. It is contended on behalf of the Appellants that the levy of surcharge at 10% and 17.5%, which is compensatory in nature, has no rational or connection with the actual loss of 2% incremental transmission loss and 0.5% transmission loss i.e. total of 2.5%.

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

44. However, we find some substance in the contention of the Appellant regarding rate of surcharge in view of the fact that in the Memo dated 22.05.2003 of the Electricity Board the indicated transformation loss of 3% is on higher side even more

than the incremental transmission losses of 2% . Operation and Maintenance Charges of 5% for 66 kV and above voltage line and sub-station has been adopted arbitrarily. In fact, the Operation and Maintenance charges, if any, should have been restricted up to 66 kV system only as the system above 66 kV is common to consumers served at 11 kV or 66 kV. Admittedly, the cost of supply has not been determined by the State Commission and the surcharge has been fixed only on an ad hoc basis, as suggested by the Electricity Board, without applying its mind to consider whether the rate of surcharge quoted by the Electricity is rational or not.

45. In this context, it would be appropriate to refer to the tariff order passed by the State Commission for the FY 2008-09. In this order, the State Commission has specifically observed that the question of whether the rate of surcharge is appropriate or not will be considered later in view of the fact that the challenge against the bill issued by the Electricity Board was pending before the High Court of Punjab and Haryana. The relevant portions are as follows:

*“Even in the case of those persons paying surcharge, several have challenged the bills received from the Board and recovery has been stayed by the Hon’ble Punjab and Haryana High Court. The commission observes that it is in the process of approving the condition of the supply of the board (licensee) as required under Regulation 3 of the PSERC (Electricity Supply Code and related matters) Regulations, the Commission **will at that time go into the commercial, financial and other aspects of the issue and determine whether such charges are at all leviable and, if so, whether the present rates are appropriate.** After comprehensively dealing with the issue, the Commission proposes to seek the views of the public at large and decide the matter thereafter.*

In the meanwhile, exiting provisions for rebates and surcharges for availing supply at different voltages will continue:

46. Despite this observation to the effect that the State Commission will go into the commercial, financial and other aspects of the issue and determine whether the surcharges are at all leviable and, if so, whether the rate of surcharges are appropriate at the time of framing of the conditions of supply, the

State Commission did not stick to its statement which was made in the tariff order for the FY 2008-09, and simply followed levy of surcharge as suggested by the Electricity Board in the impugned tariff order, without going into the question whether the rate of surcharge is appropriate or not.

47. From the perusal of the impugned order, it is clear that the State Commission sought to justify the levy of surcharge at the rates mentioned above, by asserting it as compensation on account of transformation and incremental line losses on the basis of 'draft condition of supply'. Thus, it is evident the State Commission failed to determine the cost of supply and without going into the question if the rates are appropriate, simply continued the ad valorem rate of surcharge i.e. 10% and 17.5% respectively as suggested by the Board.

48. In view of our discussions made above, the summary of our finding is given as under:

- (i) **The Appellants all along had the option of avoiding the surcharge by taking the supply at the designated voltage namely 66 kV. This option had not been, admittedly, availed of by the Appellants. In the year 1995, the Board took a policy decision to bring all the furnace induction units, prospective as well as existing, with a load of 1500 kVA and above under the category of 66 kV and in terms of the aforesaid decision, the consumer had the option of shifting to 66 kV and if they had not switched over to 66 kV, they are liable to surcharge as per the policy decision. Irrespective of what had happened in the past from 1995 to 1999, after the enactment of the Electricity Act, 2003, the tariff was based upon the Regulations being framed by the State Commission which alone had the jurisdiction to issue tariff orders by enforcing surcharge as well. Several objections were raised by the Appellants while the issue of tariff was being dealt with by the State Commission in respect of the FY 2004-05. The State Commission had clearly held that the consumers who catered supply at 11 kV are liable to pay surcharge. This order was never challenged. On the basis of this order, the State Commission has**

passed similar orders in the following financial years and merely because some concession had been given by the Electricity Board for some years on the basis of representation of the Induction Furnace Association, the Appellants cannot claim the same privilege or same concession as a matter of right.

- (ii) The contention of the Learned Counsel for the Appellant that the recovery of surcharge for transformation and incremental line losses are already included in the tariff, cannot be accepted because the transformation losses and incremental line losses which would occur due to the failure of conversion from 11 kV to 66 kV are entirely different from the transmission and distribution losses of the system.**
- (iii) Even though the State Commission while fixing the tariff shall ensure that the tariff shall reflect the cost of electricity, in this case, the State Commission had neither determined the cost of supply to different classes and categories of consumers, nor it determined the difference in cost of supply at different voltage levels to the category**

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

49. In view of the absence of the valid reasons to determine the rate of surcharge, we feel that the finding with regard to rate of surcharge has to be set aside and matter has to be remanded back to the State Commission for the purpose of fixation of the rate of surcharge on the basis of materials placed before it by the parties.

50. We make it clear that even though we confirm the finding rendered by the State Commission holding that the State Commission is empowered to impose surcharge for not converting from 11 kV to 66 kV and the Appellants are liable to

pay the surcharge, we deem it fit to set aside the finding with reference to the rate of surcharge imposed by the State Commission on the Appellants for the reasons mentioned above.

51. Accordingly, the impugned order is set aside to the extent indicated above. The Appellants are directed to approach the State Commission and place materials before the State Commission which in turn will consider the same in the light of the observations made above and fix the rate of surcharge in direct proportion to the incremental transmission losses, transformation losses and charges for use of additional 66/11 kV transmission system for Appellants and similarly placed consumers.

52. The Commission is directed to decide the matter within three months after the filing of application by the Appellants. After re-determination of surcharge the adjustment of charges on account of surcharge for the past period commencing from the effective date of implementation of the applicable tariff by the

impugned order could be adjusted against the future bills of the Appellants and similarly placed consumers.

53. With these observations, the Appeal is partly allowed. The matter is remanded to the State Commission for considering the aspect of rate of surcharge, as indicated above. Accordingly, State Commission is directed to dispose the matter as expeditiously as possible preferably within three months, as indicated above. No costs.

(RAKESH NATH)
TECHNICAL MEMBER

(JUSTICE M. KARPAGA VINAYAGAM)
CHAIRPERSON

REPORTABLE/NON-REPORTABLE

DATED: 16TH JULY, 2010
