Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 204 of 2010

Dated: 11th August, 2011

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of:

1. Faridabad Industries Association,
FIA House, BATA Chowk,
Faridabad-121 001

2. Yamuna Nagar-Jagadhri Chamber of Commerce
and Industry,
C/o Oriental Engg. Works Pvt. Ltd.,
Industrial Area,
Yamuna Nagar-135 001.

3. Haryana Plywood Manufacturers Association,
C/o EMM DEE, Vill. Jorian,
Yamuna Nagar-135 001.

4. Faridabad Industries Association,
Plot No. 23, Sector-24, Faridabad-121 005.

5. Confederation of Commerce & Industry,
C/o Desh Metal Works, Jaroda Gate,
Jagadhri-135003.

6. Gurgaon Chamber of Commerce & Industry,
Khandsa Road, Gurgaon-122001

7. Faridabad Chamber of Commerce & Industry,
FCCI Centre, Near Tubewell No. 4,
Sector 11B, Faridabad-121006

8. Bahadurgarh Chamber of Commerce & Industry,
6, MIE, Bahadurgarh-124507.

9. Gurgaon Industrial Association,
GIA House, IDC, Mehrauli Road,
Gurgaon-122 001.

10. Bhiwani Chamber of Commerce & Industry,
15, Industrial Area, Sector-21,
Bhiwani-127 021.

11. Sonipat Steel Furnace Association,
Durga Colony, Near Ram Mandir,
Kundli, Sonepat-135002

12. Oil Mills Association Charki Dadri
C/o O P Cotton & Oil Mills, Kanina Road,
Chakri Dadri-127306.

13. Confederation of Indian Industry,
(Haryana Committee),
249-F, Udyog Vihar,
Phase-IV, Sector-18,
Gurgaon-122015.

14. Haryana Copper & Copper Alloys Sheet Manufacturers Association,
C/o Lakshmi Industries, Lakshmi Nagar,
Krishna Colony, Yamuna Nagar-135 001

15. Kundli Industries Association,
130, HSIDC, Kundli (Dist. Sonepat)-131028 ... Appellants

Versus

1. Haryana Electricity Regulatory Commission,
Bays No. 33-36, Sector-4,
Panchkula-134112

2. Dakshin Haryana Bijli Vitran Nigam Limited,
Vidyut Nagar, Hissar-125 005
Haryana

3. Uttar Haryana Bijli Nigam Limited,
Shakti Bhawan, Sector-6,
Panchkula-134 109.

Counsel for the Appellant(s):	Mr. Anand K. Ganeshan Ms. Swapna Seshadri, Ms. Ranjitha Ramachandran
Counsel for the Respondent(s):	Ms. Shikha Ohri with Mr. Rajesh Monga (Rep.)for R-1 Mr. Amit Kapur Mr. Apoorva Misra Mr. Shivender Dwivedi Ms. Vibha Dhawan for R-2 & 3

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This appeal has been filed against the order dated 13.9.2010 passed by the Haryana Electricity Regulatory Commission approving the Annual Revenue Requirements and retail supply tariff for the Respondent no. 2 and 3, the distribution licensees in the state of Haryana, for the FY 2010-11.

2. The appellants are the associations of the industrial consumers in the State of Haryana. The State Commission is the first respondent. The

distribution licensees are the second and third respondents.

3. The brief facts of the case are as under:

3.1. On 28.11.2009 and 30.11.2009, the second and the third respondents respectively filed petitions before the State Commission for approval of their Annual Revenue Requirements (ARR) for the FY 2010-11. The petition did not contain any proposal for tariff determination by the State Commission.

3.2. After preliminary scrutiny of the petitions, the State Commission sought data and details on various aspects of tariff determination including proposal for retail tariff from the second and third respondents.

3.3. Despite the direction of the State Commission, no tariff proposal was submitted by the second and the third respondents.

3.4. On 13.9.2010 the State Commission passed the impugned order increasing the tariff of the consumers.

3.5. Certain clarifications were sought for by the second and the third respondents from the State Commission on the aspect of monthly minimum charges for LT industrial consumers relating to the tariff order dated 13.9.2010. The State Commission on 4.10.2010 by a communication gave the clarification which resulted in enhancement of monthly minimum charges for LT industrial consumers.

3.6. Aggrieved by the above order of the State Commission, the appellants have filed this appeal.

4. Shri Anand K. Ganesan, learned counsel for the appellants has argued on the following issues:

4.1. Increase in the tariff and fundamental change in nature of tariff without any petition filed by the distribution licensees for tariff or tariff revision: The State Commission has increased the tariff without any tariff proposal by the second and the third respondents. No notice was given to the consumers about the proposed tariff or nature of the tariff. The State Commission should have rejected the petition on this ground in consonance with Section 64 of the 2003 Act. The Regulations provide for determination of the tariff suo moto but such determination should be carried out only to reduce the tariff. However, in this case, the tariff has been increased substantially.

4.2. Non-compliance with the provisions of the Act and directions of the State Commission: The State Commission issued repeated directions to the distribution licensees since the year 2001-02 to meter the unmetered consumers. Further, they were directed to segregate the agricultural feeders to enable more scientific estimation of the power consumed by the unmetered consumers. However, the second and the third respondents have violated these directions and the statutory provisions of the Electricity Act, 2003 regarding use of correct meters. The respondent distribution licensees also failed to file the data regarding Aggregate Technical & Commercial (AT&C) losses as per the earlier directions of the State Commission. In spite of the incomplete data filed by the respondents 2 and 3, the State Commission has allowed the increase in the ARR and tariff.

4.3. No truing-up of capital expenditure, depreciation, interest and finances charges and maintenance charges: The State Commission has not been conducting any truing up of the financials of the second and third respondents year on year. Every year the State Commission determines the capital expenditure to be incurred during the tariff year on the basis of which the depreciation and interest charges are allowed on estimate basis. However, there has been consistent default by the second and the third respondents in improving their performance and implementing the capital expenditure schemes and the funds are diverted to fund expenditure not approved by the State Commission. While the power purchase cost of the second and the third respondents is trued up there is no truing up of the capital expenditure. Thus, the second and the third respondents should be

asked to give a refund of tariff which has been charged by them for servicing of the capital costs approved by the State Commission.

4.4. Two part tariff for LT industrial consumers: The appellants have clarified that they are not challenging the basis of the constitutionality of the two part tariff which has been introduced for the first time, but are only challenging the manner of its implementation. The two part tariff has been introduced only for LT industry having 20 to 50 kW load. The fixed charges have been imposed on the basis of the connected load instead of the maximum demand which is wrong. Further, there ought to be proportionate reduction in demand charges for non-availability of power supply by the distribution licensee to the consumers. This is required in view of the very poor power supply position to the industries in the State.

4.5. Communication dated 4.10.2010 by the State Commission amending the tariff order dated 13.9.2010: The State Commission by way of clarification dated 4.10.2010 has ex-parte imposed an additional charge on the consumers by way of Monthly Minimum Charges on LT consumers (0 to 20 kW) thus violating the principles of natural justice.

4.6. Quorum of hearing before the State Commission: The hearing before the State Commission when the objectors were heard was in the presence of three Members. However, the order has been passed by two Members only as the third Member had retired. The principle of natural justice requires that all the persons who heard the matter are required to decide the same.

5. Shri Amit Kapur, learned counsel for the second and third respondents and Ms. Shikha Ohri, learned counsel for the State Commission argued forcefully in support of the findings of the State Commission. After examining all the documents submitted before us and considering the contentions of all the parties, we have framed the following issues for consideration:

i) Whether the State Commission should have rejected the petitions of the distribution licensees not containing any tariff proposal and, in the absence of any tariff proposal could the State Commission enhance the tariff suo moto?

ii) Was the State Commission correct in allowing increase in Annual Revenue Requirement and retail supply tariff despite failure of the

distribution licensees to provide meters for the unmetered consumers and furnish reliable data for consumption of unmetered agriculture consumers and Aggregate Technical & Commercial Loss?

iii) Whether the State Commission has failed to true up the expenditure allowed to the distribution licensees despite their failure to improve their performance and implement the capital expenditure schemes?

iv) Was the State Commission correct in imposing two part tariff for LT consumers based on the connected load and without ensuring maintenance of a reliable power supply to such categories of consumers?

v) Has the State Commission violated the principles of natural justice in amending the tariff of LT consumers by way of suo motu clarification by a subsequent communication dated 4.10.2010 imposing monthly minimum charges?

vi) Is the impugned order signed by two Members due to retirement of the third Member, when the petition was heard by all the three Members, legally valid?

6. The first issue is regarding maintainability of the distribution licensees' petition before the State Commission in the absence of any proposal for tariff revision.

6.1. According to Shri Anand Ganesan, learned counsel for the appellants, the State Commission

should have rejected the petition instead of deciding to increase in the tariff suo motu in the absence of any tariff proposal by the licensees.

6.2. According to Ms. Shikha Ohri, learned counsel for the State Commission, the State Commission followed the procedure prescribed in the Tariff Regulations of 2008 wherein Regulation 6(3) empowers the State Commission to initiate suo motu proceedings for determination of tariff. No supporting material has been placed by the appellants on the powers of the State Commission to initiate such proceedings only for affecting a reduction in tariff.

6.3. According to Shri Amit Kapur, learned counsel for the second and the third respondents, the contention of the appellant is unsustainable as the appellant neither in any pleading in the appeal nor

during the course of hearing raised any such argument. However, in the present case the State Commission in the impugned order has clearly recorded that it exercised its suo motu power to address the revenue gap in accordance with Haryana Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Distribution & Retail Supply Tariff), 2008. The interpretation given by the appellants to Regulation 6(3) that the State Commission could use suo motu power only to reduce the tariff for consumers is contrary to the letter and spirit of the said Regulation.

6.4. The appellant has not raised this issue in its appeal and has raised it in the written submissions, which is not permissible. However, on merits, we notice that the State Commission in the impugned order has recorded that the distribution licensees in

their ARR filings did not propose any mechanism to deal with the revenue gap in their respective ARRs including any proposal for revision of distribution and retail supply tariff for FY 2010-11. The State Commission directed both the licensees in writing to submit their proposal, including revision of tariff, to bridge the envisaged revenue gap as arrived by the State Commission after detailed examination of their ARR. In response the licensees submitted that the State Commission may determine the tariff on its own. Accordingly, the State Commission in exercise of its powers under Regulation 6 (3) decided that tariff.

6.5 Let us examine the Tariff Regulations of 2008. The relevant Regulation 6(3) as quoted in the impugned order is reproduced below:

> *"If the Commission is satisfied that the expected revenue of a distribution licensee (s) differs*

significantly from the revenue it is permitted to recover, it may order the distribution licensee (s) to file an application within the time specified by the Commission to amend its tariff appropriately failing which the Commission shall suo moto start the proceedings for determination of tariff".

Thus, the Regulation provides for the State Commission suo motu starting the proceedings for determination of tariff.

6.6. The Tariff Policy under Section 8.1(7) also provides for initiation of tariff determination on a suo motu basis in case the licensee fails to initiate filing in time.

6.7. In this case the State Commission directed that licensees to file their tariff proposal and on their failure to do so, the State Commission proceeded with

determination of the tariff to bridge the revenue gap, according to its Regulations.

6.8. Section 64 (3) of the 2003 Act provides for rejection of the application filed by the licensee if such application is not in accordance with the provisions of the Act and the rules and regulation made thereunder. However, in terms of the Regulations and the Tariff Policy, the State Commission is empowered to start suo motu proceedings to determine the tariff. The Regulations do not state that the suo motu proceedings should be initiated only if the tariff is to be reduced. On the other hand, the Regulations clearly state that if the expected revenue differs significantly from the revenue it is permitted to recover, the State Commission, in the absence of a proposal from the licensee for amendment of tariff, can initiate the proceedings for determination

of tariff. Thus, the State Commission has correctly exercised it powers under its tariff regulations for determination of tariff, suo motu.

7. The second issue is regarding consumption of unmetered consumers and reduction in losses.

7.1 According to Mr. Anand K. Ganesan, learned counsel for the appellants, the inefficiency of the second and the third respondents in respect of metering of unmetered consumers in reducing distribution loss level has been incorrectly passed on to the consumers.

7.2. According to Ms. Shikha Ohri, the State Commission in the impugned order has taken note of the inefficiencies and past performance of the respondent distribution companies and has issued various directions which are being monitored by the

State Commission. The State Commission has attempted to strike a balance between the need to restore the financial health of the distribution licensee as well as to take into account the interest of consumers and has attempted to progressively align the consumer category wise retail supply tariff with the respective cost of supply. The tariffs of all consumer categories are within lower limit i.e. -20% or below the average cost of supply.

7.3. The learned counsel for the second and the third respondents while accepting slow progress in providing meters to the unmetered consumers due to socio-political reasons has argued that this could not be the reason for denying the tariff hike. In support of his argument he relied on the decision in *Bihar Industries Association vs. BERC* reported in 2009 ELR (APTEL) 171, where the State Electricity Board was in default

of Section 55 of the Act but the Tribunal allowed the increase in tariff with direction to the Board regarding 100% metering. The work of feeder segregation has since been completed during the current financial year and the distribution licensees (R2 & R3) have started preparing records of data flow from segregated feeders and sample data for some feeders has been submitted to the State Commission.

7.4. Let us now examine how the State Commission has dealt with the issues relating to metering, assessment of agriculture consumption and AT&C losses in the impugned order.

7.5. In paragraph 2.1 the State Commission has recorded that as per its previous order on the ARR and Tariff, the efficiency target has to be based on Aggregate Technical and Commercial (AT&C) loss level

but the distribution licensees have failed to provide details of AT&C losses and reduction trajectory for FY 2010-11 onwards. Further, the State Commission has noted that the running hours for agriculture unmetered tubewell assumed by the distribution licensees needs to be supported by data from agriculture feeders. The distribution licensees were also directed by the State Commission during the proceedings of the case to submit reply on the various deficiencies pointed by the State Commission in their petitions. Subsequently, the distribution companies filed revised data/information. Also, the State Commission vide its memo dated 31.3.2010 directed the distribution licensees to provide key data recorded for segregated agriculture feeders which accounted for 37% of their total sales.

7.6. It is clear from the impugned order that the State Commission was constrained by lack of requisite data while deciding the ARR and tariff for the second and third respondents. In this connection we reproduce the observation of the State Commission in the impugned order:

> *"Thus operating in an environment of data constraints the Commission had to rely on its own assumptions and statistical models based on time series and cross-sectional data analysis for taking a view on various aspects of the Annual Revenue Requirement which has resulted in considerable delay in the issuance of the instant distribution and retail supply ARR/ tariff orders for FY 2010-11"*

7.7. The findings of the State Commission are as under:

> ***"3.3. Commission's Consumption Estimates:***

The Commission observes from the consumer category sales projections of the distribution licensees that about 20% of the total project sales in FY 2010-11 are to the unmetered Agriculture tube-well consumers. Despite the provisions of the Electricity Act, 2003 and directive of the Commission to install Maximum Demand Indicator (MDI) meters (Commission's order dated 16/08/2002) to record energy flow to the agriculture pump set consumers are being billed at 'flat rate' on the basis of BHP–sets. The licensees have failed to meet with the statutory provisions. The licensees have reportedly completed the task of segregating Agriculture Feeders at a considerable cost and efforts. However, they have not provided field date from the 11 KV segregated Agriculture feeders. Resultantly, the quantum of energy booked to the agriculture unmetered category is on the basis of assumptions and approximations only".

"The facts that a large number of AP tube-well meters are either not read or are dead/ defective

and the reported connected load of the AP Tube-well consumers are far from reliable makes the task of estimating power flow to the highly subsidized AP Tube-well consumers difficult and susceptible to large margin of error".

"The Commission observes that for no apparent reasons, the running hours of the pump sets as well as the annual average load factor of the metered Agriculture consumer category have shown a steep increase over the last few years.

Thus the licensee's assessment does not appear to be accurate. It is re-iterated that UHBVNL & DHBVNAL should analyze the date emanating from the segregated agriculture feeders in order to accurately ascertain the quantum of power flow to the agriculture pump set consumers. This could then, in the absence of meters, lend some credence to the claims of the distribution licensees. The authenticity of the metered agriculture sales data too needs to be put beyond all doubts. The contradictions in the metered sales data creeps in

because of the fact that a large number of meters are defective slow or dead and hence these meters are not read or the energy recorded is un-reliable".

7.8. Thus the State Commission, not satisfied with the data submitted by the respondent distribution licensees, analysed the past data of the metered agriculture consumers and assessed the unmetered Agriculture consumers. The relevant findings of the State Commission are reproduced as under:

"The Commission has examined the actual sales data as well as the actual annual average connected load data for the period FY 2004 to FY 2009 of the AP metered consumers and projected the load factor based on CAGR for FY 22010 and FY 2011 as 20.08% in the case of UHBVNL and 17.32% in the case of DHBVNL. The corresponding average annual running hours (per pump/day) works out to 4.82 hours & 4.17 hours which have been considered for estimating the sales volume of un-metered AP consumers".

7.9. The unmetered agriculture and total sales approved by the State Commission for FY 2010-11 for the second and the third respondents vis-à-vis what was projected by the respondents are as under:

	UHBVNL	DHBVNL	'All figures in Million Units'
Unmetered agriculture			
· As projected by Discoms	4233	1687	
· As approved by the Commission	2838	1270	
Total Sales			
· As projected by Discoms	14,389	14,579	
· As approved by the Commission	11,492	13,915	

Thus, the sales approved by the State Commission were much less than that projected by the second and the third respondents.

7.10. In the absence of the requisite metered data, the State Commission has on the basis of its own analysis, estimated the consumption of unmetered agriculture and other consumers. After allowing the transmission loss of 3.53% for inter-state & intra-state

transmission system and distribution loss of 23%, the State Commission has decided the total quantum and cost of power purchase. We find that the State Commission has given a reasoned order to arrive at its own conclusions. Thus we do not find any fault in the approach and findings of the State Commission in this regard.

7.11. Regarding the distribution losses, the actual year-wise position of the second and the third respondents has been depicted in the Table 3.25 of the impugned order. Table 3.25 is reproduced below:

"Table 3.25 – Year wise distribution losses (%)

Year	*DHBVNL*	*DHBVNL*
2001-2002	*31.74*	*29.33*
2002 -2003	*30.53*	*34.62*
2003 -2004	*32.19*	*30.70*
2004 -2005	*31.12*	*30.17*
2005 -2006	*30.66*	*28.01*
2006 -2007	*28.67*	*29.65*
2007 -2008	*28.79 (up to October 07)*	*24.52 (up to November 07)*
2008 -2009	*26.19*	*25.19*
2009 -2010	*26.72 (up to November 2009*	*29.80 (up to September 2009)*

The State Commission has recorded its concern above the high distribution losses despite huge capital investments made to reduce the same and has given some directions to the second and third respondents to submit circle wise/feeder wise data and proposal for curtailing the distribution losses. However, for determining the ARR, the State Commission has allowed distribution losses of 23%.

7.12. Similarly for O&M cost, interest on loan, depreciation, interest on working capital, etc., the State Commission after deliberation on each of the items has allowed these expenditures in the ARR. However, the State Commission after the proposed tariff hike has left about Rs. 730 crores revenue gap with no specific direction for its treatment or recovery.

7.13. As far as AT&C losses are concerned, we notice that the data for the same has not been furnished by the respondents. Though AT&C loss indicates the performance and collection efficiency of the distribution licensee, it is not a pre-requisite for determination of the ARR and tariff of the licensee. For ARR and tariff of the licensee we require the distribution losses. The State Commission has determined the ARR with benchmark distribution losses of 23%. Thus, we hold that on account of deficiency in determination of AT&C loss the ARR and tariff determination does not become invalid.

7.14. We find that in the absence of adequate metering data, the State Commission did not choose to reject the petition and sought additional data and made its own assumption and determined the ARR and tariff. The State Commission has not simply

adopted the data submitted by the licensees but applied its own mind to make assessment based on the past data available with the State Commission and decided the ARR and tariff. The State Commission has also given the necessary directions to the respondents 2 and 3 for furnishing metering data of segregated feeders. Thus, we do not find any fault in the approach of the State Commission. However, we direct the State Commission to analyse the actual data submitted by the distribution licensee as per its directions in the impugned order and use it in true up of the financials of the second and the third respondents.

7.15. After having decided not to interfere with the orders of the State Commission on account of inadequate metering data we want to record our concern about the performance of the second and the third respondents in installation of meters and failure

in providing requisite data to the State Commission. We notice that about 20% of the total sale of the second and the third respondents is through unmetered agriculture consumers. Even the energy data from accounting and audit meters on the segregated 11 kW agriculture feeders has not been provided. Further, a large number of meters installed on agriculture tubewell are either not read or are defective. This is in contravention of Section 55(1) of the Act which specifies that no licensee shall supply electricity after the expiry of two years from the appointed date, except through installation of a correct meter in accordance with the Regulations of the Central Electricity Authority (CEA). According to Section 55(2), meters have to be provided for the purpose of accounting and audit at the locations specified by the CEA. According to Section 8.2.1 (2) of

the Tariff Policy, the State Commission has to undertake independent assessment of baseline data for various parameters for every distribution circle of the licensee and the exercise has to be completed by March, 2007. It is evident from the impugned order that the respondents 2 and 3 have not taken any extension for maintaining power supply without the meters, as specified in the second proviso to Section 55(1), which is reproduced below:

> *"Provided further that the State Commission may, by notification, extend the said period of two years for a class or class of persons or for such area as may be specified in that notification".*

7.16. Thus the second and the third respondents have violated the provisions of the Act regarding metering. The respondent distribution licensees have also failed to provide the energy data from the segregated 11 KV agriculture feeders and AT&C losses

to the State Commission and other relevant data required to be furnished to the State Commission for deciding ARR and tariff as per the Regulations and the directions of the State Commission.

7.17. In our opinion, the State Commission cannot be a silent spectator to the violation of the provisions of the Act and its Regulations and directions by the distribution licensees. The State Commission should immediately take appropriate action in this matter according to the provisions of the Act. The State Commission should also give directions to the second and the third respondents giving a time bound schedule for installation of consumer and energy accounting and audit meters, including replacement of the defective energy meters with the correct meters within a reasonable time to be decided by the State Commission.

8. The third issue is regarding true up of the capital expenditure.

8.1. According to learned counsel for the appellants, the State Commission has not been conducting any truing up of the financials of the distribution licensees. There has been consistent default on the part of the distribution licensees in implementing the capital expenditure programs and the amounts have been diverted to fund expenditure not approved by the State Commission. Thus while consumers have been paying for the capital expenditure programs, their actual implementation as well as benefit expected for such programs have been lacking.

8.2. According to the learned counsel for the State Commission, the revenue requirement and tariff of the respondent distribution licensees has been determined

on the basis of actual audited accounts of the FY 2008-09 with appropriate adjustments.

8.3. According to learned counsel for the second and the third respondents, the Gross Fixed Assets (GFA) for the FY 2010-11 have been approved taking into account the actual GFA for the FY 2008-09 as per the audited accounts, which reflects the actual capital expenditure incurred during and upto the FY 2008-09. The project wise actual financial transactions are extensively reviewed by independent statutory auditors and CAG of India. The project wise capital expenditure as submitted by them is also scrutinized and verified by the State Commission. The expenditure for operation & maintenance, depreciation, interest on loans, etc., is also allowed based on actual expenditure for FY 2008-09 as per the audited accounts.

8.4. We notice that the State Commission has not been truing up the financials of the respondent distribution licensees. This is not a correct practice. The ARR is based on the estimates. After the completion of the year when the audited accounts are available, the true up of all uncontrollable costs as well as capitalization of the completed works has to be carried out. While determining the ARR for FY 2010-11, the State Commission should have carried out true up for FY 2008-09 based on the audited accounts and Annual Performance Review of FY 2009-10. Admittedly, this was not done and as is apparent from the submissions of the respondents, this has not been the practice followed by the State Commission in the past.

8.5. It is correct that while estimating the ARR for FY 2010-11, the audited expenditure and GFA for FY 2008-09 has been considered. However, this is not enough. It is also essential to carry out the true up of the financials of the previous year, FY 2008-09 in this case, as the earlier ARR/tariff was determined on the estimates, which may differ from the actual expenditure incurred. Further, merely adopting the figures of Audited Accounts for the expenditure incurred is not adequate. The State Commission is also expected to do prudence check of the expenditure incurred by the licensee. Accordingly, the State Commission is directed to immediately initiate true up of the financials including capital expenditure, depreciation, interest and finance charges, O&M expenses, etc., of the respondent distribution licensees for the FY 2008-09, 2009-10 and 2010-11 and after

prudence check make adjustment for trued up amount in the ARR for the subsequent year. Thus, this issue is decided in favour of the appellants.

9. The fourth issue is regarding two part tariff for LT consumer based on connected load.

9.1. According to the learned counsel for the appellant, the demand charges ought to have been levied on the basis of contract demand and not connected load. Further, if the licensee is not in a position to supply electricity to the consumers, there ought to be a proportionate reduction in fixed charges to that extent.

9.2. The learned counsel for the State Commission has stated that the fixed charges for LT consumers above 20 kW load has been introduced on the connected load. For HT consumers who have the requisite

meters, the fixed charge recovery is based on the sanctioned contract demand/recorded demand.

9.3. According to the learned counsel for the second and the third respondents, the fixed charges are required to be billed on the basis of connected load as the distribution licensee plans its system as per the connected load. However, the consumers are encouraged to apply for load reduction if their actual load is abnormally below the connected load recognized by the licensee. At present, there is no provision of declaring the contract demand of the LT consumers.

9.4. We notice that the State Commission has given a reasoned order for imposition of the fixed charges for LT consumers above 20 kW load which incidentally will also bring their tariff upto the cost of supply. We

do not find any fault with the levy of fixed charges on LT consumers but recovery of fixed charges on connected load does not seem to be correct. The appellants have also not contested the imposition of fixed charges but have challenged the recovery based on the connected load. We are in agreement with the argument of the learned counsel for the appellant that there is diversity in operation of various equipments (machineries, motors, appliances, etc.) installed at the consumer's premises and all the equipments are not expected to operate simultaneously. Admittedly, for the HT consumers the recovery is based on the basis of the contract demand/actual demand. Therefore, imposition of fixed charges to LT consumers (above 20 kW) on the basis of the connected load is discriminatory.

9.5. The learned counsel for the appellant has stated that the requisite meters for recording maximum demand exist on the LT consumers of above 20 kW load and the respondents have not contested the same. In fact, the respondents 2 & 3 have informed that for excess recorded demand over the connected load a penalty is levied on the LT consumers. However, there is no practice of contract demand for LT consumers. We feel that when fixed charges have been introduced for LT consumer, the existing practice has to be revised for LT consumers on the same lines as for HT consumers for whom the fixed charges have been in vogue in the past.

9.6. In view of the above, we decide this matter in favour of the appellants. The State Commission is directed to issue necessary directions in this regard after hearing the concerned parties.

9.7. As regards interruptions in power supply, the State Commission in the impugned order under paragraph 3.18 has made adverse observations regarding poor power supply to the consumers by the respondent distribution licensees. The trippings and the break down in the licensed area of the respondent 3 during FY 2009-10 (upto February 2010) is higher than previous year whereas the reliability should have improved with the investments made in the various schemes. The position in some circles of the respondent no. 2 has also worsened. The voltage has also been observed to be below the norms for long durations in the areas of the respondent no. 2 and 3. Supply to industry has also come down from 20.5 hrs. in FY 2008-09 to 19 hrs. in FY 2009-10. The distribution licensees have also not supplied any feedback regarding the improvement in consumer

satisfaction as a result of setting up of consumer care centres. According to the State Commission, the consumers are required to make strenuous efforts to get even their minor grievances redressed.

9.8. The above situation reflects a sorry state of affairs in the management of distribution system by the respondent distribution licensees. However, in the absence of any provision in tariff order or in the Regulations we cannot decide to link payment of fixed charges on reliability of supply to the consumers. However, we would advise the State Commission to consider framing regulation providing for compensation to be paid by the distribution licensees for non-compliance with the standards of performance notified by the State Commission to the affected consumers. If such Regulations are existing, the State

Commission should ensure implementation of the same.

10. The fifth issue is regarding the amendment of tariff of LT consumers by way of clarification issued by the State Commission in a subsequent communication dated 4.10.2010 regarding monthly minimum charges.

10.1. According to the learned counsel for the appellants, the State Commission has ex-parte imposed an additional charge by way of a clarificatory order subsequent to the impugned order against the principles of natural justice. The minimum charges for LT consumers (0-20 kW) has been increased from Rs. 120/- per kW to Rs. 225 per kW even though the licensees had not sought any such increase.

10.2. According to the learned counsel for the State Commission, the monthly minimum charges in

relation to LT industry was inadvertently left out in the impugned order and the State Commission decided to rectify the inadvertent mistake by the communication dated 4.10.2010.

10.3. According to the learned counsel for the second and the third respondents, on examination of the impugned order, the issue is no more res integra if a mistake is apparent on the face of record and the rectification of the same is done by the Appropriate Authority, without giving hearing to the aggrieved party. He relied on the judgment passed by Hon'ble Supreme Court in *Union of India vs. Bikash Kumar* reported in (2006) 8 SCC 192.

10.4. We notice that in the impugned order minimum charges have not been indicated for the LT industrial consumers either in the pre-revised tariff or

the revised tariff. Thereafter, the respondents 2 and 3 sought clarifications from the State Commission regarding Monthly Minimum Charges which are reproduced below:

Respondent no. 3

"2. LT Industrial Consumers (UH)

There is no MMC applicable on LT industries for loads up to 20 kW which appears to be an inadvertent omission. It may be added that around 35% of LT consumers of load less than 20 kW are billed on MMC basis and in case no MMC is levied, the Distribution Utilities are going to suffer a lot. Hon'ble Commission may review their order and requested to levy MMC on LT industries having load less than 20 kW.

Respondent no. 2

*"**(DH) MMC charges for LT consumer category:** The HERC in its recent ARR order has removed the MMC charges for the LT industrial consumers. It is pertinent to mention that many LT industrial consumers are being billed under MMC out of which majority of the consumers fall in below 20*

kW slab of LT industry. Hence, the utilities would be losing significant amount of revenue from this consumer category (LT industrial consumer category below 20 kW as per approved tariff order. Hence, a revised schedule of MMC charges should be allowed to be levied from LT industrial consumers below 20 kW".

The State Commission clarified by its communication dated 4.10.2010 as under:

"*It is clarified that MMC in case of LT consumers having load upto 20 kW shall be levied @ Rs. 225 per kW of the connected load per month".*

10.5. According to learned counsel for the respondents 2 & 3, the clarificatory order was a correction of an error apparent on the face of records. We do not agree with the contention of Respondent no. 2 & 3. The State Commission has also contended that monthly minimum charges were inadvertently left out

in the impugned order. Admittedly, the monthly minimum charges for LT industry prior to the impugned order were Rs. 120/- per kW. However, in the clarification issued on 4.10.2010, the same has been enhanced to Rs. 240/- per kW. Thus, the State Commission without providing an opportunity to hear the concerned parties has amended the tariff for LT consumers. This is against the principles of natural justice and provisions of Sections 64(3) and 86(3) of the Electricity Act, 2003. The Judgment of Hon'ble Supreme Court referred to by the learned counsel for the Respondents 2 and 3 is not relevant to the present case. The State Commission may hear the concerned parties and pass a reasoned order in this matter which shall be applicable prospectively. Till then, the Monthly Minimum charges as applicable to LT

consumers upto 20 kW load prior to the date of the impugned order shall continue.

11. The sixth issue is regarding validity of the impugned order as it is not signed by the third Member who had heard the petition alongwith other Members when the representations of the objectors was considered by the State Commission on 18.2.2010.

11.1. According to the learned counsel for the appellant, the general principle of natural justice requires that all the persons who heard the matter are required to decide the matter. One of the Members who have heard the petition retired on 24.2.2010. According to Section 93 of the Act, no act or proceeding of the Commission shall be questioned or shall be invalidated merely on the ground of existence

of any vacancy or defect in the Constitution of the Commission.

11.2. The learned counsel for the respondents 2 and 3 stated that the objection by the appellants regarding quorum of the State Commission is untenable in view of the provisions of Section 93 of the Act. He also referred to Judgment in the matter of *Iswar Chandra vs. S. Sinha (1972) 3 SCC 383*, wherein the Hon'ble Supreme Court has held as under:

> *"Where there is no rule or regulation or any other provision for fixing the quorum, the presence of the majority of members would constitute it as valid meeting & matters constitute it as valid meeting & matters considered there cannot be held to be invalid".*

11.3. We notice that at the time of public hearing on 18.2.2010, three Members of the State Commission heard the objections filed by the consumers and

various other groups. However, the order was passed on 13.9.2010. In the meantime, one of the Members retired on 24.2.2010, therefore, the order was signed by the Chairperson and remaining one Member. In this connection, Section 93 of the Act is reproduced below:

> *"93.* ***Vacancies, etc., not to invalidate proceedings*** *- No act or proceedings of the Appropriate Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Appropriate Commission".*

11.4. We do not find any force in the arguments of the learned counsel for the appellants that the general principle of natural justice would be applicable in this case. It has been held by the Hon'ble Supreme Court in the PTC case that the Electricity Act, 2003 is a complete Code. Therefore, in this case Section 93 of

the Act will apply. Accordingly, we hold that the impugned order is valid.

12. **Summary of our findings**

12.1. The State Commission has correctly exercised its powers to determine the tariff suo motu, in the absence of a tariff proposal by the Licensee, in accordance to the Tariff Regulations.

12.2. We find that in the absence of adequate data furnished by the second and the third respondents, the State Commission sought additional data, made its own assumption and determined the ARR and tariff. We do not find any fault in the approach of the State Commission in this regard. However, we direct the State Commission to analyse the actual data submitted by the distribution licensee as per its directions and true up the financials of the licensees.

We have also given some directions to the State Commission in paragraph 7.17 regarding installation of meters for necessary action.

12.3. The State Commission has not been truing up the financials of the respondent distribution licensees, which is not a correct practice. The ARR is approved on estimated figures but the actual expenditure may vary from the estimated figures. It is, therefore, essential to carry out the true up after finalization of the audited accounts. Further, the State Commission is expected to carry out the prudence check of the actual expenditure incurred as per the audited accounts. Accordingly, the State Commission is directed to immediately initiate true up of financials including capital expenditure, depreciation, interest and finance charges, O&M expenses, etc. of the distribution licensees from the FY 2008-09 to 2010-11.

12.4. On the issue of fixed charges based on connected load for LT consumers, we hold that the imposition of fixed charges is correct but the recovery of the fixed charges based on connected load is not correct due to diversity in operation of various equipments at the consumer premises. This is also discriminatory to the LT consumers as the fixed charges for HT consumers are being recovered on the basis of contract demand/recorded demand. Accordingly, this issue is decided in favour of the Appellant and the State Commission is directed to issue necessary directions in this regard after hearing the concerned parties. Regarding the trippings and the break down, we are not in a position to provide any relief in payment of fixed charges in the absence of any provision in the Tariff order or the Regulations. However, we have advised the State Commission to

consider framing the Regulations providing for compensation by the distribution licensees for non-compliance with the standards of performance notified by the State Commission to the affected consumers. If such Regulations are existing, the State Commission should ensure implementation of the same.

12.5. In our opinion, the clarification issued by the State Commission on 4.10.2010 raising the monthly minimum charges for LT industrial consumers without hearing the concerned parties is against the principles of natural justice and Section 64(3) and 84(3) of the Act and the same is set aside. The State Commission may hear the concerned parties and pass a reasoned order in the matter which shall be applicable prospectively. Till then the Monthly Minimum charges as applicable to LT industrial consumer upto 20 kW prior to the date of the impugned order shall continue.

12.6. As regards the validity of the impugned order in the absence of the signatures of the third Member who had heard the petition alongwith other Members, we hold that the order is valid in view of the provisions of Section 93 of the Act.

13. In view of above, the Appeal is allowed partly to the extent indicated above without any cost.

14. Pronounced in the open court on this **11th day of August, 2011.**

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

REPORTABLE / NON-REPORTABLE
vs