Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO…5542 OF 2016
[Arising out of SLP [C] No.12398/2014]

Sai Bhaskar Iron Ltd. … Appellant(s)

Vs.

A.P. Electricity Regulatory Commission & Ors. … Respondents

WITH

CA Nos.5543-5544 of 2016 @ SLP [C] Nos. 14638-14639/2014
CA No.5545 of 2016 @ SLP [C] No. 15205/2014
CA Nos. 5546-5571 of 2016 @ SLP [C] Nos. 15245-15270/2014
CA Nos. 5572-5575 of 2016 @ SLP [C] Nos. 15348-15351/2014
CA Nos. 5576-5578 of 2016 @ SLP [C] Nos. 15356-15358/2014
CA Nos. 5579-5583 of 2016 @ SLP [C] Nos. 15360-15364/2014
CA Nos. 5584-5586 of 2016 @ SLP [C] Nos. 15389-15391/2014
CA No. 5587 of 2016 @ SLP [C] No. 15603/2014
CA No. 5588 of 2016 @ SLP [C] No. 15845/2014
CA Nos. 5589-5598 of 2016 @ SLP [C] Nos. 15878-15887/2014
CA No. 5599 of 2016 @ SLP [C] No. 15891/2014
CA Nos. 5600-5601 of 2016 @ SLP [C] Nos. 15938-15939/2014
CA No. 5602 of 2016 @ SLP [C] No. 15940/2014
CA Nos. 5603-5611 of 2016 @ SLP [C] Nos. 15985-15993/2014
CA No. 5612 of 2016 @ SLP [C] No. 15998/2014
CA Nos. 5613-5618 of 2016 @ SLP [C] Nos. 17138-17143/2014
CA No. 5619 of 2016 @ SLP [C] No. 17469/2014
CA No. 5620 of 2016 @ SLP [C] No. 17495/2014
CA No. 5622 of 2016 @ SLP [C] No. 17509/2014
CA Nos. 5623-5625 of 2016 @ SLP [C] Nos. 17860-17862/2014

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C.A. No. 8249/2015;
CA No. 5858 of 2016 @ SLP [C] No.12607/2015
CA No. 5859 of 2016 @ SLP [C] No. 34088/2015
CA No. 5860 of 2016 @ SLP [C] No. 3063/2016; and
CA No. 5861 of 2016 @ SLP [C] No. 3516/2016.

J U D G M E N T

ARUN MISHRA, J.

1. Delay condoned in filing SLPs.

2. Leave granted.

3. The question involved in the present case is with respect to levy of fuel surcharge adjustment (in short 'FSA') which is collected from the consumers in addition to fixed tariff for consumption of power. The concept of FSA was brought in by the Andhra Pradesh Electricity Reform Act, 1998 (hereinafter referred to as

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'the Act of 1998'). Earlier the Electricity Board used to collect fuel cost adjustment. Under section 3(1) of the Act of 1998, Andhra Pradesh Electricity Regulatory Commission has been established bestowed with the power to grant licences and fix tariff for supply of power. Section 26(9) of the Act lays down that no tariff or part of tariff required to be determined under sub-section (6) of section 29 may be amended more frequently than once in any financial year ordinarily except in respect of any changes expressly permitted under the terms of any fuel surcharge formula prescribed by the regulations.

4. The Government of India enacted the Electricity Act, 2003 (hereinafter referred to as "the Act of 2003") to consider the laws of trading of power for the purpose of making it consumer-friendly and to create better environment for development of power industry, at the same time protecting the rights of the consumers. Section 62(3) of the Act of 2003 prohibits preference to any consumer of electricity but may differentiate according to the consumer's load factor and other aspects permissible under the aforesaid provision. Section 62(4) of the Act of 2003 is *pari materia* to section 26(9) of the Act of 1998. By virtue of the power conferred under sections 9(2) and 54(2) of the Act of 1998, the A.P. Electricity Regulatory Commission (hereinafter referred to as "the Commission") has framed the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (hereinafter referred to as "the Regulations of 1999"). The

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Commission has framed Regulation No.8 dated 28.8.2000 called Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) First Amendment Regulations, 2000. By virtue of the aforesaid First Amendment Regulations, provisions contained in the chapter on tariff were incorporated by way of Regulation 45-A specifying expected revenue from charges and tariff proposals and under Regulation 45-B fuel surcharge adjustment formula was prescribed. Regulation 45C was also inserted providing for subsidies as the State Government may consider appropriate. Regulation 45-B was further amended by way of reforms called the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Amendment Regulations, 1 of 2003. They came into force w.e.f. 1.4.2003. The amended Regulation 45-B provided a formula for working out the FSA. Condition No.1 also mentioned that FSA will be distributed among all categories of consumers that existed in the quarter. However the consumption by the agricultural sector will be excluded till the Commission is satisfied that metering of agricultural consumption is complete, as may be notified from Tariff orders from time to time. As per section 61 of the Act of 2003, the Commission has to be guided by the aforesaid provisions. As the Central Government had not framed the national electricity policy or interim policy, as such Regulation No.9 of 2004 was notified by the A.P. Electricity Regulatory Commission. The Commission made the transitory Regulations in exercise of the power conferred

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under section 181 read with section 61 of the Act of 2003 called the A.P. Electricity Regulatory Commission (Transitory Provisions for Determination of Tariff) Regulations, 2004 (in short "Regulations of 2004"). They came into force w.e.f. 10.6.2004. It was specified that the Regulations of 1999 as amended from time to time under the provisions of the Act of 1998 shall continue to apply as regulations under the Electricity Act, 2003 and remain in force till appropriate new regulations are notified by the Commission under the Electricity Act, 2003.

5. The Commission had also framed terms and conditions for determination of tariff for wheeling and retail sale of electricity called the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for Wheeling and Retail Sale of Electricity), Regulation, 2005. Aggregate Revenue Requirement (in short "ARR") was specified in Regulation 2(1)(2). Regulation 3(4) provided ARR to be the basis for the fixation of the tariff/charges for retail sale of electricity including surcharges. However Regulation 24(3) provided that nothing in the Regulation shall, expressly or by implication, bar the Commission from dealing with any matter or exercising any power under the Act for which no Regulations have been framed, and the Commission may deal with such matters, exercise such powers and discharge such functions in a manner it deems fit. The orders of the Commission determining the FSA were questioned before the High Court. Writ petitions were filed before the High Court challenging

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the vires of section 26(2) of the Act of 1998, and the validity of Regulation 45-B of Regulations of 1999 as substituted in 2003. The Commission determined the FSA for all the eight quarters for the period from 2010 to March, 2012 vide order dated 20.9.2012 and vide order dated 2.11.2012 for the first quarter of financial year 2012-13. The orders were also questioned in the writ petition. The Division Bench of the High Court vide order dated 24.2.2014 upheld the vires of the Regulations and on merits left the matter to be agitated in the alternative remedy of appeal. However, writ petitions which were filed were also disposed of in terms of order dated 24.2.2014 hence the special leave petitions have been filed in this Court.

Rival Submissions :

6. It was submitted on behalf of the appellants that Regulation 45-B of the Regulations of 1999 is ultra vires the provisions contained in section 26(9) of the Act of 1998 and section 62(4) of the Act of 2003, insofar as it provides for inclusion of any variation other than that arising out of fuel costs alone. It was further submitted that only fuel cost had to be considered and no other charges other than transportation can be included. The FSA formula in Regulation 45B provides for element other than variable cost of all purchases even beyond variation of fuel costs alone and the same transgresses the limits of FSA formula permitted under the Act. Since the provision of section 26(9) of the Act of 1998 and section 62 of the Act of 2003 provide for variation of tariff more than once in a

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financial year the exception provided is with respect to FSA. Fuel has to be given natural meaning. In fact, the negative imperative of no variation of tariff more than once is being violated. Condition Nos.5, 10 and 11 of the formula are also ultra vires to the aforesaid provisions. It was also submitted that providing for exclusion of agricultural consumption till metering of agricultural services are complete as contained in Condition 1 of Regulation 45-B is bad in law and contrary to the mandate of section 55(1) of the Act of 2003; more so, after a lapse of 2 years' period. Time mandated under section 55(1) for metering the consumption has not been extended. Mandate of compulsory metering has taken effect from 10.6.2005. Consequently, condition No.1 is repugnant to the aforesaid provision as such it was submitted that all sales of electricity including the agricultural consumption has to be considered in computing the factor 'Qi' in the FSA formula. Regulation 45B ceased to have effect on 10.6.2004 after one year from the date of coming into force of the Electricity Act, 2003 by virtue of the proviso to section 61 of the said Act. It was further submitted that on coming into force of Tariff Regulation 4 of 2005 modified under the Act of 2003, Regulations of 1999 containing Regulation 45-B ceased to have the effect. The Regulations of 2003 were also attacked on the ground that there was no previous publication of the draft. Regulation 9 of 2004 made under the Reform Act with retrospective effect of 10.6.2004, the Commission has no power to make regulations with retrospective effect. Regulation 45B casts

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an additional burden without authority of law. Condition No.1 is contrary to the provision contained in sections 61 and 65 of the Act of 1998. It was also submitted that it was the liability of the State Government to compensate the supplier of electricity affected by the grant of subsidy made to the agricultural sector. Condition No.1 is also contrary to sections 61 and 65 of the Act of 2003. Regulations of 2005 indicate that power purchase cost for each year stands included in the ARR and FSA over and above the purchase cost. It does not provide for adjustment in price on account of fluctuation in the cost of fuel. Formula for determining the FSA travels beyond that.

7. It was submitted on behalf of the Commission and the State Government that under section 85(3) of the Act of 2003, the Act of 1998 is saved, in the Schedule at serial No.3. Consequently, the provisions of the Act of 1998 which are not consistent with the provisions of the Act of 2003 shall continue to apply to the State of Andhra Pradesh. The saving provision in the Regulations of 2005 reflects that the Regulations of 1999 framed under the Act of 1998 are still in operation. Regulation 12.4 of Regulations of 2005 provides for levy of FSA. The fuel surcharge has not been defined under the Act of 1998 or the Act of 2003 or in the Regulations of 2005 framed thereunder. The meaning and scope of fuel surcharge is given in Regulation 45-B of Regulations of 1999. The formula contains the components to form part of FSA and had been implemented for the last more than

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one decade. FSA has been determined as per the formula prescribed under Regulation 45-B. It is incorrect to submit that FSA should be confined to variation of fuel cost. Condition Nos.1, 5, 10 and 11 of Regulation 45-B have been notified in the Gazette, therefore, there is complete compliance of the provisions contained in section 55(1) of the Act of 2003. The Commission is empowered to differentiate according to consumer's load factor or power factor etc. as provided in section 26(7) of the Act of 1998. Similar provisions are contained in section 62(3) of the Act of 2003. The Commission has power to frame the regulations under sections 26(9) and 54 of the Act of 1998 with respect to FSA and under section 62(4) of the Act of 2003. FSA is a related surcharge levied to meet the increased cost of generation and purchase of electricity. The vires of section 62(4) of the Act of 2003 have not been questioned and the challenge to the vires of the provisions of section 26(9) of the Act of 1998 has been given up. The orders passed by the Regulatory Commission are justified and writ petitions have been rightly dismissed by the High Court.

Statutory Provisions :

8. For appreciating the rival contentions, we deem it appropriate to take note of the various provisions of the Act of 1998 which have been enacted to establish and incorporate autonomous statutory Electricity Regulatory Commissions to balance the interest of all the stakeholders in the electricity industry and to promote healthy

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growth of power sector in the State. The State has been divested of its regulatory functions. Section 11 deals with the functions of the Commission. It has the power under section 11(1)(c) to issue licences and determine the conditions to be included in the licences. Under section 11(1)(e) it has the power to regulate the purchase, distribution, supply and utilization of electricity, the quality of service, the tariff and charges payable. Part 'A' of the Act of 1998 deals with tariff. Section 26 deals with licensee's revenues and tariffs. The provisions contained in section 26 are extracted hereunder :

> **"26. Licensee's revenues and tariffs:-** (1) The holder of each licence granted under this Act shall observe the methodologies and procedures specified by the Commission from time to time in calculating the expected revenue from charges which it is permitted to recover pursuant to the terms of its licence and in designing tariffs to collect those revenues.
>
> (2) The Commission shall subject to the provisions of sub-section (3) be entitled to prescribe the terms and conditions for the determination of the licensee's revenue and tariffs by regulations duly published in the Official Gazette and in such other manner as the Commission considers appropriate.
>
> Provided that in doing so the Commission shall be bound by the following parameters:–
>
> (a) the financial principles and their applications provided in the Sixth Schedule to the Electricity (Supply) Act, 1948 read with Sections 57 and 57-A of the said Act;

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(b) the factors which would encourage efficiency, economic use of the resources, good performance, optimum investments performance of licence conditions and other matters which the Commission considers appropriate keeping in view the salient objects and purposes of the provisions of this Act; and

(c) the interest of the consumers.

(3) Where the Commission, departs from factors specified in the Sixth Schedule of the Electricity (Supply) Act, 1948 while determining the licensees' revenues and tariffs, it shall record the reasons therefor in writing.

(4) Any methodology or procedure specified by the Commission under sub-sections (1), (2), and (3) above shall be to ensure that the objectives and purposes of the Act are duly achieved.

(5) Every licensee shall provide to the Commission in a format as specified by the Commission at least 3 months before the ensuing financial year full details of its calculation for that financial year of the expected aggregate revenue from charges which it believes it is permitted to recover pursuant to the terms of its licence and thereafter it shall furnish such further information as the Commission may reasonably require to assess the licensee's calculation. Within 90 days of the date on which the licensee has furnished all the information that the Commission requires, the Commission shall notify the licensee either—

(a) that it accepts the licensee's tariff proposals and revenue calculations; or

(b) that it does not consider the licensee's tariff proposals and revenue calculations to be in accordance with the methodology or procedure in its licence, and such notice to the licensee shall,-

(i) specify fully the reasons why the Commission considers that the licensee's calculation does not comply with the

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methodology or procedures specified in its licence or is in any way incorrect, and

(ii) propose a modification or an alternative calculation of the expected revenue from charges, which the licensee shall accept.

(6) Each holder of a supply licence shall publish in the daily newspaper having circulation in the area of supply and make available to the public on request the tariff or tariffs for the supply of electricity within its licensed area and such tariff or tariffs shall take effect only after seven days from the date of such publication.

(7) Any tariff implemented under this section, –

(a) shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor or power factor, the consumer's total consumption of energy during any specified period, or the time at which supply is required; or paying capacity of category of consumers and need for cross-subsidisation;

(b) shall be just and reasonable and be such as to promote economic efficiency in the supply and consumption of electricity; and

(c) shall satisfy all other relevant provisions of this Act and the conditions of the relevant licence.

(8) The Commission also shall endeavour to fix tariff in such a manner that, as far as possible, similarly placed consumers in different areas pay similar tariff.

(9) No tariff or part of any tariff required by sub-section (6) may be amended more frequently than once in any financial year ordinarily except in respect of any changes expressly permitted under the terms of any fuel surcharge formula prescribed by regulations. At least three months before the proposed date for implementation of any tariff or an amendment to a tariff the licensee shall provide details of the proposed tariff or amendment to a tariff to the Commission,

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together with such further information as the Commission may require to determine whether the tariff or amended tariff would satisfy the provisions of sub-section (7). If the Commission considers that the proposed tariff or amended tariff of a licensee does not satisfy any of the provisions of sub-section (7), it shall, within 60 days of receipt of all the information which it required, and after consultation with the Commission Advisory Committee and the licensee, notify the licensee that the proposed tariff or amended tariff is unacceptable to the Commission and it shall provide to the licensee an alternative tariff or amended tariff which shall be implemented by the licensee. The licensee shall not amend any tariff unless the amendment has been approved by the Commission.

(10) Notwithstanding anything contained in Sections 57-A and 57-B of the Electricity (Supply) Act, 1948, no Rating Committee shall be constituted after the date of this enactment and the Commission shall secure that licensees comply with the provisions of their licences regarding their charges for the sale of electricity (both wholesale and retail) and for the connection to and use of their assets or systems in accordance with the provisions of this Act.

Explanation :- In this section, –

(a) *"the expected revenue from charges"* means the total revenue which a licensee is expected to recover from charges for the level of forecast supply used in the determination under sub-section (5) above in any financial year in respect of goods or services supplied to customers pursuant to a licensed activity; and

(b) *"tariff"* means a schedule of standard prices or charges for specified services which are applicable to all such specified services provided to the type or types of customers specified in the tariff notification."

Section 26(9) specifically allows changes in fuel surcharge which is to be prescribed as per the formula prescribed by the regulations.

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9. The Commission has power under section 26 of the Act of 1998 to prescribe tariffs by Regulations duly published in the Official Gazette, *inter alia*, considering the interests of consumers. Licensee is obligated to furnish the information under section 26(5) as to its calculation for financial year of the expected aggregate revenue which it would recover. Under section 26(6) the holder of a supply licence shall publish in the daily newspaper tariff or tariffs for the supply of electricity in his licensed area. As per the provision in section 26(8) the Commission shall endeavour to fix tariff in the manner as far as possible, similarly placed consumers in different areas pay similar tariff. Section 26(9) creates a negative mandate on amendment of tariff determined under section 26(6) which may not be amended more than once in a financial year except FSA. Section 39 provides for appeals against the orders of the Commission. Section 54 of the Act of 1998 deals with the power to make regulations. Under section 54(2)(g) the Commission has the power to fix the method and manner of determination of licensee's revenues and tariff fixation and the matters to be considered in such determination and fixation.

10. The provision contained in section 185(3) of the Central Act of 2003 saves the enactment specified in the Schedule not inconsistent with the provisions of the Act. Relevant portions of section 185(3) and the Schedule are extracted hereunder :

> **"185. Repeal and saving.**—(1) Save as otherwise provided in this Act, the Indian Electricity Act, 1910 (9 of 1910), the Electricity

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(Supply) Act, 1948 (54 of 1948) and the Electricity Regulatory Commissions Act, 1998 (14 of 1998) are hereby repealed.

(2) Notwithstanding such repeal,—

(*a*) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

(*b*) the provisions contained in sections 12 to 18 of the Indian Electricity Act, 1910 and rules made thereunder shall have effect until the rules under sections 67 to 69 of this Act are made;

(*c*) the Indian Electricity Rules, 1956 made under Section 37 of the Indian Electricity Act, 1910 (9 of 1910) as it stood before such repeal shall continue to be in force till the regulations under section 53 of this Act are made;

(*d*) all rules made under sub-section (1) of section 69 of the Electricity (Supply) Act, 1948 (54 of 1948) shall continue to have effect until such rules are rescinded or modified, as the case may be;

(*e*) all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government.

(3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable.

(4) The Central Government may, as and when considered necessary, by notification, amend the Schedule.

(5) Save as otherwise provided in sub-section (2), the mention of particular matters in that section, shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeals.

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THE SCHEDULE

ENACTMENTS

[*See* sub-section (3) of Section 185]

1. The Orissa Electricity Reform Act, 1995 (Orissa Act No.2 of 1996).
2. The Haryana Electricity Reform Act, 1997 (Haryana Act No. 10 of 1998).
3. The Andhra Pradesh Electricity Reform Act, 1998 (Andhra Pradesh Act No. 30 of 1998).
4. The Uttar Pradesh Electricity Reform Act, 1999 (Uttar Pradesh Act No. 24 of 1999).
5. The Karnataka Electricity Reform Act, 1999 (Karnataka Act No. 25 of 1999).
6. The Rajasthan Electricity Reform Act, 1999 (Rajasthan Act No. 23 of 1999).
7. The Delhi Electricity Reforms Act, 2000 (Delhi Act No. 2 of 2001).
8. The Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 (Madhya Pradesh Act No. 4 of 2001).
9. The Gujarat Electricity Industry (Reorganisation and Regulation) Act, 2003 (Gujarat Act No. 24 of 2003)."

In the Schedule at item No.3, Act of 1998 is mentioned as such it has been saved from repeal. As specified and provided under section 185(3) of the Act of 2003, the provisions of the Act of 1998, which are not inconsistent with the provisions of the Act of 2003 are in vogue.

11. In the aforesaid backdrop, we proceed to take note of the Regulations of 1999 framed by the Commission under the provisions of sections 9 and 54 of the Act of 1998. The Regulations provide for provisions for conduct of the business. By virtue of the First Amendment Regulations, 2000, the Regulations of 1999 had

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been amended. Under the heading of tariffs, Regulation 45-B has been inserted providing for fuel surcharge adjustment formula.

Regulation 45-B had been substituted in 2003 which is extracted hereunder:

"**45-B**:

Unless otherwise agreed by the Commission, the amount eligible for recovery towards the Fuel Surcharge Adjustment (FSA) for the price and mix variations in the quantity of energy to be purchased as per the tariff order during a quarter '1' shall be determined as per the following formula, aggregated for the quarter '1'.

$$F_i = \frac{(P_i \times E_i + FC_i + Z + A_i)}{Q_i}$$

Where

Pi — is the difference in the Weighted Average Variable Cost in Rupees adjusted to four decimal points, of power purchase cost in quarter '1' for the power purchase quantity mentioned in the tariff order compared to the Weighted Average Variable Cost adopted in the tariff order.

Ei — is the energy purchase as mentioned in the tariff order in K wh during the quarter to be submitted for each of the generating stations.

FCi — difference in Rupees, of the actual total fixed charges of the generating stations from the base values adopted in the tariff order.

Qi — is the actual energy sold to all categories in K wh in the quarter in DISCOM or RESCO, subject to condition No. 1, mentioned here under.

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Z is the changes in the cost in Rupees as allowed by the Commission for a period extending in the past beyond the relevant quarter.

Ai adjustment in Rupees to account for the financial impact of demonstrated incidents of merit order violation on account of controllable factors or any other events the financial impact of which, in the Commission's view, should be given appropriate treatment.

Condition (1) The FSA as worked out will be distributed among all categories of consumers that existed in the quarter. However the consumption by the agricultural sector will be excluded till the Commission is satisfied that metering of agricultural consumption is complete, as may be notified in the Tariff orders from time to time.

(2) The licensee shall provide the Commission with its calculation of each fuel surcharge adjustment required to be made pursuant to its tariff before it is implemented with such documentation and other information as it may require, for purpose of verifying the correctness of adjustments.

(3) FSA billed to retail categories to be made over to Bulk supplier by individual Distribution Companies and/or RESCOS as the case may be.

(4) APTRANSCO must file with the Commission all information (including sales data from the DISCOMS/RESCOs) required for calculation of the Fuel Surcharge Adjustment within 30 days of the end of the respective quarter failing which it will forfeit any future claims on this account for such quarter.

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DISCOMS/RESCOs should use actual consumption details of the relevant quarter when levying FSA.

(5) The licensee will report data from computing the total cost (split for fixed and variable) for each of the generation stations that has supplied power in the respective quarter for which fuel surcharge adjustment is being computed. The total amount eligible for recovery will be computed on an aggregate basis.

(6) Fuel cost data has to conform to the fuel costs to the allowed level and no other charges other than the transportation cost can be included in the fuel cost. Every statement has to be confirmed by the licensee to that effect. The costs arrived at will be compared to the fuel cost indexation which will be developed by the Commission in the future.

(7) Penalties are leviable for furnishing wrong data.

(8) The licensee shall publish the FSA approved by the Commission in one English and one Telugu daily newspaper with circulation in the area of supply, for general information of the consumers, and shall make available copies of the FSA order for the relevant quarter to the public on request, at a reasonable cost.

(9) The FSA shall be implemented after 7 days of such publication.

(10) The actual variable costs and Fixed costs computed for Central Generating Stations 9CGS) should exclude the effect of UI charges.

(11) The FSA will include not only fixed costs of two part tariff but also of single part tariff wherever applicable".

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(By Order of the Commission)

S. SURYA PRAKASA RAO,
Secretary to Commission

Hyderabad,
23-06-2003."

12. Sections 61 and 62 of the Act of 2003 deal with the tariff regulations and determination of tariff. The provisions are extracted hereunder :

> **"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 cross-subsidies in the manner 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

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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 the 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.

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(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 procedure 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."

Section 62(1) provides for determination of tariff for supply of electricity by generating company to a distribution licensee, transmission of electricity, wheeling of electricity and for retail sale of electricity. Section 62(3) enables the Commission to differentiate according to consumer's load factor, power factor, voltage, total consumption of electricity, geographical position of any area, nature of supply and purpose for which supply is required. At the same time, it is not to show undue preference to any consumer. Section 62(4) of the Act of 2003 is akin to section 26(7) of the Act of 1998 and permits change in fuel surcharge as per the specified formula. Section 55(1) of the Act of 2003 mandates that no licensee shall supply electricity after the expiry of two years from the appointed date, except through installation of a correct meter.

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13. Though the Act of 1998 had been specifically saved by the provisions contained in section 185 of the Act of 2003, the Commission decided to make a transitory regulation to be in force till new regulations are framed and accordingly, published a draft regulations in the A.P. Gazette on 16.6.2004 seeking comments and suggestions by 26.6.2004. No suggestions for any changes/modifications had been received. Thus, in exercise of power conferred under section 181 and section 61 of the Act of 2003 and other powers enabling the Commission in that behalf, it framed the Regulations of 2004 which came into force with effect from 10.6.2004 and it has adopted the existing Regulations of 1999 as amended from time to time, and they shall continue till new Regulations are notified by the Commission under the Act of 2003. Regulations of 2004 are extracted hereunder :

"**ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION**

Regulation No. 9 of 2004

INTRODUCTION

Under section 61 of the Electricity Act, while specifying the terms and conditions for the determination of tariff, the Commission has to be guided inter-alia by the Provisions of clauses (a) to (i) thereof. One of the provisions refers to the National Electricity Policy and tariff policy to be notified by the Central Government. As the Central Government has not framed the National Electricity Policy and tariff policy till date, the Commission has not finalized the aforementioned terms and conditions for the determination of tariff. The Commission is also in the process of finalizing various other Regulations under the Electricity Act, 2003. The Commission will be notifying these Regulations including the Conduct of Business

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Regulations under the Electricity Act, 2003. The Commission therefore decided to make a transitory Regulation to be in force till the new Regulations are framed and accordingly published a draft Regulation in the A.P. Gazette on 16-06-2004 seeking comments and suggestions of interested persons by 26-06-2004. No suggestions for any changes/modifications have however been received.

In exercise of the powers conferred on the A.P. Electricity Regulatory Commission under Section 181 read with 61 of the Electricity Act, 2003 (Act 36 of 2003) and other powers enabling the Commission in that behalf, the Commission here makes the following Regulation, namely:

1. (i) This Regulation may be called the A.P. Electricity Regulatory Commission (Transitory Provisions for Determination of Tariff) Regulation, 2004.

   (ii) This shall be deemed to have come into force on 10th June, 2004.

2. The existing Regulations notified by the Andhra Pradesh Electricity Regulatory Commission, including the A.P. Electricity Regulatory Commission (Conduct of Business) Regulation, 1999, incorporating the provisions relating to determination of tariff and terms and conditions and notified as Regulation No. 2 of 1999 and published in the A.P. Gazette No. 23 dt. 22-07-99 and as amended from time to time as well as all other regulations notified by the Commission from time to time under the provisions of the Andhra Pradesh Electricity Reform Act, 1998, shall continue to apply as regulations under the Electricity Act, 2003 and remain in force till appropriate new Regulations are notified by the Commission under the Electricity Act, 2003.

(BY ORDER OF THE COMMISSION)

S. SURYA PRAKASA RAO,
Secretary"

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14. The Commission has framed the Regulations of 2005 under section 181 read with sections 61 and 62 of the Act of 2003. 'ARR' is defined in Regulations under section 2(1)(2) thus :

> **"2. DEFINITIONS AND INTERPRETATION**
>
> 1. In this Regulation, unless the context otherwise requires:
>
> 1. xxx xxx xxx
>
> 2. "Aggregate Revenue Requirement: (ARR) means the revenue required to meet the costs pertaining to the licensed business, for a financial year, which would be permitted to be recovered through tariffs and charges by the Commission.
>
> xxx xxx xxx"

Regulation 3 deals with the extent of application of the regulations. Same is extracted hereunder :

> **"3. EXTENT OF APPLICATION**
>
> 1. This Regulation shall apply to all the Distribution Licensees in the State for a) Distribution Business and b) Retail Supply Business.
>
> 2. In accordance with the principles laid out in this Regulation, the Commission shall determine the Aggregate Revenue Requirement (ARR) for a) Distribution Business and b) Retail Supply Business.
> 3. The ARR determined for Distribution Business will be the basis for the fixation of the wheeling tariff/charges.
> 4. The ARR determined for Retail Supply Business will be the basis for the fixation of the Tariff/Charges for retail sale of electricity including surcharges."

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The expenditure of the Distribution Licensee considered as "controllable" and "uncontrollable" has been specified in Regulation 10. The cost of power purchase is uncontrollable. It is also provided in Regulation 10(4) that the Distribution Licensee shall be eligible to claim variations in "uncontrollable" items in the ARR. Regulation 24 of Regulations, 2005 deals with the saving. Same is extracted hereunder :

"24. SAVING

1. Nothing in this Regulation shall be deemed to limit or otherwise affect the power of the Commission to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Commission.

2. Nothing in this Regulation shall bar the Commission from adopting in conformity with the provisions of the Act, a procedure, at variance with any of the provisions of this Regulation, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters.

3. Nothing in this Regulation shall, expressly or by implication, bar the Commission from dealing with any matter or exercising any power under the Act for which no Regulations have been framed, and the Commission may deal with such matters, exercise such powers and discharge such functions in a manner it deems fit."

It is clearly provided in Regulation 24(3) that nothing in Regulations of 2005 shall, expressly or by implication, bar the Commission from dealing with any

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matter or exercising any power under the Act for which no Regulations have been framed.

Meaning of 'surcharge' :

15. As to the meaning of 'surcharge', appellants have relied upon various decisions, it is appropriate to mention them. Relying upon *The Commissioner of Income Tax, Kerala v. K. Srinivasan* 1972 (4) SCC 526, it was submitted that income-tax includes surcharge. Reference has also been made to *Sarojini Tea Co. (P) Ltd. v. Collector of Dibrugarh, Assam and Anr.* (1992) 2 SCC 156 in which this Court has considered various decisions relating to the meaning of 'surcharge', thus :

> **"10.** Since the question for consideration is whether the surcharge levied under the Surcharge Act can be held to be land revenue, it is necessary to examine the nature of the said levy. According to the *Shorter Oxford English Dictionary* the word 'surcharge' stands for an additional or extra charge or payment. In *Bisra Lime Stone Co. Ltd.* v. *Orissa State Electricity Board* (1976) 2 SCC 167 after referring to the said definition, this Court had observed: (SCR pp. 310-11 : SCC p. 170, para 11)
>
> > "Surcharge is thus a superadded charge, a charge over and above the usual or current dues."
>
> **11.** In that case the Orissa State Electricity Board had imposed a uniform surcharge of 10 per cent on the power tariff. It was argued that surcharge was unknown to the provisions of the Electricity (Supply) Act, 1948 and the Electricity Board had no power under the said Act to levy a surcharge. This Court negatived the said contention

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and in that context, after explaining the meaning of the expression 'surcharge', it was observed: (SCR p. 311 : SCC p. 170, para 11)

> "Although, therefore, in the present case it is in the form of a surcharge, it is in substance an addition to the stipulated rates of tariff. The nomenclature, therefore, does not alter the position. Enhancement of the rates by way of surcharge is well within the power of the Board to fix or revise the rates of tariff under the provisions of the Act."

12. Similarly, in *CIT* v. *K. Srinivasan* (1972) 4 SCC 526 a question arose whether the term 'income tax' as employed in Section 2 of the Finance Act, 1964, would include surcharge and additional surcharge whenever provided. This Court while tracing the concept of surcharge in taxation laws of our country, has observed: (SCR p. 312 : SCC p. 528, para 5)

> "The power to increase federal tax by surcharge by the Federal legislature was recommended for the first time in the report of the committee on Indian Constitutional Reforms, Vol. I Part I. From para 141 of the proposals it appears that the word 'surcharge' was used compendiously for the special addition to taxes on income imposed in September 1931. The Government of India Act, 1935, Part VII, contained provisions relating to finance, property, contracts and suits. Sections 137 and 138 in Chapter I headed 'finance' provided for levy and collection of certain succession duties, stamp duties, terminal tax, taxes on fares and freights, and taxes on income respectively. In the proviso to Section 137 the federal legislature was empowered to increase at any time any of the duties of taxes leviable under that section by a surcharge for federal purposes and the whole proceeds of any such surcharge were to form part of the revenue of the federation. Sub-section (3) of Section 138 which dealt with taxes on income related to imposition of a surcharge."

13. It was further observed at page 315 of the report: (SCR p. 315 : SCC p. 530, para 10)

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> "The meaning of the word 'surcharge' as given in the *Webster's New International Dictionary* includes among others 'to charge (one) too much or in addition …' also 'additional tax'. Thus the meaning of surcharge is to charge in addition or to subject to an additional or extra charge."

14. In *C.V. Rajagopalachariar* v. *State of Madras* AIR 1960 Mad 543: (1959) in the context of the Madras Land Revenue Surcharge Act, 1954 and the Madras Land Revenue (Additional Surcharge) Act, 1955, it has been laid down: [AIR p. 545, para (5)]

> "The word 'surcharge' implies an excess or additional burden or amount of money charged. Therefore, a surcharge of land revenue would also partake the character of land revenue and should be deemed to be an additional land revenue. Although Section 4 of the two enactments referred to above only deems it to be recoverable as a land revenue it is manifest that the surcharge would be a part of the land revenue. The effect of the two Acts would be, therefore, to increase the land revenue payable by a landholder to the extent of the surcharge levied. If therefore, a surcharge levy has been made, the government would be enabled to collect a higher amount by way of land revenue from a ryotwari pattadar than what was warranted by the terms of the previous ryotwari settlement."

15. The said decision was approved by this Court in *Vishwesha Thirtha Swamiar* v. *State of Mysore* (1972) 3 SCC 246. In that case this Court was considering the question whether the Mysore State legislature was competent to enact the Mysore Land Revenue (Surcharge) Act, 1961. After examining the nature of the levy the Mysore High Court had held that the so-called land revenue surcharge was but an additional imposition of land revenue or a land tax and fell either within Entry 45 or Entry 49 of the State List. This Court agreeing with the view of the High Court held that the surcharge fell squarely within Entry 45 of the State List, namely, land revenue. It was observed: (SCC pp. 249-50, paras 10 and 12)

> "The legislation is but an enhancement of the land revenue by imposition of surcharge and it cannot be called a tax on land revenue, as contended by the learned counsel for the

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> appellant. It is a common practice among the Indian legislatures to impose surcharge on existing tax. Even Article 271 of the Constitution speaks of a surcharge for the purpose of the Union being levied by way of increase in the duties or taxes mentioned in Article 269 and Article 270 ….
>
> It seems to us that the Act clearly levies land revenue although it is by way of surcharge on the existing land revenue. If this is so, the fact that the surcharge was raised to 100 per cent of the land revenue on the wet and garden land and 75 per cent of the land revenue in respect of dry lands, subject to some minor exceptions, does not change the nature of the imposition."
>
> **16.** From the aforesaid decisions, it is amply clear that the expression 'surcharge' in the context of taxation means an additional imposition which results in enhancement of the tax and the nature of the additional imposition is the same as the tax on which it is imposed as surcharge. A surcharge on land revenue is an enhancement of the land revenue to the extent of the imposition of surcharge. The nature of such imposition is the same viz., land revenue on which it is a surcharge."

16. In *State of Orissa & Anr. v. Jayashree Chemicals & Ors*. 2004 (13) SCC 594, this Court considered the provisions contained in section 2(g)(v) and section 3 of the Orissa Electricity (Duty) Act, 1961 and held that charge in section 2(g)(v) includes surcharge which amounts to charge on freight.

17. On due consideration of meaning of 'surcharge' in various decisions, in our opinion, nature of surcharge has to be considered as per intendment in which it has been used in the enactment. 'Surcharge' is basically over and above main levy and

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is in the form of additional charge. It may carry different contours as per provisions of an enactment and different methodology for its determination.

In Re : Formula of FSA and its vires :

18. In the backdrop of the aforesaid provisions, we now advert to the first submission whether Regulation 45-B is ultra vires to the provisions of section 26(9) of the Act of 1998 or sections 61 and 62(4) of the Act of 2003. Regulation 45-B deals with the determination of fuel surcharge. 'Fuel surcharge' has not been defined in the Act of 1998 or the Act of 2003. The Commission has the power under section 26(2) to prescribe the terms and conditions for determination of the licensee's revenue and tariffs. Section 26(9) enables the Commission to vary fuel surcharge which is to be determined as per the formula prescribed by regulations. Thus the Commission has been given the legislative power to prescribe the fuel surcharge formula by way of making regulation and to include such factors as it considers appropriate for determination of fuel surcharge. Under Section 61 of the Act of 2003 the Commission has the power to specify the terms and conditions for determination of tariff. It is pertinent to note that under the Act of 2003 Commission has adjudicatory, legislative as well as advisory powers. It has to consider under section 61(b) commercial principles in regard to the generation, transmission, distribution and supply of electricity. Under section 61(d) the

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Commission has to frame the conditions with regard to safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner. Section 62(4) of the Act of 2003 provides that no tariff or part of any tariff creates an embargo on deviation of tariff frequently more 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. Section 62 does not deal with the matter to be provided in determination of fuel surcharge formula. The provisions of section 61 contain principles on which the Commission has to act, it cannot be said to be ultra vires. The fuel surcharge formula in Regulation 45-B is in consonance with the factors provided under sections 61 and 62 of the Act of 2003 and also the provisions contained in section 26 of the Act of 1998. The fixation is as per law laid down by this Court and the statutory guidelines given under section 61 of the Act of 2003 are binding upon the Regulatory Commission and tariff has to be fixed in compliance thereof as held in *PTC India Ltd. v. Central Electricity Regulatory Commission, through Secretary* (2010) 4 SCC 603 and *National Thermal Power Corporation Ltd. v. Madhya Pradesh State Electricity Board & Ors.* (2011) 15 SCC 580. In *Transmission Corporation of Andhra Pradesh Ltd. & Anr. v. Sai Renewable Power Pvt. Ltd. & Ors*. (2011) 11 SCC 34 also, similar proposition was laid down :

> **"56.** Sections 61 to 64 of the Electricity Act, 2003 place an obligation upon the appropriate Commission to determine the tariff in

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> accordance with the provisions of this Act. An application for determination of tariff shall be made by the generating company under Section 64 and the tariff has to be determined by the appropriate Commission and it is also required to specify the terms and conditions for determination of the tariff as per the factors and the guidelines specified under Section 61 of the Act."

19. It is also true, as contended on behalf of the appellants that administrative instructions are binding in the absence of statutory guidelines and any breach thereof would be arbitrary as held in *Dr. Amarjit Singh Ahluwalia v. The State of Punjab & Ors*. (1975) 3 SCC 503 which decision has been followed in *B.S. Minhas v. Indian Statistical Institute & Ors.* (1983) 4 SCC 582. However, in our opinion, there is no violation of the provisions of section 61 of the Act of 2003 and we have found FSA regulations are in compliance of the statutory directives given in section 61.

20. In *Rohtas Industries Ltd. & Ors. v. Chairman, Bihar State Electricity Board & Ors*. 1984 (Supp) SCC 161, a question arose as to the validity of supplementary bills raised by the Bihar State Electricity Board for fuel surcharge. In exercise of the power conferred under section 49 of the Electricity Act, 1948 the Electricity Board from time to time issued notifications fixing tariffs and terms and conditions. Para 16.7 of the tariff Notification, 1978 provided that the consumers of specified category shall be liable to pay fuel surcharge at a rate to be determined

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every year in accordance with the formula set out in sub-para 2 of said paragraph 16.7. A dispute arose due to raising of the fuel surcharge. One of the questions raised was that the bills were not in accordance with the provisions of tariff notification. The High Court disagreed hence the matter travelled to this Court. This Court answered the question whether the fuel surcharge can only be on the actual cost of fuel consumed in the generating stations. This Court has held that though the nomenclature given to the levy is "fuel surcharge", it is really a surcharge levied to meet increased cost of generation and purchase of electricity and this is made absolutely clear in the formula given in para 16.7.2. The formula considered by this Court in *Rohtas Industries* (supra) and relevant discussion is extracted hereunder :

> **"9.** The next argument advanced on behalf of the appellants was that even if the Board is legally entitled to levy the fuel surcharge, that can only be for the purpose of recouping the amounts actually paid by the Board by way of "fuel surcharge" to the Damodar Valley Corporation and the U.P. State Electricity Board for the quantities of energy purchased by the Board from those sources and the extra cost that the Board had actually to incur on fuel consumed in those two generating stations at Patratu and Barauni. From the counter-affidavit filed on behalf of the Board, it is seen that in respect of the increase in the cost of production of electricity in the two generating stations of the Board, the fuel surcharge has taken into account only that part of the increase in cost which is relatable to the increased price of the coal and oil i.e. fuel alone. The increase in expenditure referable to the enhancement in cost of the energy generated on other accounts such as wages, maintenance, etc. has not been taken into account in the fuel surcharge. Such increase in cost of production on account of those other factors has been offset by a revision of the basic general tariff by

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16.5 per cent payable not only by the industries but by all classes except the agriculturist class. In respect of the energies purchased by the Board from outside sources, namely, the Damodar Valley Corporation and the U.P. State Electricity Board, the increase in cost per unit incurred by the Board has been included in the computation of the fuel surcharge. We see no substance whatsoever in the contention advanced by the appellants that only such amounts, if any, as might have been paid by the Board to the D.V.C. and the U.P. State Electricity Board as and by way of fuel surcharge can go into the computation of the fuel surcharge levied by the Board under paragraph 16.7 of the 1979 tariff. Though the nomenclature given to the levy is "fuel surcharge" it is really a surcharge levied to meet the increased cost of generation and purchase of electricity and this is made absolutely clear in the formula given in para 16.7.2.

10. The formula for determining the fuel surcharge set out in paragraph 16.7.2 reads:

$$S = \frac{(A1 \times A3 + B1 \times B3 + C1 \times C3 + D1 \times D3 + E1 \times E3)}{(A2 + B2 + C2 + D2 + E2)}$$

This is followed by detailed explanation as to what the different alphabets used in the numerator and denominator signify. The explanation given in respect of Cl is "increase in the *average unit rate* of purchase of energy from D.V.C. during the year for which the surcharge is to be calculated. The said increase to be calculated with respect to the base year 1977-78". C3 stands for "units purchased from D.V.C. during the year". Likewise, El and E3 have been explained as "Increase in the *average unit rate* of purchase of energy from Uttar Pradesh State Electricity Board during the year for which surcharge is to be calculated, the said increase to be calculated with respect to the base year 1977-78" and "*units purchased* from Uttar Pradesh State Electricity Board" respectively.

11. We see no force in the contention put forward on behalf of some of the appellants that the words "increase in the average unit rate of purchase of energy" used in Cl below paragraph 16.7.2 should be interpreted as taking their colour from the contents of paragraph

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16.7.3. From a reading of these provisions it is abundantly clear that the entire increase in cost incurred in the purchase of energy from the D.V.C. and the U.P. State Electricity Board has to go into the computation of the surcharge leviable under paragraph 16.7. The contention to the contrary advanced by the appellants is therefore, only to be rejected. There is no ambiguity whatever in the words used in Cl so as to require us to take light from paragraph 16.7.3 for the purpose of understanding their scope and meaning.

xxx xxx xxx

18. Some of the appellants have endeavoured to persuade us to go into the minutest details of the mechanism of the tariff fixation effected by the Board in an endeavour to demonstrate in relation thereto that a factor here or a factor there which ought to have been taken into account has been ignored. We have declined to go into those factors which are really in the nature of matters of price fixation policy and the Court will be exceeding its jurisdiction if it is to embark upon a scrutiny of matters of this kind which are essentially in the domain of the executive to determine, subject, of course, to the constitutional limitations."

It was submitted on behalf of the appellants that the stand of the Bihar Electricity Board in *Rohtas Industries* (supra) particularly in para 9 of the report, where it had realized fuel surcharge on the basis of that part of the increase in cost which is relatable to increased price of coal and oil that is fuel alone but a close scrutiny of para 9 makes it clear that in respect of energy purchased by the Board from outside sources namely Damodar Valley Corporation and U.P.State Electricity Board, the increase in cost per unit incurred by the Board has been included in the computation of fuel surcharge and this Court has found no merits in the contention

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that such amount as might have been paid by the Board to the DVC and the U.P.State Electricity Board as and by way of fuel surcharge can go into the computation of fuel surcharge levied by the Board under the 1979 tariff. The law laid down is that the nomenclature given to the levy as fuel surcharge is really a surcharge levied to meet the increased cost of generation and purchase of electricity. Thus the submission has no merit to sustain. This Court has clearly laid down that the increased cost of generation and purchase of electricity can be realized under the head of fuel surcharge.

21. This Court has considered the question of levy of fuel surcharge again in *Bihar State Electricity Board v. Pulak Enterprises & Ors*. (2009) 5 SCC 641. Section 49 of the Electricity (Supply) Act, 1948 and Clause 16.10.1 of the Notification dated 21.6.1993 came up for consideration before this Court. The notification provided payment of operational surcharge at a rate to be determined every year which consists of two elements i.e. fuel surcharge and other operational surcharge. Clause 16.10.3 laid down the formula for determining fuel surcharge. Clause 16.10.4 laid down the formula for determination of other operational surcharge. Following was the formula on fuel surcharge which came up for consideration of this Court :

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"11. In order to appreciate the facts to be stated hereinafter it would be appropriate to notice the formula for computation of the fuel surcharge laid down in Clause 16.10.3 as under:

$$S1 = A1 \times A3 + B1 \times B3 + C1 \times C3 + D1 \times D3 + E1 \times E3 + F1 \times F3 + G1 \times G3 + H1 \times H3$$
$$\text{---}$$
$$(A2 + B2 + C2 + D2 + E2 + F2 + G2 + H2)\ldots.$$

Whereas,

S1	=	Average fuel surcharge per unit in paise applicable during the financial year.
A1, B1, C1	=	Units generated from PTPS, BTPS and MTPS respectively.
D1, E1, F1, G1, H1	=	Units purchased from DVC, U.P. SEB, OSEB, NTPC, PGCIL and any other source respectively.
A2, B2, C2	=	Units sold, out of sent out from PTPS, BTPS and MTPS on which fuel surcharge is leviable.
D2, E2, F2, G2, H2	=	Units sold, out of purchased from DVC, U.P. SEB, OSEB, NTPC, PGCIL and any other source respectively during the year in which fuel surcharge is leviable.
A3, B3, C3	=	Increase in average cost of fuel surcharge in paise per unit computed for Board's generation at PTPS, BTPS and MTPS.
D3, E3, F3, G3, H3	=	Increase in average unit rate of purchase of energy from DVC, U.P. SEB, OSEB, NTPC, PGCIL and any other source respectively during the year for which the surcharge is to be calculated. The said increase to be calculated with respect to the year 1992-1993 (after amendment, read 1991-1992).

(In the above, PTPS stands for Patratu Thermal Power Station, BTPS for Barauni Thermal Power Station and MTPS for Muzaffarpur

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> Thermal Power Station. They are Board's own generating stations. Likewise, DVC stands for Damodar Valley Corporation, U.P. SEB for Uttar Pradesh State Electricity Board, OSEB for Orissa State Electricity Board, NTPC for National Thermal Power Corporation and PGCIL for Power Grid Corporation of India Ltd. They are external sources of supply of electricity to the Board.)"

This Court has laid down that fuel surcharge has to be calculated strictly within the framework of the formula provided in tariff notification. This Court also laid down that fuel surcharge is undoubtedly a part of tariff but fixing rates of consumption charges or the guaranteed charges or the fixed charges or the delayed payment surcharge, and fixing rates of fuel surcharge do not stand on a par.

22. This Court in *Pulak Enterprises* (supra) has reaffirmed the decision in *Rohtas Industries* (supra) as to the factors which can be taken into consideration for determination of fuel surcharge. Since determination of fuel surcharge formula is not the function of the court. It is not defined in the Act, as such the Commission has specified in its wisdom formula for its calculation in Regulation 45B. It cannot be said to be ultra vires to the aforesaid provisions. We find no breach of the provisions of section 26 of the Act of 1998 and principles enumerated in section 61 and section 62 of the Act of 2003 or any other provisions of the Act of 2003. The Regulations advance the mandate of the provisions of the Act. Reliance has been placed on the provisions which were in vogue in the year 2000 before the

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impugned provision was inserted in the year 2003 to contend that earlier provision was proper and legal. Question is not of choosing a better Regulation, but of power to frame it. In our opinion, as the Commission has the power to specify the fuel surcharge formula and considering nature of levy, could have taken into consideration the difference in total fixed cost, changes in adjustment as contemplated in the regulation inserted in the year 2003, the Commission has not at all transgressed its limits while carving out the formula. There is no violation of statutory provisions while enacting Regulation 45B in the year 2003. The submission raised that fuel has to be given a specific natural meaning and it is circumscribed cannot be accepted in view of the decision of this Court in *Rohtas Industries* (supra) and *Pulak Enterprises* (supra) and in view of the provisions of the Act of 1998 and the Act of 2003.

Scope of interference :

23. The scope of interference in judicial review in such matters reserved for expert bodies is limited. The court cannot substitute its opinion. It has been laid down by this Court that price fixation is not the function of the court. This Court in *Pulak Enterprises* (supra) has discussed the scope of interference in such a matter thus :

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"29. The significance of the question as to whether fixing the rate of fuel surcharge is a legislative function or a non-legislative function is that if the function is held to be legislative, in the absence of any provision in that regard the principles of natural justice would not be applicable and the scope of judicial review would also be limited to plea of discrimination i.e. violation of Article 14 of the Constitution of India. As a general proposition, the law on the point is settled.

30. In *Prag Ice and Oil Mills* v. *Union of India* (1978) 3 SCC 459 a seven-Judge Bench of this Court by majority observed: (SCC p. 490, para 52)

> "*52*. … In the ultimate analysis, the mechanics of price fixation has necessarily to be left to the judgment of the executive and unless it is patent that there is hostile discrimination against a class of [persons], the processual basis of price fixation has to be accepted in the generality of cases as valid."

31. The legal position was reiterated in *Rohtas Industries Ltd.* v. *Bihar SEB* (1984) Supp. SCC 161 and *Kerala SEB* v. *S.N. Govinda Prabhu & Bros.* (1986) 4 SCC 198 wherein it was observed, " 'price fixation' is neither the forte nor the function of the court" (*Kerala SEB case*, SCC p. 214, para 10).

32. As regards the nature of the function, in *Saraswati Industrial Syndicate Ltd.* v. *Union of India* (1974) 2 SCC 630 the Court had observed (at SCC p. 636, para 13) that "price fixation is more in the nature of a legislative measure even though it may be based upon objective criteria found in a report or other material". It should not, therefore, give rise to a complaint that rule of natural justice has not been followed in fixing the price. In *Prag Ice and Oil Mills* v. *Union of India* (1978) 3 SCC 459 the Court observed: (SCC p. 482, para 37)

> "*37*. We think that unless, by the terms of a particular statute, or order, price fixation is made a quasi-judicial function for specified purposes or cases, it is really legislative in character…. A legislative measure does not concern itself to the

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facts of an individual case. It is meant to lay down a general rule applicable to all persons or objects or transactions of a particular kind or class."

33. In *Union of India* v. *Cynamide India Ltd.* (1987) 2 SCC 720 this Court held that except in cases where it becomes necessary to fix the price separately in relation to individuals, price fixation is generally a legislative act, the performance of which does not require giving opportunity of hearing. Following passage from the judgment may usefully be noticed: (SCC pp. 734-35, para 5)

> "*5*. … legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing — there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate—in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. … But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity."

Reference may also be made to a Constitution Bench decision in *Shri Sitaram Sugar Co. Ltd.* v. *Union of India* (1990) 3 SCC 223.

34. In a sense, fixing rate of fuel surcharge under Clause 16.10 of the tariff notification is different from fixing the tariff under Section 49 of the Act. Fuel surcharge is undoubtedly a part of tariff. But fixing rates of consumption charges or the guaranteed charges or the fixed charges or the delayed payment surcharge, etc. and fixing rates of fuel surcharge do not stand on a par. Though rates of consumption charges, etc. are based on objective materials, there is enough scope for flexibility in fixing the rates. It also involves policy to fix different rates for different categories of consumers. Such is not the position with the fuel surcharge.

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> **35.** Clause 16.10.1 specifies the categories coming in the net of the levy and Clause 16.10.3 provides the formula. In simple words, the formula envisages addition of units generated or purchased and increased average cost of fuel and average unit rate of purchase rates and division of the total by the quotient is the average fuel surcharge per unit (expressed in terms of paise) described by denominator S1 in the formula. The whole exercise, it would appear, involves arithmetical accounting. There is no scope for exercise of any discretion or flexibility. This distinction, however, does not help the petitioners. It rather goes against them because if fixing rate of fuel surcharge is just an arithmetical exercise, giving opportunity of hearing would hardly serve any useful purpose."

24. In *National Thermal Power Corporation Ltd.* (supra), this Court has observed that price fixation is legislative in character. In *PTC India Ltd.* (supra) also, this Court has held that fixation of tariff like price fixation is legislative in character. The functions of the Commission have been held to be adjudicatory, advisory and legislative. The powers and functions enumerated under section 178 of the Act of 2003 confer wide powers upon the Commission to frame regulations which cannot be said to be ultra vires.

25. This Court in *Association of Industrial & Electricity Users* (supra) has observed that the court has not to act as an appellate authority and laid down the scope of judicial interference in such matters thus :

> "**11.** We also agree with the High Court that the judicial review in a matter with regard to fixation of tariff has not to be as that of an

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> Appellate Authority in exercise of its jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied with is that the Commission has followed the proper procedure and unless it can be demonstrated that its decision is on the face of it arbitrary or illegal or contrary to the Act, the court will not interfere. Fixing a tariff and providing for cross-subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law."

26. No doubt about it that section 26(9) and sections 61 and 62(4) of the Act of 2003 contain an embargo on variation of tariff more than once in a financial year. Negative words are prohibitory and are ordinarily used as legislative devise to make a statute imperative as laid down by this Court in *M. Pentiah & Ors. v. Muddala Veeramallappa & Ors.* AIR 1961 1107 and as emphasized by this Court in *Mannalal Khetan & Ors. v. Kedar Nath Khetan & Ors.* 1977 (2) SCC 424. However, there is a positive mandate as to FSA variation which cannot be ignored and has to be given full effect. While doing so there is no variation of tariff as contemplated under the aforesaid provisions. Mechanism of determination of tariff is different.

In Re : Disrimination vis-à-vis Agriculture Sector :

27. A challenge has been made to Regulation 45-B submitting that it casts additional burden without authority of law inasmuch as the letter "Q" in the

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formula is subject to condition 1 and therefore excludes the consumption by agricultural sector and does not permit distribution of additional charge among all consumers for the actual energy sold to them. It makes all the consumers not only to pay for the energy consumed by them but also for the electricity consumed in the agricultural sector which is arbitrary and contrary to the scheme of the Act and in particular sections 61 and 62. The submission cannot be accepted as differential treatment is permissible within the ken of the provisions of section 26. As provided in section 26(8) in case consumers are similarly placed same tariff has to be applied. Agriculturists and consumers like appellants cannot be said to be similarly placed. It is also provided in section 26(7) that the tariff implemented may differentiate according to the consumer's load factor or power factor, consumer's total consumption of energy during any specified period from the time at which supply is required or paying capacity of category of consumers and need for gross subsidization. Thus paying capacity *inter alia* is one of the factors which can be used for protective discrimination under discriminatory tariffs as provided in section 26(7)(a).

28. In *Real Food Products Ltd. & Ors. v. A.P. State Electricity Board & Ors.* 1995 (3) SCC 295, this Court considered the claim of discrimination of HT consumers with agriculturists to be untenable. Concessional tariff extended to agriculturists as a separate class was held not violative of Article 14.

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29. In *Rohtas Industries* (supra) also this Court had negatived the submission based upon the classification and held that classification which is legally valid and permissible for grant of concession in the basic rates will equally hold good for the purpose of subsequent scheme of distribution of burden in the form of fuel surcharge and the decision of the Board restricting levy of fuel surcharge to those categories of consumers who were enjoying the benefits of concession in the general rate and in sparing smaller type of consumers such as agriculture, irrigation and commercial consumers being subjected to that burden was upheld. This Court in *Rohtas Industries* (supra) has laid down thus :

> **"8.** The expression "licensee" means a person licensed under Part II of the Indian Electricity Act, 1910, to supply energy or a person who has obtained licence under Section 28 of that Act to engage in the business of supplying energy — through definition in Section 2(6). Admittedly, the appellants before us are not licensees. They are consumers receiving high tension supply to their factories. For the purpose of tariff fixation, the Board has classified the consumers into 10 categories, viz. "domestic", "commercial (*i*)", "commercial (*ii*)", "street light", "irrigation", "light tension industrial" (small scale industrial upto 100 h.p.), "11 k.v. h.t.s.", "33 k.v. h.t.s.", "132 k.v. h.t.s." and "railway traction (25 k.v.)". It is seen from the materials on record for us that the industries between themselves consume nearly 65 per cent of the total quantity of energy supplied by the Board. Apparently with a view to encouraging the establishment of industries in the State, the general tariff rate applicable in respect of high tension supply to industries and factories has been fixed at rates which are much lower when compared to those applicable to other types of consumers. While the general rate applicable for supply of high tension electric energy for industries of the class to which the appellants belong was 22 paise per unit, consumers belonging to "commercial" categories were charged at rates ranging between 48

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paise to 58 paise per unit, "agricultural" consumers at 29 paise per unit, "low tension" consumers at 34 to 38 paise per unit and "domestic" consumers at rates ranging between 38 to 43 paise per unit. Thus, in the fixation of the general tariff rate, a substantial concession has been shown in favour of industrial low tension and high tension consumers. The appellants have no case that any illegality was involved in treating the industrial consumers, as a separate class and granting them the benefit of a preferential treatment for the purpose of fixing the basic rate of levy for supply of electricity. The stand taken by the Board is that it was found absolutely necessary at the time of the revised tariff fixation effected in 1979 to augment its revenue by levying of the additional fuel surcharge in order to offset the heavy increase in expenditure and after taking into account all relevant facts and circumstances, it was decided to distribute that burden amongst the privileged class of consumers, namely those belonging to categories of low tension industrial service, high tension service, extra high tension service and railway traction service. Even after taking into account the fuel surcharge so levied under 1979 tariff, the rates applicable to high tension consumers like the petitioners range between 40.31 paise and 58.80 paise per unit only, while the commercial (*ii*) consumer has to pay 71.33 paise per unit and even the domestic consumer has to pay 48 paise per unit. The position that obtains under the 1981 tariff which also has been challenged by some of the appellants is substantially similar. In our opinion, the Board was perfectly within its rights in deciding to restrict the levy of fuel surcharge to those categories of consumers who were enjoying the benefit of a concession in the general rate and in sparing smaller type of consumers such as the agricultural, irrigation and commercial consumers from being subjected to that burden, in view of the fact that they were already being subjected to a basic levy at substantially higher rates. The true consequence of the action so taken by the Board is only to effect a reduction in the quantum of concession that was being enjoyed by the consumers belonging to the industrial and railway traction categories. A classification which is legally valid and permissible for the grant of a concession in the basic rates will equally hold good for the purpose of a subsequent scheme of distribution of the burden in the form of fuel surcharge. In this context, it is also relevant to remember that the levy of surcharge was necessitated by reason of the extra expenditure which the Board had to incur in the generation of electricity in the two power stations run by the Board

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> and in the purchase of power from the two outside sources, namely, the D.V.C. and the U.P. State Electricity Board and 65 per cent of the total quantity of energy supplied by the Board is consumed by the industrial and railway traction consumers. A classification of these bulk consumers has a rational nexus with the object and purposes of the levy of surcharge. Having regard to all these facts and circumstances, we find no substance in the contention advanced by some of the appellants that the imposition of fuel surcharge under paragraph 16.7 of the 1979 tariff is arbitrary and violative of Article 14 of the Constitution."

30. In *Hindustan Zinc Ltd. etc. etc. v. Andhra Pradesh State Electricity Board & Ors.* (1991) 3 SCC 299 placing burden of enhanced tariff on high tension consumers including power intensive industries was held not unreasonable and discriminatory since consumers consisted a separate class. The challenge on the ground of making good the loss on supply of electricity at cheaper rates was also repelled. This Court also laid down that the court could not strike down the upward revision made as arbitrary unless the Board is found to have shed its public utility character and there is a limited scope of judicial review and this Court further laid down that there is a limited judicial review in the matter of price fixation. The relevant portion is extracted hereunder :

> **"26.** It is, therefore, obvious that mere generation of surplus by the Board as a result of adjusting its tariffs when the quantum of surplus has not been specified by the State Government after the 1978 amendment of Section 59 of the Supply Act, cannot invite any

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criticism unless it is further shown that the surplus generated as a result of the adjustment of tariffs by the Board has resulted in the Board acting as a private trader shedding off its public utility character. In other words, if the profit is made not merely for the sake of profit, but for the purpose of better discharge of its obligations by the Board, it cannot be said that the public enterprise has acted beyond its authority. The Board in the present case has shown that the surplus resulting from upward revision of tariffs applicable to the HT consumers made in the present case, was for the purpose of better discharge of its other obligations under the Supply Act and in effect, it has merely resulted in a gradual withdrawal of the concessional tariffs provided earlier to the power intensive consumers which do not in its opinion require continuance of the concessional tariffs any longer. In fact, no material has been placed before us to indicate that this assertion of the Board is incorrect or there is any reasonable basis to hold that the upward revision of tariffs applicable to HT consumers is merely with a desire to earn more profits like a private trader and not to generate surplus for utilisation of the funds to discharge other obligations of the Board towards more needy consumers, such as agriculturists, or to meet the needs of expansion of the supply to deserving areas. The argument with reference to statistics that the upward revision of tariffs for the HT consumers results in earning amounts in excess of the cost of generation does not, therefore, merit a more detailed consideration.

27. It was also contended on behalf of the appellants that the generation of electricity by the Andhra Pradesh Electricity Board is both thermal as well as hydro, the quantity from each source being nearly equal and the entire electricity generated is fed into a common grid, from which it is supplied to all categories of consumers. On this basis, it was argued that the rise in the fuel cost which led to the fuel cost adjustment applicable only to the HT consumers was unreasonable and discriminatory since the burden of rise in fuel cost was placed only on the HT consumers. In our opinion, this argument has no merit. The HT consumers, including the power intensive consumers, are known power guzzlers and in power intensive industries, electricity is really a raw material. This category of consumers, therefore, forms a distinct class separate from other consumers like LT consumers who are much smaller consumers. There is also a rational nexus of this classification with the object

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sought to be achieved. Moreover, the power intensive consumers have been enjoying the benefit of a concessional tariff for quite some time, which too is a relevant factor to justify this classification. Placing the burden of fuel cost adjustment on these power guzzlers, who had the benefit of concessional tariff for quite some time and have also a better capacity to pay, cannot, therefore, be faulted since the consumption in the power intensive industries accounts for a large quantity."

The decision in *Hindustan Zinc Ltd.* (supra) has been followed in *Pulak Enterprises* (supra).

31. This Court in *Association of Industrial Electricity Users v. State of A.P. & Ors*. 2002 (3) SCC 711 has considered and upheld the levy of different tariffs. It has laid down thus :

"10. We are also unable to agree with the learned counsel for the appellants that the Act does not envisage classification of consumers according to the purpose for which electricity is used. Sub-section (9) of Section 26 does state that the tariff which is fixed shall not show undue preference to any consumer of electricity but then the said sub-section itself permits differentiation according to the consumer's load factor or power factor, consumer's total consumption of energy during the specified period, time at which the supply is required or paying capacity of category of consumers and the need for cross-subsidisation or such tariff as is just and reasonable and be such as to promote economic efficiency in the supply and consumption of electricity and the tariff may also be such as to satisfy all other relevant provisions of the Act and the conditions of the relevant licence. This section has to be read along with Section 11 which sets out the functions of the Commission and, inter alia, provides that amongst the functions is the power to regulate the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be

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> maintained unless the charges for electricity supplied are adequately levied and duly collected. Depending upon the various factors stipulated in Section 26(7), categorisation between industrial and non-industrial, agricultural or domestic consumers can certainly take place. This is precisely what has been done in the present cases. 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."

In view of the aforesaid discussion, the submission with respect to favourable treatment and discrimination *vis a vis* the agricultural sector is hereby repelled.

In Re : Variation in cost of Rupee :

32. It was also submitted on behalf of the appellant that Regulation 45B that letter 'Z' in the formula for which the Commission to apply the change in cost of rupee for a period beyond the period of supply of electricity to the consumers without any time limit, the submission in this regard is baseless and cannot be accepted. As a matter of fact the fuel surcharge is determined as per the formula which takes into account the change in cost of rupee for a period extending in the past beyond the relevant quarter. There is nothing bad in it as there is change in the cost of rupees which can be allowed by the Commission for realization of fuel surcharge as and when it is determined. It is a method of determining the actual

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value to be paid in rupees and cannot be said to be illegal or arbitrary at all. It is in consonance with business norms.

In Re : Vagueness of Formula :

33. It was also submitted that letter 'A' in the formula is vague and unrealistic so as to permit the Commission to impose additional burden unrelated to escalation of fuel cost under the guise of FSA. The submission is too tenuous to be accepted and proceeds on assumption that only escalation in fuel cost can be levied even the financial year impact of demonstrated incidents of merit order violations on account of controllable factors and any other event which had the financial impact can be given appropriate treatment and can also form part of FSA as laid down by this Court in *Rohtas Industries* (supra) and *Pulak Enterprises* (supra).

In Re : Metering of consumption :

34. Coming to the submission that as metering is mandated on completion of two years, as such agricultural aspect cannot be included on lapse of said period. Section 55 of the Act of 2003 deals with the use of meters and it is provided that no licensee shall supply electricity after expiry of two years from the appointed date except through installation of a correct meter in accordance with the regulations. The said Commission may also extend the period up to two years for a class or

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class of persons as may be specified in the notification. The provision made in condition No.1 of Regulation 45-B cannot be said to be repugnant to section 55(1) as it deals with the licensee's obligation to supply electricity after two years only on the basis of metered supply. It has not been achieved so far. However, electricity is being consumed and the authorities are not able to do the complete metering of agricultural services. In our opinion, in the prevailing conditions, in particular plight of agricultural sector and purpose of enactment, it is open to the Commission to make such a wholesome provision carved out in condition No.1. Thus there is no violation of the provisions contained in section 55(1) of the Act of 2003. The consequence of section 55 of the Act of 2003 cannot be that if metering is not achieved within two years the consumption in agricultural sector cannot be provided within the purview of FSA formula. Thus condition 1 did not cease to have effect after 10.6.2005 as submitted on behalf of the appellants.

JUDGMENT

In Re : Subsidy :

35. Coming to submission of violation of section 65, section 65 of the Act of 2003 which enables the State Government to make a provision for subsidy to any consumer or class of consumers. The State Government has to pay in advance in such manner the amount to compensate the person affected by the grant of subsidy. Section 65 is extracted hereunder :

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> **"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 the State Commission shall be applicable from the date of issue of orders by the Commission in this regard."

36. Considering the condition of farmers which is pathetic and they are unable to face the burden, it is rightly pointed out on behalf of the Commission that the State Government had given them certain concessions in the form of subsidy. However the Commission had excluded them from meeting the fuel surcharge adjustment charges. Provision of section 65 relating to subsidy by the State Government is not at all attracted. The matter involved in the present cases is not of subsidy but determination of fuel surcharge formula. Thus, the submission based upon the violation of the provision of section 65 is wholly unwarranted and is liable to be rejected as subsidy has not been included in the determination of fuel

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surcharge. It cannot be invalidated on the ground of violation of provisions contained in section 65 of the Act of 2003.

In Re : Lapse of Regulations of 1999 :

37. Next submission raised on behalf of the appellants is that the Regulations of 1999 as amended in 2003 being the tariff regulation under the Act of 1998, ceased to have effect on 10.6.2004 after one year from the date of coming into force of the said Act, by reason of proviso to section 61 of the Act of 2003. The submission raised is untenable for various reasons. First is that regulations have been framed with effect from 10.6.2004. The proviso to section 61 of the Act of 2003 makes it clear that the terms and conditions for determination of tariff and the enactment specified in the Schedule as they stood 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 section 61, whichever is earlier. Thus, the tariff regulations framed under the Act of 1998 would remain in force for maximum period of one year and the regulations had been framed with effect from 10.6.2004 and the Transitory Regulations have been enacted vide Regulations of 2004 by the Commission. Regulation 2 of said Regulations of 2004 clearly provides that Regulations of 1999 as amended from time to time under the Act of 1998 shall apply as regulation under the Electricity Act, 2003 and shall remain in force or till new regulations are

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notified by the Commission under the Act of 2003. Even if earlier Regulations of 1999 came to an end on 10.6.2004 and if it is further assumed without deciding that the Commission had no authority to enact retrospectively, in our opinion, it could have adopted the Regulations of 1999 as amended, framed under the Act of 1998 shall continue, to apply for future. Considering the period in question involved in the matter, it cannot be said to be Regulations of 1999, as amended, are inoperative as they have been adopted vide Regulation No.9/2004. With respect to the fuel surcharge adjustment no provision has been made in the regulations framed in the year 2005. On facts also, the Regulation 45-B was implemented subsequently and had been again amended in the year 2013. It has operated for more than a decade for determination of FSA.

In Re : Procedural lapse in framing Regulations :

38. The submission raised that amended Regulations were without previous publication as envisaged under section 181(3) of the Act of 2003, as such they are void due to non-compliance of the said provision. It is apparent that Regulation 9/2004 was previously notified as mentioned in the notification itself. A draft of regulation**s** was published seeking suggestions and comments. No suggestions for changes/modification were submitted. As such the regulations are in compliance with the provision of section 181 read with section 61. Thus we find no violation of

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the provision of section 181(3). The contention that there was no previous publication is factually incorrect.

Effect of Regulations of 2005 :

39. Submission raised that the FSA can be realized in terms of the Regulations of 2005 cannot be accepted for the simple reason that the Regulations of 2005 do not deal with FSA and there is a saving clause as provided in Regulation 24. Moreover, the Act of 1998 had not been repealed and there was re-adoption of the Regulations of 1999 in the year 2004. It is also factually incorrect submission that FSA had been realized under the Regulations of 2005 after framing of the said regulations. In fact FSA had been determined as rightly contended on behalf of the Commission under Regulation 45-B as amended in 2003 for more than a decade. A challenge had been raised for the first time after 10 years. It is obvious that the parties clearly understood Regulation 45-B is in vogue and in fact it legally prevailed and rightly followed.

40. It was also submitted that Regulation 6(4) of Regulations of 2005 provides that ARR shall contain power purchase cost for each year of the controlled period. It is clear from ARR as defined in Regulations of 2005 and FSA that they do not run counter to each other but are supplementary. The Regulations of 2005 do not

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deal with determination of fuel surcharge. Regulation 45-B cannot be said to be invalid for the aforesaid reason.

41. There is a saving clause contained in Regulation 24 of Regulations of 2005. Regulation 12.4 provides that the distribution licensee shall be entitled to recover or refund as the case may be the charges on account of fuel surcharge adjustment as approved by the Commission from time to time *suo motu* or based on the filing made by the institution company as the Commission may deem fit. The provisions of the Act provided that the formula has to be specified by the Commission for FSA and this has been specified only in Regulation 45-B which has been adopted in the year 2004 for continuance by the Commission. The Commission had adopted the said regulations and the same continues to be in operation.

Conclusion :

42. In our opinion, the challenge made by the appellants is unworthy of acceptance. Fuel surcharge is really a surcharge levied to meet increased cost of generation and purchase of electricity and the scope cannot be circumscribed by its nomenclature. Thus the formula in Regulation 45B and the FSA determined by the Commission would take into consideration various factors which result in the increased cost of generation and purchase of electricity.

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43. The appeals are found to be devoid of merits and are hereby dismissed. The appellants are directed to make the deposit along with interest; if no other rate is prescribed at the rate of 8 per cent per annum, and other charges for delay, as may be permissible to recover within a period of one month from today. In addition, the respondents are at liberty to take coercive steps to recover the amount.

……..J.
(V. Gopala Gowda)

New Delhi;
July 5, 2016.

……..J.
(Arun Mishra)

SUPREME COURT OF INDIA
यतो धर्मस्ततो जयः
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ITEM NO.1B COURT NO.3 SECTION XIIA

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 5542 @ SLP(C) No.12398/2014

SAI BHASKAR IRON LTD. Appellant(s)

VERSUS

A.P.ELECT.REGUL.COMMISSION & ORS. Respondent(s)

WITH

CA Nos.5543-5544 of 2016 @ SLP [C] Nos. 14638-14639/2014
CA No.5545 of 2016 @ SLP [C] No. 15205/2014
CA Nos. 5546-5571 of 2016 @ SLP [C] Nos. 15245-15270/2014
CA Nos. 5572-5575 of 2016 @ SLP [C] Nos. 15348-15351/2014
CA Nos. 5576-5578 of 2016 @ SLP [C] Nos. 15356-15358/2014
CA Nos. 5579-5583 of 2016 @ SLP [C] Nos. 15360-15364/2014
CA Nos. 5584-5586 of 2016 @ SLP [C] Nos. 15389-15391/2014
CA No. 5587 of 2016 @ SLP [C] No. 15603/2014
CA No. 5588 of 2016 @ SLP [C] No. 15845/2014
CA Nos. 5589-5598 of 2016 @ SLP [C] Nos. 15878-15887/2014
CA No. 5599 of 2016 @ SLP [C] No. 15891/2014
CA Nos. 5600-5601 of 2016 @ SLP [C] Nos. 15938-15939/2014
CA No. 5602 of 2016 @ SLP [C] No. 15940/2014
CA Nos. 5603-5611 of 2016 @ SLP [C] Nos. 15985-15993/2014
CA No. 5612 of 2016 @ SLP [C] No. 15998/2014
CA Nos. 5613-5618 of 2016 @ SLP [C] Nos. 17138-17143/2014
CA No. 5619 of 2016 @ SLP [C] No. 17469/2014
CA No. 5620 of 2016 @ SLP [C] No. 17495/2014
CA No. 5622 of 2016 @ SLP [C] No. 17509/2014
CA Nos. 5623-5625 of 2016 @ SLP [C] Nos. 17860-17862/2014
CA No. 5626 of 2016 @ SLP [C] No. 17869/2014
CA Nos. 5630-5631 of 2016 @ SLP [C] Nos. 18043-18044/2014
CA Nos. 5632-5663 of 2016 @ SLP [C] Nos. 18199-18230/2014
CA No. 5666 of 2016 @ SLP [C] No. 18254/2014
CA No. 5667 of 2016 @ SLP [C] No. 18261/2014
CA No. 5668 of 2016 @ SLP [C] No. 18317/2014
CA No. 5670 of 2016 @ SLP [C] No. 18331/2014
CA No. 5671 of 2016 @ SLP [C] No. 18334/2014
CA No. 5672 of 2016 @ SLP [C] No. 18354/2014
CA No. 5673 of 2016 @ SLP [C] No. 18358/2014
CA No. 5674 of 2016 @ SLP [C] No. 18395/2014
CA No. 5675 of 2016 @ SLP [C] No. 18458/2014
CA No. 5676 of 2016 @ SLP [C] No. 18956/2014

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CA No. 5677 of 2016 @ SLP [C] No. 19116/2014
CA Nos. 5678-5685 of 2016 @ SLP [C] Nos. 19261-19268/2014
CA No. 5686 of 2016 @ SLP [C] No. 19401/2014
CA No. 5687 of 2016 @ SLP [C] No. 19448/2014
CA No. 5688 of 2016 @ SLP [C] No. 19575/2014
CA No. 5689 of 2016 @ SLP [C] No. 19640/2014
CA No. 5690 of 2016 @ SLP [C] No. 19686/2014
CA Nos. 5692-5703 of 2016 @ SLP [C] Nos. 19709-19720/2014
CA No. 5704 of 2016 @ SLP [C] No. 19728/2014
CA No. 5705 of 2016 @ SLP [C] No. 19752/2014
CA No. 5706 of 2016 @ SLP [C] No. 19774/2014
CA Nos. 5707-5709 of 2016 @ SLP [C] Nos. 19782-19784/2014
CA No. 5710 of 2016 @ SLP [C] No. 19785/2014
CA No. 5711 of 2016 @ SLP [C] No. 19786/2014
CA Nos. 5712-5731 of 2016 @ SLP [C] Nos. 19789-19808/2014
CA Nos. 5732-5745 of 2016 @ SLP [C] Nos. 19818-19831/2014
CA No. 5746 of 2016 @ SLP [C] No. 19880/2014
CA No. 5747 of 2016 @ SLP [C] No. 20340/2014
CA No. 5748 of 2016 @ SLP [C] No. 20383/2014
CA No. 5749 of 2016 @ SLP [C] No. 20406/2014
CA No. 5750 of 2016 @ SLP [C] No. 20581/2014
CA No. 5751 of 2016 @ SLP [C] No. 20940/2014
CA No. 5752 of 2016 @ SLP [C] No. 20956/2014
CA No. 5753 of 2016 @ SLP [C] No. 21054/2014
CA Nos. 5754-5755 of 2016 @ SLP [C] Nos. 21396-21397/2014
CA No. 5756 of 2016 @ SLP [C] No. 21399/2014
CA Nos. 5757-5768 of 2016 @ SLP [C] Nos. 21500-21511/2014
CA Nos. 5769-5776 of 2016 @ SLP [C] Nos. 21615-21622/2014
CA No. 5777 of 2016 @ SLP [C] No. 21624/2014
CA No. 5778 of 2016 @ SLP [C] No. 21928/2014
CA No. 5779 of 2016 @ SLP [C] No. 22665/2014
CA No. 5780 of 2016 @ SLP [C] No. 22677/2014
CA Nos. 5781-5786 of 2016 @ SLP [C] Nos. 22688-22693/2014
CA Nos. 5787-5789 of 2016 @ SLP [C] Nos. 22777-22779/2014
CA No. 5790 of 2016 @ SLP [C] No. 22781/2014
CA No. 5791 of 2016 @ SLP [C] No. 23484/2014
CA Nos. 5792-5793 of 2016 @ SLP [C] Nos. 23492-23493/2014
CA No. 5794 of 2016 @ SLP [C] No. 23495/2014
CA No. 5795 of 2016 @ SLP [C] No. 23556/2014
CA Nos. 5796-5798 of 2016 @ SLP [C] Nos. 24581-24583/2014
CA Nos. 5799-5800 of 2016 @ SLP [C] Nos. 27121-27122/2014
CA Nos. 5801-5804 of 2016 @ SLP [C] Nos. 22950-22953/2014
CA Nos. 5806-5809 of 2016 @ SLP [C] Nos. 27062-27065/2014
CA Nos. 5810-5811 of 2016 @ SLP [C] Nos. 24541-24542/2014
CA No. 5812 of 2016 @ SLP [C] No. 27200/2014
CA No. 5813 of 2016 @ SLP [C] No. 26323/2014
CA No. 5814 of 2016 @ SLP [C] No. 26324/2014

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CA Nos. 5815-5818 of 2016 @ SLP [C] Nos. 27201-27204/2014
CA Nos. 5819-5822 of 2016 @ SLP [C] Nos. 26061-26064/2014
CA No. 5823 of 2016 @ SLP [C] No. 26819/2014
CA No. 5824 of 2016 @ SLP [C] No. 24857/2014
CA Nos. 5825-5826 of 2016 @ SLP [C] Nos. 27674-27675/2014
CA No. 5827 of 2016 @ SLP [C] No. 28332/2014
CA No. 5828 of 2016 @ SLP [C] No. 28354/2014
CA No. 5829 of 2016 @ SLP [C] No. 28358/2014
CA No. 5830 of 2016 @ SLP [C] No. 28606/2014
CA Nos. 5831-5832 of 2016 @ SLP [C] Nos. 29863-29864/2014
CA No. 5833 of 2016 @ SLP [C] No. 28246/2014
CA Nos. 5834-5835 of 2016 @ SLP [C] Nos. 29242-29243/2014
CA No. 5836 of 2016 @ SLP [C] No. 32016/2014
CA No. 5837 of 2016 @ SLP [C] No. 31408/2014
CA Nos. 5838-5839 of 2016 @ SLP [C] Nos. 31800-31801/2014
CA No. 5840 of 2016 @ SLP [C] No. 35438/2014
CA No. 5841 of 2016 @ SLP [C] No. 36224/2014
CA No. 5842 of 2016 @ SLP [C] No. 35460/2014
CA No. 5843 of 2016 @ SLP [C] No. 34650/2014
CA No. 5844 of 2016 @ SLP [C] No. 2689/2015
CA No. 5845 of 2016 @ SLP [C] No. 663/2015
CA No. 5846 of 2016 @ SLP [C] No. 35082/2014
CA No. 5847 of 2016 @ SLP [C] No. 36504/2014
CA No. 5848 of 2016 @ SLP [C] No. 1302/2015
CA No. 5849 of 2016 @ SLP [C] No. 4494/2015
CA No. 5850 of 2016 @ SLP [C] No. 2841/2015
CA No. 5851 of 2016 @ SLP [C] No. 4478/2015
CA No. 5852 of 2016 @ SLP [C] No. 8551/2015
CA No. 5853 of 2016 @ SLP [C] No. 7102/2015
CA No. 5854 of 2016 @ SLP [C] No. 7096/2015
CA No. 5855 of 2016 @ SLP [C] No. 16494/2015
CA No. 5856 of 2016 @ SLP [C] No. 16617/2015
CA No. 5857 of 2016 @ SLP [C] No. 16487/2015
C.A. No. 8249/2015;
CA No. 5858 of 2016 @ SLP [C] No.12607/2015
CA No. 5859 of 2016 @ SLP [C] No. 34088/2015
CA No. 5860 of 2016 @ SLP [C] No. 3063/2016; and
CA No. 5861 of 2016 @ SLP [C] No. 3516/2016.

[HEARD BY HON'BLE V. GOPALA GOWDA AND HON'BLE ARUN MISHRA, JJ.]

Date : 05/07/2016 These appeals were called on for pronouncement of judgment today.

For Appellant(s) Mr. C. S. N. Mohan Rao,Adv.

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Mr. Abhijit Sengupta,Adv.

Mr. Sudhir Naagar,Adv.

Mr. Y. Raja Gopala Rao,Adv.

Ms. Vismai Rao,Adv.

Mr. Ananga Bhattacharyya,Adv.

Mr. B. Ramana Murthy,Adv.

Mrs. Sudha Gupta,Adv.

Mr. Rakesh Dahiya,Adv.

Mr. M. P. Shorawala,Adv.

Mr. M. Ram Babu, Adv.
Mr. N. Eswara Rao, Adv.
for M/s. M. Rambabu & Co.

Mr. Senthil Jagadeesan,Adv.

Mr. Venkateswara Rao Anumolu,Adv.

Mr. G. Umapathy, Adv.
for Mr. Rohit K. Singh,AOR

Mr. Sanjay Jain,Adv.

Mr. Vikas Mehta,Adv.
Ms. Anushree Menon, Adv.

Ms. Liz Mathew, Adv.
for M/s. Mclm & Co.

Mr. D. Mahesh Babu,Adv.

Mr. Danish Zubair Khan,Adv.

For Respondent(s) Mr. Rakesh K. Sharma,Adv.

Mr. K. V. Mohan,Adv.

Mr. G. N. Reddy,Adv.

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Hon'ble Mr. Justice Arun Mishra pronounced the judgment of the Bench comprising Hon'ble Mr. Justice V. Gopala Gowda and His Lordship.

Delay, if any, in filing substitution application/s is also condoned. Substitution applications are allowed.

For the reasons recorded in the reportable judgment, which is placed on the file, the appeals are dismissed. The appellants are directed to make the deposit along with interest; if no other rate is prescribed at the rate of 8 per cent per annum, and other charges for delay, as may be permissible to recover within a period of one month from today. In addition, the respondents are at liberty to take coercive steps to recover the amount.

Pending applications, if any, stand disposed of.

JUDGMENT

(Renuka Sadana)
Court Master

(Parveen Kumar)
AR-cum-PS

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