Before the Appellate Tribunal for Electricity (Appellate Jurisdiction)

APPEAL NOs. 4, 13, 14, 23, 25, 26, 35, 36, 54 & 55 of 2005

Dated: 26th May, 2006

Present: **Hon'ble Mr. Justice Anil Dev Singh, Chairperson**
Hon'ble Mr. Justice E. Padmanabhan, Judicial Member
Hon'ble Mr. A.A. Khan, Technical Member

APPEAL No.4 of 2005

M/s Siel Limited
19, Rajendra Place
New Delhi 110008 **...Appellant**

Vs.

1. **The Punjab State Electricity Regulatory Commission, SCO Nos.220-221, Sector 34-A, Chandigarh Through its Chairman**
2. **Punjab State Electricity Board, The Mall, Patiala, through its Chairman**
3. **State of Punjab through the Secretary, Department of Power, Chandigarh**

...Respondents

Counsel for Appellant (s): **Mr. Sanjay Sen**

Counsel for Respondent (s): **Mr. M.G. Ramachandran, Ms. Taruna Baghel, Ms. Saumya Sharma for PSERC**
Mr. P.S. Bhullar, for PSEB
Mr. D.P. Singh, Addl. Advocate General with Sh. Avneet Toor for State of Punjab
Mr. J.C. Shukla, Registrar for PSERC

APPEAL No.13 of 2005

PHD Chamber of Commerce & Industry ...Appellant
107, Sector 18-A, Chandigarh
Through its Co-Chairman

Vs.

1. **State of Punjab through Secretary-Power Punjab Civil Secretariat, Chandigarh**
2. **Punjab State Electricity Board, The Mall, Patiala, through its Secretary**
3. **The Punjab State Electricity Regulatory Commission, SCO Nos.220-221, Sector 34-A, Chandigarh Through its Registrar ...Respondents**

Counsel for Appellant (s): **Mr. Amit Rawal & Mr. Praveen Gupta**

Counsel for Respondent (s): **Mr. M.G. Ramachandran, Ms. Taruna Baghel, Ms. Saumya Sharma for PSERC**
Mr. P.S. Bhullar, for PSEB
Mr. D.P. Singh, Addl. Advocate General with Sh. Avneet Toor for State of Punjab

APPEAL No.14 of 2005

APEX Chamber of Commerce & Industry (Punjab), Room No.212, 2nd Floor, Savitri Complex, ...Appellant
G.T. Road, Ludhiana.

Vs.

1. **State of Punjab through Secretary-Power Punjab Civil Secretariat, Chandigarh**
2. **Punjab State Electricity Board, The Mall, Patiala, through its Secretary**
3. **The Punjab State Electricity Regulatory Commission, SCO Nos.220-221, Sector 34-A, Chandigarh Through its Registrar ...Respondents**

Counsel for Appellant (s): **Mr. Amit Rawal & Mr. Praveen Gupta**

Counsel for Respondent (s): **Mr. M.G. Ramachandran, Ms. Taruna**

Baghel, Ms. Saumya Sharma for PSERC
Mr. P.S. Bhullar, for PSEB
Mr. D.P. Singh, Addl. Advocate General with Sh. Avneet Toor for State of Punjab

APPEAL No.23 of 2005

Steel Furnace Association of India (Punjab Chapter), C/o. Upper India Steel Mfg., & Engg. Co. Ltd, Ludhiana – 141 010 & Ors., ...Appellant

Vs.

1. The Punjab State Electricity Regulatory Commission, SCO Nos.220-221, Sector 34-A, Chandigarh Through its Chairman
2. Punjab State Electricity Board, The Mall, Patiala, through its Chairman
3. State of Punjab through the Secretary, Department of Power, Chandigarh

...Respondents

Counsel for Appellant (s): Mr. S.N. Mookherjee, Sr. Adv with Mr. Ravi Kapur

Counsel for Respondent (s): Mr. M.G. Ramachandran, Ms. Taruna Baghel, Ms. Saumya Sharma for PSERC
Mr. P.S. Bhullar, for PSEB
Mr. D.P. Singh, Addl. Advocate General with Sh. Avneet Toor for State of Punjab

APPEAL No.25 of 2005

All India Steel Re-Rollers Association ...Appellant
Ram Mandir, G.T. Road, Gobindgarh,
Fatehgarh Sahib thorugh its authorized
Signatory Sh.K.K.Bhatia

Vs.

1. **Punjab State Electricity Board, The Mall,**
   Patiala, through its Secretary
2. **The Punjab State Electricity Regulatory Commission,**
   SCO Nos.220-221, Sector 34-A, Chandigarh
   Through its Registrar ...Respondents

Counsel for Appellant (s): **Mr. Vishal Gupta**
Mr. Sunil Narang

Counsel for Respondent (s): **Mr. M.G. Ramachandran, Ms. Taruna Baghel, Ms. Saumya Sharma for PSERC**
Mr. P.S. Bhullar, for PSEB
Mr. D.P. Singh, Addl. Advocate General with Sh. Avneet Toor for State of Punjab

APPEAL No.26 of 2005

Mandi Gobindgarh Induction Furnace Association
C/o.Gian Casting Pvt Ltd.,
Grain Market, Mandi Gobindgarh
Though its authorized signatory ...Appellant

Vs.

1. **Punjab State Electricity Board, The Mall,**
   Patiala, through its Secretary
2. **The Punjab State Electricity Regulatory Commission,**
   SCO Nos.220-221, Sector 34-A, Chandigarh
   Through its Registrar ...Respondents

Counsel for Appellant (s): **Mr. Rajesh Bindal**

Counsel for Respondent (s): **Mr. M.G. Ramachandran, Ms. Taruna Baghel, Ms. Saumya Sharma for PSERC**
Mr. P.S. Bhullar, for PSEB
Mr. D.P. Singh, Addl. Advocate General with Sh. Avneet Toor for State of Punjab

APPEAL No.35 of 2005

M/s Punjab Alkalies & Chemicals Limited ...Appellant
S.C.O. 125-127, Sector 17-B,
Chandigarh -160017

Vs.

1. **The Punjab State Electricity Regulatory Commission,**
   SCO Nos.220-221, Sector 34-A, Chandigarh
   Through its Secretary
2. **Punjab State Electricity Board, The Mall,**
   Patiala, through its Secretary
3. **Government of Punjab through the Secretary,**
   Department of Power, Chandigarh

...Respondents

Counsel for Appellant (s): **Mr. Arun Nehra for PACL**
Mr. Anurag Puri & Mr. M.P.S. Rana

Counsel for Respondent (s) **Mr. M.G. Ramachandran, Ms. Taruna Baghel, Ms. Saumya Sharma for PSERC**
Mr. P.S. Bhullar, for PSEB
Mr. D.P. Singh, Addl. Advocate General with Sh. Avneet Toor for State of Punjab

APPEAL No.36 of 2005

Lalru Industries Association (Regd.)
Secretariate, Wockhardt Limited
Village Sarsini, Patiala thourgh its
President ...Appellant

Vs.

1. **Punjab State Electricity Board, The Mall,**
   Patiala, through its Chairman
2. **The Punjab State Electricity Regulatory Commission,**
   SCO Nos.220-221, Sector 34-A, Chandigarh
   Through its Chairman ...Respondents

Counsel for Respondent (s) **Mr. M.G. Ramachandran, Ms. Taruna Baghel, Ms. Saumya Sharma for PSERC**
Mr. P.S. Bhullar, for PSEB
Mr. Chandan Kumar

APPEAL No.54 of 2005

Punjab State Electricity Board
The Mall, Patiala, Punjab
Though authorized Officer ...Appellant

Vs.

1 . The Punjab State Electricity Regulatory Commission,
SCO Nos.220-221, Sector 34-A, Chandigarh
2. State of Punjab, Department of Power,
Punjab Government Secretariat, Chandigarh
Through its Principal Secretary & Ors.,

...Respondents

Counsel for Appellant (s): **Mr. P.S. Bhullar**

Counsel for Respondent (s): **Mr. M.G. Ramachandran, Ms. Taruna Baghel, Ms. Saumya Sharma for PSERC**
Mr. Arun Nehra for PACL
Mr. Sharat Kapoor for BSNL
Mr. Vishal Gupta
Mr. Narender Singh Yadav
Mr. Rajesh Bindal
Mr. Chandan Kumar for Northern Rly.
Mr. Amit Rawal
Mr. D.P. Singh, Addl. Advocate General with Sh. Avneet Toor for State of Punjab

APPEAL No.55 of 2005

Punjab State Electricity Board
The Mall, Patiala, Punjab
Though authorized Officer ...Appellant

Vs.

1 . The Punjab State Electricity Regulatory Commission,
SCO Nos.220-221, Sector 34-A, Chandigarh
2. State of Punjab, Department of Power,
Punjab Government Secretariat, Chandigarh
Through its Principal Secretary & Ors.,

...Respondents

Counsel for Appellant (s): **Mr. P.S. Bhullar**

Counsel for Respondent (s): **Mr. M.G. Ramachandran, Ms. Taruna Baghel, Ms. Saumya Sharma for PSERC**
Mr. D.P. Singh, Addl. Advocate General with Sh. Avneet Toor for State of Punjab
Mr. Chandan Kumar
Mr. Vishal Gupta
Mr. Ajay Majithia
Mr. Manish Jain
Mr. Rajesh Bindal
Mr. Amar Singh

JUDGMENT

PER HON'BLE MR. JUSTICE ANIL DEV SINGH, CHAIRPERSON

This order will dispose of three sets of appeals. Appeal Nos. 4, 13, 14, 23, 25, 26 & 35 of 2005 have been filed either by the Power Intensive Industrial Consumers or their associations and are directed against the Order of the Punjab State Electricity Regulatory Commission (PSERC/Commission), dated June 14, 2005, to the extent it fixes tariff for power intensive industrial consumers at the rate of Rs.3.72 per KWH.

2. Appeal No.**36 of 2005,** filed by an association of Power Intensive Industrial Consumers, challenges Circular No.42 of

2005 of the Punjab State Electricity Board (PSEB/Board) issued in compliance with the order of the PSERC, dated June 14, 2005, whereby tariff to various categories of consumers were revised.

3. The other two appeals being Appeal Nos.**54 and 55 of 2005**, have been filed by the PSEB. While Appeal No.54 of 2005 is directed against the tariff order of the PSERC, for the year 2004-2005, dated November 30, 2004, the other Appeal, being Appeal No.55 of 2005, is directed against the tariff order of the PSERC for the year 2005-2006, dated June 14, 2005. In both the appeals, the PSEB questions the decisions of the PSERC, whereby certain expenses allegedly incurred by the Board have been disallowed.

4. The facts leading to these appeals briefly stated are as under:

On March 31, 1999, the PSERC was created under Section 17 of the Electricity Regulatory Commissions Act, 1998 (for short Act of 1998). On June 10, 2003, the Electricity Act, 2003 (for short Act of 2003), came into force. By virtue of the first proviso to Section 82 of the Act of 2003, the PSERC

constituted under the Act of 1998 is deemed to have been constituted under the Act of 2003. On December 8, 2003, the PSEB filed its ARR and proposed tariff for the financial year 2004-05 before the PSERC. On February 23, 2004, the PSERC required the PSEB to withdraw the ARR, until modalities of its financial reconstruction package were worked out and were included in the ARR. Thereafter, on April 6, 2004, the PSERC allowed the PSEB to withdraw ARR with permission to file a tariff proposal by May 31, 2004. On May 31, 2004, the PSEB again filed its ARR and tariff proposals for the year 2004-05. The PSERC after issuing a public notice and taking into consideration the objections and suggestions filed in response thereto disallowed certain expenses of the PSEB and determined the tariff and ARR for the year 2004-2005 on November 30, 2004. On December 30, 2004, the PSEB filed its ARR for the financial year 2005-06, along with an application for determination of tariff for the said year. The application was found to be incomplete by the PSERC. The deficiencies in the filings were communicated to the Board by the Commission vide its letter, dated January 21, 2005. After

the PSEB removed the deficiencies, the ARR and tariff review application were taken on record by the PSERC on February 9, 2005. The filings by the PSEB were notified for information of the consumers through news papers on February 14, 2005 for their response. After the receipt of the objections and suggestions and on hearing the interested parties, the PSERC determined the tariff for the financial year 2005-06 by its Order, dated June 14, 2005.

5 As already pointed out, the PSEB being aggrieved by the tariff Orders, dated November 30, 2004, and June 14, 2005, has preferred Appeals, being Appeal Nos. 54 and 55 of 2005. Seven appeals being Appeal Nos. 4, 13, 14, 23, 25, 26, 35 and 36 of 2005 have been filed by the Power Intensive Industrial Consumers and their associations.

6. Extensive arguments were advanced by the learned counsel for the parties including the State of Punjab spread over a number of days. Some of the parties have filed elaborate written submissions. We now proceed to consider

the various points which were raised before us in these appeals.

A. ***Tariff Determination without Framing of Regulations-Whether bad in law or stands vitiated***

7. The sheet anchor of the case of the learned counsel for the Power Intensive Industrial Consumers (Industrial Consumers) is that the tariff for the financial year, 2005-06 has been determined by the PSERC without framing Tariff Regulations under Section 61 of the Act of 2003 and is, therefore, bad in law. According to them framing of the tariff Regulations is a condition precedent for exercise of power by the Commission under Section 62 of the Act of 2003 for determination of tariff. It was submitted that since Regulations were not framed under Section 61 of the Act of 2003, the Commission had no power to determine the tariff under Section 62 thereof. On the other hand, the learned counsel appearing for the Commission and the Board submitted that the power of the Commission to fix tariff was not dependent upon the framing of the Regulations under Section 61 of the Act.

8. In order to appreciate the submissions of the learned counsel for the parties, it will be useful to set out the provisions of Sections 2(62), 61, 62, 64, 76, 79, 82, 86, 178 & 181 of the Act of 2003 to the extent they are relevant to the issue. These provision read thus:

"2(62)"specified" means specified by Regulations made by the Appropriate Commission or the Authority, as the case may be, under this Act;

61. Tariff Regulations - The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

(g) that the tariff progressively, reflects the cost of supply of electricity, and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

62. Determination of tariff- (1)The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity.

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be

specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

64. Procedure for tariff order. (1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by Regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-

section (1) and after considering all suggestions and objections received from the public,-

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and Regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor:

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.

76. Constitution of Central Commission – (1) There shall be a Commission to be known as the Central Electricity Regulatory Commission to exercise the powers conferred on, and discharge the functions assigned to, it under this Act.

(2) the Central Electricity Regulatory Commission, established under Section 3 of the Electricity Regulatory

Commissions Act, 1998 (14 of 1998) and functioning as such immediately before the appointed date, shall be deemed to be the Central Commission for the purposes of this Act and the Chairperson, Members, Secretary, and other officers and employees thereof shall deemed to have been appointed under this Act and they shall continue to hold office on the same terms and conditions on which they were appointed under the Electricity Regulatory Commissions Act, 1998 (14 of 1998).

Provided that the Chairperson and other Members of the Central Commission appointed, before the commencement of this Act, under the Electricity Regulatory Commissions Act, 1998 (14 of 1998), may, on the recommendations of the Selection Committee constituted under sub-section (1) of section 78, be allowed to opt for the terms and conditions under this Act by the Central Government.

(3) The Central Commission shall be a body corporate by the name aforesaid, having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.

(4) The head office of the Central Commission shall be at such place as the Central Government may, by notification, specify.

(5) The Central Commission shall consist of the following Members, namely:-

(a) a Chairperson and three other Members;

(b) the Chairperson of the Authority who shall be the Member, ex officio.

(6) The Chairperson and Members of the Central Commission shall be appointed by the Central Government on the recommendation of a Selection Committee referred to in section 78.

79. Functions of Central Commission – (1) The Central Commission shall discharge the following functions, namely:-

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations.

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

(g) to levy fees for the purposes of this Act;

(h) to specify Grid Code having regard to Grid Standards;

(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees.

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;

(k) to discharge such other functions as may be assigned under this Act.

(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely:-

(i) formulation of National electricity Policy and tariff policy;

(ii) promotion of competition, efficiency and economy in activities of the electricity industry;

(iii) promotion of investment in electricity industry;

(iv) any other matter referred to the Central Commission by that Government.

(3) The Central Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under section 3.

82. Constitution of State Commission- (1) Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission:

Provided that the State Electricity Regulatory Commission, established by a State Government under section 17 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule, and functioning as such immediately before the appointed date shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary, and officers and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts:

Provided further that the Chairperson and other Members of the State Commission, appointed, before the commencement of this Act, under the Electricity Regulatory Commissions Act, 1998 (14 of 1998) or under the enactments specified in the Schedule, may, on the recommendations of the Selection Committee constituted under sub-section (1) of Section 85, be allowed to opt for the terms and conditions under this Act by the concerned State Government.

(2) The State Commission shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power to acquire, hold and dispose of

property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.

(3) The head office of the State Commission shall be at such place as the State Government may, by notification, specify.

(4) The State Commission shall consist of not more than three Members, including the Chairperson.

(5) The Chairperson and Members of the State Commission shall be appointed by the State Government on the recommendation of a Selection Committee referred to in section 85.

Section-86. Functions of State Commission-(1) The State Commission shall discharge the following functions, namely:

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licenses to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and

(k) discharge such other functions as may be assigned to it under this Act.

(2) The State Commission shall advise the State Government on all or any of the following matters, namely:-.

(i) promotion of competition, efficiency and economy in activities of the electricity industry;

(ii) promotion of investment in electricity industry;

(iii) reorganization and restructuring of electricity industry in the State;

(iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government.

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under section 3.

178. Powers of Central Commission to make Regulations: (1) The Central Commission may, by notification make Regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such Regulations may provide for all or any of following matters, namely:-

(a) period to be specified under the first proviso to section 14;

(b) the form and the manner of the application under sub-section (1) of section 15;

(c) the manner and particulars of notice under sub-section (2) of section 15;

(d) the conditions of licence under section 16;

(e) the manner and particulars of notice under clause (a) of sub-section (2) of section 18;

(f) publication of alterations or amendments to be made in the licence under clause(c) of sub-section (2) of section 18;

(g) Grid Code under sub-section (2) of section 28;

(h) levy and collection of fees and charge from generating companies or transmission utilities or licensees under sub-section (4) of section 28;

(i) rates, charges and terms and conditions in respect of intervening transmission facilities under proviso to section 36;

(j) payment of the transmission charges and a surcharge under sub-clause (ii) of clause (d) of sub-section (2) of section 38;

(k) reduction and elimination of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 38;

(l) payment of transmission charges and a surcharge under sub-clause (ii) of clause(c) of section 40;

(m) reduction and elimination of surcharge and cross subsidies under the second proviso to sub-clause (ii) of clause (c) of section 40;

(n) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;

(o) duties of electricity trader under sub-section (2) of section 52;

(p) standards of performance of a licensee or class of licensees under sub-section (1) of section 57;

(q) the period within which information to be furnished by the licensee under sub-section (1) of section 59;

(r) the period within which the cross-subsidies shall be reduced and eliminated under clause (g) of section 61;

(s) the terms and conditions for the determination of tariff under section 61;

(t) details to be furnished by licensee or generating company under sub-section (2) of section 62;

(u) the procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;

(v) the manner of making an application before the Central Commission and the fee payable therefor under sub-section (1) of section 64;

(w) the manner of publication of application order under sub-section (2) of section 64;

(x) issue of tariff order with modifications or conditions under sub-section (3) of section 64;

(y) the manner by which development of market in power including trading specified under section 66;

(z) the powers and duties of the Secretary of the Central Commission under sub-section (1) of section 91;

(za) the terms and conditions of service of the Secretary, officers and other employees of Central Commission under sub-section (3) of section 91;

(zb) the rules of procedure for transaction of business under sub-section (1) of section 92;

(zc) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section (8) of section 128;

(zd) the manner of service and publication of notice under section 130;

(ze) any other matter which is to be, or may be, specified by Regulations.

3. All Regulations made by the Central Commission under this Act shall be subject to the conditions of previous publication.

181. Powers of State Commissions to make Regulations. –(1) The State Commissions may, by notification, make Regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such Regulations may provide for all or any of the following matters, namely: -

(zd) the terms and conditions for the determination of tariff under section 61;

9. As is apparent from a reading of Section 61 of the Act of 2003, it requires the appropriate Commission to specify the terms and conditions for determination of tariff. The terms and conditions of tariff can only be specified by the Regulations as mandated by sub-clause (62) of Section 2 of the Act.

10. The learned counsel for the Industrial Consumers laid much stress on the word 'shall' in Section 61 of the Act of 2003 and argued that framing of the Regulations by the Commission is a mandatory requirement that must be complied with before the Commission resorts to determination of tariff under the provisions of Section 62 of the Act of 2003. In other words, the submission of the learned counsel for the Industrial Consumers is that tariff cannot be determined by the Commission without the existence of the Regulations.

11. Undoubtedly, Section 61 of the Act of 2003 requires that the appropriate Commission shall specify the terms and conditions for determination of tariff but it does not prescribe that the determination of tariff, which takes place under

Section 62 thereof, will not be undertaken by the Commission in the absence of the Regulations.

12. The Act of 2003 came into operation on June 10, 2003. Sub-section (1) of Section 82 of the Act of 2003 mandatorily requires every state government to constitute a Regulatory Commission in the State within six months from the appointed date viz. April 10, 2004. The States, which had earlier not constituted the Regulatory Commission under the Act of 1998, have constituted it under the Act of 2003. Under the first proviso to Section 82 of the Act of 2003 the Electricity Regulatory Commission established by the State Government under Section 17 of the Act of 1998 and functioning as such immediately before June 10, 2003 shall be the State Commission for the purposes of the Act of 2003. When the Act of 2003 came into force, the Central Electricity Regulatory Commission was already functioning, as the same was established under Section 3 of the Act of 1998, and by a deeming fiction created by virtue of Section 76(2) of the Act of 2003, it is the Central Commission for the purposes of the Act of 2003.

13. After coming into force of the Act of 2003 and Constitution of the State Regulatory Commission, a mandatory duty under Section 62 thereof has been cast on the Regulatory Commission to determine tariff. The duty cast on the Central and State Commission to determine tariff is also reflected by Sections 79 and 86 of the Act of 2003. While Section 79 specifies the functions of the Central Commission, Section 86 lays down the functions of the State Commission. Section 79, inter-alia, provides that the Central Regulatory Commission shall discharge the functions to regulate tariff of generation companies owned or controlled by the Central Government. It also entrusts the central Commission to regulate the tariff of generating companies, other than those, owned and controlled by the Central Government in case such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State. Similarly, Section 86, inter-alia, provides that the State Commission shall discharge the functions of determining the tariff for generation, supply, transmission and wheeling of electricity, wholesale or bulk or retail, as the case may be,

within the State. Thus, Sections 79 and 86, besides Section 62, cast a mandatory obligation and duty on the respective Commission to determine tariff. Determination of tariff cannot brook any delay in view of the revenue requirements of the generators and licensees. It was for good reason the Act of 2003, nowhere prescribes that fixation of tariff shall be made after the framing of the Regulations under Section 61 thereof. Otherwise, determination of tariffs by the Commissions could be delayed inordinately. We, however, hasten to add that it is not our view that the appropriate Commission is exempt from framing Regulations or they can frame them at their convenience. In case Regulations are not framed by a Regulatory Commission, surely the Tribunal is not powerless to direct the Commission to frame the Regulations. Under Section 121 of the Act of 2003, the Tribunal is empowered to issue such orders, instructions or directions as it may deem fit to any appropriate Commission for performance of its statutory functions under the Act.

14. It also needs to be noted that Section 178(1) of the Act of 2003, while empowering the Central Commission to make Regulations, has provided that the Central Commission may by Notification make Regulations consistent with the Act and the Rules generally to carry out the provisions of this Act. Likewise, Section 181(1) of the Act of 2003 provides that the State Commissions may make Regulations. It is not only in sub-section (1) of Section 178 and sub-section (1) of Section 181 that the word 'may' has been used, even in sub-section (2) of Section 178 and sub section (2) of Section 181 the word 'may' has been used in contrast to the word shall. These are enabling provisions to arm the respective Commissions with the power to frame Regulations to provide for matters enumerated therein including those mentioned in clause (s) of sub-section (2) of Section 178 and clause (zd) of sub-section (2) of Section 181. Without prejudice to the generality of the powers comprised in sub-section (1) of both the provisions (Sections 178 & 181), sub clause(s) of sub-section (2) of Section 178 and clause (zd) of sub-section (2) of Section 181 empower the Central Commission and the State Commission

respectively to frame Regulations providing for terms and conditions for determination of tariff under Section 61.

15. Neither Section 61 nor Section 178(2)(s) or Section 181 (2) (zd) of the Act of 2003 are indicative of any compulsion on the part of the Commission to determine tariff only after framing of the Regulations. Pressing necessity to determine tariff cannot be postponed or overlooked for want of Regulations, which could not be framed in a short time. Although the need and importance of framing the Regulations cannot be undermined, the non-existence of Regulations, however, cannot be a ground for the Commission to justify non determination of tariff by it.

16. The obligation to determine tariff by an appropriate Commission also emanates from Section 64 of the Act of 2003. Section 64, *inter alia,* provides that the appropriate Commission shall issue tariff order or reject the application within 120 days from the date of the receipt of the tariff application from a generating company or a licensee and after considering the suggestions and objections received from the

public thereto. The legislative command to determine the tariff under Section 64 has to be carried out by the Commission, once an application of a generator or a licensee is received and it cannot be stifled or diluted because of the failure of the Commission to frame the Regulations. It is significant to note that Section 61 of the Act of 2003 or any other provision thereof does not specify the consequences for the failure of the Commission to frame Regulations. This being so, the provisions requiring the Commission to determine the tariff cannot be held to be in-operative till such time the Regulations are framed under Section 61 read with Sections 178 & 181 of the Act of 2003.

17. While power is conferred on the appropriate Commission to frame Regulations, it has also been saddled with a duty to determine the tariff. The generating company or a licensee, as the case may be, cannot be allowed to suffer for the delay on the part of the Commission in the exercise of its power to frame Regulations. The duty imposed on the Commission to determine tariff could be well discharged without the

Regulations, if they have not been framed, by seeking guidance from the factors and parameters laid down in Section 61. The application of the generating company or a licensee cannot be placed in cold storage in the absence of the Regulations.

18. In case the tariff is not determined by the Commission on the ground that it was not possible for it to frame the Regulations, the generator or licensee, may not be able to function because of the paucity of funds and such a situation will not be in the interest of the consumers. It could not be the intention of the Parliament to make the determination of tariff dependent on the existence of tariff Regulations. Where the Commission fails in its public duty to frame Regulations, its inaction cannot be allowed to harm the interests of the consumers, generator or licensee.

19. It needs to be highlighted, even at the risk of repetition, that according to Section 61, the Commission is to frame Regulations and in doing so it is required to be guided by the parameters referred in Section 61 (a) to (i) of the Act of 2003.

As per Section 61(i) Commission is also to be guided by the National Electricity Policy and tariff policy in framing the Regulations. The tariff policy was not in existence when the impugned Tariff Orders were passed by the Commission. In case tariff Regulations had been framed by the Commission before passing of the impugned Tariff Orders, they would have been framed without any guidance from the Tariff Policy. If the argument of the learned counsel for the Industrial Consumers is taken to its logical conclusion, then the Regulations framed without guidance from the tariff policy would be bad, not withstanding the fact that tariff policy was not available as Section 61 of the Act of 2003, *inter alia,* provides that the Commission shall be guided by the tariff policy while framing the Regulations. It appears to us that such an interpretation would be against the intent of the legislation. There is nothing in the language of the provisions of the Act of 2003 including Section 61 thereof, which bars the determination of tariff, without framing of Regulations.

20. In U.P. State Electricity Board Vs. City Board, Mussoorie –AIR 1985 Supreme Court 883, it was held that framing of Regulations, under Section 79(h) of the Electricity (Supply) Act, 1948 was not a condition precedent for fixation of grid tariff. The Supreme Court in this regard observed as follows:

> *" The first contention urged before us by the City Board is that in the absence of any Regulations framed by the Electricity Board under section 79 of the Act regarding the principles governing the fixing of Grid Tariffs, it was not open to the Electricity Board to issue the impugned notifications. This contention is based on sub-section (1) of Section 46 of the Act which provides that a tariff to be known as the Grid Tariff shall, in accordance with any Regulations made in this behalf, be fixed from time to time by the Electricity Board. It is urged that in the absence of any Regulations laying down the principles for fixing the tariff, the impugned notifications were void as they had been issued without any guidelines and were, therefore, arbitrary. It is admitted that no such Regulations had been made by the Electricity Board by the time the impugned notifications were issued. The Division Bench has negatived the above plea and according to us, rightly. It is true that Section 79 (h) of the Act authorizes the Electricity Board to make Regulations laying down the principles governing the fixing of Grid Tariffs. But Section 46(1) of the Act does not say that no Grid Tariff can be fixed until such Regulations are made. It only provides that the Grid Tariff shall be in accordance with any Regulations made in this behalf. That means that if there were any Regulations, the Grid Tariff should be fixed in accordance with such Regulations and nothing more. We are of the view that the framing of Regulations under S. 79(h) of the Act cannot be a condition precedent for fixing the Grid Tariff. A similar contention was rejected by this*

Court in Mysore State Road Transport Corporation v. Gopinath Gundachar Char (1968) 1 SCR 767 : (AIR 1968 SC 464) which was a case arising under the Road Transport Corporation Act, 1950. Under S. 14 of that Act a Road Transport Corporation was entitled to appoint officers and servants as it considered necessary for the efficient performance of its functions. Under Section 34(1) of the Road Transport Corporations Act, 1950, the State Government had been empowered inter alia to issue directions to the Road Transport Corporation regarding recruitment, conditions of service and training of its employees. Under S. 45(2)(c) of that Act, the Road Transport Corporation was empowered to make Regulations regarding the conditions of appointment and service and the scales of pay of officers and servants of the Corporation other than the Chief Executive Officer General Manager and the Chief Account Officer. Admittedly no Regulations had been framed under S. 45(2) (c) of that Act. It was contended that the Corporation could not appoint officers and servants referred to therein or make any provision regarding their conditions of service until such Regulations were made. This Court rejected the said plea with the following observation at page 770 (of SCR) : at p. 465 of AIR):-

" The conjoint effect of Sections 14(3)(b), 34 and 45(2)(c) is that the appointment of officers and servants and their conditions of service must conform to the directions, if any, given by the State Government under Section 34 and the Regulations, if any, framed under Section 45(2) (c). But until such Regulations are framed or directions are given, the Corporation may appoint such officers or servants as may be necessary for the efficient performance of its duties on such terms and conditions as it thinks fit".

21. From the aforesaid observations, it is clear that the Supreme Court held that Section 46(1) of the Act of 1948 merely requires that if there were any Regulations, the grid tariff should be fixed in accordance with such Regulations and nothing more. In the Electricity Act of 2003, with which we are concerned, even this requirement of Section 46(1) of the Electricity Supply Act, 1948, which has been highlighted by the Supreme Court, is not there. There is no provision which prescribes that till Regulations are framed, tariff cannot be determined.

22. In Rajiv Anand & Ors. vs. Union of India & Ors., AIR 1998 DELHI 259, the Delhi High Court rejected the plea that without prescribing procedure for recovery of bank dues, the collector cannot proceed to recover the same under Section 32-G of the State Financial Corporations Act, 1951. In this regard, the High Court held as follows:

> *" the contention urged for the petitioners is that without prescribing procedure, S. 32-G cannot be invoked and given effect to. In our view, however, the absence to specify procedure by making appropriate rule or Regulation cannot nullify the legislative intent. The statutory provision cannot be held to remain a dead letter*

till such time the procedure is prescribed, in the absence of clear words in the Act which may show such an intention on the part of Legislature. We are unable to find any such intention from the provisions of the Act. Under the Act the procedure is to be prescribed by either State Government framing the rule or Board framing requisite Regulations. The provisions in the Act do not show operation of S. 32-G would depend upon the action of the State Government or the Board and on account of their inaction, the legislative intent would remain in abeyance. In absence of the procedure being prescribed, the authority under S. 32-G would be required to follow and apply such procedure which is just, fair and reasonable and is in consonance with the principles of natural justice. We are unable to accept the aforesaid contention See : The Mysore State Road Transport Corporation v. Gopinath Gundachar Char, AIR 1968 SC 464, U.P. State Electricity Board v. City Board, Mussoorie, AIR 1985 SC 883: (1985 All LJ 243) and Surinder Singh v. Central Government, AIR 1986 SC 2166. These decisions would also show that there is no legal impediment in enforcing the statutory provisions like S. 32 G in absence of prescribed procedure".

23. In the case of S. Bharat Kumar & Ors. Vs. Government of A.P. & Ors., 2000 (6) ALT 1 (D.B.), it was contended before a Division Bench of the Andhra Pradesh High Court that Andhra Pradesh State Electricity Regulatory Commission has not prescribed the terms and conditions for the determination of the licensee's tariff in accordance with Section 26(1) and (2) of the Andhra Pradesh Electricity Reform Act, 1998 and

therefore, the entire exercise undertaken by the Commission in fixing the tariff is vitiated in law. Repelling the arguments, the Andhra Pradesh High Court held as follows:

> *" We cannot accept this contention. There is no quarrel with the proposition that framing of Regulations, Bye-laws or Rules as contemplated by the Act is not a condition precedent for enforcing the main provisions of the Act if they are otherwise capable of being enforced without reference to such subordinate legislation. If an authority is needed, we may refer to the case of UPSEB vs. City Board, Mussuori. There is nothing in the language of sub-sec. (2) of Section 26 which obligates the Commission to frame the Regulations before dealing with the tariff determination. We find no force in the contention that the procedure and methodologies laid down for calculating the expected revenue from charges by the licencee could be done only by way of Regulations. Such guidelines or methodologies are primarily meant for the guidance of the licencee. It is not necessary that they should be published in the form of Regulations. The public will in no way be handicapped to file their objections against the tariff proposals submitted by the licencee for the reason that the procedure and methodology is not published before hand. Moreover, the objector is at liberty to approach the Commission for furnishing the copy of such procedures and methodologies prescribed under sub-sec. (1) of Sec. 26. The existence of enabling provision under sub-sec. (2) for making the Regulations cannot be pressed into service in support of the contention that the prescription of procedures and methodologies under sub-sec. (1) shall also be by way of Regulations. There is no compelling reason to either read the word 'may' as 'shall' in sub-sec. (2) or to project the provisions of sub-sec. (2) into sub-sec. (1)".*

24. The decision of the Andhra Pradesh High Court in the aforesaid matter was carried in appeal to the Supreme Court in the case of Association of Industrial Electricity Users Vs. State of A.P. & Ors., (2002) 3 Supreme Court Cases 711. The Supreme Court while dismissing the appeal and upholding the order of the Andhra Pradesh High Court observed as follows:

> *"The High Court has at length considered all aspects of the cases and has examined in detail the exercise which was undertaken by the Commission in fixing the tariff and, in our opinion, the view expressed by the High Court calls for no interference".*

25. In the case of Surinder Singh Vs. Central Government & Ors., IR 1986 Supreme Court 2166, it was held that where a statute confers powers on an authority to do a certain act or exercise power in respect of matters, subject to rules, the exercise of power conferred by the statute does not depend on the existence of Rules unless the statute expressly provides for the same. Explaining the expression "subject to the Rules", the Supreme Court observed that it only means in accordance with the rules, if any, and in case any rules are framed, the powers so conferred on authority could be exercised in accordance with the rules. But if no rules are framed, there is

no hiatus and the authorities are not precluded from exercising the power conferred by the statute.

26. In the case of T. Cajee Vs. U. Jormanik Siem, AIR 1961 Supreme Court 276, the Supreme Court set aside the order of the High Court, whereby the order of the District Council removing SIEM was quashed on the ground that the District Council had not framed any law for the exercise of its powers as contemplated by para 3(1)(g) of the Sixth Schedule to the Constitution. The High Court was of the opinion that till a law as contemplated by para 3(1)(g) was made, the District Council could not exercise power of either appointment of a SIEM or his removal. The Supreme Court reversing the order of the High Court held that the Administration of the district including the appointment or removal of SIEM could not come to a halt till law under para 3(1)(g) was made.

27. In B.N. Nagarajan & Ors., etc. vs. State of Mysore & Ors. etc., AIR 1966 Supreme Court 1942, Rule-8 of the Mysore State Civil Services (General Recruitment) Rules, 1957 came

up for consideration. The Rule was to the following effect:

> *" Method of recruitment, - Recruitment to the State Civil Services shall be made by the competitive examination or by promotion. The method of recruitment and qualifications for each State Civil Service shall be as set forth in the rules of recruitment of such service specially made in that behalf".*

28. It was contended before the Supreme Court that the words "shall be as set forth in the rules of recruitment of such service specially made in that behalf", clearly show that till the rules are made in that behalf no recruitment can be made to any service. Rejecting the contention, the Supreme Court held that in case there was a statutory rule on the matter, the administration must abide by that rule and it cannot act contrary to the rule but it does not imply that till the rules are framed, no recruitment can be made to any service. Applying the analogy to the instant case, it could not have been the intention of the Legislature to make the exercise of power under Section 62 to determine tariff dependent upon the existence of tariff Regulations as a pre-condition.

29. The learned counsel for the Industrial Consumers pointed out that as per Section 45(5) of the Act of 2003, the

charges fixed by the distribution licensee are required to be in accordance with the provisions of the Act and the Regulations made in this behalf by the concerned State Regulatory Commission. It was contended on behalf of the Industrial Consumers that unless Regulations are framed, the charges cannot be fixed by the distribution licensee. Drawing inspiration from Section 45(5), it was canvassed by the learned counsel for the Industrial Consumers that the tariff determination is dependent upon the existence of Tariff Regulations as a pre- condition. This interpretation placed by the learned counsel for the Industrial Consumers on Section 45(5) and the inference drawn there from do not seem to be correct. Section 45(5) does not provide that no charges can be fixed by the distribution licensee until Regulations are framed. Section 45(5) simply means that if Regulations have been made by the Regulatory Commission, the charges should be fixed by the distribution licensee not only in accordance with the provisions of the Act but also in consonance with the Regulations and nothing beyond it. This interpretation is in conformity with the decision of the Supreme Court in U.P.

State Electricity Board Vs. City Board, Mussoorie (supra). In that case the Supreme Court was, *inter alia,* dealing with the interpretation of Section 46(1) of the Electricity (Supply) Act, 1948 which provided that the grid tariff shall be in accordance with any Regulations made in this behalf. The Supreme Court held to the effect that if any Regulations were in existence, the Grid Tariff shall be fixed in accordance with such Regulations and in case the Regulations have not been framed, the charges are to be fixed by the distribution licensee only in accordance with the provisions of the Statute.

30. Having regard to the aforesaid discussion and the judgments of the Supreme Court, we are of the opinion that the Commission may be under a legal obligation to frame the Regulations but the existence of Regulations is not a condition precedent for determination of tariff under Section 62 of the Act of 2003. The Act of 2003 does not intend that power to determine tariff should remain in suspended animation till tariff Regulations are framed. The exercise of power conferred by the statute on the Commission to determine the tariff does

not depend upon the existence of Regulations since the Statute does not provide so.

31. The Learned Counsel for the Industrial Consumers submitted that when the statute requires a particular thing to be done in a particular manner that thing must be done in that manner alone and in no other manner. In support of this principle, the Learned Counsel relied upon the decisions of the Supreme Court in Babaji Kondaji Garad vs. Nasik Merchants Co-op. Bank Ltd. 1984 (2) SCC, 50 and A.R. Antulay vs. Ramdas Sriniwas Nayak- 1984 (2) SCC, 500. There can be no quarrel with this proposition but as already noticed the framing of the Regulations is not a pre-condition for exercise of power under Section 62 of the Act of 2003.

32. Some of the learned counsel for the Industrial Consumers relied upon the decisions of the Supreme Court J.K. Cotton Spinning & Weaving Mills vs. State of U.P. , 1961 (3) SCR 185 and Krishan Kumar Vs. State of Rajasthan, 1991 (4) SCC 258. These decisions are of no avail to the Industrial Consumers as the provisions of the Act of 2003 are different.

33. Before concluding the discussion on the issue in question, we may point out that our attention was drawn to para 1.3 of the Tariff Order dated November 30, 2004 for the year 2004-05 and para 1.3 of the Tariff Order dated June 14, 2005 for the year 2005-06. From a perusal of these paras, it appears that the Commission with a view to continue the existence of the Punjab State Electricity Regulatory Commission's Tariff Regulations, 2002 (for short Regulations of 2002) issued a notification dated July 8, 2004 and decided to follow the procedure prescribed by the Regulations of 2002 until the new Regulations are framed by the Commission under the Act of 2003. It was also submitted that the Tariff Regulations framed under the Act of 1998 were not inconsistence with the Act of 2003 and therefore, in any event it was not a case where tariff was determined without the existence of the Regulations. On the other hand it was argued on behalf of the Industrial Consumers that the tariff Regulation framed under the Act of 1998 had ceased to be

operative w.e.f. June 9, 2000 and Notification of July 8, 2004 could not have the effect of reviving the same.

34. The arguments of the learned counsel for the Industrial Consumers appear to be correct. According to the proviso to Section 61 of the Act, the terms and conditions for determination of tariff framed under the Electricity (Supply) Act 1948, Act of 1998 and the enactments specified in the schedule thereto shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under Section 61, whichever is earlier. It cannot be disputed that Sections 1 to 120 and Section 122 to 185 of the Act of 2003 came into force on June 10, 2003. In accordance with the proviso to Section 61 the earlier Regulations were to remain in force for a period of one year. The period of one year expired on June 9, 2004 but the Notification seeking to continue the earlier Regulations was issued on July 8, 2004. In other words, the Regulations on the date of issue of the aforesaid notification were no longer in existence and therefore, they could not be revived by that notification.

35. The Learned Counsel for the Board and the Commission then submitted that assuming it was not possible to revive the earlier Regulations on the ground that the Notification was issued after the stipulated period of one year, but there was no legal impediment for the Commission to follow and adopt the procedure laid down in the Tariff Regulation issued in accordance with the Electricity Regulatory Commissions Act, 1998. The learned counsel for the Industrial Consumers countering the submissions of the Board and the Commission contended that since Section 181(3) of the Act of 2003, providing for previous publication of Regulations was not complied with, the earlier Regulations could not be validly adopted by the Commission. The learned counsel for the Industrial Consumers in order to buttress their submissions relied upon the decision of the Supreme Court in Ramakrishna Vivekananda Mission Vs. State of West Bengal & Ors., Civil Appeal Nos. 3232-3234 of 2000, decided on November 29, 2004.

36. It appears to us that it was not necessary for the Commission to meet the requirement of previous publication of the Regulations, in view of the Electricity (Removal of Difficulties) Ninth Order 2005, issued by the Central Government. Paras 2 and 3 of the Ninth Order of 2005 are relevant and it will be useful to set out the same :-

> *" **2. Previous publication of Regulations made by the State Commissions :-**Regulations made by the State Commissions, before the commencement of this order, without meeting the requirement of the previous publication under sub-section (3) of Section 181 of the Act shall again be published as draft Regulations for the information of persons likely to be affected thereby for inviting the objections or suggestions following the procedure prescribed under the electricity (Procedure for Previous Publication) Rules, 2005, and shall be finalized after considering such objections or suggestions received.*
>
> ***3. Action taken under Regulations: -** Any action taken under the Regulations made by the State Commissions, before the commencement of this order, without following the requirement of previous publication shall not be deemed invalid merely on the ground of non-compliance of previous publication of Regulations."*

37. The Central Government issued the order in exercise of the powers conferred on it under Section 183 (1) of the Act of 2003 for removal of difficulties in giving effect to the provisions of the Act. It appears to us that once the Central Government

is empowered to issue an order for removal of difficulties in giving effect to the provisions of the Act, it will be legitimate for the Central Government to issue an order. This principle is deducible from the decision of the Supreme Court in Madeva Upendra Sinai & Ors. Vs Union of India & Ors. (1975) 3 SCC 765, wherein it was observed as follows:

> *"Now let us turn to clause (7) of the Regulation. It will be seen that the power given by it is not uncontrolled or unfettered. It is strictly circumscribed, and its use is conditioned and restricted. The existence or arising of a "difficulty" is the sine qua non for the exercise of the power. If this condition precedent is not satisfied as an objective fact, the power under this clause cannot be invoked at all. Again, the "difficulty" contemplated by the clause must be a difficulty arising in giving effect to the provisions of the Act and not a difficulty arising aliunde, or an extraneous difficulty. Further, the Central Government can exercise the power under the clause only to the extent it is necessary for applying or giving effect to the Act, etc., and no further. It may slightly tinker with the Act to round off angularities, and smoothen the joints or remove minor obscurities to make it workable, but it cannot change, disfigure or do violence to the basic structure and primary features of the Act. In no case, can it, under the guise of removing a difficulty, change the scheme and essential provisions of the Act."*

38. It seems to us that the Central Government appears to be conscious of the fact that the Electricity Regulatory Commission after being constituted is required to determine

the tariff at the request of the utilities on urgent basis so that they could meet their revenue requirements. Framing of Regulations is a time consuming process. It may have been difficult for the newly established Commission under the Act of 2003 to frame regulations and follow the requirement of previous publication of the Regulations etc. within a short time before it was called upon to determine the tariff. The Central Government being conscious of the problem issued the Electricity (Removal of Difficulties) Ninth order 2005. In case the Central Government had not issued the said order the legislative intent exhibited in Sections 62, 64, 79 and 86 etc. may have remained in abeyance.

39. The Commission for determining tariff issued a public notice in leading newspapers inviting objections to the tariff proposals from the general public. By public notice, objectors were advised to file their objections with the Secretary of the Commission with advance copy to the PSEB. Thereafter, notice of public hearing was given. The procedure obviously was followed under the tariff Regulations framed under the

Electricity Regulatory Commissions Act, 1998. In case public notice had not been issued, it would have been challenged on the ground of violation of the principles of natural justice. Even when the procedure complying with the principles of natural justice has been followed by the Commission by adopting the tariff Regulations, 2002, issued in accordance with the Act of 1998, it is still being challenged on the ground that the Commission could not have followed that procedure since the earlier tariff Regulations were no longer in vogue. It appears to us that the Commission had adopted a just and fair procedure in accordance with the principles of natural justice. It has not been shown by the Industrial Consumers as to how they have been prejudiced by the procedure followed by the Board. It is also not shown that the procedure followed by the Commission, as laid down in the Regulations framed under the Act of 1998, in the instant case is contrary to the factors enumerated in Section 61 of the Act of 2003.

40. In view of the aforesaid discussion we hold as follows:

(i) Framing or existence of the Regulations is not a condition precedent or a sine qua non for determination of tariff by the Regulatory Commission;
(ii) Tariff determination undertaken in the absence of the Regulations does not contravene the provisions of the Act of 2003;
(iii) In any event the PSEB had adopted a fair procedure apart from following the Regulations of 2002.
(iv) Consequently, the contentions advanced by the Industrial Consumers stand rejected as indicated above.

B. Allocation of the Cost of Ranjit Sagar Dam Project:

41. Before the establishment of the Commission, the State Government had allocated the capital cost of Ranjit Sagar Dam between the Punjab State Electricity Board (PSEB) and the Irrigation Deptt. While 79.1% of the cost was allocated towards power component, 20.9% cost was allocated to the Irrigation Deptt. The learned counsel for the Industrial Consumers submitted that the aforesaid apportionment made by the State Government was absolutely arbitrary and the PSEB has been unjustifiably burdened with huge unjustified cost, which has resulted and is continuously resulting in fixation of higher tariff. This position which has been taken by

the Learned Counsel for the Industrial Consumers has been echoed by the Commission in its various tariff orders. This is apparent from tariff orders for the years 2002-03, 2003-04, 2004-05 and 2005-06. At this stage, it will be useful to set out the observations of the PSERC alongwith the views of the PSEB and the stand of the consumers expressed before it in this regard:-

"Tariff Order 2002-03:

"5.11 Ranjit Sagar Dam Project:

Objections Raised:

RSD Project :

Another matter of relevance for the financial health of PSEB and for the interest of the consumers is the apportionment of the assets and liabilities of RSD project, in the ratio of 79:21 between PSEB and the Irrigation Deptt. The completion of the project was inordinately delayed and this resulted in heavy cost escalation. Further, due to certain reasons, one of which is the unfinished Shahpur Kandi Project, the RSD Project's generation of energy for the PSEB is far below the rated capacity, although the Board has been burdened with the interest cost of the full debt burden and repayment liabilities thereof. The electricity consumers are rightly claiming that they have to pay unjustified costs on account of (i) unfairly large debt transferred to PSEB, even when the RSD Project cannot be said to be a completed project till the completion of Shahpur Kandi Project and (ii) higher depreciation and ROR charges on a grossly overvalued

asset . Quite clearly, there is a lot of force in the grievance of the consumers.

Role of the Government:

It is generally said that the accumulated losses, like profits belong to the owners. Then there is the aspect of piled up subsidies which have not been paid by the Government. Furthermore, if the reform process is to move ahead and then succeed, it is vital that all historical liabilities, whatever be their cause, must be liquidated at the earliest and possibly, in one go. Thus, a sweeping Balance Sheet Restructuring Plan through a drastic approach is an inescapable responsibility cast on the Government. This has been done by most of the States where such a situation existed. If an FRP is put in operation, further gains for the Board could be expected as the costly interest debt is exchanged for cheaper one.

In response to specific queries from the Commission, the State government has conveyed its willingness to consider a Financial Restructuring Plan to clean the PSEB Balance sheet and also to address the issues raised with regard to the RSD project. The Commission earnestly hopes that these exercises will be completed expeditiously well before the Commission is called upon to pass its next tariff order.

Tariff Order 2003-04:

"5.11 Ranjit Sagar Dam Project:

Objections Raised:

CII pointed out that as directed in the earlier Tariff Order, the apportionment of cost, which was adopted by the Government, is required to be reviewed and with this, the value of capitalization of RSD will work out to Rs. 1500 crores against Rs 4607.48 crores now adopted. As the Government is delaying the decision, Commission is

empowered to take a decision, as per Supreme Court Judgement on October 3, 2002, which upholds the autonomy of the Commission. PSEB Engineers' Association pleads with the Commission to issue suitable instructions to Government of Punjab for more equitable cost sharing of RSD project between Irrigation and Power with 20% charged to Power and 80% to Irrigation.

PSEB's Response:

The PSEB submitted that, it is representing to the Government of Punjab, for equitable cost of RSD project, since 1985 and no positive response is received for the Government.

Views of the Commission:

The Commission has conveyed the concern of the consumers in this regard and requested the Government for reallocation of the cost of RSD project between Irrigation and Power Departments".

In the annual revenue requirement for the year 2003-04, the PSEB Stated that the matter relating to RSD cost to PSEB was taken up with the Government vide letter dated November 2003 for rationalizing the allocation of cost between irrigation Deptt. and the PSEB. The Board highlighted in the ARR the irrational allocation which was costing the Board Rs. 428 crores at an average recovery rate of Rs. 2.25 KWh from the consumers. The Board also Stated that it had cited the cost of Uttar Pradesh Jal Vidyut Nigam Ltd.(UPJVNL) wherein an apportionment of 70-75% was made for civil works and 30-25% for electro-mechanical works for Dam based projects.

Even the State of Punjab accepted the position that the allocation cost of Ranjit Sagar Dam project does not benefit the consumers and ought not be passed on to them. This observation of the Government was recorded by the

Commission in Para 5.27 (h) of Tariff Order of 2002-03. It will be useful to set out the said stand of the government:-

"(h) Interest Charges:

It has been commented that since determination of tariff is on cost plus basis, there is need to ensure that before taking up any project, the viability of the project and its utility to the consumer is properly looked into. The issue assumes more importance keeping in view that operation of electricity industry is of monopolistic nature. Statutes provide for determination of tariff on 'cost plus' basis where all costs are passed on to the consumers. However, the intention of the law cannot be that costs which do not result into benefits to the consumers are also passed on to them. In this connection the State government cited two projects – Ranjit Sagar Dam Project and SYL Project and suggested disallowing interest on the loan borrowed for the above two projects.

It has also been observed that the Board shall take advantage of falling interest rates and explore the possibilities of replacing high cost borrowings with borrowing at current interest rates."

"Tariff Order 2004-05:

Cost of Ranjit Sagar Dam Project:

High cost of Ranjit Sagar Dam Project has been a cause of concern for the Commission. The Commission has commented upon this issue in its earlier two Tariff Orders also. As already pointed out therein, time over-run of the project of over a decade resulted in huge cost over-run and the project conceived at a cost of about Rs. 700 crores was finally executed a cost of Rs. 5700 crores. Of the total cost of the project, the sharing of cost was in the ratio of 79.1 % and 20.9% for the PSEB and Irrigation Deptt. respectively. Even the cost rightfully to be apportioned to

the Irrigation Deptt. representing 20.9% was not taken over by the State Government. This resulted in over burdening the Board substantially. The Commission already disallowed this portion of cost amounting to Rs. 1444 crores for the purpose of determining Annual Revenue Requirements of the Board in its last two tariff orders. The consumers, on their part, have also been highly critical of the exorbitant cost of this project and have pointed out that the cost of power from this project works out to over Rs. 6 per unit. It has been further stated that even purchase of power from the costliest sources will be cheaper than this power and the Board should not be forced to take over the project at this cost.

The Commission has been very concerned about the high cost of the project and has suggested to the government to look into this aspect and come up with solutions. No progress in this regard, however, seems to have been taken place as the cost continues to be reflected in the Balance sheet and Annual Revenue requirement of the Board as before. The Commission would again like the Board and the Government to look into this issue and respond so that a justifiable and rightful solution is found. The Commission will give its final view thereafter.

"Tariff Order 2005-06:

Objections raised:

CII and SFAI have submitted that excessive costs in the form of interest, depreciation and Rate of Return (ROR) pertaining to over allocated amount to RSD project should be disallowed (RSD capitalization is overstated by Rs 2719 crores) and not passed on to the consumers.

SIEL Ltd. and PACL have objected that the cost of the RSD project apportioned to Irrigation Deptt. is yet to be taken over by GoP and as a result, consumers are being burdened through tariff. Siel Ltd. has further Stated that as the average PLF of hydel projects is 50%, therefore, only 50% of total capital cost of Rs. 5340.3 crores should be capitalized and the balance should be borne by GoP. The reduction in ARR on this account should be taken forward as Regulatory Reserve with interest and benefit given to consumers in the ensuing years.

Response of PSEB:

The Board has informed that the Commission had, in its last Tariff order, advised the GoP and the Board to look into the matter. The Board is discussing the matter with GoP and once the consultations reach a final stage, details shall be furnished to the Commission.

View of the Commission:

The issue is already discussed in detail in Chapter 8, para 8.4 of Tariff Order 2004-05. The Board should take up the matter earnestly with the Government for early settlement of the issue."

42. From the above observations of the Commission, it is apparent that the Commission felt deeply disturbed on account of the allocation of 79.1% of the capital cost of the Ranjit Sagar Dam to the account of Punjab State Electricity Board. The Commission has been asking the State

Government to look into the apportionment of the capital cost allocated between PSEB and Irrigation Department. But the State Government has done precious little in this behalf to rectify the imbalance even though the State itself felt that the allocation of cost of RSD project does not benefit the consumers and ought not to be passed on to them (see para 5.27(L) of Tariff Order of the year 2002-03 and para 5.11 of Tariff Order of the year 2003-04).

43. The Commission has voiced its concern not only for the high cost of Ranjit Sagar Dam allocated to the Board but also about the apathy of the State towards solving the problem. It has been pointed out by the Commission in para 8.4 of the Tariff order for the year 2004-05 that time overrun of the project of over a decade has resulted in huge cost over run and the project conceived at a cost of about Rs. 700 crores was finally executed at a cost of over Rs. 5,700 crores. From the various tariff orders of the Commission, particularly tariff order for the year 2004-05, it is obvious that even the cost allocated to the Irrigation Department, was actually not borne by the State Government. The entire capital cost of the RSD

project was placed on the PSEB until the Commission intervened and disallowed the capital cost of Rs. 1444 crores, allocated to the Irrigation Department, for the purpose of determining annual revenue requirement of the Board. Inspite of said reduction by the Commission, the consumers are still being burdened with 79.1% of the cost of RSD project. It is an inequitable burden, which has been unjustly and unfairly placed on the consumers of electricity in the State of Punjab. It is not denied that the load of this allocation is being continuously reflected in the ARRs of the Board and the tariff determined by the Commission. It was a clear mistake to load 79.1% the cost of the RSD Project on the Board. The Commission has not been able to rectify the mistake, as it was of the view that the apportionment was done prior to the establishment of the Commission and the project was also executed before its coming into being. The Commission, therefore, merely hoped that the State Government will undertake an exercise for financial restructuring of the Board to clean up its balance sheet. It appears as if the State Government is not obliged under law to listen to the PSERC.

Result is that this abominable injustice to the consumers continues.

44. The consumers have been suffering for the last so many years for the error committed by the State in allocating 79.1% cost of the project to the Board. Allocation of the cost is a tariff issue. The consumers who are being continuously affected by the allocation did not have a say in the matter. The mistake can not be allowed to continue ad infinitum. Relief must be given to the consumers on the analogy of the maxim Actus Curiae Neminem Gravabit, which means that no one should suffer for the mistake of the court. There is no reason why on the analogy of this principle, which applies to the act of the court, should not be applied and extended to the mistake of an authority like the Commission and the State, discharging quasi judicial or/and even administrative functions, which adversely affects the people at large and cause grave injustice and harm to them. The wrong must be rectified and they need to be relegated to a situation in which

they would have been placed had that mistake not taken place.

45. In Jang Singh Vs Brij Lal and Ors., AIR 1966 SC 1631, the Supreme Court applying the aforesaid principle held as follows:

> **"***There is no higher principle for the guidance of the court than the one that no act of courts should harm a litigant and it is the bounden duty of courts to see that if a person is harmed by a mistake of the court he should be restored to the position, he would have occupied but for that mistake".*

46. In M/s Indian Export House Pvt. Ltd, New Delhi & Anr. Vs J.R. Vohra, AIR 1983 Delhi 167, the Delhi High Court noticing the doctrine held as follows:

> *10. "To throw out the occupant on the road and make him move to other premises and then to hear his objections is to prejudge the matter and will do violence to the provisions of law as interpreted by the Supreme Court. If a party is required to be heard before giving vacant possession under the law, then not to do so is not a mere violation of principles of natural justice, but is a violation of the statute itself. Post decisional remedial hearing is permissible in cases on which the action taken is urgent and could not have brooked any delay without irreversible result. Eviction of a tenant is not at all an urgent matter and he cannot be ousted on the assurance that he will be heard after the damage has been done. The principles of natural justice cannot*

> *be allowed to be by passed in this matter. Speed in justice is desirable but haste is depreciable. " To issue a warrant for recovery of possession without a show cause notice and without holding an adequate inquiry into the objections, if any, of the tenant is a mistake made by the court and where the court has made a mistake, the mistake should be rectified by the court and the party should be relegated to the position as it stood before. Actus Curiae neminem gravabit act of the court should do not harm to the litigant."*
>
> *(emphasis supplied)*

47. To the same effect is the decision of the Supreme Court in Johri Singh Vs such Pal Singh and Ors. AIR 1989 SC 2073, wherein it was held as follows:-

> *"The single strand running though all these decision is that no litigant should be prejudiced and made to suffer because of a wrong order of the court. The principle has been crystallized in the maxim actus curiae neminem gravabit. This salutary principle has held sway for a very long time and cannot be allowed to be diluted in the instant case.*

48. In A.R., Antulay Vs R.S. Nayak, (1988) 2 SCC 602, the appellant, who was an Ex-Chief Minister of the State of Maharashtra, was charged with criminal offences triable under Criminal Law Amendment Act 1952 (for short 1952 Act). The appellant could not be tried in accordance with the 1952 Act because of the earlier order of the Supreme Court directing the transfer of his case pending before the Court of Special Judge,

Bombay to a sitting Judge of the Bombay High court. In the subsequent proceedings, the Supreme Court held that the appellant had a right to be dealt with under 1952 Act, as that was the only procedure established by law. The Court applying the principle comprised in the maxim *Actus Curiae neminem gravabit* – Act of the court shall prejudice no man rectified the earlier mistake and re-transferred the matter to the Court of Special Judge. In this regard the Supreme Court held as follows:

> *"83…The basic fundamentals of the administration of justice are simple. No man should suffer because of the mistake of the court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the handmaids of justice and not the mistress of the justice. Ex debito justitiac, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied. This is a peculiar fact of this case which requires emphasis."*
>
> ……
>
> *" 98…It is a well settled position in law that an act of the court should not injure any of the suitors. The Privy Council in the well known decision of (Alexander) Rodger v. Comptoir D'escompte De Paris (1869-71) LR 3PC 465) 17 ER 120 observed:*
>
> *"One of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors, and when the expression 'act of the court' is used, it does not mean merely the act of the primary court, or of*

any intermediate court of appeal, but the act of the court as a whole, from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the court in the course of the whole of the proceedings does an injury to the suitors in the court."

49. In the aforesaid decision of the Supreme Court, there are observations to the effect that an act of the court shall prejudice no one is founded upon justice and good sense and affords a safe and certain guide for the administration of the law. The Supreme Court also observed that to own up the mistake when judicial satisfaction is reached does not militate against its status or authority and perhaps it would enhance both.

50. On the analogy of the principle behind the aforesaid maxim and the requirements of fair play, consumers cannot be prejudiced by the mistake of the State or the Regulatory Commission. Injustice meted to the consumers must be knocked down and mistake of allowing 79.1% the cost of the RSD project on them needs to be rectified by the Regulatory Commission. More so for the reason that the Tariff

determination is an annual function of the PSERC, wrong apportionment of the RSD cost by the State Government directly affects the yearly tariff formulation by the Commission. It is a continuous wrong which is being perpetuated year after year. In Angalo Waterproof Ltd. Vs. Bombay Waterproof Manufacturing Co. 1997(1) SCC 99 , it was held that in a case of continuing or recurring wrong, there would be corresponding continuous or recurrent cause of action to make a grievance about the same. Therefore, on principle the consumers are justified in making a grievance with regard to the aforesaid allocation of the cost of the RSD Project.

51. The question is, if the Commission in exercise of its statutory power does not cure and allow the established inequities created by the apportionment of the cost of the RSD project to be perpetuated, who will treat the injury inflicted on the consumers. State, as it seems, is impervious to the injustice to the consumers. Healing touch must be applied by the Commission, which is the sole authority, after the coming

into force of the Electricity Act of 2003, vested with the jurisdiction to determine the tariff. In case apportionment of the cost of the RSD project is not corrected, the resultant tariff determinations will continue to be stained with illegality and harm the consumers.

52. An apprehension was expressed by the counsel for the respondents that even if the Commission determines the legitimate cost of the RSD project which can be allocated to the Board, it will not be binding on the State as no direction can be given to it by the Commission under the Act of 2003. It was submitted that the Board, a statutory authority constituted under the Act of 1948, and the State are two different entities and a direction by the Commission to the Board cannot be treated as a direction to the State. Consequently, it was argued that the State may be ignore the direction and render the same as otiose.

53. The Punjab State Electricity Board undoubtedly is a statutory body but at the same time it is the hand and the voice of the State Government. It is the State Government

which has the say in the constitution and the functioning of the Board. In this context, it will be useful to refer to some of the provisions of the Electricity (Supply) Act, 1948, whereunder the Board was constituted and is still operating, as conceded by the learned counsel for the PSEB.

54. Section 5 of the Act of the 1948 authorises the State Government to constitute State Electricity Board (SEB) by a notification in the official gazette. As per Sub-section (2) of Section 5, the Board is to consist of not less than three and not more than seven Members appointed by the State Government. Sub-section (5) of Section 5 empowers the State Government to appoint one of the members as the Chairman of the Board. Under Section 10 of the Act of 1948, the State Government has the power to suspend or remove from office any member of the Board. Sub Section (5) of Section 10 empowers the State Government to remove the Chairman and the members of the Board and to appoint, new chairman and members in their places. Section 12 declares that the Board shall be a body corporate. Section 12 A makes provision for the Board to have capital structure. For this purpose, the

Government can direct that from a particular date, as may be specified by a notification, the Board shall be a body corporate with such capital, not exceeding Rs. 10 crores. The State Government can increase the maximum limit of the capital with the approval of the State legislature. Such capital may be provided by the State Government after due appropriation made by the State legislature by law for the purpose and subject to such terms and conditions as may be determined by the State.

55. These provisions show the pervasive control of the State over the Board. Thus, it is clear that it is the State Government, which is behind the façade of the statutory body. Since almost entire population of the State of Punjab, as consumers, is being affected by the allocation of capital cost of RSD project, public interest demands, lifting of the veil of the Board to see the real face behind it. Once that is done, the State is seen behind its outward appearance in the shape of the Board.

56. Traditionally, the doctrine of "lifting of the veil" enunciated in the decision of the House of Lords in Soloman v. Soloman & Co. Ltd., 1897 AC 22, was recognized in the corporate jurisprudence but it may be possible to apply the principle outside the corporate jurisprudence to do justice between the parties. The Supreme Court in Secretary, H.S.E.B. vs. Suresh & Ors., (1999) 3 SCC 601, applied doctrine of "lifting of the veil" in order to determine employer-employee relationship. In this regard, the Supreme Court held thus:-

> *"The High Court did in fact note with care and caution the doctrine of "lifting of the veil" in industrial jurisprudence and recorded that in the contextual facts and upon lifting of the veil, question of having any contra opinion as regards the exact relationship between the contesting parties would not arise and as such directed reinstatement though, however, without any back wages. While it is true that the doctrine enunciated in Soloman v. Soloman & Co. Ltd. came to be recognized in the corporate jurisprudence but its applicability in the present context cannot be doubted, since the law court invariably has to rise up to the occasion to do justice between the parties in a manner as it deems fit. Roscoe Pound Stated that the greatest virtue of the law court is flexibility and as and when the situation so demands, the law court ought to administer justice in accordance therewith and as per the need of the situation".*

57. It can not be disputed that the Board is bound by the directions of the Commission in the matters relating to tariff. The Commission, therefore, when it works out the cost of the RSD project, that is to be allocated to the Board, it will be binding on the Board. Since the State and the Board are the two sides of the same coin, the determination made by the Commission would also bind the State as well.

58. Having held so, we would examine the question whether the State Government independently, directly and by itself, without being reached through the Board, will be bound by the directions of the Commission. The answer lies in Section 61 of the Act of 2003 and Section 28 of the Act of 1998 and other allied provisions. The Appropriate Commission while determining tariff under Section 61 of the Act is required to be guided by the factors and parameters enshrined therein. One of the factors on the basis of which tariff is to be determined is the consumer interest. Sub-clause (d) of Section 61 requires the Commission to safeguard the interest of the consumers

and ensure that the recovery of the cost of electricity is effected in a reasonable manner. This was also one of the requirements under Section 28(2)(e) of the Act of 1998. The Commission, therefore, is/was bound to determine fair, prudent and reasonable cost of the RSD project which is to be allocated to the Board, in consonance with the interest of the consumers. At the same time recovery of the cost of electricity is/was to be made in a reasonable manner. The aforesaid provisions of the Act of 2003 and the Act of 1998 are not hedged in with the limitation that in case the State Government or any other authority has allocated an unwarranted cost to the generator or a licensee, it can not be interfered with, even when such a cost may be imprudent and unjust and not in the interest of the consumers. Otherwise the cost loaded by the State Government on the Board will have to be allowed by the Commission for the purposes of tariff and the ARR of the Board. In case such a limitation is read, into the aforesaid provisions, the purpose of the Act including Section 61 will be frustrated. Since the Commission has the power to determine the tariff and the ARR of a utility,

it has all the incidental and ancillary powers to effectuate the purpose for which power is vested in it. Consequently, directions or orders of the Regulatory Commission made for the purpose of determination of tariff and ARR in consonance with the provisions of the Act are binding on all the concerned parties including the State and the Board.

59. Though the Commission was of the confirmed opinion that the State had wrongly allocated 71% cost of the RSD project to the account of the Board, it still felt that it cannot undo the wrong, even when the State of Punjab at one point of time had accepted the position that the allocation of cost of the RSD project does not benefit the consumers and ought not be passed on to them. When the State Government even after realizing the height of injustice meted out to the consumers, did not do what it should have done, the Commission should have determined the prudent cost of the RSD project which could be fairly allocated to the Board. In such circumstances, the Commission ought to have stepped in and activated itself, as it was not powerless to safeguard the interests of the

consumers in a matter which in essence is a tariff issue and falls within its jurisdiction. But it appears that the Commission was labouring under an erroneous belief that it had no jurisdiction to interfere with the allocation of the cost of the RSD project, imposed by the Government on the Board.

60. We are convinced that there is need to rectify the wrong approach adopted by the State in allocating 79.1% of the cost of RSD project to the Board and 20.9% of the cost of the project to the Irrigation department. We may sum up the reasons for this view of ours:

(i) Large share of the cost of the RSD project allocated to the Board has an impact on matters relating to depreciation, return on net fixed assets and interest burden of the loans;

(ii) On account of allocation of major portion of the cost of RSD project to the share of the Board, large debt has been transferred to it (Board), even though the RSD Project has not achieved the targeted generation due to failure to execute and complete an allied project known as Shahpur Kandi Project;

(iii) Due to transfer of unfairly large debt and its carrying cost, the consumers are being made to pay unjustified costs added to the tariff.

(iv) The State Government has accepted that the allocation of cost of RSD Project does not benefit the consumers.

(v) The State Government failed to come out with Financial Restructuring Plan for the Board.

(vi) Most of the State Governments have restructured the finances of the Boards for fixation of a fair tariff and giving relief to the consumers, but the State of Punjab has failed to restructure the finances of the PSEB.

61. The mistake in allocation of cost of the RSD project which is being called as 'historical inequity' by the PSEB and the Government cannot be allowed to persist since the tariff, *inter alia,* depends upon the cost of the Ranjit Sagar Dam allocated to the Board.

62. The burden of the overvalued asset is of not of few thousand rupees but it runs into hundreds of crores. Approximately Rs. 500 crores per annum is being loaded in the tariff. It is not disputed that Government is recovering Rs. 533 crores per year from the Board as interest on the Government loans advanced to the Board. The consumers are forced to carry the burden of high cost government loans as the Government, as already pointed out, has so far failed to come out with a relief package for the Board. Other loans from the financial institutions etc. have been restructured and

rescheduled since the interest cost of the earlier loans was too high. But in the case of the Government loans, even when the rates of interests have fallen, the Government is still charging interest between 14% to 18% per annum on the loans provided to the Board. In case the Government is allowed to have a final say in regard to the question whether subsidy has been paid by the Government to the Board or is still outstanding and the matters of allocation of RSD cost, rate of interests on loans etc., the Commission will never be able to work out tariff in accordance with the parameters laid down in Section 61 of the Act, rather it will be a mute spectator to the arbitrary stand of the Government This has happened in the past and is clearly illustrated by the tariff order of the Commission for the year 2002-03, wherein it is mentioned that the audited Balance Sheet of the Board for the year 2001-02 filed along with ARR for the year 2002-03 showed an outstanding subsidy of Rs. 5470 crores as recoverable from the State Government. Outstanding subsidy consisted of cash subsidy and rural electrification subsidy. The State Government took the extraordinary and unfair stand that the RE subsidy due to the

Board is to be limited to the amount of interest due from the Board to the Government on the loans taken from the Government, notwithstanding the fact that the State Government was under an obligation to pay the subsidies in full to the Board due to grant of free power supply at its instance. On April 4, 2003 the Commission wrote to the State Government specifically seeking its views with regard to payment of unpaid subsidies. In response, the State Government virtually told the Commission that the matter did not fall within its (Commission) jurisdiction. The reply reads as under:-

"(a) It is the view of the State Government that the Commission is not legally bound to resolve pending issues between the PSEB and the State Government especially those pertaining to the period before the Commission became functional.

(b) The liability of the State Government to pay R.E. subsidy was contained within the limit of the annual interest payable by the PSEB on loans extended by the Government to the PSEB. Even this liability stood terminated by a decision of the Government during 1990-91. (However, during discussions of the representatives of Punjab Government with the Commission on 19th May, 2003, it was conceded by the Officers of the Punjab Government that Government may accept liability for RE subsidy upto the extent of annual interest

payable by the PSEB on loans advanced by the Government. Actually, Government of Punjab has been allowing this).

(c) The State Government would address this issue further while undertaking the financial restructuring of the PSEB".

63. We are unable to appreciate the stand of the state government. We are anguished to note that the PSERC felt helpless after this reply and was of the view that it was not appropriate for the Commission to say anything more on the subject except to express the hope that the issue will be resolved at an early date, finally and to the satisfaction of all concerned. As already pointed out, the question of subsidy for the year 2002-03 has been raised at this stage only to illustrate that the State Government and the PSERC are under misapprehension that the PSERC is powerless to decide such matters. It appears that the Commission felt that it cannot issue any directions to the Government. One baneful manifestation of this view is that in case it is accepted that the Commission cannot determine the capital cost chargeable to the power component of the RSD project or it cannot deal with

the matter relating to RE subsidies of the earlier years, when the Commission had not been constituted, in that event balance sheet figures of the Board imposed by the State with regard to RSD cost, exhorbitant interest levied on Government loans etc. will have to be accepted painfully by the Commission year after year even at the cost of denying fair tariff fixation to consumers. On the same reasoning it may be argued that since no directions can be given to the State Government by the Commission, the question whether or not payments on account of subsidies are outstanding from the Government to the Board, cannot be gone into by the Commission. Consequently, in case the Government claims that the entire amount of subsidy has been paid to the Board, it will have to be taken as the gospel truth and the Commission will be reduced to the status of a mere rubber stamp of the State Government and in that event the entire exercise for formulation of tariff will be rendered farcical. This position is inconsistent with Section 61(d) of the Act of 2003, whereunder the interest of the consumers have to be safeguarded and recovery of cost of electricity is to be effected

only in a reasonable manner. This position is also contrary to Section 62 of the Act of 2003, according to which the Appropriate Commission is required to determine the tariff in accordance with the provisions of the Act.

64. For a proper determination of tariff and ARR of the utilities suitable and binding directions can be given by the Regulatory Commissions to the Government to achieve the purpose of Sections 61 and 62 of the Act of 2003, particularly clause (d) of Section 61 thereof.

65. In a nutshell, the Commission is empowered to issue orders or directions to the State Government in regard to the matters having a bearing on and nexus with tariff determination. The directions of the Commission are binding on it not only because it is the owner of the PSEB dejure and defacto but even otherwise as well. Section 146 of the Act of 2003 provides that whoever, fails to comply with any order or direction given under the Act, within such time as may be specified or contravenes or attempts or abets the contravention of any of the provisions of the Act or any rules

or Regulations made thereunder, is liable for punishment with rigorous imprisonment for a term which may extend to three months or with fine which may extend to one lakh rupees or both. The word 'whoever' is of a very wide connotation. It covers all persons and authorities. Under Section 94 the Appropriate Commission is empowered to summon and enforce the attendance of any person and requisition public record. Therefore, it can summon and enforce the attendance of even the officers of the Government. It can require the production of any document including any public record from the State. Under sub-section (2) of Section 94, it has power to pass interim orders in any proceedings. Power to pass interim orders is not restricted in as much as there is no embargo in passing orders against Government or its functionaries. Therefore, interim orders can even be passed against the Government or its officials. Section 95 provides that all proceedings before the Appropriate Commission shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code and the Appropriate Commission shall be deemed to be a civil court for

the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973.

66. There is nothing in Sections 61 & 62 of the Act of 2003 to show that orders relating to tariff will not bind the State Government. The State is not above law and it is bound to respect the mandate of the legislature. Otherwise tariff determination will not be in consonance with the various factors and parameters specified in Section 61. The Commission is an independent statutory body and its directions being in terms of the Act are definitely binding on the Board whose dejure owner is the State. The ultimate end effect shall be on dejure owner viz. the State of Punjab.

67. Therefore, we are of the considered view that the Commission is not helpless in dealing with the RSD cost and loans and interest thereon which are reflected in the Balance sheet of the Board and such costs cannot as a matter of

course be passed on to the consumers without considering the reasonableness of such costs and the interests of the consumers. It has to be considered by the Commission whether a particular expenditure is properly incurred or not. In the case of West Bengal Electricity Regulatory Commission vs. CESC Ltd. supra (pages 761-762), it was held that the Commission is bound to examine the accounts of the utility even though they may be genuine and are not challenged. According to the Supreme Court, the accounts of the utility are not ipso-facto binding on the Commission as the Commission is required to consider the factors and parameters for determination of tariff. In this regard, the Supreme Court held as follows:

> *" We notice that for the purpose of the !948 Act, clause XVII of Schedule VI defines the various types of expenditures enumerated therein, as expenditure "properly incurred" therefore for the purpose of 1948 Act it would have been sufficient for a licensee to bring his expenditure under that definition clause and the same was entitled to be counted for the purpose of determining the tariff under the said Act. But we have noticed hereinabove that though the principles of Schedule VI have been adopted by the Commission in its Regulations the same will have to be considered along with other principles enumerated in the Regulations which includes the principles encompassed in clauses (b) to (g) of Section*

29(2) of the 1998 Act. We have also held that in the event of there being any conflict, it is the provisions of the 1998 Act which would prevail. The 1998 Act mandates the Commission to take into consideration the efficient management by the licensee of its Company, as also the interest of consumers while determining the tariff, therefore, if these two factors which go in favour of the consumers are in conflict with the definition of expenditure "properly incurred" in Schedule VI to the 1948 Act then it is for the Commission to reconcile this conflict and decide whether to accept the expenditure reflected in the accounts of the Company or not. In this process the Commission in our opinion is not bound by the auditors' report.

Herein we notice that the objects of the 1948 Act are entirely different from the objects of the 1998 Act. The 1948 Act under Schedule VI does not contemplate taking into account factors like good performance of the Company as also the consumers' interests in its expenditure while considering a particular expenditure as "properly incurred expenditure". While the 1998 Act specifically mandates that these factors also should be taken into account while considering whether a particular expenditure is "properly incurred expenditure" or not, therefore, it is not correct to say that each and every expenditure maintained under the provisions of the Sixth Schedule ipso facto becomes binding on the Commission.

The High Court further came to the conclusion that in view of the fact that there is no challenge to the accounts of the Company by the consumers, the said accounts of the Company should be accepted by the Court. Here again we are not in complete agreement with the High Court. There may be any number of instances where an account may be genuine and may not be questioned, yet the same may not reflect good performance of the company or may not be in the interest of the consumers. Therefore, there is an obligation on the Commission to examine the accounts of the Company, which may be genuine and unchallenged on

that count still in the light of the above requirement of Sections 29(2)(g) to (h). In the said view of the matter admitting that there is no challenge to the genuineness of the accounts, we think on this score also the accounts of the Company are not ipso facto binding on the Commission. However, we hasten to add that the Commission is bound to give due weightage to such accounts and should not be differ from the same unless for good reasons permissible in the 1998 Act"

68. The learned counsel for the Board and the State submitted that it is not the function of the Commission to go into the questions of RSD costs, loans/ liabilities of the Board forgetting that these are matters relating to capital investment and over burden on the finances of Board. He referred to Section 61 of the Act of 2003 to submit that the Commission does not have any power to frame Regulations in regard to such matters. As a sequitur, it was argued that in case the Commission does not have the power to frame Regulations on the aforesaid subject, the Commission also will not have the power to go into the question of apportionment of the cost of the RSD project between the Board and the Irrigation Department, or with regard to the question of procurement of loans and incurring of liabilities by the Board or with respect

to the purchase of power. According to the learned counsel for the Board it is well settled that even if any order or direction issued by the Commission was based on the Regulations, it can not be enforced, if it related to factors outside its domain. It was further argued that where a Regulation is inconsistent with the Act, it must be ignored and direction or order based on such a Regulations is not enforceable. In order to support the plea, the learned counsel relied on the decision of the Supreme Court in Bharathidasan University & Anr. Vs. CTE & Ors. (2001) 8 SCC 676, wherein it was held that where the power to make Regulations is circumscribed by specific limitations and engrafted therein, Regulations which are not within the specified limits must be ignored.

69. The learned counsel also invited our attention to Section 22(2) of the Act of 1998, particularly sub-clauses (a), (c), (e) and (m) thereof. The learned counsel submitted that wide and extended powers were bestowed on the State Government to confer functions upon the State commissions relating to matters which were specified in various sub clauses including

(a), (c), (e) & (m) of sub-section (2) of Section 22 of the Act of 1998, to regulate the investment approval for generation, transmission, distribution and supply of electricity to the entities operating in the State; to regulate the operation of the power system within the State, to regulate the working of the licensees and other persons authorised or permitted to engage in the electricity industry in the State and to promote their working in an efficient, economical and equitable manner; to regulate the assets, properties and interest in properties concerning or related to the electricity industry in the State including the conditions governing entry into, and exit from, the electricity industry in such manner as to safeguard the public interest.

70. The learned counsel for the Board also pointed out that the Punjab Electricity Regulatory Commission, even before coming into force of the Act of 2003, was not conferred with any of the aforesaid functions by the State Government and thus, even when the Act of 1998 was in vogue, it did not have the power to deal with matters of investment for generation,

transmission, distribution and supply of electricity or with regard to the matters concerning assets and properties and interests in properties concerned or related to the electricity industry in the State. Learned counsel also submitted that neither under Section 61 of the Act of 2003 nor under Section 86 thereof, which basically deal with the functions of the State commissions, any power has been vested in the Commission to deal with the matters of loans/ liabilities, investments for generation transmission, distribution and supply of electricity etc.

71. The upshot of the submissions of the learned counsel for the Board and Government is that RSD cost and the question of loans and liabilities are beyond the domain of the commission. It is strange that the aforesaid pleas have even come from the Board. It leaves no manner of doubt in our minds that the Board and the Government are inseparable.

72. We do not agree with the submissions of the learned counsel that the questions relating to the RSD cost and loans/liabilities of the Commission are outside the jurisdiction

of the Commission. In order to deal with the submissions of the Board, we will have to again refer to Section 61(d) of the Act of 2003 and have to reiterate that the Commission u/s 61 (d) of the Act of 2003, while determining tariff, is required to safeguard the consumers' interest and permit recovery of cost of electricity in a reasonable manner. We may again note that the determination of tariff in the instant case depends upon various factors including the RSD cost and the interest payable on the loans and liabilities. RSD cost and loan and liabilities affect the tariff and the revenue requirement of the Board. They have to be taken into consideration for fixation of tariff. The issue of RSD cost and loan and liabilities are in reality issues concerning tariff and not merely issue of investment etc.

73. According to Section 61(a) of the Act of 2003 the Commission for determination of tariff is also to be guided by the principles and methodologies specified by the Central Electricity Regulatory Commission for determination of tariff applicable to generating companies and transmission

licensees. Regulation 4(2) of the Central Electricity Regulatory Commission (Terms & Conditions of Tariff), 2003 framed by the CERC lays down the terms for determination of tariff of hydro electric power generating system. Regulation 4(2) of CERC Regulations to the extent relevant reads as follows:-

> *" In relation to multi purpose hydro electric projects with irrigation, flood control and power components, the capital cost chargeable to the power component of the project only shall be considered for determination of tariff".*

74. Thus the cost of power component of RSD project can be taken into consideration for determination of tariff. Therefore, what is the cost of the power component of the RSD project has to be decided by the Commission being a tariff issue.

75. The learned counsel for the Board was not right in urging that the Commission has no jurisdiction to frame Regulations in regard to the factors relating to determination of the cost of RSD project or the cost of the power component of the project. Again under Section 86(1)(a) it is the function of the Commission to determine tariff. Thus all issues relating to or

having impact on tariff fall within the purview** of the Commission. Just because provisions of Section 22(2) of the Act, 1998 have not been completely incorporated in Section 86 of the Act, is no ground to hold that issues relating to cost of RSD project, wrongly loaded on the Board, and the questions relating to RE subsidies and loans etc. cannot be gone into by the Commission. A contrary view overlooks the wide power of the Commission to deal with all aspects and issues relating to tariff and ARR and their determination.

76. In view of the aforesaid analysis, we hold and direct that:-

(i) Commission is not powerless to issue orders and directions relating to matters having a bearing on and nexus with the determination and fixation of tariff and its directions shall be binding on all persons and authorities including the State Government in this case.

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(ii) The accounts of the Board which reflect the cost of the RSD project allocated to the Board are** not binding on the Commission even though the allocation may have been done by the State of Punjab as the allocation is a tariff issue.

(iii) The allocation of 79.1% of the cost of Ranjit Sagar Dam to the Board is arbitrary and a clear anomaly resulting in undue burden on the Board. Since such fastening of liability is a continuous wrong and affects the tariff, the Commission shall determine the cost of the project by due diligence and fair study of the cost which is to be allocated to the Board.

iv) It will be open to the Commission to secure the assistance of experts for determining the cost which is to be allocated to the Board in accordance with law;

v) The Board and the State of Punjab shall file all the relevant documents before the Commission for determining the cost chargeable to the power component

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of the project and if there is a non compliance, it is open to the Board to draw adverse inference as well.

vi) In case the Commission allocates a reduced cost of the RSD project to the Board, consequential effect shall be given to it by the State of Punjab. It shall also be entitled to all consequential reliefs;

vii) The Commission shall complete its determination within six months from the date of communication of this judgement;

viii) Since the determination will take place in future, the relief, subject to the outcome of the Commission's determination regarding allocation of cost of RSD Project to the Board, shall be made available to the consumers after the truing up exercise for the year 2006-07 and the outcome of the truing up exercise shall be given effect to;

ix) Such relief shall be available to all the consumers and shall not be confined to the industrial consumers alone who have filed appeals before us.

C. ***Issue relating to retrospective operation of tariff order for the year 2005-06***

77. Some of the Industrial Consumers have questioned determination of tariff by the Commission on the ground that the effect of the Tariff Order for the year 2005-06 was given from April 1, 2005 while the order was passed on June 14, 2005. According to them the Commission was not having any jurisdiction to require the consumers to pay enhanced tariff from a retrospective date.

78. In order to determine the reasons which led to the passing of the tariff order on June 14, 2005 instead of it being passed on March 31, 2005, it is necessary to refer to a few dates. The Board filed ARR and tariff application on December 30, 2004. The application, however, was found to be incomplete. The Commission by its communication dated January 21, 2005 asked the Board to remove the deficiencies and complete the application. It was, however, only on Feb., 9, 2005 that the deficiencies were removed and the application was taken on record. This led to delay in the determination of tariff for the year 2005-06. The Commission was able to pass the tariff order only on June 14, 2005, though the financial year commenced on April 1, 2005.

79. It is not in dispute that the Commission determined the tariff for the year 2005-06. The Industrial Consumers would not have been able to grudge the application of the tariff order with effect from April 1, 2005, in case the tariff order was passed on that date or on a date close to that date. It is only because the tariff order was delayed by about two months that the Industrial Consumers are finding fault with its application from April 1, 2005.

80. It needs to be noticed that the retrospective operation covers only a period of two months and having regard to the short time involved, the Commission was of the view that the interest of the consumers will not be adversely affected by the retrospective operation of the tariff order.

81. We do not find that the Commission was wrong in its approach by giving effect to the tariff order from the aforesaid retrospective date as the tariff was fixed for the tariff year 2005-06, which commenced on 1st April, 2005. If the submission of the Industrial Consumers is accepted, a

consumer could initiate some proceedings in a Court against the Commission with a prayer for seeking an interim order restraining the Commission from revising the tariff on some ground or the other. This could delay the passing of the tariff order in case an interim order interdicting the determination of tariff is passed pending the proceedings. In such a contingency, it is only after the interim order is lifted by the Court that the Commission would be in a position to pass the tariff order. Obviously, it would only be just and fair that the tariff order relates back to and commences on the first day of the year for which the tariff determination is made. In Kanoria Chemicals & Industries Ltd. & Anr. Vs. State of U.P. & Ors. (1992) 2 SCC 124, a question was raised with regard to the competence of the Electricity Board to determine tariff with retrospective effect. The Supreme Court was of the view that retrospective effect to the revision of tariff was clearly envisaged in law. In this regard, the Supreme Court held as follows:

> *" A retrospective effect to the revision also seems to be clearly envisaged by the section. One can easily conceive a weighty reason for saying so. If the section were*

interpreted as conferring a power of revision only prospectively, a consumer affected can easily frustrate the effect of the provision by initiating proceedings seeking an injunction restraining the Board and State from revising the rates, on one ground or other, and thus getting the revision deferred indefinitely. Or, again, the revision of rates, even if effected promptly by the Board and State, may prove infructuous for one reason or another. Indeed, even in the present case, the Board and State were fairly prompt in taking steps. Even in January 1984, they warned the appellant that they were proposing to revise the rates and they did this too as early as in 1985. For reasons for which they cannot be blamed this proved ineffective. They revised the rates again in March 1988 and August 1991 and, till today, the validity of their action is under challenge. In this State of affairs, it would be a very impractical interpretation of the section to say that the revision of rates can only be prospective".

82. Section 62, which provides for determination of tariff by the Commission, does not suggest that the tariff cannot be determined with retrospective effect. In the instant case, the whole exercise was undertaken by the PSERC to determine tariff and the annual revenue requirement of the PSERB for the period April, 1, 2005 to March 31, 2006, therefore, logically tariff should be applicable from April 1, 2005.

83. According to sub-section (6) of Section 64 of the Act of 2003, a tariff order unless amended or revoked continues to be

in force for such period as may be specified in the tariff order. Thus the Commission is vested with the power to specify the period for which the tariff order will remain in force. The Commission deriving its power from Section 64(6) has specified that the order shall come into force from April 1, 2005. No fault can be found with such a retrospective specification of the Commission.

84. The learned counsel for the industrial consumers relied on the decision of the Supreme Court in Sri Vijay Lakshmi Rice Mills vs. State of Andhra Pradesh, AIR 1976 SC 1471, wherein it was held that a notification takes effect from the date it is issued and not from a prior date unless otherwise provided by the statute, expressly or by appropriate language from which its retrospective operation could be inferred. This decision is of no avail to the industrial consumers, in view of the provisions of Section 64 (6) of the Act of 2003, which empowers the Commission to specify the period for which the tariff order will remain in force. In other words, the

Commission is empowered to specify the date on which the tariff order will commence and the date on which it will expire.

85. The Board in consonance with the cost plus regime is entitled to recover all costs prudently incurred for providing service to the consumers. Besides, the Board is entitled to reasonable return. Since the cost prudently incurred has to be recovered, therefore, in the event of the tariff order being delayed, it can be made effective from the date tariff year commences or by annualisation of the tariff so that deficit, if any, is made good in the remaining part of the year or it could be recovered after truing up exercise by loading it in the tariff of the next year. All these options are available with the Commission.

86. There is one more aspect which needs to be considered. In case the Commission had lowered the tariff rates, relief to the consumers could not be denied on the ground that the tariff order is being operated retrospectively.

87. For all these reasons we hold that the Commission had the jurisdiction to pass the tariff order with retrospective effect. Therefore, we reject the submission of the learned counsel for the industrial consumers that the tariff cannot be fixed from a retrospective date.

D. Re Cost of Supply and Cross Subsidy

88. The learned counsel for the Industrial Consumers submitted that the tariff is to be based on the cost of supply of electricity to each category of consumers, having regard to the voltage at which power supply is made available. Some of the learned counsel for the appellants submitted that no consumer category should be asked to pay for consumption of electricity by another category of consumers. In other words, there should be no cross subsidies amongst the different consumer categories. In any event, according to the learned counsel, cross subsidies need to be reduced and ultimately eliminated. The learned counsel canvassed that the tariff order for the year 2005-06 is contrary to the provisions of Section 61 (d) and (g). They pointed out that according to

Section 61 (d) and (g), the Commission is to be guided, while fixing tariff, by the principle that the interest of the consumers is required to be safeguarded, and at the same time, recovery of the cost of electricity has to be made in a reasonable manner. Furthermore, the tariff is to be fixed in such a manner that it progressively reflects the cost of supply of electricity and also reduces and eliminates cross subsidies within the period to be specified by the appropriate Commission. The learned counsel on behalf of the appellants also argued that the Commission ought to have applied the concept of cost of supply to determine the question whether cross subsidy has increased or decreased. It was further contended that the Commission by disregarding the concept of cost of supply acted contrary to the provisions of Section 61(g) of the Act of 2003.

89. The learned counsel for the Industrial Consumers further submitted that cross subsidy component in the impugned tariff order for the year 2005-06, has gone up, which violates the express provisions of the statute requiring the Commission

to ensure that the current level of cross subsidy is reduced and eliminated.

90. The learned counsel appearing for the Board and the Commission submitted that the Commission has reduced the cross subsidy level for the tariff year 2004-05, as against the previous years, by increasing the tariff for the domestic consumer and by requiring the agricultural consumer to pay Rs. 2/- per unit, which represents over 60% of the cost of supply. It is pointed out that before the tariff determination for the year 2004-05, no tariff was payable by the agricultural consumers. According to the learned counsel for the Board and the Commission, Section 61 (g) of the Electricity Act, 2003, must be applied in an objective and rational manner. What is required to be ensured is that the Commission proceeds in the direction of a tariff regime, which has the effect of reducing the cross subsidy progressively, which means, progressing by degrees. It does not mean that the cross subsidies have to be done away with suddenly by providing a tariff shock to the consumers. It will be in consonance with

the provisions of Section 61 (g), if the reduction in cross subsidy is looked at with reference to the rate of electricity per unit, and not with reference to the quantum of cross subsidy collected, which depends upon variable factors. In case, the consumption by HT consumers is more, the cross subsidy will go up. In the event the consumption of electricity by agricultural consumers increases, the cross subsidy will still go up. But when HT and agricultural consumption goes down, collection of cross subsidy will decrease. Therefore, it was submitted that the question whether the cross subsidy has increased or decreased should not be considered, on the basis of quantum of consumption of electricity.

91. We have considered the submissions of the learned counsel for the parties. The National Electricity Policy recognizes that electricity is an essential requirement for all facets of life and it is a basic human need. The National Electricity Policy also points out that it is a critical infrastructure on which the socio economic development of the country depends. An estimated investment of the order of Rs.

90,000 crores at 2002-03 price level would be required to finance generation, transmission, sub-transmission, distribution and rural electrification projects. For the investment of this scale to take place, the Act has ensured reasonable return to the generating companies and licensees. It has also been ensured that they are not saddled with the cost of subsidies**.** This is done to instil confidence in investors and entrepreneurs that they will be able to secure reasonable return on their investments in the electricity sector. Such confidence building measures are necessary as the country requires the unleashing of the economic development. Tremendous growth in generation, transmission and distribution of electricity is needed. Electricity is the axis on which economic development of the country rolls[**].

92. While keeping in view, this perspective, the poor of the country cannot be forgotten. Poorer sections of society have to be pulled up from life of deprivation and they shall not be denied access to electricity on the ground that they cannot

[**] Corrected as per the Order dated 25th July 2006

afford the same. For some time in our democratic set up, some sections need socio-economic support and the support wholly and solely cannot come from the Government alone in the form of subsidy. The well to do sections of the society need to contribute for making electricity available to the poor and certain other weak sectors. This can be achieved either by the method of cross subsidization or by imposition of electricity duty by the State. But at the same time this does not mean that cross subsidies or the electricity duty should be allowed to cast unbearable burden on the consumers and the people. High level cross subsidies lead to injustice and create problems of their own. It is also a fact that categories which are cross subsidized, by fixing above cost tariffs for commercial and industrial consumers have a tendency to over consume. This is marked in respect of agricultural category. Because of the free or almost free electricity available to farmers, there has been depletion of sub-soil water as the same is being overdrawn and exploited. In the interests of the society a mechanism needs to be developed where cross subsidies and subsidies do not stimulate over consumption of

electricity by the beneficiaries of the largesse and the cross subsidies do not become too burdensome for the subsidizing consumers. Such a situation also cannot be allowed to develop where cost of electricity cannot be recovered in a reasonable manner and the tariff is not brought progressively to the level of cost of supply of electricity.

93. The aforesaid ratiocination is based on the various provisions of the Act of 2003, particularly, its Preamble and Sections 39, 42, 61(d), 61(g) and 65 and National Electricity Policy and National Tariff Policy. These provisions are relevant for examining the submissions of the learned counsel for the parties. It will, therefore, be useful to set out the Preamble of the Act of 2003, Sections 39, 42, 61(d) & (g) and Section 65 thereof, National Electricity Policy and National Tariff Policy notified by the Central Government on February 12, 2005 and January 06, 2006 respectively, to the extent these are relevant to the matters relating to cost of supply, cross subsidy and subsidy. The preamble and the aforesaid provisions read thus:

"PREAMBLE TO THE ELECTRICITY ACT, 2003
[No. 36 OF 2003]

"An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."

Section 39 :

*"39. **State Transmission Utility and Functions**:-(1) The State Government may notify the Board or a Government company as the State Transmission Utility:*

Provided that the State Transmission Utility shall not engage in the business of trading in electricity:

Provided further that the State Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity, of such State Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 (1 of 1956) to function as transmission licensee through a transfer scheme to be effected in the manner specified under part XIII and such company or companies shall be deemed to be transmission licensees under this Act.

***(2)** The functions of the State Transmission Utility shall be -*

(a) to undertake .....

(d) *to provide non-discriminatory open access to its transmission system for use by-*

(i) any licensee or generating company on payment of the transmission charges ; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

Provided further that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:

Provided also that such surcharge may be levied till such time the cross subsidies are not eliminated:

Provided also that the manner of payment and utilisation of the surcharge shall be specified by the State Commission.

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

Section 42:

42. ***Duties of distribution licensees and open access****:- (1) …….*

(2) *The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:*

Provided that such open access may be allowed before the cross subsidies are eliminated, on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

.....
.....
(4) *Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.*

Section 61(d):

61. Tariff Regulations.

The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

a. …….

d. safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

Section 61(g)

g. that the tariff progressively reflects the cost of supply of electricity, and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission";

……

Section 65:

65. Provision of subsidy by State Government.

"If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under section 62, the State Government shall, notwithstanding any direction which may be given under section 108, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government:

Provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by State Commission shall be applicable from the date of issue of orders by the Commission in this regard."

E. *National Electricity Policy:*

5.5 RECOVERY OF COST OF SERVICES & TARGETTED SUBSIDIES:

5.5.1 There is an urgent need for ensuring recovery of cost of service from consumers to make the power sector sustainable.

5.5.2 A minimum level of support may be required to make the electricity affordable for consumers of very poor category. Consumers below poverty line who consume below a specified level, say 30 units per month, may receive special support in terms of tariff which are cross-subsidized. Tariffs for such designated group of consumers will be at least 50 % of the average (overall) cost of supply. This provision will be further re-examined after five years.

5.5.3 Over the last few decades cross-subsidies have increased to unsustainable levels. Cross-subsidies hide inefficiencies and losses in operations. There is urgent need to correct this imbalance without giving tariff shock to consumers. The existing cross-subsidies for other categories of consumers would need to be reduced progressively and gradually.

5.5.4 The State Governments may give advance subsidy to the extent they consider appropriate in terms of section 65 of the Act in which case necessary budget provision would be required to be made in advance so that the utility does not suffer financial problems that may affect its operations. Efforts would be made to ensure that the subsidies reach the targeted beneficiaries in the most transparent and efficient way.

F. National Tariff Policy:

"8.3 Tariff design : Linkage of tariffs to cost of service

It has been widely recognised that rational and economic pricing of electricity can be one of the major tools for energy conservation and sustainable use of ground water resources.

In terms of the Section 61 (g) of the Act, the Appropriate Commission shall be guided by the objective that the tariff progressively reflects the efficient and prudent cost of supply of electricity.

The State Governments can give subsidy to the extent they consider appropriate as per the provisions of section 65 of the Act. Direct subsidy is a better way to support the poorer categories of consumers than the mechanism of cross-subsidizing the tariff across the Board. Subsidies should be targeted effectively and in transparent manner. As a substitute of cross-subsidies, the State Government has the option of raising resources through mechanism of electricity duty and giving direct subsidies to only needy consumers. This is a better way of targetting subsidies effectively.

Accordingly, the following principles would be adopted:

1. In accordance with the National Electricity Policy, consumers below poverty line who consume below a specified level, say 30 units per month, may receive a special support through cross subsidy. Tariffs for such designated group of consumers will be at least 50% of the average cost of supply. This provision will be re-examined after five years.

2. For achieving the objective that the tariff progressively reflects the cost of supply of electricity, the SERC would notify roadmap within six months with a target that latest by the end of year 2010-2011 tariffs are within ± 20 % of the average cost of supply. The road map would also have intermediate milestones, based on the approach of a gradual reduction in cross subsidy.

For example if the average cost of service is Rs 3 per unit, at the end of year 2010-2011 the tariff for the cross subsidised categories excluding those referred to in para 1 above should not be lower than Rs 2.40 per unit and that for any of the cross-subsidising categories should not go beyond Rs 3.60 per unit.

3. While fixing tariff for agricultural use, the imperatives of the need of using ground water resources in a sustainable manner would also need to be kept in mind in addition to the average cost of supply. Tariff for agricultural use may be set at different levels for different parts of a State depending of the condition of the ground water table to prevent excessive depletion of ground water. Section 62 (3) of the Act provides that geographical position of any area could be one of the criteria for tariff differentiation. A higher level of subsidy could be considered to support poorer farmers of the region where adverse ground water table condition requires larger quantity of electricity for irrigation purposes subject to suitable restrictions to ensure maintenance of ground water levels and sustainable ground water usage.

4. Extent of subsidy for different categories of consumers can be decided by the State Government keeping in view various relevant aspects. But provision of free electricity is not desirable as it encourages wasteful consumption of

electricity besides, in most cases, lowering of water table in turn creating avoidable problem of water shortage for irrigation and drinking water for later generations. It is also likely to lead to rapid rise in demand of electricity putting severe strain on the distribution network thus adversely affecting the quality of supply of power. Therefore, it is necessary that reasonable level of user charges are levied. The subsidized rates of electricity should be permitted only up to a pre-identified level of consumption beyond which tariffs reflecting efficient cost of service should be charged from consumers. If the State Government wants to reimburse even part of this cost of electricity to poor category of consumers the amount can be paid in cash or any other suitable way. Use of prepaid meters can also facilitate this transfer of subsidy to such consumers.

5. Metering of supply to agricultural / rural consumers can be achieved in a consumer friendly way and in effective manner by management of local distribution in rural areas through commercial arrangement with franchisees with involvement of panchayat institutions, user associations, cooperative societies etc. Use of self closing load limitors may be encouraged as a cost effective option for metering in cases of "limited use consumers" who are eligible for subsidized electricity".

94. Having set out the aforesaid relevant provisions of the Act and the Policies, we will now deal with the various submissions advanced by the learned counsel for the industrial consumers regarding cross subsidy, subsidy and

cost of supply *and the views*** expressed at the threshold by us.

95. It was submitted by the learned counsel for the Industrial Consumers that cross subsidies cannot be permitted to exist between the different consumer categories as per the provisions of the Act of 2003. Reliance was placed by the learned counsel on the decision of the Supreme Court in West Bengal Electricity Regulatory Commission Vs CESC Ltd etc., JT (2002) 7 SC 578. It was pointed out that the Supreme Court had set aside the order of the Calcutta High Court, whereby the High Court had directed continuance of cross subsidy, contrary to the view of the West Bengal Electricity Regulatory Commission. The learned counsel contended that on the basis of the Supreme Court decision cross subsidies need to be rooted out from the system and in case the Government chooses to subsidize the supply of energy to any particular class of consumers, the same can be done provided the burden or loss suffered by the generator or the

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transmission licensee is borne by the State government and not imposed on any class of consumers.

96. We have given our deep consideration to the submission of the learned counsel for the Industrial Consumers, but we express our inability to accept the same. The provisions of the Act of 2003 and the aforesaid policies of the Government have enabled the Regulatory Commission to continue with the cross subsidies for the present. This is borne out by an analysis of

the following provisions of the Act and the aforesaid policies and their analysis:-

i. Preamble to the Act of 2003, inter-alia, speaks of rationalization of subsidies. Rationalisation of subsidies presupposes existence of subsidies in the system and their continuance**;**

ii. According to Section 61(g), an appropriate commission, while framing Regulations for specifying the terms and conditions for determination of tariff is to be guided by the objective that the tariff progressively reflects the cost of supply of electricity, and also reduces and eliminates cross subsidies within a period to be specified by the appropriate commission. Thus, the legislation while taking notice of the existence of cross subsidies in the system, requires cross subsidies to be reduced gradually, step by step and not abruptly or suddenly.

iii. Para 5.5.3 of the National Electricity Policy recognizes the fact that cross subsidies have increased to unsustainable levels and there is urgent need to correct the imbalance. The National Tariff Policy proceeds on the basis that cross subsidies are to be brought down but not abruptly to prevent tariff shock to the consumers. Thus the policy permits continuation of cross subsidies in the system for some time but at the same time it requires imbalance

created by high level of subsidies in the system, to be corrected.

iv. Section 39(2) while laying down the functions of a State transmission utility, inter-alia, requires the State utility to provide non discriminatory open access to its transmission system for use by any licensee or generating company on payment of the transmission charges or any consumer as and when such open access is provided by the State Commission under Sub section (2) of Section 42, on payment of the transmission charges and a surcharge thereon as may be specified by the State Commission, provided that such surcharge shall be utilized for the purpose of meeting the requirements of current level of cross subsidy : provided further that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State commission: provided also that such surcharge may be levied till such time the cross subsidy is not eliminated.

v) Section 42(2) provides that the State Commission shall introduce open access in such phases and subject to such conditions, as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all

relevant factors including such cross subsidies, and other operational constraints:

vi) Such open access may be allowed before the cross subsidies are eliminated on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission :

vii) Further such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

viii) Also such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:

ix) Sections 39 and 42 of the Act of 2003 reveal that the Parliament was conscious of the presence of cross subsidies between the different categories or class of consumers but they have not been rooted out. Rather, the Commissions has been left free to continue with them for the time being, but with the rider that they shall be reduced and eliminated progressively.

97. Reliance placed by the learned counsel for the Industrial Consumers on the decision of the Supreme Court in West Bengal case (supra) for contending that cross subsidies cannot be continued, is of no avail as the provisions are distinct and different. In that case, it was noticed by the Supreme Court

that the object of the Act of 1998 was to prevent discrimination in fixation of tariff by imposing cross subsidy. The Supreme Court decided the question of cross subsidy in the context of Sections 29(2)(d), 29(3) and 29(5) of the 1998 Act. At this stage, it would be necessary to examine these provisions. Section 29(2) (d) of the Act of 1998 provides that the State Commission while determining by Regulations the terms and conditions for the fixation of tariff, shall be guided by the factors which would encourage efficiency, economical use of the resources, good performance, optimum investments and other matters which the State Commission considers appropriate for the purpose of the Act. Section 29(3) enunciates that the State Commission, while determining the tariff, shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor, power factor, total consumption of energy during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required. Section 29(5) of the Act of 1998 postulates that in the event

the State Government requires grant of any subsidy to any consumer or class of consumers in the tariff to be determined by the State Commission, the State Government shall pay the amount by the grant of subsidy in the manner the State Commission may direct.

98. In the aforesaid provisions of the Act of 1998, there is no mention of cross-subsidy. The absence of any provision relating to cross subsidy is significantly different from the Act of 2003.

99. In so far as the Act of 2003 is concerned, as already pointed out, it permits the regulatory Commission to provide for cross subsidies between different class and categories of consumers. Therefore, the decision of the Supreme Court in West Bengal Case (supra) is of no assistance to the Industrial Consumers.

100. The arguments advanced on behalf of the Industrial Consumers that the appropriate Commission cannot resort to

system of cross subsidy has no force, and the same is hereby rejected.

101. It was also contended by the learned counsel for the industrial consumers that the cross subsidies instead of being reduced have increased by fixation of tariff by the Commission for the year 2005-06.

102. In this regard, they drew our attention to Table Nos. 7.44, 9.5 and 9.6 of the Tariff order for the year, 2005-06. The learned counsel submitted that the burden of cross subsidies on the industrial consumers have increased more than 10%, while the quantum of collection from the agricultural and domestic consumers have not increased by 10%.

103. In response, the learned counsel for the Board and the Commission submitted that there has been no increase in the cross subsidies among consumer categories. It was pointed out that there has been uniform increase in the tariff for all categories by 10% and this being so, it was submitted that there was no increase in the cross subsidies.

104. The point for our consideration is whether cross subsidy has increased or reduced has to be determined with reference to the consumption of electricity by the subsidizing and the subsidized consumers or is it to be worked out on the basis of cost of supply of electricity per unit, to different categories of consumers. In case the cross subsidy is to be worked out on the basis of the consumption of electricity by the subsidized and subsidizing consumers, the amount of cross subsidy in that event would depend on the quantum of sale of energy to various categories of consumers. By employing this method, the quantum of cross subsidy will be directly proportionate to the increase or decrease in the consumption of electrical energy by various categories of consumers. For example when the consumption of energy by the industrial consumers goes down, the quantum of cross subsidies will decrease. But when the industrial consumers are consuming more, the cross subsidy will go up. Again, when the sale of energy to the agricultural consumers goes up, the quantum of cross subsidy will proportionately increase.

Therefore, in case the quantum of cross subsidy is measured on the basis of consumption, it will vary depending upon the quantum of consumption by the consumers of various categories. This is illustrated by figures given in the written submissions filed on behalf of the appellants in Appeal No. 35 of 2005. If this method is adopted, the cross subsidies between consumers may show inflated results even where the tariff for the industrial & commercial consumers and railways is reduced and tariff for the subsidized category is kept static or is increased, since, the calculations will depend on the consumption of electricity by the various categories. In the instant case, there has been a uniform increase of tariff for all categories by 10% but the quantum of cross subsidies considered from the point of view of consumption may have gone up. Basically, the distortions would disappear once the cross subsidies are eliminated. But this still seems to be a far cry in view of the recent Electricity (Amendment) Bill, 2005, which has been tabled in the Parliament. Section 7 of the

Amendment Bill seeks to substitute the following clause in place of Section 61(g) of the principal Act:

> *(g) that the tariff progressively reflects the cost of supply of electricity, and also reduces cross subsidies in the manner specified by the Appropriate Commission,"*

For the present, however, the law is that eventually the cross subsidies are to be reduced and eliminated so that tariff progressively reflects the cost of supply.

105. It appears to us that the question whether cross subsidies have increased or decreased should be considered with reference to the rate of supply of electricity per unit to different categories of consumers and not on vagaries of consumption, which are indefinite and cannot be controlled by the Commission or the Board**.** In two years viz. 2004-05 and 2005-06; there has been a 6 paise/unit** increase in tariff for the industrial consumers whereas there has been a 15 paise/unit** increase in tariff for the domestic consumers. This being so it cannot be said that there has been an increase in the cross subsidies.

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106. It is significant to note that in the year 2004-05, tariff for agricultural consumption was fixed at Rs. 2/- per unit. It is equally important to note that earlier electricity was being supplied to agriculturists free of cost. Therefore by applying the aforesaid ** method, it can be safely Stated that cross subsidy has been lowered during the year 2004-05 and was not increased during the year 2005-06. It may not be proper to consider the question whether cross subsidy has increased or decreased during the year 2005-06 by making a comparison with the tariff for the year 2004-05 as the tariff for the year, 2004-05 was reduced on the basis of an assumption that the Board will generate a surplus of Rs. 438.29 crores. Subsequently, after the truing up exercise, it was revealed that the Board has actually suffered a revenue gap of Rs. 305.24 crores on account of reduction in tariff. However, the Board had a surplus of Rs. 36.66 crores for the financial year 2003-04. Therefore, the revenue gap for the year 2004-05 was to the tune of Rs. 268.58 crores. This

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revenue gap had to be recovered during the year 2005-06 and for that and other factors, the Commission in its wisdom increased the tariff of all categories of consumers by 10%. Therefore, cross subsidy for the year 2005-06 was not reduced as compared to the year 2004-05.

107. The cross subsidies have to be brought down by degrees without giving tariff shock to the consumers. Though it is desirable that cross subsidies are reduced through every tariff order but in a given situation, it may not be possible. As long as cross subsidy is not increased and there is a roadmap for its gradual reduction in consonance with Section 61(g) of the Act of 2003 and the National Tariff Policy, the determination of tariff by the Commission on account of existence of cross subsidy in the tariff can not be flawed.

108. The learned counsel for the Industrial Consumers canvassed that the Commission is required to safeguard the interests of the consumers by fixing a reasonable tariff, which should reflect the cost of supply of electricity. There cannot be any quarrel with the proposition that the ultimate aim is to go

by the concept of cost plus basis of supply of electricity to various categories and classes of consumers, but this cannot be achieved immediately in one go. This can be accomplished stage by stage over a period of time by reducing the cross subsidies etc. In case, the cost of supply of electricity is known the inefficiencies of the generator and the licensee cannot be hidden**.** This will tend to bring transparency and efficiency in the working of the utilities. It will also be conducive to the recovery of the cost of electricity by utility in a reasonable manner, giving boost to cost plus regime. We are conscious of the fact that at present, data on cost of supply has not been made available to the Commission. The data must be supplied by the utilities to the Commission. The cost of supply at different voltages is different. Therefore, data in this regard must be acquired with reference to cost of supply to the different class of consumers by calling upon the Board to furnish the same.

109. According to Section 61(g) of the Act of 2003, the Commission is required to specify the period within which

cross subsidy would be reduced and eliminated so that the tariff progressively reflects the cost of supply of electricity. Under Section 28(2) of the Act of 1998, the Commission while prescribing the terms and conditions of tariff was required to safeguard the interests of the consumers and at the same time, it was to ensure that the consumers paid for the use of the electricity in a manner based on average cost of supply. The word "Average" preceding the words "cost of supply" is absent in Section 61(g) of the Act of 2003. The omission of the word "Average" is significant. It indicates that the cost of supply means the actual cost of supply, but it is not the intent of the legislation that the Commission should determine the tariff based on cost of supply from the date of the enforcement of the Act of 2003. Section 61(g) of the Act of 2003 envisages a gradual transition from the tariff loaded with cross subsidies to a tariff reflective of cost of supply to various class and categories of consumers[**]. Till the Commission progressively reaches that stage, in the interregnum, the roadmap for achieving the objective must be notified by the Commission

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within six months from January 6, 2006,** when the tariff Policy was notified by the Government of India,** i.e. by July 6, 2006. In consonance with the tariff policy, by the end of the year 2010-11, tariffs are required to be fixed within ± 20% of the average cost of supply (pooled cost of supply of energy received from different sources). But the policy has reached only up to average cost of supply. As per the Act, tariff must be gradually fine tuned to the cost of supply of electricity and the Commission should be able to reach the target within a reasonable period of time to be specified by it. Therefore, for the present, the approach adopted by the Commission in determining the average cost of supply cannot be faulted. We, however, hasten to add that we disapprove the view of the Commission that the words "Cost of Supply" means "Average Cost of Supply". The Commission shall gradually move from the principle of average cost of supply towards cost of supply.

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110. Keeping in view the provisions of Section 61 (g), which requires tariff to ultimately reflect the cost of supply of electricity and the National Tariff Policy, which requires tariff to be within ± 20% of the average cost of supply, it seems to us that the Commission must determine the cost of supply, as that is the goal set by the Act. It should also determine the average cost of supply**.** Once the figures are known, they must be juxtaposed, with the actual tariff fixed by the commission. This will transparently show the extent of cross subsidy added to the tariff, which will be the difference between the tariff per unit and the actual cost of supply.

111. In a given case, where an appropriate Commission comes to the conclusion that time has come when tariff is to be fixed without providing for cross subsidies between various consumer categories, it can fix the tariff accordingly as there is nothing in the Act which compels a regulatory Commission to formulate tariff providing for cross subsidies between the consumer categories for all times to come.

112. The cross subsidized categories or for that matter any category of consumers cannot be allowed to waste energy or consume it extravagantly. The Commission must fix reasonable level of consumption for categories up to which they would be required to be cross-subsidized, but in case the consumption rises beyond the prescribed limit, a higher tariff which has no element of cross subsidy in it, needs to be fixed. By this method the genuine needs of the consumers which are being cross-subsidized would be met and at the same time they will be prevented from indulging in over consumption of electricity. This will lead to saving of energy and ground water in the case of agricultural consumers.

113. The National Electricity Policy and the National Tariff Policy talk of minimum level of support to make the electricity affordable for consumers of very poor category. According to these policies consumers below poverty line, who consume less than a specified level, say 30 units per month, can receive a special support through cross subsidy. Tariffs for such designated group of consumers will be at least 50% of

the average cost of supply. That means beyond 30 units per month, such consumers will be liable to pay regular tariff.

114. For all consumers who are being cross-subsidized by the commission, a limit on consumption must be specified for which special support through cross subsidy may be given, but once the consumer exceeds that limit he should be charged at the normal tariff. In this regard, for the year 2007-08, parameters shall be fixed by the Commission. To effectuate the order, we consider it necessary to press into service Section 55 of the Act of 2003. As per Section 55 of the Electricity Act, 2003, a licensee is required to supply electricity through installation of correct meters in accordance with the Regulations made by the concerned authorities. Therefore, metered supply of power shall be given to every consumer of electricity including those who are subsidized or cross subsidized. In order to give effect to this direction the work should commence within three months and completed by the end of March, 2007 by the Board/Discom.

115. Under Section 65, State Government can grant subsidy to any consumer or class of consumers in the tariff determined by the State electricity regulatory Commission under Section 62. The State government is required to pay subsidy in advance and in such manner as may be specified by the regulatory commission. If the payment is not made in advance and in such manner as may be directed by the State commission, the tariff fixed by the State Commission shall be applicable. As per para 8.3 of the National Tariff Policy, payment of direct subsidy is a better way to support the economically weaker sections of consumers than the mechanism of cross subsidizing the tariff across the Board. As a substitute of cross subsidy, the State government has the option of raising resources through mechanism of electricity duty and giving direct subsidies to only needy consumers. It is the option of the State government to** subsidise or not to subsidise. It is also the option of the State government, in case they decide to give subsidy, *to determine*** the extent to

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which the subsidy shall be given. In case the State Government decides to give subsidy as a substitute for cross subsidy, it will be a better way to support the poorer sections of the society, but as already pointed out, the option lies entirely in the hands of the state government.

116. Keeping in view of the provisions of the Act, the Commission was bound to require the Government to pay the outstanding subsidy including Rural Electrification subsidy. The manner of payment was also to be specified under section 65 of the Act by the Commission and the State government would be bound by such specification. Section 29(2) (d) and (e) and Sub-section (5) of Section 29 of the 1998 Act is also to the same effect. It can not be left to the discretion of the State how the subsidy is to be paid to the Board. The State appears to be adjusting subsidy against the interest allegedly due from the Board on account of Government loans which is not permissible, as the Act provides for actual payment as a statutory obligation. Factually, subsidy has not been paid in cash and has merely been adjusted not against the principal

but against interest. In any case, if subsidy would have been adjusted against the principal amount, the loans would have been substantially reduced and consequently, the interest payable by the Board would have come down drastically.

117. *In view of the aforesaid discussions, we direct that* **the Commission shall determine the following:

i) What is the total amount of subsidy payable by the State to the Board including cash and RE subsidy without any adjustment of earlier loans or interest?

ii) What should be the mode of payment of subsidy?

iii) To what extent the subsidy could be applied or adjusted towards the principal (loans)?.

iv) What is the amount of interest payable by the Board to the State?

v) What is the quantum of amount which the state has failed to disburse towards RE subsidy?

118. It will be open to the Commission to call for the record of the Board and the State including their statement of Accounts to determine the issues. The Board and the State Government shall be duty bound to assist the Commission in

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coming to the right conclusion. In case the Commission is of the opinion that it would need the assistance of an expert or experts, it shall nominate the expert(s) in consultation with the Board, the State and representative of the consumers. Before relying upon the report of the expert (s), the same shall be furnished to the aforesaid parties and it will be open to them to respond. After considering all aspects of the matter, the Commission shall determine the aforesaid questions. In case, if the Govt. fails to respond, the Commission may draw adverse inference and arrive at its own conclusion on the materials made available.

119. We further direct that:

i) The Commission shall determine the cost of supply of electricity to different class and categories of consumers;

ii) The Commission shall also determine the average cost of supply;

iii) Once the figures of cost of supply and average cost of supply are known, the Commission shall determine the extent of cross subsidies added to tariff in respect of each class/category of consumers; and

iv) The consumers who are being cross subsidized by the Commission, a limit of consumption shall be specified for which special support through cross subsidy may be provided. Once the consumer exceeds the limit, he shall be charged at normal tariff. These directions shall be applicable from the next tariff year onwards.

E. *Disputes with regard to Revenue Requirement for Tariff Year 2005-06.:*

120. Some dispute was raised by the Industrial consumers with regard to the annual revenue requirement of the Board for the tariff year 2005-06. The plea was taken on the ground that there was discrepancy between the revenue requirement mentioned in Table no. 7.44 of the tariff order for the year 2005-06 and revenue requirement mentioned in table

no. 9.6 thereof. We have perused table nos. 7.44 and 9.6. Table no. 7.44 shows total revenue requirement of the Board as Rs. 7863.54 crores, while in table no. 9.6 total revenue requirement as Rs. 8135.29 crores has been set out. The figure of Rs. 7863.54 crores in table no. 7.44 does not include revenue gap of Rs. 268.58 crores for the year 2004-05. Therefore, the total revenue requirement of the Board is Rs. 7863.54 crores plus Rs. 268.58 crores, aggregating to Rs. 8132.12 crores. Thus, we find there is no discrepancy between the figures reflected in table nos. 7.44 and 9.6.

F. Diversion of Funds

121. It was submitted by the learned counsel for the industrial consumers that interest bearing loans were procured for capital investment but they were used to meet revenue deficit. It was pointed out that except Rs. 100 crores, the Commission has allowed pass through of the entire burden of interest on diverted loans to the consumers for the year 2004-05. The learned counsel contended that interest on these loans ought not to have been passed on to the

consumers at all for the year 2004-05. On the other hand, it was submitted by the learned counsel for the PSEB that the Commission has wrongly disallowed interest of Rs. 100 crores each for the tariff year 2004-05 and 2005-06 while determining the annual revenue requirement of the Board for the aforesaid period. The learned counsel for the Board contended that when the Board was saddled with the interest liability, the Commission was not justified in disallowing interest cost of Rs. 100 crores for each of the aforesaid years. He pointed out that the Board is aggrieved by the orders of the Commission for the tariff year 2004-05 & 2005-06, inter *alia*, on the ground of disallowance of the interest cost of Rs. 100 crores which the Board has actually incurred.

122. There is no dispute that the loans procured for capital investments were diverted by the Board to meet its revenue expenditure. This manoeuvre of the Board is not in keeping with the sound accounting principles. At the same time it is inconsistent with the provisions of the Act of 2003. The learned counsel for the Industrial Consumers submitted

that the situation has been aggravated further by saddling the consumers with the interest liability which accrued on account of the loans secured for capital investment. The Commission in its various tariff orders highlighted the malady and impressed on the State government to remedy the situation but nothing has been done by the State. Not getting any favourable and constructive response from the Government, the Commission disallowed interest of Rs. 100 crores each for the years 2003-04; 2004-05 and 2005-06 from the allowable interest. At this stage, it will be useful to set out the observations of the Commission in regard to the question of diversion of funds, from the various tariff orders:

Tariff Order 2002-03

> *"The objectors have also highlighted that booking of expenditure on account of interest charges on loans raised to meet revenue deficit in the past year, to revenue account is not permissible. The Board, in its various submissions has accepted the fact of diversion of funds from capital account to meet revenue deficit. The Government has also agreed with this Statement of the Board. It is an undisputed and accepted accounting principle that such diversion of funds from capital to meet revenue deficit is not permissible. And even if this practice has been indulged in, the burden of interest cannot be passed on to the consumers. However, to work out the exact diversion of funds in earlier years, the Commission had to put frame*

on a reliable basis and then get information from the Board to work out the exact amount. Due to non availability of such data readily from the Board, the Commission is left with no alternative but to allow all the interest burden to be passed on to consumer for this year. The Commission would however like to examine the matter in detail by next year filing of ARR after obtaining required information from the Board.

Tariff Order 2003-04

On a careful examination of the above objections, the Commission has found considerable force in them.

The capitalized cost of the RSD Project was determined by the State Government at Rs. 5414.44 crores in the year 2000. Further, this cost was apportioned between the PSEB and the irrigation Department in the ratio of 79.1 and 20.9. The share of the PSEB in the capitalized cost comes to Rs. 4282.82 crores. For a power project with an installed capacity of 600 MW (out of which share of PSEB is restricted to about 75%), this cost is clearly too high, even though this is the actual cost incurred. The cost of the project got escalated due to many reasons, including the inordinate delay of several years in its completion. Further, even when this project has been completed, its full power potential cannot be realized till another large project Shahpur Kandi Project, below the RSDP is executed. Similarly, the apportionment ratio looks heavily loaded against the PSEB. Because of overvaluation of this asset, the consumers are paying unusually high costs in the form of interest, depreciation and ROR. A sizeable portion of these costs can be regarded as unjustified. At these costs, the per unit of energy supplied by RSDP is proving to be two to three times as costly as the costliest power being presently purchased by the PSEB.

The PSEB is carrying loans amounting to Rs. 3900 crores from the financial institutions. The annual interest on

these loans amounts to Rs. 497.90 crores. Many of the older loans carry as high an interest as 17.5% per year. In today's set up, loans are much cheaper and most well managed business concerns are exchanging their old, expensive debts for cheaper ones. PSEB has informed that Power Finance Corporation has restructured its loan of Rs. 112 cores, reducing the rate of interest from 17.5% to 12% per annum. With its poor financial status and in the absence of full backing of the State Government, the PSEB is finding it very difficult to make much headway. All the same, the consumers' grievance is well founded.

The audited Balance of the Board for the year 2001-02 (which is the latest audited balance sheet available) shows an outstanding subsidy of Rs. 5470 crores as recoverable from the State Government Objectors have Stated that this is the main reason for the current financial problems of the Board. According to them, either the Government should pay to the Board the whole of this amount or at least it should pay interest on this amount to the Board especially when the Government is recovering Rs. 553 crores per year from the Board as interest on the Government loans advanced to the Board. According to the Board, the accumulated subsidies relate to R.E. subsidy and cash subsidies. The Government has, however, vide its letter No. 2/381/9611/PE(s) 24038 dated 11.11.1997 made it clear that RE subsidy due to the Board is to be limited to the amount of interest due from the Board to the Government on the loans taken from the Government The interest payable to the State Government for period prior to 1998-99 already stands adjusted against RE subsidy due in respective years. As the interest payable to the State Government by the Board for the year 1998-99 to 2001-02 totals upto Rs. 2228.10 crores, the amount of subsidy payable by the Government to the Board for these years has also to be restricted to this amount only as against Rs. 5470.04 crores exhibited by the Board. Thus the subsidy due from the Government has been over Stated by the Board to the extent of Rs.

3241.94 crores as on March 31, 2002. This point has also been raised in the Audit Report on the balance sheet of the Board. There is, of course, an additional claim of the Board against the Government on cash subsidy to be allowed to the Board due to grant of free power supply to agricultural pump set users with effect from February 1997. This claim of the Board rests on the commitment made by the then Chief Minister. Punjab on the floor of the Vidhan Sabha to the effect that the Board shall be compensated in cash for the losses incurred by it due to non-realization of revenue which was being collected from the agricultural pump set users till then. Though the assurance of the Chief Minister has not been followed up with a formal Government order sanctioning the grant, the Board has continuously been raising this claim against the Government. However, no firm commitment has been made by the Government in this regard. On April 4, 2003, the Commission wrote to the State Government specifically asking for its view with regard to payment of unpaid subsidies, especially the cash subsidies. The reply from the State Government stated that:-

(a) It is the view of the State Government that the Commission is not legally bound to resolve pending issues between the PSEB and the State Government especially those pertaining to the period before the Commission became functional.

(b) The liability of the State Government to pay R.E. subsidy was contained within the limit of the annual interest payable by the PSEB on loans extended by the Government to the PSEB. Even this liability stood terminated by a decision of the Government during 1990-91. (However, during discussions of the representatives of Punjab Government with the Commission on 19th May, 2003, it was conceded by the Officers of the Punjab Government that Government may accept liability for RE subsidy upto the extent of annual interest payable by the PSEB on

loans advanced by the Government. Actually, Government of Punjab has been allowing this).

(c) *The State Government would address this issue further while undertaking the financial restructuring of the PSEB.*

In view of the explicit stand of the State Government, it is not appropriate for the Commission to say anything more on the subject except to express the hope that the issue will be resolved at an early date, finally and to the satisfaction of all concerned. If the subsidy due from the Government is reduced by the overstated amount of Rs. 3241.94 crores, the balance sheet will acquire a very different appearance with regard to the accumulated losses. These losses will go up from Rs. 272.39 crores as on March 31, 2002 to Rs. 3514.33 crores. To overcome this cash crunch, the Board has utilized the funds generated from items like depreciation, consumer contributions and deposits, provident fund and working capital loans. The Board also adopted the device of defaulting on some current liabilities like power purchases, coal purchases due to suppliers. Such measures may be permissible only to tide over a passing crisis because they do not solve the problem but only postpone it. Over a medium or longer period, they can prove to be ruinous and thus they can never pass the test of prudent expenditure. Resources raised through depreciation amounts, consumer deposits and consumer contribution are not meant to be used to meet revenue expenses but are solely to be deployed for capital formation (i.e. creating new assets or replacing existing assets) or for repayment (or redeeming) of capital liabilities. They are investible funds available at zero cost. If they are utilized to make up a revenue gap, corresponding amount will have to be borrowed from the market for investment, which means that instead of utilizing zero cost resources, the Board is opting for costly funds. For all purposes, it can be stated that these costly funds

have been called up to meet the situation created by the need to fill up a revenue gap. In other words, it can be said that loans raised for capital expenditure have been diverted to meet the revenue expenditure at least till the time the revenue gap is eliminated through higher profits, efficiency gains or Govt. subventions. Clearly, the interest cost of such loans is not a fit cost to be passed on to the consumers.

Looked at from another angle, such diversions will also result in a mismatch between net assets and capital liabilities since there will be some loans against which no assets could be shown to have been created. Net assets of the Board excluding subsidy receivables, as per the balance sheet for 2001-02, are Rs.11204.20 crores. An equity capital of Rs. 2806.11 crores was also available for creation of these assets. Thus, quantum of loan which could be reasonably raised by the Board against net assets was Rs. 8398.09 crores. Against this, the loans actually availed by the Board (including projected working capital loans of Rs.827.71 crores, GPF and pension funds) amount to RS.10436.57 crores, indicating an excess of Rs. 2038.48 crores. Also, there were "other current liabilities" of RS.1880 crores, bulk of which

consisted of unpaid fuel/power purchase related dues and pending supplies/works related bills.

The above analysis pertains to the balance sheet for the year 2001-02. The Commission has good reasons to believe that the situation could not have changed much during the year 2002-03, especially with regard to accumulated losses since in the revised ARR for 2002-03, the Board has projected a revenue gap of Rs. 1401 crores, out of which the Commission has accepted a gap of Rs. 324.94 crores only.

The Commission is conscious of the fact that the situation which prevails in the Board is due to historical factors and events which took place before this Commission came into existence. Otherwise also, these matters are to be settled mutually by the Government and the Board. In fact, in response to the suggestions of the Commission, the Government has conveyed its willingness to address these issues pertaining to re-apportionment of RSDP, cleaning up the balance sheet and restructuring the finances of the Board, possibly through a medium term Financial Restructural Plan. However, the Commission feels that in performance of its duties laid down under the Electricity Regulatory Commissions Act, 1998, the Commission is required to probe such matters. Under Section 29 of this Act, the Commission is the sole authority for fixing the tariffs and it is to fix the tariffs after following the guidelines given in Section 29(2). Section 29(2) is reproduced below:-

"The State Commission shall determine by Regulations the terms and conditions for the fixation of tariff, and in doing so, shall be guided by the following, namely:-

> *(a) the principles and their applications provided in sections 46. 57 and 57A of the Electricity (Supply) Act, 1948 (54 of 1948) and the Sixth Schedule thereto.*

(b) the case of the Board or its successor entities, the principles under section 59 of the Electricity (Supply) Act, 1948 (54 of 1948);

(c) that the tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency;

(d) the factors which would encourage efficiency, economical use of the resources, good performance, optimum investments, and other matters which the State Commission considers appropriate for the purpose of this Act;

(e) the interests of consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based on the average cost of supply of energy;

(f) the electricity generation, transmission, distribution and supply are conducted on commercial principles;

(g) national power plans formulated by the Central Government".

A harmonious interpretation of Section 59 of the Electricity (Supply) Act,1948 and other Clauses of Section 29(2) of the Electricity Regulatory Commissions Act, 1998 clearly implies that the Commission is bound to allow only such expenses/ costs in the ARR, which are properly chargeable to revenue and would generally be incurred in an organisation being run on commercial lines and operating at adequate and improving level of efficiency. The Commission is also required to take care of interests of consumers. Judged by these standards, the objections raised by the consumers cannot be brushed aside lightly. As an illustration, any expenses

incurred to service the debt raised in the past to meet the revenue deficit cannot be admitted in the current ARR. It was on such considerations that in its last Tariff Order, the Commission had highlighted the issues pertaining to valuation of RSD, cleaning up the balance sheet of PSEB and the need for a Financial Restructuring Plan. The Commission, however, recognizes the practical difficulties which come in the way of an instant solution of the problems which have actually emerged over a number of years. By the same logic, it might cripple the Board financially if the Commission were to insist on a very strict-enforcement of the legal provisions, embark on a complicated exercise to determine- all the costs which ought not to be passed on in the current ARR and then actually pass an order disallowing all such costs. The Commission would like to approach the matter cautiously and allow the PSEB and the Government some more time to sort out these issues.

In view of the above, the Commission has decided to disallow Rs. 100.00 crores out of a much larger amount claimed as interest on loans which were clearly obtained to bridge the revenue deficit in earlier years. At present, it is not possible for the Commission to precisely identify the total quantum of unjustified interest amount.

For future ARR filings, the Board should clearly spell out the exact manner in which the accumulated liabilities/losses were funded, what was the extent and period for which funds meant for capital purposes were used to bridge the revenue deficits and what was the interest liability on such funds.

Tariff Order 2004-2005

Re-diversion of Funds

At the time of issuing Tariff Order for the year 2003-04, the Commission had asked PSEB to explain its position about diversion of capital funds towards revenue expenditure. PSEB had not given any satisfactory reply to this query at that time.

During the processing of ARR for the year 2004-05, the Board has further made certain submissions on diversion of funds vide letter of Member (Finance) dated October 20, 2004. It is stated therein that diversion of funds is mainly due to non-revision of tariff in earlier years as well as free AP supply. These ultimately has affected revenue receipts and the cost of operations going up. It is further stated that the historical mis-match cannot be balanced without total financial re-structuring of the Board's Balance Sheet. However, the accumulated losses and gap between capital funds and its utilization is being looked into in the Financial Restructuring Plan being finalized by the Government of Punjab. Further during the year 2003-04, there was no diversion of capital funds. It is also Stated that the Board has made earnest efforts to reduce the cost of loans and other finance charges which have resulted in the net interest and finance charges during the year 2003-04 coming down to Rs. 631.94 crores only from Rs.709.14 crores during the previous years. Disallowance of Rs.100 crores on ad-hoc basis by the Commission on account of RSDP cost, accumulated losses etc. is also mentioned.

Finally it is requested to allow total interest and finance charges as claimed in the ARR while finalizing the tariff for the year 2004-05.

The Commission notes that the reply of the Board is rather general on the main issue of diversion of funds. Even in this, the Board accepts the fact of "historical mismatch" which can be remedied only through re-structuring of Board's Balance Sheet. The Commission also notes that the Board never commented about disallowance of Rs.100 crores in interest charges after issue of Tariff Order for the year 2003-04 in May 2003 and has first commented on it only now in October 2004.

In order to reach its own conclusions on the matter, the Commission has undertaken detailed exercise for assessment of extent of diversion of funds. In this connection it is noted that, the PSEB is an autonomous body created by the Government of Punjab under the statutory provisions of the Electricity (Supply) Act, 1948 for the specific purpose of generation, transmission and distribution of electricity in the State. For creation of the infrastructure, PSEB received funds from the State Government in the form of equity, loans, subsidy and grants for capital assets. Besides raising loans from the banks and various financial institutions, the Board utilized from time to time the funds available in the form of consumer contributions. The accumulations in GPF of the employees have also been utilized by the Board for this purpose with the prior approval of the State Government. The extent and effect of diversion of funds meant for capital expenditure ending the years 2002-03 and 2003-04 as assessed by the Commission is exhibited in Table below:

Table - Diversion of Capital Funds

S.No	Item	Amount (Rs. In crores)					
		2002-03			2003-04		
1.	Net Fixed Block			8745.87			8492.78
2.	Add works in progress	2315.30			2382.49		
3.	Less WIP of RSDP allocable to Irrigation Branch	1469.27			1444.21		
4.	Balance WIP (2-3)	846.03		846.03	938.28		938.28
5.	Total (1+4)			9591.90			9431.06
6.	Consumer Contribution	1229.73				1369.95	
7.	Grant & subsidy toward cost of capital assets	434.35				414.53	
8.	Total (6+7)	1664.08		1664.08		1784.48	1784.48
9.	Balance capital base (5-8)			7927.82			7646.58
10.	**Requirement of loans+ Equity**			**7927.82**			**7646.58**
11.	Amount of GoP loans	4537.53			4537.53		
12.	Less RSDP loans to be apportioned to irrigation Branch@20.9%	580.28			580.28		
13.	Balance GoP Loans (11-12)	3957.25	3957.25		3957.25	3957.25	
14.	Add other loans		4220.11			3836.60	
15.	Equity		2806.11			2806.11	
16.	Accumulations in GPF	1269.19			1379.99		
17.	Less amount invested	112.78			151.47		
18.	GPF utilized by Board (16-17)	1156.41	1156.41		1228.52	1228.52	
19.	**Actual loans +Equity** (13+14+15+18)		12139.88	**12139.88**		11828.48	**11828.48**
20.	Amount Diverted	**4212.06**			4181.90		

As per provisional balance sheet for the year 2003-04, the value of gross fixed assets of PSEB as on 31.3.2004 is Rs. 13402.08 crores. After deduction of accumulated depreciation of Rs. 4909.30 crores, the value of net

fixed assets comes to Rs. 8492.72 crores. Besides net assets worth Rs. 8492.78 crores, the value of works-in-progress at the close of year is Rs. 2382.49 crores inclusive of works-in-progress amounting to Rs. 1444.21 crores pertaining to RSDP allocable to irrigation Branch. Thus, after adding net works-in-progress amount to Rs. 938.28 crores allocable to Board, the total assets work out to Rs. 9431.06 crores. Of these, the assets created with the funds available from consumers' contribution, grants and subsidy towards capital assets work out to Rs. 1784.48 crores. This leaves the balance assets of Rs. 7646.58 crores. Thus, the requirement of loans and equity to finance these assets should have been limited to Rs. 7646.58 crores only.

Against the above requirement, PSEB actually availed of loans and equity amounting to Rs. 11828.48 crores upto the period ending March 31, 2004. Clearly, the Board has availed loans of Rs. 4181.90 crores (11828.48-7646.58) in excess of its requirement for capital assets. This is obviously meant for diversion towards revenue expenditure. The PSEB has thus utilized these excess loans for purposes other than creation of assets. From the above table, it is also noted that the diversion of capital funds upto the end of financial year 2003 was Rs. 4212.06 crores. The diversion fund to the large scale continued during the year 2003-04 as well as the corresponding figure at the end of 2003-04 was Rs. 4181.90 crores.

The fact of substantial diversion of funds is also proved by the perusal of Balance Sheets of the Board. As will be seen therefrom, at the end of the year 2002-03, the accumulated losses of the Board as reflected in the Balance Sheet were Rs.708.37 crores only. However, to this is required to be added unpaid R.E. subsidy to the Board to the extent of Rs.3241.94 crores, making total of RS.3950.31 crores. This is on

account of the fact that though the Board has been claiming R.E. subsidy from the Government even beyond the interest chargeable on the Government loans to the Board, the Government has clearly refused to bear any burden on account of R.E. subsidy beyond the amount of interest due on Government loans. In view of the clear and consistent policy of the Government in this regard and the clear refusal of the Government, the claim of the Board towards RE. subsidy needs to be restricted only to the amount of interest on Government loans. The amount of unpaid subsidy of Rs.3241.94 crores represents subsidy claimed by the Board beyond the amount of interest on Government loans and as such is not payable by the Government. This, therefore, needs to be added to the accumulated losses taking the total accumulated losses to RS.3950.31 crores. These accumulated losses would clearly have been funded by the Board by taking loans from outside sources. Obviously the loans taken for other purposes, therefore, would have been diverted to fund the accumulated losses. Thus, even perusal of the Board's Balance Sheet substantiates diversion of funds to the order of Rs.4000 crores at the end of year 2002-03.

The position continued during the next year 2003-04 as well. The accumulated losses are represented as Rs.542.58 crores in the provisional Balance Sheet for this year. There was no change in the figure of unpaid subsidy during the year 2003-04 as there was no question of R.E. subsidy after coming into existence of the Commission and its passing of Tariff Order. Therefore, only unpaid subsidy of Rs.3241.94 crores as above is to be added to work out the total accumulated losses. Adding accumulated losses to unpaid subsidy, the total accumulated losses at the end of 2003-04 work out to Rs.3784.52 crores which is roughly at the same level as the year before. This

proves that the substantial diversion of funds continued during the year 2003-04 as well.

The diversion of Capital fund is not an accepted practice. More importantly, it has carrying cost by way of interest on the borrowed funds so diverted. Appropriately, these carrying costs need to be borne either by the Board or the Government. The Commission feels that the consumers should justifiably not be burdened with these costs. The Commission has given time to the Government and the Board in its past two Tariff Orders to undertake the restructuring and to clear these costs from the Balance Sheet. However, adequate progress in this regard has not taken place as no concrete results are reflected by way of clearing of these costs in the Balance Sheet. The Commission is alert to the fact that the costs are real as far as Board is concerned and are direct results of events prior to setting up of the Commission. As such, taking a considerate view, the Commission decides to continue its past practice of disallowing Rs.100 crores towards this liability and allows only balance to be charged from the consumers through the tariff.

The Commission, therefore, disallows interest of Rs. 100 crores from the amount of interest allowable for the year 2004-05.

Interest on fresh borrowings of Rs. 1090.00 crores has been calculated at Rs. Rs.45.44 crores. Consumers contribution of Rs.139.68 crores, say Rs.140.00 crores (estimated at previous year's level as per provisional accounts for the year 2003-04) is likely to be received during the current year. As such, the actual borrowings for investment will be to the tune of Rs.869.00 crores after adjustment of this amount. Therefore, interest on fresh borrowing has also been proportionately reduced by RS.6.30 crores being

interest on Rs.140.00 crores. Thus, the interest amount for the year 2004-05 will work out to RS.875.62 crores as above.

The Commission, therefore, approves interest and finance charges of Rs. 944.31 cores (gross) and Rs. 875.62 crores (net) after capitalization of Rs. 68.69 crores for the year 2004-05.

Tariff Order 2005-06

As analysed by the Commission in its earlier Tariff Order (and not disputed by the Government of Punjab or the Board), there is a huge mismatch (amounting to more than Rs.4000 crores) between the assets and liabilities of the Board. Alternately, the Board is carrying accumulated losses of more than Rs.4000 crores. Either way, the Board is compelled to constantly carry a corresponding burden of unproductive debt. Going strictly by commercial principles, the cost of this debt cannot be treated as a pass through, legitimate revenue expenditure. The Government of Punjab itself had Stated in its comments on the ARR for the year 2002-03 that interest costs of loans which do not result in benefits to the consumers cannot be passed on to them.

There is only partial justification in the arguments that the consumers must cheerfully bear this burden which is historical and is entirely due to the reason that these losses occurred because tariffs were not raised sufficiently in the past and thus the consumers alone benefited from this cause. There are at least two other equally important reasons for these recurring losses viz. the inability of the Board to achieve reasonable levels of operating efficiencies in the past and the failure of the Government (in the period prior to the commencement of the regulatory regime) to either provide subventions to the Board to liquidate annual losses or to resolve the issue of large unpaid RE subsidies,

as was Stated, year after year, in the Balance Sheet of the Board.

If the Commission is to go by the letter and spirit of the Electricity Act, 2003, it must decide that it is the obligation of all the three major stakeholders - the Government of Punjab, the Board and the consumers - to discharge such obligations. Even though it is a generally accepted principle of corporate business that accumulated losses have to be taken care of by the owners, the Commission feels that all the three must make broadly similar sacrifices in such situations. Furthermore, the Government of Punjab had accepted its responsibility to clean up the Balance Sheet of the Board and the State Government has been constantly assuring the Commission for the last three years but unfortunately, the required process has not been completed till date.

It may be stated here that the consumers are currently being made to discharge another large obligation from which they deserve relief. In the last few years, the interest rates have fallen all around. Like all other commercial organizations, and also in response to directions of the Commission, the Board has been successfully exchanging its old debts for cheaper and easier loans as a result of which the average interest rate being paid by the Board on the institutional loans has already come down to 7.05 - 11.5 percent from the earlier rate of 11.5 - 18 percent. However, the Government of Punjab has shown no such accommodation to the Board in respect of its large portfolio of loans aggregating to Rs.4537.53 crores. Legitimately, the consumers could expect a relief of around Rs.100 crores on this account.

In the above stated circumstances, the Commission feels that the decision to disallow interest cost of RS.100 crores is just, reasonable and fair and is in no way harsh. The Commission further feels that within the provisions of the law the Government of Punjab cannot be directly

burdened with any such charges.

On the basis of above decisions, the Commission approves interest and finance charges as given in Table below:

Interest Charges approved for the year 2005-06

(Rs. In crores)

S.No.	Particulars	Loans o/s as on 31.3.05	Receipt of loans	Repayment of loans	Loans o/s as on 31.3.06	Amount of interest
1	**2**	**3**	**4**	**5**	**6**	**7**
1.	**As per ARR** (other than WCL & Government loans)	4124.66	1876.00	840.19	5160.47	56537
2.	**Approved by Commission** (other than WCL & Government loans)	3825.66	*1060.00	840.19	4045.47	479.27
3.	Working capital loan	600.00	518.74	600.00	518.74	37.71
4.	Government loans	4537.53	-	-	4537.53	480.73
5.	Total (2+3+4)	8963.19	1578.74	1440.19	9101.74	997.71
6.	Add finance charges	-	-	-	-	15.90
7.	Grand Total					1013.61
8.	Less capitalization	-	-	-	-	102.20
9.	**Net interest & finance charges**	-	-	-		**911.41**

Receipt of loans of Rs.1060.00 crores = Approved investment of Rs. 1200 crores -consumer contribution of RS.140 crores

Thus, net interest and finance charges work out to Rs.911.41 crores for the year 2005-06. Out of this amount, Rs.100 crores is to be disallowed on account of diversion of capital fund for revenue purposes for the year 2005-06 as was decided by the Commission in para 7.15.8 of the Tariff Order for the year 2004-05. The net interest and finance charges, thus, work out to Rs.811.41 crores for the year 2005-06.

The Commission, therefore, approves net interest and finance charges of Rs. 811.41 crores net of capitalization of Rs.102.20 crores for the year 2005-

06".

123. It seems to us that the Commission has correctly analyzed the situation that the consumers are being burdened with interest on account of diversion of funds. The Commission was also entirely right in its view that borrowings made for the purpose of capital expenditure have been wrongly diverted for the purpose of meeting the revenue deficit. But in practical terms, except for relieving the consumers of Rs. 100 crores interest for each of the aforesaid years, the rest of the interest was saddled on them by the Commission. While disallowing the aforesaid amount, the Commission had also expressed the view that Section 59 of Electricity (Supply) Act, 1948, Section 29(2) of the Electricity Regulatory Commissions Act, 1998 imply that the Commission is bound to allow only such expenses/ costs in the ARR, which are properly chargeable to revenue and would generally be incurred in an organization being run on commercial lines and operating at adequate and improving levels of efficiency, that the Commission is required to take care of the interests of the consumers, that in view of the statutory provisions, the

objections raised by the consumers cannot be brushed aside lightly, and that any expenses incurred to service the debt raised in the past to meet the revenue deficit cannot be admitted in the current ARR. Even though, it was the consistent opinion of the Commission that diversion of funds is impermissible, yet it has allowed pass through of the bulk of the interest, ostensibly on the ground that in case the Board is asked to bear the entire interest load, it will have a crippling effect on its financial resources.

124. Basically, the main reasons for the diversion of funds are related to RSD cost allocated to the Board, subsidy including RE subsidy, high rate of interest of Government loans etc. In view of such heavy burden, the Board requires funds for its revenue expenses. The Board appears to have adopted the strategy of diversion of funds because of the necessity created by the aforesaid burden imposed on it.

125. In the tariff order for the year 2003-04, it is pointed out by the Commission that the balance sheet of the Board for the year 2001-02 showed an outstanding subsidy of Rs. 5470

crores as recoverable from the State Government According to the Board this amount related to rural electrification subsidy and cash subsidy. As already noted, rural electrification subsidy due to the Board from the government was unilaterally limited to the amount of interest accrued due from the Board to the government on the loans extended by the government. That means the outstanding subsidy amount was not adjusted against the principal amount due from the Board to the government, and only the interest payable by the Board to the State government was adjusted against the RE subsidy. Even with regard to cash subsidies, which were due from the government to the Board, the State did not like the intervention of the Commission when the Commission took up the matter with the State Government through its communication dated April 4, 2003. The State Government replied that the Commission is not legally bound to resolve pending issues between PSEB and the State Government This stand of the State Government is inconsistent with the provisions of the Act of 1998 since these are not issues concerning the Board and the State alone but they are issues

having an impact on tariff payable by the consumers. These are actually tariff issues which fell within the domain of the Board. The Commission ought not to have felt bound by the view expressed by the State of Punjab in the aforesaid letter and ought not to have allowed heavy financial burden on the Board to continue.

126. It also needs to be pointed out that the Board had exchanged its institutional debts for cheaper ones. As a consequence thereof the average interest rate came down to 7.05% – 11.5%P.A. from the earlier rate of 11.5% - 18% P.A. . In so far as the Government of Punjab is concerned, it did not scale down the rate of interest in respect of the loan of Rs 4537.53 crores standing to the account of the Board. The aforesaid factors and RSD cost seem to have substantially contributed to the financial crunch which the Board has been facing.

127. It has been pointed out by the Commission that the total assets of the Board are to the tune of Rs. 9431.06 crores. Out of these, the assets created with the funds available from

the consumers' contributions, grants and subsidies work out to Rs. 1784.48 crores. Therefore, the value of the balance assets is Rs. 7646.58 crores. It has been rightly observed by the Commission in the tariff order for the year 2004-05 that the requirement of loans and equity to finance these assets should have been limited to Rs. 7646.58 crores only, but the Board took loans amounting to Rs. 11828.48 crores during the period ending with March 31, 2004. Thus, the Board availed loan of Rs. 4181.90 crores in excess of its requirement for capital assets. This, according to the commission, were meant for diversion towards revenue expenditure.

128. It seems that the Commission felt that these mistakes cannot be corrected as the State government is insulated from its directions relating to tariff issues. This perception cannot be countenanced in law as otherwise tariff cannot be determined according to the parameters and factors laid down in Section 61 of the Act of 2003. The Commission is required to determine the tariff by seeking guidance from factors which would encourage economical use of the resources and

optimum investments and at the same time safeguard the interests of the consumers and recover the cost of electricity in a reasonable manner etc. (see Section 61 particularly 61(c), (d) and (g).

129. It appears to us that the breach of financial discipline by the Board violates the provisions of Section 61 of the Act of 2003 and corresponding provisions of Section 29(2) of the Act of 1998. Since the issue of diversion of funds is interlinked with other issues namely RSD cost allocation, subsidy, high rate of interest on Government loans etc., the controversy relating to the extent of interest which can be allowed as a pass through can not be resolved unless the other issues are also decided by the Commission as directed by us. The resolution of these issues are bound to take time and cannot be decided without relevant data. Therefore, relief can only be given to the consumers for the future years.

130. In view of the foregoing, we direct that for the year 2006-07 the issue relating to the extent of interest which can be allowed as a pass through shall be determined and resolved

by the Commission alongwith the determination of the issue relating to RSD cost allocation, subsidy and high rate of interests on Govt. loans. This shall be accomplished during the truing up exercise for the year 2006-07.

G. ***Re. Higher tariff rate for peak load supply:***

131. Learned counsel for some of the industrial consumers submitted that the Board has wrongly allowed peak hour exemption charges to be recovered from the consumers. In the impugned tariff order dated November 30, 2004 for the year, 2004-05 it has been pointed out by the Commission that there is an acute shortage of power in the State of Punjab, especially during peak load hours. The Commission also pointed out that the over drawing** of power under Availability Based Tariff (ABT) regime during the peak hours, costs much higher than the average power purchase cost. The Commission while considering the matter recorded as under:-

** Corrected as per the Order dated 25th July 2006

"The Commission has considered the matter and notes that there is no denying the fact that there is acute shortage of power in the State especially during peak load hours. Overdrawing under ABT during this period costs much higher than the average power purchase cost and goes upto even Rs 6/- per unit. The Commission also notes that recoveries made through PLEC are duly accounted for in the tariff income of the Board. As such, both the additional cost of power purchase during peak hours and the recoveries through PLEC are duly taken care of in the Board's expenditure and receipts. The system therefore, does not require any change in this regard. The existing rate of PLEC is also not considered unreasonably high especially in view of the exorbitant extra costs of power purchase involved. The Commission further notes that in acute shortage situation of power in peak hours, the PLEC has to be based on the extra load reserved by the consumer and not as per actual use. This is because if the Board reserves the load for the consumer, it is committed to supply that power and has to make arrangement accordingly to fulfill this commitment. In view of the commitment of the Board which in any case stands, it is not so material whether the extra power is actually drawn by the consumer or not".

We do not find any error in the reasoning of the Board and we affirm the same. The contention of the Industrial Consumers is rejected.

H. ***Re Employees' Cost++:-***

132. Both, industrial consumers as well as the PSEB have questioned the determination of employees' cost++ by the

Commission. The Commission by its tariff order dated June 14, 2005 allowed cumulative increase of 15.61% for the year 2005-06 in the approved level of employees' cost++ of the Board of Rs. 1274.66 crores for the year 2002-03. The Industrial Consumers are aggrieved of this cumulative increase in the employees' cost++, as reflected from their memo of appeals. It is pointed out by the learned counsel appearing on behalf of the Industrial Consumers that for the year 2002-03, the Commission in its first tariff order had allowed the entire employees' cost++ as claimed by PSEB as pass through with the rider that for the next year the employees' cost++ will remain capped. Consequent to this order, the employees' cost++ remained capped for the year 2003-04. It also remained capped for the year also 2004-05. But contrary to the aforesaid capping of the cost, the Commission has allowed cumulative increase of 15.61% in employees' cost++ for the year 2005-06, which works out to Rs. 1473.63 crores.

133. On the other hand, the Board is aggrieved of the fact that the Commission had pegged the employees' cost++ as a result of which no increase was allowed for the year 2004-05. it is also dissatisfied with the increase effected by the Board for the year 2005-06 on the ground that the increase was inadequate for meeting the employees' cost++. It is mainly for this reason that the Board has filed the instant appeals (Appeal nos. 54 and 55 of 2005).

134. It is not in dispute that the Commission has, on an analysis of the data, came to the conclusion that the employees' cost++ of the PSEB is the highest as compared to the other State electricity Boards. The Commission compared the employees' cost++ of seven Boards including the State of Punjab for the years 2001-02 and 2003-04 by referring to the following tables:

EMPLOYEES' COST++ OF THE BOARD COMPARED TO OTHER STATE ELECTRICITY BOARDS FOR THE YEAR 2001-02

S. No	State Electricity Board	No. of Consumers in million	No. of Employees	Employee per MU of electricity sold	Employee per 1000 consumers	Shate of Estt/ Admn in total cost %	Estt. Expenses in paise/Kwh of sale
1	2	3	4	5	6	7	8
1.	Andhra Pradesh	13.55	61671	2.07	4.55	7.07	25.51
2.	Gujarat	7.10	47782	1.46	6.73	9.79	35.76
3.	Karnataka	10.82	38106	1.95	3.52	12.58	47.14
4.	M.P.	8.14	88572	3.34	10.88	14.00	45.49
5.	Maharashtra	12.98	111724	2.37	8.61	12.03	43.00
6.	**Punjab**	**5.37**	**84171**	**3.65**	**15.67**	**19.26**	**54.94**
7.	Tamil Nadu	14.42	93504	2.57	6.49	15.59	48.29
8.	U.P.	9.38	62740	2.24	6.69	13.11	50.30
9.	Average of all SEBs in India			2.53	7.59	12.70	44.50
10.	All India Average (SEBs/ Deptts)			2.60	7.78	12.69	44.40

COMPARATIVE ANALYSIS FOR THE YEAR 2003-04

S.No	Name of State Electricity Board	No. of Consumers	No. of Employees	Energy sold in MU per Employee	No. of consumers per Employee	% of estt. Exp. To total cost %	Estt. Expenses in paise/Kwh of sale	Circuit in Km per employee
1	2	3	4	5	6	7	8	9
1.	Andhra Pradesh	15870287	76679	0.45	207	3.91	-	-
2.	Gujarat	9958056	51537	0.74	193	6.92	24	7.84
3.	M.P.	6597849	74648	0.21	88	12.82	52	7.24
4.	Maharashtra	16927863	103038	0.50	164	13.59	42	6.67
5.	**Punjab**	**5705751**	**96295**	**0.24**	**59**	**20.48**	**56**	**2.95**
6.	Rajasthan	5747725	11687	1.31	492	5.91	26	-
7.	Tamil Nadu	17025652	83949	0.47	203	13.13	40	7.33

135. From a perusal of the charts, the following facts are clearly established:-

i. The number of consumers of electricity in the State of Punjab is the least as compared to the other six States referred to in the charts.
ii. PSEB sells 0.24 MU per employee, which puts the Board in the second lowest position in the matter of sale of energy per employee.
iii. Each employee of the PSEB caters to 59 consumers in the State of Punjab. This ranking is the lowest amongst the seven SEBs.
iv. PSEB has the highest percentage of establishment cost to total cost as it constitutes 56 Paise/ Kwh cost of energy sold, which is also the highest compared to other six States.
v. The Boards per employee cable line circuit is the lowest being 2.95 Km/ckt cost against 7.84 Km/ckt in respect of Gujarat State.

136. The Commission has noted that the position which was prevailing in the year 2001-02 has not improved even in the subsequent years. It appears that nothing substantial has been done by the Board to reduce the employees' cost++. However, in Para 5.13(h) of the Memo of Appeal of the Board, it has been stated that the Board has taken the following steps for curtailing the employees' cost++:

i) The Board has not been recruiting employees since the year 1996, except in case of specific need based recruitment, which was unavoidable.
ii) Employees have been redeployed.
iii) The Board has imposed a ban on creation of new posts.
iv) Persons are being engaged on contract basis to meet critical requirements.
v) The Board has adopted new policy on November 23, 2004, for payment of lump sum compensation in lieu of appointment and liberalized family pension in case of death of an employee during service on compassionate grounds, in place of its existing policy of providing payments to the widow/ dependents of the deceased employee.
vi) The Board has adopted a new pension policy dated October 18, 2004 for contributory pension for new recruitees.

137. Though the Board has claimed to have taken initiatives for curtailing the employees' cost++, it seems that these initiatives are mere cosmetic in nature. On the one hand the Board says that it has not been recruiting people since 1996, on the other hand it says that need based

recruitment, which is unavoidable in nature, is being made. It has not been stated as how many persons have been recruited under the pretext of need based recruitment.

138. The main plank on which the Board has assailed the impugned orders of the Commission with regard to employees' cost++, is that the Commission has over looked the fact that Board cannot substantially reduce employees due to certain obligations cast upon it under law. The Board is seeking to justify the increase in the employees' cost++ on the following grounds:

i. Basic salary / increment: annual increment was assured to the employees in terms of Punjab State Electricity Board Main Service Regulations 1972 (PSEB MSR). The rate of increment has been provided in the PSEBs Master scale, which gives rise to average increase of 3.25 % p.a. in the total basic pay.

ii. The Board has adopted recommendations of the 5th Pay Commission, following the decision of the State Government and accordingly Dearness Allowance (DA) to the extent of 50% was merged with Dearness pay (DP). This has resulted in an increase in the House Rent

Allowance, leave encashment and terminal benefits payable to the employees of the Board.

139. It is significant to note that in so far as the increase in DA and merger of DA with DP of the employees of the Board is concerned on the own showing of the Board, the benefits have been extended in order to maintain parity with the employees of the State Government. These benefits have been extended on the ostensible ground that when the electricity undertaking was transferred to the Board, it was stipulated that the salary, allowances etc of the transferred employees were not to be less favourable than the Government employees. It appears to us that this condition applied only to the salary and allowances etc, which were in vogue on the date of the transfer. This stipulation does not in any manner guarantee same salary, allowances for the PSEB employees as may be admissible to the employees of the State Government in comparable posts. There is no obligation on the part of the Board to extend same salary and allowances to the employees of the Board as are payable to the employees of the State Government The

process of reforms which has been triggered by the Act of1998 and the Act of 2003 will lose its momentum in case salaries/ incentives are not linked to the performance of the employees. There is nothing on record to show that there has been improvement in the performance of the employees of the Board. Benefit should be made available for rewarding efficiency in performance. Automatic availability of benefits generates inefficiency and indolence.

140. In R.C. Sharma Vs. Chief Secretary, Government of Madhya Pradesh (1974) 3 SCC 160, three undertakings were transferred from Government of MP to M.P. Industries Corporation Ltd. The MP Government made a commitment to the employees consequent upon transfer of their service to the MP Industries Corpn. Ltd. to the effect that their emoluments and other conditions of service and benefits will not be affected. Subsequently, after the transfer there was increase in rates of DA of the government employees. This benefit was not extended to the employees of the MP Industries Corpn Ltd. The Union filed an application under Section 33 C(2) of the

Industrial Disputes Act, 1947 for payment of DA to the employees of the company on par with the MP Government employees. The application was dismissed by the Labour Court. The union filed a Writ Petition before the High Court. The Writ Petition too was dismissed by the High Court. Thereafter, a Special Leave Petition was filed before the Supreme Court on the ground that the company was bound to give the same salary and benefits to its employees as were payable by the State Government to its employees at all times. While rejecting the submission of the union, the Supreme Court held that the offer made by the MP Government and accepted by the employees only protected the terms and conditions of service, existing at the time of transfer and it did not entitle the employees to secure benefits which the Government might, in future, confer upon its employees. In this regard, the Supreme Court observed as under:-

> **"***The short question involved in this appeal is whether under the terms of the offer made and accepted by the employees they are entitled to the same Dearness Allowance as is being paid by the State Government to its employees. The first term made it quite clear that when the employees of the erstwhile undertakings of the State would join the service of the Corporation their subsisting pay and scale and other*

conditions of service and benefits to which they were entitled at that time would not be affected by the transfer. The case of the Union was that the second term or condition entitled them to the same Dearness Allowance which the employees of the Madhya Pradesh State Government were getting. Now this term or condition was confined only to the question of the effect of the transfer on the service of an employee. It was made clear that the transfer of service would not be treated as an interruption in his service. This was amplified by saying, "you will be entitled to leave and other benefits on the same basis as if your services under the State Corporation was a continuation of your total uninterrupted services under the said undertakings". The High Court relied on an earlier decision given by it in Misc. Petition No. 237 of 1968, decided on March 26, 1969. According to that decision leave and other benefits that were secured under Condition 2 were leave and such benefits which depended upon the length of service, e g., gratuity, pension etc. The object of creating a fiction of continuity of service was not to make the Corporation employees Government employees and to make applicable to them any change effected in the conditions of service of Government employees; but what was intended was to secure to the transferred employees leave and benefits depending upon the length of service by making their service fictionally uninterrupted. Ordinarily the change of employers would have the effect of interrupting service. Condition No. 2 was, therefore, meant to overcome that situation. That condition dealt solely with the effect of the transfer of service on the benefits to which an employee would be entitled if there was no interruption in his service. The second sentence therein, namely, "in other words" etc. was merely explanatory of the first sentence that the transfer of service will not be treated as in interruption in the service. The second sentence was not intended and could not be read as meaning that whatever benefits an employee of the State Government were to get in future the employees of the Corporation would automatically become entitled to them. As pointed out by the High Court in the earlier judgment if Condition 2 was to be read as securing to a transferred

employee benefits which the Government might in future confer upon its employees that would contradict Condition 1 which secured only such benefits to which a transferred employee was entitled at the time of transfer. We are in entire agreement with this view of the High Court.

Mr. C.K. Daphtary who appeared for the industrial consumers tried to persuade us that Condition 2 should be so interpreted as to confer to the employees of the Corporation the same benefits to which the employees of the State became entitled in the course of subsequent years We are unable to construe Condition 2 in the manner suggested. All that that condition secured was that the employees should not suffer in the length of their service and in the enjoyment of the benefits which an uninterrupted service confers on them because of the transfer of their service from the State Government to the Corporation."

141. The principle adumbrated by the Supreme Court applies to the case in hand. In spite of the fact that the Commission had capped the employees' cost++ by its first tariff order and there was no ground for holding that there has been improvement in the functioning of the employees of the Board, the Commission having regard to the increase in the employees' cost++ allowed cumulative increase of 15.61% for the year 2005-06 in the approved level of employees' cost++ of Rs. 1274.66 crores. Thus, the employees' cost++ for the year 2005-06 was worked out at Rs. 1473.63 crores. This increase

of 15.61% was calculated by the Commission on the basis of growth in wholesale price index of all commodities starting from the year 2001-04 to 2005 every year.

142. The learned counsel for the Board submitted that the employees' cost++ of Rs. 1700 crores which had been projected by the Board should have been allowed as these expenses are uncontrollable. The learned counsel relied upon the decision of the Supreme Court in WBERC Vs CESC, JT 2002 (7) SC 578, in which the employees' cost++ claimed by the WBSEB was allowed by the Supreme Court in the peculiar facts and circumstances of that case. The payment on account of wages including overtime and other welfare benefits were made by the company under lawful agreements entered with the workmen. During the currency of the agreements it was not legally feasible for the company to stop those payments. Therefore, the amounts expended toward the employees' cost++ was treated as amount properly incurred. The facts of the present case are different. Here the Board is extending benefits such as increase in salaries, DA etc to the

employees to maintain parity with the employees of the Government even though they are not legally bound to give such benefits and there has been no improvement in the performance of the Board employees. As already pointed out, the comparative analysis of various parameters clearly establish that the employees of the PSEB are not productive and performance linked incentive shall be the requirement of the day.

143. In the year 2001-02, employees' cost++ constituted 56 P/Kwh of energy sold, which as already pointed out is the highest compared to other six Boards. By an increase of 15.61% in the employees' cost++, it will constitute about 61 P/Kwh cost of energy sold, which is clearly very high. But it seems to us that for the year 2005-06, the increase may not be interfered with as for earlier two years 2003-04 and 2004-05 no increase in the employees' cost++ has been allowed. At the same time we make it clear that in case the employees of the Board do not improve their efficiency, the aforesaid employees'

cost++ allowed by the Commission will remain capped till the performance of the Board employees improve.

144. We also make it clear that we cannot allow a pass through of Rs. 1700 crores as employees' cost++ as demanded by the Board. No worthwhile measures were adopted by the Board to reduce the employees' cost++ during the years in question. Even Voluntary Retirement Scheme, which could have been one of the options, was not adopted on the ground that the State Government was not in a position to find funds. These are mere excuses. The State Government itself had taken stand during the year 2002-03 that the employees' cost++ of Rs. 1316.50 crores claimed by the Board was quite high. The Government was of the view that the employees' cost++ at Rs. 1123.83 crores should be allowed based on norms of 3-5 employees per MU of energy sold. Subsequently, the same Government changed its stance for the year 2004-05. It seems to us that it is not prudent for the Board to employ excessive manpower.

145. In the circumstances, we decline to interfere with the decision of the Commission disallowing increase in the employees' cost++ for the year 2003-2004 and allowing only Rs. 1473.63 crores as employees' cost++ for the year 2004-2005.

I. Separate Tariffs:

146. The learned counsel for the industrial consumers contended that the Commission was bound to determine separate tariff for the generation, transmission, distribution and retail sale of electricity in consonance with the provisions of Section 62(1) and 86 (1)(a) of the Act of 2003. It was pointed out that the Commission arrived at tariff for retail supply without determining separate tariff for generation, transmission and distribution of electricity in clear violation of law. On the other hand, learned counsel for the PSEB and the PERC submitted that the PSEB, prior to the coming into operation of the Act of 2003, was a vertically integrated utility and has remained to be so. It was pointed out by them that the PSEB has retained its character of an integrated utility in accordance with the first proviso to Section 14 of the Act of

2003 read with Section 172 (a) thereof. As a sequitur, it was urged that since the PSEB remained vertically integrated utility, the tariff for generation, transmission, distribution and retail supply is not required to be worked out separately. The costs incurred by the PSEB for its different activities is loaded on the retail sale of electricity and they are not separately charged. It was further submitted that in any event the bundling of the cost for various activities has not adversely affected the consumers.

147. We have reflected upon the submissions of the learned counsel for the parties on the aforesaid aspect of the matter. Section 62(1) postulates determination of tariff separately for each of the following activities:

a) supply of electricity by a generating company to a distribution licensee;
b) transmission of electricity;
c) wheeling of electricity;
d) retail sale of electricity.

148. In order to facilitate the Commission to carry out the command of the legislation, contained in Sub section (1) of

Section 62, to determine unbundled tariff, sub-section (2) of Section 62 empowers the Commission to require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution of electricity for determination of tariff. Sub-section (5) of Section 62 also confers power on the Commission to require a licensee or a generating company to comply with such procedure as may be specified by it for calculating the expected revenues from the tariff and charges, which it is permitted to recover. Enabling provisions of sub-sections (2) and (5) of Section 62 of the Act of 2003 are meant to arm the Commission to achieve the purpose of Section 62(1) of the Act of 2003.

149. Section 86(1) also throws light on the issue. Section 86(1) requires the State Commission to discharge functions specified thereunder. One of the functions which the Commission has to discharge as per sub-clause (a) of Sub-Section (1) of Section 86, relates to the determination of tariff. Sub-clause (a) of Sub-Section (1) of Section 86 requires the

Commission to determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be within the State. This Section also prescribes that the tariff has to be determined separately for generation, supply, transmission, wheeling and retail sale of electricity.

150. The PSEB, even after coming into the force of the Electricity Act of 2003, has remained vertically integrated utility under the provisions of Section 172 of the Act of 2003, which reads as under:

> *"(a) a State Electricity Board constituted under the repealed laws shall be deemed to be the State Transmission Utility and a licensee under the provisions of this Act for a period of one year from the appointed date or such earlier date as the State Government may notify, and shall perform the duties and functions of the State Transmission Utility and a licensee in accordance with the provisions of this Act and rules and Regulations made thereunder:*
>
> *Provided that the State Government may, by notification, authorise the State Electricity Board to continue to function as the State Transmission Utility or a licensee for such further period beyond the said period of one year as may be mutually decided by the Central Government and the State Government".*

151. The PSEB by virtue of Section 172(a) is deemed to be the State Transmission Utility and a licensee for a period of one year from the appointed date. The State Government by Notification issued under proviso to Section 172(a) has authorized the State Electricity Board to continue its function as the State Transmission Utility and a licensee for the period 2004-05 and 2005-06.

152. The fact that the PSEB has retained the character of a vertically integrated utility does not mean that the provisions of Section 62 have to be given a go by. For generation no licence is required but for distribution, transmission and for undertaking trading in electricity, a licence is required under Section 12 of the Act of 2003. The licence is to be obtained for the said activities from the appropriate Commission under Section 14 of the Act of 2003. First proviso to Section 14 lays down that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under the Act

for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the appropriate Commission and thereafter the provisions of this Act shall apply to such business. The second and third proviso make further exceptions and State as under:

14. *"Grant of Licence:*

.....

Provided further that the Central Transmission Utility or the State Transmission utilitity shall be deemed to be a transmission licensee under this Act:

Provided also that in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after, the commencement of this Act, such government shall be deemed to be a licensee under this Act, but shall not be required to obtain a licence under this Act:"

153. Thus, under the aforesaid provisions, the Board is to be considered as deemed licensee for distribution as well as transmission of electricity. Clause (38) of Section 2 of the Electricity Act, 2003 defines a "licence", which means a licence granted under Section 14. The Statute does not make any distinction between a licensee or a deemed licensee. Therefore, for the purposes of application of Section 62(1) of the Act of 2003, no distinction can be made between a distribution licensee or a deemed distribution licensee for determination of separate tariffs. Similarly, no distinction can be made between a transmission licensee or a deemed transmission licensee. Whatever procedure is prescribed for determination of tariff for transmission and distribution of electricity by licensees, the same procedure will apply for the deemed licensees. Since separate tariffs are required to be determined for transmission and distribution of electricity by the licensees in the same way separate tariffs are required to be determined for transmission and distribution of electricity by deemed licensees, who are vertically integrated.

154. The whole concept behind unbundling of a utility is to ensure that the electricity sector performs efficiently. The cost and expenses for different activities like generation, transmission, distribution, wheeling and retail sale of electricity should be known so that it becomes impossible to hide inefficiency and possible to make corrections, whenever and wherever needed. This is essential for promoting excellence in service provided by the utilities. This is also conducive for the development of electricity industry and generation of competition. The object and purpose of the Act of 2003 as reflected in the Preamble thereof will be achieved only when various provisions of the Act are strictly complied with. In most of the States, unbundling has taken place but for no discernible reason it has not taken place in the State of Punjab. No special circumstances have been pointed out in the case of State of Punjab which would impel us to think that the State of Punjab stands on a different footing than other States in which un-bundling has taken place for achieving the purpose of the Act of 2003.

155. The Commission in accordance with the provisions of Sub Sections (2) and (5) of Section 62 of the Act of 2005 and Section 86(1)(a) thereof, is mandated to determine separate tariff for generation, supply, transmission, distribution, wheeling and retail sale of electricity within the State irrespective of the fact whether the State utility has remained vertically integrated or has been unbundled.

156. In view of the aforesaid discussion, we direct that the Commission shall determine the tariff separately for generation, transmission, distribution, wheeling and retail sale of electricity. But for the period 2005-06, it may not be necessary to re-determine the tariff for generation, transmission and distribution of electricity etc. as the industrial consumers have not shown any adverse impact of bundled tariff. Even for the determination of tariff for the year 2006-07, it may not be immediately possible for the Commission to determine separate tariff for generation, transmission, distribution, wheeling and retail sale of electricity as the Board will have to work out the details, which

may take some time. This, however, will not cause prejudice to the consumers as the Board must provide all the requisite information to the Commission within five months, so that the Commission is able to determine separate tariff for generation, transmission, distribution, wheeling and retail sale of electricity well before the Commission takes up the truing up exercise close to the end of the year 2006-07. After the truing up exercise is completed the Commission shall give effect to it in the determination of tariff for the year 2007-08 as well. From the year 2007-08, the Commission is directed to determine separate tariff for generation, transmission, distribution, wheeling and retail sale of electricity.

J. Re Power Purchase Cost and T & D Losses:

157. The learned counsel for the Board submitted that the Commission while conducting a truing up exercise for the years 2003-2004 and 2004-2005 assessed a lower agricultural pump set consumption (AP Consumption) on the basis of its own unrealistic norms. The learned counsel further contended that an amount of Rs. 164.37 crores and Rs.76.44

crores was illegally disallowed by the Commission on the assumption that the Board failed to reduce the T&D losses for the years in question. According to the learned counsel for the Board, T&D losses rose due to the adoption of lower A.P. consumption norm. On the other hand, it was submitted by the learned counsel for the industrial consumers that there was need to reduce T&D losses of the Board for the tariff year 2005-06.

158. It cannot be disputed that there is need to reduce T&D losses of the Board to increase the availability of power and improve performance of the utilities. Operational efficiency of the utility can be measured by looking at its T&D losses. It is a most important yardstick for determining the performance of the utility. High transmission distribution losses have been responsible for inefficiencies in the system. T & D losses have a significant impact on the annual revenue requirement of utility.

T&D losses are worked out by the following formula:

Total energy input in the system– (sum total of metered sales + estimated consumption by the agricultural pump sets)

159. The whole difficulty arises because meters have not been installed for the individual AP Consumers. Even if there was proper metering on the feeders, supplying power to AP Consumers consumption by the AP Consumers could have been verified on actual basis. But, as the actual figures are not available, T & D losses, therefore, are estimated by the Board and the Commission.

160. In the ARR for the year 2002-2003, the Board projected the following figures of T & D losses:

Year	T &D Losses as per ARR 2002-03
1999-00	30.80%
2000-01	26.51%
2001-02	25.50%
2002-03	24.50%

161. Subsequently, the Board in its presentation on July 23, 2002, before the Commission, estimated T & D losses as under:

Year	T&D Losses as per Presentation
2001-02	26.25%
2002-03	24.50%
2003-04	23.00%
2004-05	21.50%
2005-06	20.75%
2006-07	20.00%

162. The Commission determined loss level for the year 2001-2002 at 27.52% against 25.5% estimated by the PSEB. For the year 2002-2003, the Commission reduced the target by 2%, thus, scaling the T & D losses from 27.52%. It is significant to note that the Government of Punjab has signed memorandum of understanding with the Government of India for undertaking reforms in the power sector in the state of Punjab. In the memorandum of understanding, the State Government had agreed to bring down the T & D losses to 18% by the year 2003. However, the Commission fixed the T & D loss level at 25.52% for the year 2002-2003.

163. The PSEB in the ARR filings of the year 2003-04 reflected the T & D losses of 26.25% for the year 2002-2003. The Board worked out the AP Consumption at 6150 MUs on assumed basis. The Commission, however, determined the consumption at 5818 MUs. On this basis, the T & D losses against the actual energy availability came to be 25.61% against the target of 25.52% fixed by the Commission. It appears that the T & D losses and AP Consumption were

reworked in the tariff order pertaining to the year 2004-2005. As per the re-determination, T & D losses work out to 24.54%, against the target of 25.52%. For this achievement, the Board was given incentive.

164. It is pointed out by the Commission that in the ARR filed for the year 2003-2004, the Board submitted that the T & D losses would be reduced during the year 2003-2004 to the level of 26.0%. Subsequently, the Board represented before the Commission on May 7, 2003, that the T & D losses for the year 2003-2004 will be restricted at 24%. The Commission fixed the T & D losses target at 24.5%, instead of 24%, as represented by the Board. The target of 24.50% reflects a reduction of 1.02% over the target fixed for the year 2002-2003.

165. For the years 2004-05 and 2005-06, the Commission worked out the T & D losses and the estimated consumption by agricultural pump sets, as set out below:

> **"Losses for the year 2004-05:**
>
> *In its ARR filings for the year 2004-2005, the Board has stated that the revised estimates for losses for the year 2003-2004 are 25.35%. This figure has been computed*

with the agriculture consumption level being estimated by the Board at 6243 MUS. With regard to the norm to be adopted for determination of the aggregate consumption by the agriculture pump sets, the Commission has given its decision in para 3.3 that it will be 1650 kwh/kw/year for 2003-04 as was decided by the Commission in its tariff order for that year. Adopting this norm, the aggregate agriculture consumption comes to 5744 MUs and the T & D losses for the year 2003-04 work out to be 27% against the target fixed by the Commission at 24.50%. Thus, instead of showing an improvement, there has been a sharp decline in the performance of the Board. It has been stated by the Board that the losses during the year 2003-04 are higher because of a (a) higher expected supply to consumers and lower power cuts; (b) greater supply to the low end consumers; (c) a large number of inefficient submersible motors have been installed by the consumers and unauthorized load of the motors has not been regularized; and (d) the desired frequency in the metered sale could not be achieved owing to non replacement of slow and sluggish meters with the static meters on account of limited availability of static metes. The reasons given by the Board for its failure to achieve the target during the last year do not carry any conviction and hence the Commission is unable to accept these. If any judgment was to be passed, it could be said that the Board has shown no seriousness in pursuing this vital matter. In these circumstances and as was indicated in its last tariff order, the Commission has no option but to penalize the Board for this failure.

The Board in its ARR filings for the year 2004-05 has stated that during the year 2004-05, the losses would be reduced to the level of 24.0% on the assumption that consumption by agriculture pump sets will be 6472 MUs. The Commission has separately decided in para 7.2 that the norm for determining the total agriculture consumption during the year 2004-05 would be 1700 kwh/kw/year, which gives the figure of 6213 MUs as the aggregate

agriculture consumption during the year. Further, the Commission has decided to fix the target for T & D losses at 23.25% for the next year 2004-05 (a reduction of 1.25% over the loss level fixed for the last year 2003-04). The Commission is firmly of the view that if the Board was to acquire even a reasonable determination to show results, this target is eminently achievable. The Commission reiterates its intention not to compromise in this matter because this is the least which the Board can do to show respect for the unanimous view of all the consumers and the State Government and demonstrate its own commitment to its often declared resolve to achieve higher operational efficiencies. All the legitimate revenue requirements of the Board, including for investment, are being fully met through the tariff orders of the Commission and the Government of Punjab has repeatedly stated its willingness to lend full support to the anti theft drive of the Board. The Commission would also like to state here that it would continue to set this modest target of 1.25% for loss reduction in each of the next four years starting with 2004-05."

"3.4 POWER PURCHASE

To meet the energy demand, the Board, in its ARR for the year 2004-05 projected power purchase at 10728 MU net. The Commission in its Tariff Order for the year 2004-05 approved power purchase for the year 2004-05 at 11372 MU net. In the ARR for the year 2005-06, the Board has given revised estimates of power purchase for the year 2004-05 at 12457 MU net. The Board in its presentation dated April 11, 2005 has given R.R.E. for power purchase at 10915 MU net. These being the latest estimates, the Commission accepts the power purchase at 10915 MU net for the year 2004-05.

3.5 TRANSMISSION & DISTRIBUTION LOSSES (T & D LOSSES)

In its ARR for the year 2004-05, the Board has projected T & D losses at 24% for the year 2004-05 on the assumption that AP consumption will be 6472 MU. The Commission in its Tariff Order for the year 2004-05 fixed the target for T & D losses at 23.25% for the year 2004-05 with AP Consumption at 6213 MU arrived at with norm for AP consumption at 1700/kwh/kw/year.

In the ARR filing for the year 2005-06, the Board has given revised estimates for T & D losses during 2004-05 as 24.50% with revised estimates of AP consumption at 6853 MU arrived at with AP consumption norm of 1814 kwh/kw/year on the connected load and factoring the consumption of temporary tubewell connections, lift irrigation tubewells, tubewells in Kandi area and PAU tubewell connections. With actual sales including AP consumption at 6563 MU as now approved and actual availability (generation + purchase) as per R.R.E. given by the Board in its presentation dated April 11, 2005, the actual T & D losses work out to 24.14%. With sales and energy availability now approved by the Commission, the T & D losses will work out to 24.19% against the target of 23.25% fixed by the Commission as shown in Table 3.8 under Energy Balance. The Commission in its tariff order for the year 2004-05 had deliberated the issue of T & D losses in detail before fixing T & D loss level for the year 2004-05. The Commission sees no reason for review of its decision. The Commission, therefore, retains target T & D loss level at 23.25% for the year 2004-2005. The Commission decides that financial burden due to the consequential additional power purchase on this account may not be passed on to the consumers but borne by the Board.

3.6 ENERGY BALANCE

The details of energy requirement and availability in the ARR for the year 2004-05, approved by the Commission in the Tariff Order for the year 2004-05, revised estimates in the ARR for the year 2005-06, later revised by the Board in its presentation and subsequent fax and now approved by the Commission are given in Table 3.8 below. Energy balance for working out actual T & D loss with sales and availability now approved by the Commission is also shown in column 8 of Table 3.8.

EXTRACT OF TABLE AT PAGE 60 OF Tariff order 2005-06

The total energy requirement now approved by the Commission is 30465 MU (net) whereas total energy availability now approved is 30833 MU (net). The difference of 368 MU (net) between energy requirement and energy availability is due to the under-achievement of the T & D loss target approved by the Commission as discussed in para 3.5 and depicted in columns 7 & 8 of Table 3.8. The higher T & D loss level than the T & D loss level approved by the Commission has, thus, resulted in increased power purchase to the extent of 368 (7279-6911) MUs net."

166. Thus, it is seen that the Commission has worked out the T & D losses, on the basis of norms. The norms fixed by the Commission are neither unreasonable nor arbitrary. It appears that the Board was not able to reach the targets set by the Commission, except once. A comparison of the targets set by the Board in its presentation dated July 23, 2002 and

its actual performance shows that T&D losses were hardly reduced by the Board.

167. It may be pointed out that a study group was appointed by the State Government for steering power reforms. It was pointed out in the report that there was need for a realistic measurement of the base level T&D losses of the system. It was also pointed out that in the physical terms, PSEB loses about 7,500 million units in T&D losses which implies a revenue loss of about Rs. 2,400 crores per annum. That apart it was brought out in the report that in several countries in a very short time T&D losses were considerably reduced. For example, a company in Argentina reduced the losses from 25.6% to 8.1%; while a company in Peru reduced the losses from 20% to 10.1%. Another example given by the Study Group is of a company in Chile, which reduced T&D losses from 19.8% to 6%. The expert group was of the opinion that target of 12.5% for Punjab was well worth perusing.

168. It is extremely important for the electricity sector to reduce the T & D losses. We find no reason to interfere with

the determination of the Commission with regard to the T & D losses. In this view of the matter, we do not find any merit in the submissions of the learned counsel for the Board in this respect and they are accordingly rejected.

K. <u>Coal Transit Loss:</u>

169. The Board is aggrieved by the disallowance of Rs. 7.37 Crores on account of alleged coal transit loss for its thermal generating stations for the year 2004-05. It is also aggrieved by the capping of the coal transit loss on 0.8 percent in the non-pit head station for the financial year 2005-06.

170. The Commission has pointed out that during the Tariff year 2004-05 the PSEB had claimed that the usual transit loss during 2003-04 was 7.31 percent, 1.62 percent and 2.72 percent for GNDTP, GGSTP and GHTP respectively against approved transit loss of three percent for all the three thermal power generation stations. As is clear from the order of the Commission the transit loss in respect of the aforesaid three plants during 2003-04 was verified and it was found to

be 2.99 percent, 1.38 percent and 2.72 percent. The Commission also pointed out that CERC norms specify coal transit loss for non-pit head generation stations at a level of 0.8 percent.

171. In the circumstances, the Commission approved transit loss of two percent for all the three stations for the year 2004-05.

172. We do not find any error in the view of the Commission. Losses must be brought down by the utilities by adopting appropriate and prudent measures. Losses reflect inefficiencies and must be ultimately eliminated. Therefore, we do not find any reason to disagree with the view of the Commission. Accordingly, the plea is rejected.

L. Conclusion

173. In the result:-

(i) Appeal Nos. 4,13,14,23, 25, 26, 35 & 36 of 2005 of the Industrial consumers are allowed to the extent indicated above;

(ii) The directions contained in this judgment shall be carried out by all concerned including the State of Punjab, the Commission and the Board;

(iii) The relief granted herein shall be applicable to all the consumers and shall not be confined to the appellants (industrial consumers) before us;

(iv) Appeal Nos. 54 and 55 of 2005 preferred by the Board are hereby dismissed as we do not find any merit in them; and

(v) The parties shall bear their respective costs.

Before parting with the matter, we must place on record our appreciation for the valueable assistance rendered by the learned counsel Mr. S.N. Mookherjee, Mr.M.G. Ramachandran, Mr. Sanjay Sen, Mr. P.S. Bhullar, Mr. Arun Nehra and other learned counsel.

(Justice Anil Dev Singh)
Chairperson

26.05.2006

(Justice E. Padmanabhan)
Judicial Member

(A.A. Khan)
Technical Member

[++] corrected as per the Order dated 25th July 2006